

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF
INDUSTRIAL ACCIDENTS

BOARD NO. 013131-15

Richard Kenney
Pembroke Hospital
Insurance Company State of PA

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant and Koziol)¹

The case was heard by Administrative Judge Herlihy.

APPEARANCES

Michael D. Kantrovitz, Esq., for the employee
David G. Shay, Esq., for the insurer at hearing and on appeal
Christopher L. Maclachlan, Esq. for the insurer on appeal

FABRICANT, J. The insurer appeals from a decision awarding the employee weekly benefits pursuant to § 34, from November 10, 2015 to date and continuing. Because the decision fails to list, or otherwise indicate consideration of the insurer's medical evidence, we vacate the decision and recommit the case to the administrative judge.²

The employee was a 66-year-old mental health associate caring for psychiatric patients on the date of injury, May 24, 2015. On that date, he was attacked by a patient and sustained trauma to the back of his head and neck, as well as to his left ear. (Dec. 4.)

The § 11A impartial medical examination was conducted by Dr. Fereshtah Soumekh on May 21, 2016, (Ex. 4), and subsequently, Dr. Soumekh was deposed on March 3, 2017. (Dec. 3.) Finding medical complexity, the judge allowed the parties to submit additional medical evidence, without objection. (Dec. 3.) Pursuant to that

¹ Judge Harpin was recused from this case and did not take part in deliberations.

² Therefore, we do not reach the other issues raised by the insurer.

Richard Kenney
Board No. 013131-15

finding, the insurer submitted medical reports from Dr. Robert Levine.³ However, the insurer's submitted evidence is neither listed, nor mentioned, in the judge's decision. (Ins. br. 2; Employee br. 2-3.)

In his brief, the employee concedes that "recommittal would likely be required" if the omitted evidence were to address the issues of causal relationship or the extent of incapacity. However, the employee concludes: "the substantive value of the [insurer's] medical evidence . . . had grown stale by the time of [h]earing" (Employee br. 3-4.)

Despite the employee's assessment of the insurer's submitted evidence, the duty to consider and evaluate that evidence lies solely with the judge. Further, any objection the employee may have had to the admissibility of the insurer's medical evidence is waived because it was not raised at hearing. Uka v. Westwood Lodge Hosp., 28 Mass. Workers' Comp. Rep. 19, 22 (2014)(objections to admission of evidence not raised below are waived). Thus, although the employee asserts that, in any event, the insurer was afforded adequate due process, there can be no true due process without the review of all duly admitted evidence. We have no indication that such consideration was afforded here.

We therefore vacate the decision and recommit the case to the administrative judge for further action in accordance with this decision.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: February 28, 2018

³ The insurer's motion to exclude the opinions and reports of the employee's two treating physicians, who refused to be deposed, was filed on March 16, 2017. The employee withdrew his request to submit reports of Dr. Lentini, and the insurer's motion to exclude Dr. Piecyk's reports was allowed on March 23, 2017. (Dec. 2-3; Ins. br. 2.)