COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 010212-97

Manuel Fantasia (deceased)	Employee
Anna Fantasia	Claimant
Borjohn Optical Technology, Inc.	Employer
Centennial Insurance Co.	Insurer

REVIEWING BOARD DECISION

Judges Fabricant, McCarthy and Costigan)

APPEARANCES

William C. Harpin, Esq., for the employee
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from a decision in which an administrative judge addressed the Appeals Court's order of recommittal, and affirmed his earlier award of benefits for a November 11, 1984 date of injury.[1] Because we agree with the employee that the decision adequately disposes of the statute of limitations issue that necessitated the recommittal, we affirm the decision.

The case has a long history, with two prior appeals to the reviewing board, and, most recently, one to the Appeals Court. The facts are set out in detail in Fantasia v. Northeast Mfg. Co, Inc., 14 Mass. Workers' Comp. Rep. 200 (2000). The legal dispute in this recommittal decision is whether the insurer was prejudiced by the employee's late filing of his claim for benefits due to work-related berylliosis pursuant to the versions of §§ 41and 49 applicable to his 1984 injury.[2]

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[1] This date represents the last date of employment with the employer.

[2] At the time of the injury, Section 41 provided a one-year statute of limitations. Section 49 provided, in pertinent part, "Failure to make a claim within the time fixed by section forty-one shall not bar proceedings under this chapter if it is found that it was occasioned by mistake or other reasonable cause, or if it is found that the insurer was not prejudiced by the delay."

The employee did not claim benefits for berylliosis, diagnosed as a likely cause of his symptoms in the September 8, 1993 report of Dr. Leibowitz, until 1997.[3] There was no notice of his injury to the employer until the filing of the claim. (Dec. 334.) Using the 1993 date of notice of likely work-related injury, the employee's only possible remedy for this late claim is the § 49 allowance for a showing of "no prejudice" to the insurer that existed in the statute at the time of the injury. The sole issue before us is whether the employee has affirmatively shown no prejudice to the employer, thereby allowing the late claim filing and notice.

There is a gap of approximately three and one half years between 1993, when the employee could have filed his claim upon learning of a "likely" diagnosis of berylliosis, until the actual filing of his claim on March 28, 1997. The judge on recommittal found that the employee had shown "no prejudice" to the insurer, and therefore affirmed his award of benefits from the prior hearing decision. The insurer contends that the judge's findings are arbitrary, capricious and contrary to law. We disagree.

The insurer argues that the judge improperly shifted the burden to the insurer to show prejudice. It is true that the judge's decision contains numerous references to "the insurer argues," in addressing prejudice, regarding issues of timely investigation, preservation of evidence, witnesses, and timely medical treatment and examination. While this syntax is unfortunate, given that the burden to show no prejudice rests with the employee, we believe that the same analysis of this legal issue is readily accomplished with an articulation of the employee's responsibility in making the showing of "no prejudice."

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[3] The 1993 diagnosis was "[i]nterstitial lung disease, likely secondary to berylliosis." (Dec. 335.) We consider this to be sufficient notice to the employee of a work exposure, requiring his commencement of workers' compensation claims against the employers listed in the original decision, Fantasia v. Northeast Mfg. Co., Inc., 14 Mass. Workers' Comp. Rep. 200 (2000).

The judge's findings on the tolling of the statute until such time as the employee was "damn sure" that he had contracted work-related berylliosis are erroneous. (Dec. 334-335.) The employee knew he had worked with beryllium while polishing mirrors working for Borjohn, the employer, in 1983-1984. There was no tolling that would allow for the employee's waiting until 1997 to file his claim against Borjohn, as the employee was charged with the knowledge of the likely causal relationship between the work and the disease as of 1993. The error, however, is harmless, given the judge's findings on § 49 prejudice.

The employee correctly asserts no prejudice resulting from the insurer's lack of knowledge of the employee's disease, as it relates to medical treatment or a possible § 45 medical examination. Berylliosis is a progressive, incurable and ultimately fatal disease. The judge found the employee permanently and totally incapacitated after exhaustion of the § 34 benefits awarded in the 1998 hearing decision. Under these circumstances, the insurer would have gained nothing from earlier knowledge of the employee's disease, with regard to medical treatment and examination. The judge's findings correctly reflect this point. (Dec. 335-336.)

Beryllium was established as a dangerous substance that can cause the diagnosed disease well before the employee's tenure at Borjohn. There was also no dispute that the employee used beryllium while working at Borjohn. (Dec. 336-337.) These facts place the employee's case within the category of an occupational exposure and disease that is common to Borjohn's industry of polishing beryllium mirrors, supporting the employee in showing the absence of prejudice. In Tassone's Case, 330 Mass. 545 (1953), the court held the employee had shown no prejudice to the insurer for a late claim for industrial dermatitis:

> As to prejudice in investigating the claim, the injury resulted from the use of cement in the making of shoes. It could be found that [the employer] and its insurer knew, or easily could ascertain, the danger of dermatitis ins the use of cement. The very employment of the employee exposed her to that danger. The case did not call for the investigation of an isolated incident to determine whether the injury occurred out of and in the course of the employment. There was evidence that dermatitis is very common in the shoe industry. By inference from the circumstances stated it could have been found that the insurer was not prejudiced.

Id. at 548-549. Contrast Fredyma v. ATT, 11 Mass. Workers' Comp. Rep. 420, 426 (1997)(fluorescent light exposure causing various symptoms not within the Tassone-type injury/disease category for prejudice analysis). We consider, as the judge clearly did, that the present case falls within the same rule.

The employee further contends no prejudice results from the lack of documentary evidence. The employer's president, Mr. Borowski, admitted beryllium was used during the employee's tenure at Borjohn. All of Borjohn's employment and work records were seized by the FBI in 1987, and not returned. Therefore, the absence of these records was as true in 1993, when the employee should have filed the claim, as it was in 1997, when he did file the claim. The judge so found, (Dec. 336-337), and his reasoning was sound.

The employee also maintains that Borjohn's ability to defend the claim was not prejudiced by any delay in litigating the employee's claim against a later employer, Northeast Manufacturing. The denial of Northeast's liability for the employee's disease was summarily affirmed in the Appeals Court's Rule 1:28 Memorandum decision, filed on December 9, 2004, with a footnote describing the argument (among others) as being "entirely without merit." Slip op. at 4 n.1. The issue is therefore settled as the law of the case, and may not be relitigated. King v. Driscoll, 424 Mass. 1, 7-8 (1996)(an issue, once decided, should not be reopened). Moreover, it is the judge's fact-finding on the extent of exposure at each workplace that the insurer is actually attacking in this argument. The judge found that the industrial hygiene at Borjohn was markedly worse than at any other of the five employers against which the employee filed claims. Again, the employer had knowledge of its own conditions; the judge's fact-finding on the lack of prejudice was not arbitrary, capricious or contrary to law. See Pena's Case, 5 Mass. App. Ct. 451, 456 (1977)(issue of prejudice is factual question for judge to determine). The insurer was able to introduce the testimony of Borjohn's president at the 1997 hearing, and the judge simply did not believe his account of the nature and extent of the employee's exposure. Fantasia, supra at 205 n.3.

Overall, the judge's findings crediting the employee's contentions that the insurer was not prejudiced in its defense of his claim are sound. The judge's occasional grammatical confusion notwithstanding, he did not, as the insurer argues, improperly relieve the employee of the burden of showing no prejudice. Accordingly, the decision is affirmed.

The insurer shall pay the employee's attorney a fee, pursuant to G. L. c. 152, § 13A(6), in the amount of $ 1,458.01.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed**: June 24, 2008**