

## COMMONWEALTH OF MASSACHUSETTS

### DEPARTMENT OF INDUSTRIAL ACCIDENTS

**BOARD NOS. 029551-93,  
010212-97, 010213-97,  
010214-97, 038101-97,  
040699-97, 040700-97,  
040701-97, 040702-97,  
040703-97, 040704-97,  
040705-97**

Manuel Fantasia	Employee
Northeast Mfg. Co., Inc.	Employer
Hardric Laboratories	Employer
Borjohn Optical Technology	Employer
Alexander Machine and Tools Co.	Employer
LKM Industries	Employer
Galaxie Laboratories, Inc.	Employer
American Mutual Insurance (Northeast Mfg.)	Insurer
Sentry Insurance (Northeast Mfg.)	Insurer
Travelers Insurance Co. (Hardric Laboratories)	Insurer
Lumberman's Mutual Insurance Co. (Hardric Laboratories)	Insurer
Workers' Compensation Trust Fund (Hardric Laboratories)	Insurer
Centennial Insurance Co. (Borjohn Optical Technology)	Insurer
Travelers Insurance Co. (Alexander Machine and Tools, Inc.)	Insurer
AIM Insurance Co. (LKM Industries Inc.)	Insurer
Travelers Insurance Co. (LKM Industries Inc.)	Insurer
Commercial Union Insurance Co. (LKM Industries Inc.)	Insurer
Hartford Insurance Co. (Galaxie Laboratories Inc.)	Insurer

### **REVIEWING BOARD DECISION**

(Judges Carroll, Levine & Maze-Rothstein)

### **APPEARANCES**

Martin Himmelfarb, Esq., and William Harpin, Esq., for the employee  
Timothy Nevils, Esq., and David Cronin, Esq., for insurer American Mutual at hearing  
P. Waldron-Taylor, Esq., for insurer Travelers (Hardric) at hearing  
Thomas Muldoon, Esq., for insurer Travelers (LKM) at hearing  
Kara Larzelere, Esq., for insurer Travelers (Hardric & LKM) on brief  
Linda Borer, Esq., for insurer Lumberman's (Hardric) at hearing & on brief  
Paul Ingraham, Esq., for insurer Trust Fund at hearing  
Daniel Murphy, Esq., for insurer Centennial at hearing  
Paul Moretti, Esq., for insurer Centennial on brief  
Richard Florino, Esq., for insurer Sentry at hearing & on brief

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James White, Esq., for insurer AIM Mutual at hearing  
Stefan Michaud, Esq., for insurer Commercial Union at hearing  
Cynthia Canavan, Esq., for insurer Hartford at hearing

**CARROLL, J.** Two insurers, Centennial, insurer of Borjohn Optical Technology (Borjohn), and Lumberman's, insurer of Hardric Laboratories (Hardric), appeal from the decision of an administrative judge awarding a closed period of § 35 weekly temporary partial incapacity benefits, followed by § 34 weekly temporary total incapacity benefits, until those benefits were statutorily exhausted, and § 34A weekly permanent total incapacity benefits thereafter.<sup>1</sup> Because the judge erred in considering a critical piece of photographic evidence, we recommit the case for findings anew.

Manual Fantasia was sixty-seven years old at the hearing in this matter. A high school graduate, he has taken numerous college courses although he has not earned a degree. He did, however, complete training in precision machining and optical processing. (Dec. 595.)

Prior to 1967, the employee worked as a welder and machinist for several companies. In 1967, he commenced employment as a quality control inspector at Northeast Manufacturing Company (Northeast). He left that job in 1970, worked for numerous other employers and, in 1976, began working for Hardric Laboratories as a quality control inspector and engineer. His job included setting up machine tools and inspecting and measuring heat-treated machine parts. Some of the parts were small beryllium mirrors. (Dec. 596.)

In 1983, Fantasia left Hardric and began working for Borjohn as a quality control inspector, inspecting and working on polished parts. Borjohn filled one order for beryllium mirrors during the employee's tenure. The order took many months to fill. (Dec. 599.)

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<sup>1</sup> As the judge ordered Centennial (Borjohn) to pay the employee's claim, it is Centennial which in fact appeals the judge's rulings against it.

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After being laid off from Borjohn, the employee returned to working for Northeast, again in the quality control area, dealing with customers and inspecting beryllium copper parts. He ended his employment with Northeast in 1990. Thereafter he worked for several other employers. None of his employment after 1990 exposed him to beryllium. He was laid off on October 18, 1993 and began an unsuccessful job search. He ended his job search and retired in April 1994. (Dec. 601-602.)

In July 1993, the employee experienced breathing problems while ascending stairs. He consulted with his doctor. Testing revealed a spot on one lung and the possibility of berylliosis was raised. In June 1996 he underwent lung surgery, which led to a definitive diagnosis of berylliosis. (Dec. 602.)

The employee filed a claim for benefits. A § 10A conference was held after which the administrative judge ordered Lumberman's Insurance to pay § 35 weekly temporary partial benefits. Both the employee and Lumberman's appealed to a hearing de novo.

At the hearing, the employee, a co-employee at Borjohn, and the presidents of Hardric, Borjohn and Northeast testified. Dr. William Patterson also testified in person at the hearing, as the expert physician on behalf of Lumberman's.<sup>2</sup> (Dec. 587-588.) Pertinent to the dispositive issue of Centennial's appeal are the judge's findings on the method of polishing beryllium used at Borjohn:

The conventional method for polishing beryllium is to polish the metal with pitch and "slurry." Slurry is a mud like substance that is used to coat the beryllium. The beryllium is then polished in the slurry. As the mirror is polished, the beryllium dust is caught wet, in the slurry, and thus, not released into the air. Soon after the process is begun, the slurry has much beryllium oxide, a hazardous substance if breathed. However, so long as the slurry remains wet, there is no danger. But this is a dirty process, with slurry covering the polishing area of the machine and dripping down the side of the machine to the floor. The slurry can also drip and splash onto the polisher's clothing. Once this slurry "mud" dries, the beryllium oxide becomes dust again, and can become airborne.

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<sup>2</sup> The judge ruled that the case presented medical complexity. Thus, the parties were allowed to introduce their own medical evidence pursuant to § 11A(2). (Dec. 593.)

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. . .

Borjohn used the pitch and slurry system of beryllium polishing described above. As at Hardric, the employee worked in a separate room, away from the polishing, but visited the beryllium room daily. There was no vacuum system because the polishing was done with the wet slurry. The slurry was wiped up with rags and reused. The slurry with beryllium in it was not treated any differently than the slurry not used in beryllium polishing. The slurry was allowed to dry out on many occasions.

The photograph taken at Borjohn during this time, entered into evidence as Exhibit 19A, shows the polishing machines with dried slurry on them, running down the sides of them, and onto the floor. There appears to be footprints tracking the dried slurry throughout the room. The room where beryllium was polished was typically dirty and dusty due to the dried slurry. Donna Paris-McKinnon, whose job it was to polish the beryllium parts, described the work site as “always kind of messy.” She described walking throughout the facility, including the employee’s office, in her dusty pants and smock.

(Dec. 597, 599-600.)

Dr. Patterson heard the testimony of the co-employee, Donna Paris-McKinnon. Based on her testimony, Dr. Patterson offered the opinion that the employee’s “last important exposure” to beryllium occurred at Borjohn, due to the grossly inadequate industrial hygiene practices described there. (Dec. 610-611.) Dr. David Christiani, the employee’s expert physician, ultimately opined that Borjohn was the last employment causally related to the employee’s berylliosis. (Dec. 608.) The judge adopted the opinions of both doctors as to causal relationship, along with that of the impartial physician, Dr. Karl Kelsey, and the testimony of Donna Paris-McKinnon, to conclude that the employee’s last exposure to beryllium occurred at Borjohn. Thus, Borjohn’s insurer, Centennial, was found liable to pay the employee compensation for his industrial disease. (Dec. 619-620.)

One issue, of the many argued by Centennial, requires that the case be recommitted. The judge’s findings as to Exhibit 19A, the photograph of polishing

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machines, are erroneous. The judge found that the photograph was taken at Borjohn “during this time,” i.e., the term of the employee’s employment there. The insurer points out correctly that this is simply not the case. Although the photograph was taken at Borjohn, it was actually taken years after the employee had stopped working there, and at an entirely different facility than the one in which the employee had worked. (February 26, 1998 Tr. 124.) The employee had never worked around the machines in the picture. Moreover, the machines pictured were not even the types that were used to polish beryllium, being much larger than the ones used during the relevant time period at Borjohn. (February 26, 1998 Tr. 125; March 30, 1998 Tr. 14-15, 31, 43-44.) No party contends anything to the contrary in their briefs on appeal. The erroneousness of the finding being undisputed, we need examine only the prejudice arising from such an error: Was it harmful or harmless?

“Where crucial and material findings are made without evidentiary support, the error resulting therefrom is not harmless and renders the ultimate decision both arbitrary and capricious.” Bursaw v. B.P. Oil Co., 8 Mass. Workers’ Comp. Rep. 176 (1995). As the findings in question here are at the center of the judge’s analysis of why Borjohn should be the liable employer in this complicated exposure case, the findings are “crucial and material.” We do not think, therefore, that the error is harmless. Certainly, we cannot tell how much of the judge’s crediting the testimony of Paris-McKinnon, concerning the lack of industrial hygiene at Borjohn, was necessarily grounded on his inaccurate impressions garnered from the photograph. See Praetz v. Factory Mutual Engineering & Research, 7 Mass. Workers’ Comp. Rep. 45, 46 (1993); Crowell v. New Penn Motor Express, 7 Mass. Workers’ Comp. Rep. 1, 3 (1993). Indeed, there was evidence presented in the testimony of Borjohn’s president regarding conditions in that workplace that tended to contradict Paris-McKinnon’s testimony and the conditions seen in the photograph. (February 26, 1998 Tr. 160-163.) Moreover, Dr. Patterson, whose opinion the

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judge adopted, in turn based that opinion on the testimony of Paris-McKinnon. This adoption is therefore also put into question.<sup>3</sup> All told, we do not consider that the error in the judge's mischaracterization of Exhibit 19A can be harmless.

We therefore vacate the judge's findings on page 660 of his decision, regarding Employee's Exhibit 19A, and recommit the case for further findings on the issue of the employee's exposure to beryllium dust at Borjohn. The judge may consider the photograph (Exhibit 19A) for the limited purpose for which it was offered: to assist in the understanding of the general polishing process. (February 25, 1998 Tr. 85-96.) See Solomon v. Dabrowski, 295 Mass. 358, 359-360 (1936); Liacos, Massachusetts Evidence, § 3.10 (6<sup>th</sup> ed. 1994).

The outcome after recommittal will determine whether, as is argued by Lumberman's, reimbursement for money paid as a result of the conference order should be made to Lumberman's.

We summarily affirm the decision as to Centennial's and Lumberman's remaining arguments on appeal.

So ordered.

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Martine Carroll  
Administrative Law Judge

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Frederick E. Levine  
Administrative Law Judge

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<sup>3</sup> Moreover, the judge's adoption of the opinions of two other medical experts, Dr. Christiani and Dr. Kelsey, which opinions causally related the employee's berylliosis to the last exposure to airborne berylliosis at Borjohn, is likewise put in question by his misinterpretation of the picture. All three doctors relied on a history that was based in part on Paris-McKinnon's testimony regarding industrial hygiene at Borjohn. The judge's erroneous finding regarding the photograph may have been a factor in his crediting the testimony of Paris-McKinnon over that of Borjohn's president.

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Susan Maze-Rothstein  
Administrative Law Judge

Filed: **July 24, 2000**  
MC/jdm