COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035621-96**

William Lanzille	Employee
August A. Busch & Company of MA	Employer
Anheuser Busch Companies, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Maze-Rothstein and Levine[1])

APPEARANCES
Michael C. Akashian, Esq., for the employee
Patricia A. Costigan, Esq., for the self-insurer

CARROLL, J. The parties cross-appeal from a decision in which an administrative judge awarded the employee a closed period of § 34 temporary total incapacity benefits from date of injury up to the date of the § 11A impartial medical examination. The employee argues that the impartial examiner was biased. The judge made detailed findings on the issue of bias, which met the requirements of Tallent v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 794 (1995); Martin v. Red Star Express Lines, 9 Mass. Workers' Comp. Rep. 670 (1995), and G. L. c. 152, § 11A. Therefore, we summarily affirm the judge's rejection of the contention of bias. The self-insurer argues on appeal that the decision is arbitrary, capricious and contrary to law because the award of benefits was not grounded in the medical evidence before the judge at hearing. Because we agree that there was no medical evidence covering the "gap" period of time for which § 34 benefits were awarded by the judge, we recommit the case for introduction of additional medical evidence.

William Lanzille, age 52 at time of the hearing, worked for August A. Busch and Co. (Busch) twice. (Dec. 3, 4.) His most recent work for Busch spanned fourteen years

[1] Judge Levine did not participate in this case or decision.

and involved heavy lifting in the warehouse. (Dec. 4.) Each night he lifted approximately 3,500 cases of beer and placed the cases on pallets. Id. Mr. Lanzille is a high school graduate with two years of college courses at Salem State College. (Dec.3, 4.) In addition to his work for the employer, which included beer delivery for 4 years in the 1960s, the employee has worked in several businesses, some as owner or as a partner. (Dec. 4.) Lanzille has owned a clothing store, been part owner in a temporary agency and been a co-owner of a hair replacement clinic. He has skills in retail sales, operating a small business and performing at least minimal accounting and bookkeeping operations. Id.

The employee suffered numerous injuries, including back injuries, from work related incidents over the years. Id. He was symptom free when, on September 9, 1996, he injured his neck, back[2] and head in a fall at work. (Dec. 4.) The employee filed a claim which the self-insurer did not accept. Following a § 10A conference order of § 35 temporary partial incapacity benefits, the self-insurer appealed to a hearing de novo. (Dec. 1.)

On August 28, 1997, the employee underwent an impartial medical examination pursuant to the provisions of G. L. c. 152 § 11A, and the § 11A physician rendered a report. (Dec. 2.) The physician diagnosed the employee with headaches, dizziness and tinnitus by history, as well as cervical strain with upper extremity paresthesias, and low back strain with left leg pain and paresthesias. (Dec. 5; Impartial Physician report, 3.) The physician opined that, with the exception of the tinnitus, the September 9, 1996 industrial accident appeared to have exacerbated the pre-existing conditions.[3] (Dec. 6; §11A report; Dep. 13.) The physician felt that discrepancies in the employee's examination made it very difficult to evaluate his subjective complaints. (Dec. 6; Dep. 30.) The doctor found no objective basis for the employee's leg, low back and headache

[2] The employee's last active treatment for his back, prior to the 1996 work injury, was in 1993. (Dec. 4.)

[3] The judge aptly noted that, since the pre-existing injuries in the case were work-related, there were no issues under § 1(7A) to be decided. (Dec. 8.)

complaints. (Dec. 6; Dep. 15, 21, 22.) The doctor found some increased muscle tension and some tenderness in the left cervical region, along with some paresthesias. (Dec. 6; § 11A Report 4; Dep. 15, 16, 20. 21, 61.) However, he could not evaluate the significance of such findings, due to the discrepancies in the examination. Id. The impartial physician concluded that the employee could return to his regular work without restrictions, and that his subjective complaints were insufficient to disable him. (Dec. 6.)

The employee filed a § 11A motion contending that the impartial physician was biased against workers' compensation claimants. After deposition of the impartial doctor, the judge rejected the employee's arguments regarding the § 11A physician's alleged lack of impartiality. The judge therefore did not allow additional medical evidence to be introduced, and relied on the exclusive prima facie medical evidence supplied by the § 11A report and deposition testimony. (Dec. 8.)

The judge concluded that the employee was a credible witness, and found that he had suffered a work-related injury on September 9, 1996. The judge adopted the opinions of the impartial medical physician, that the employee suffered an exacerbation of his pre-existing medical impairments in the September 9, 1996 incident, but that he was capable of returning to his regular work without restrictions as of the date of the examination, August 28, 1997. (Dec. 8-9.) The judge noted that "because the only medical evidence was that of [the impartial physician] and neither party requested medical reports to cover the gap period from the date of injury or the § 10A Conference to the date of [the] § 11A impartial examination, I find that Employee was temporarily totally disabled from September 9, 1996, until August 28, 1997 [the date of the examination]." (Dec. 8-9.)

We address the self-insurer's sole argument on appeal, that the decision should be reversed as the award of benefits is wholly unsupported by any medical evidence. We agree that the decision is flawed because of the gap in the medical evidence. However, the remedy is not reversal, but recommittal, in light of our opinions from Lebrun v. Century Markets, 9 Mass. Workers' Comp. Rep. 692 (1995), to Bellanton v. The Flatley Company, 11 Mass. Workers' Comp. Rep. 617 (1997). We do not think, as argued by the

self-insurer, that the imprecision of the employee's motion to introduce additional medical evidence should mandate reversal. "Where a judge is persuaded that there is an absence of necessary medical evidence to adjudicate a contested period of incapacity, that judge *shall* make a ruling of inadequacy and fill the gap with additional medical evidence . . . ." Lebrun, supra, at 697 (emphasis added). We elaborated on that general proposition in Miller v. M.D.C., 11 Mass. Workers' Comp. Rep. 355 (1997):

> [B]y ordering the commencement of [incapacity] benefits nearly five months prior to the impartial examination, the judge apparently felt that the employee was entitled to those benefits earlier than the examination date. Taking that view, the judge should have exercised his authority *sua sponte* to require additional medical evidence. . . . [W]here, as in this case, the judge on his own initiative did purport to plug part of the evidentiary hole, he must authorize the submission of additional medical testimony to cover the entire period of the gap.

Id. at 358, n. 5.

Finally, we recommitted a case where the judge had awarded benefits from the date of injury to the date of the impartial examination, at which time the doctor opined that the employee could return to work. In Bellanton, supra at 618-619, we stated:

> [T]he judge specifically credited the employee's account of her work accident, and found that the industrial accident caused the employee to be totally incapacitated from her last day of work, September 13, 1993, until September 13, 1994, the date of the § 11A examination; the judge awarded benefits accordingly.
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> . . .
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> By ordering § 34 benefits for the entire one-year period, the judge obviously felt that the employee was entitled to benefits. Taking that view, the judge should have exercised her authority *sua sponte* to require additional medical evidence. [Citations omitted.] In so concluding, we follow the guidance of O'Brien's Case, 424 Mass. 16, 22 (1996) (additional medical testimony may be necessary to provide each party a fair opportunity "to make out[its] position on the disputed issue").

Accordingly, we recommitted the case for the introduction of additional medical evidence and further incapacity analysis in light of that evidence. Id. at 619.

Likewise, we recommit this case before us to the administrative judge for the allowance of additional medical evidence for the gap period.

So ordered.

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: November 3, 1999