COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 019520-02

Craig Anderson **Employee**
D & D Electrical Contractors **Employer**
Transportation Insurance Co. **Insurer**

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

The case was heard by Administrative Judge Dike.

APPEARANCES

Joseph F. Agnelli, Jr., Esq., for the employee at hearing and on appeal
Judith B. Gray, Esq., for the employee at oral argument
Douglas K. Birkenfeld, Esq., for the insurer

COSTIGAN, J. Both parties appeal from the decision of the administrative judge wherein he: 1) denied the employee's claim for §§ 13 and 30 medical benefits for treatment of his cervical condition; 2) terminated the employee's § 34 total incapacity benefits; and 3) denied the insurer recoupment of payments it had made voluntarily, which were retroactively terminated by the decision. The employee argues that the judge erred in applying § 1(7A)'s "a major cause" standard to his cervical condition, and in failing to consider his right shoulder injury, for which the insurer had accepted liability, in determining his incapacity. The insurer maintains the judge erred by failing to make subsidiary findings in support of his denial of recoupment. We agree on all counts, and reverse the decision in its entirety. Because the administrative judge no longer serves on the industrial accident board, we recommit the case for a hearing de novo.

Craig Anderson, thirty-four years old at the time of hearing, had a technician's degree in electronics, and had worked as a cable installer for the employer since August 2000. His job entailed moderate to heavy physical exertion and required that he perform a great deal of work overhead and in awkward positions. In 2002, the employee began to experience numbness in his right hand and tightness in his

right elbow and forearm. He also complained of popping in his right shoulder and pain in his neck, which he attributed to extensive overhead work. In June 2002, he finally left work. (Dec. 3.)

The insurer accepted liability for the employee's right hand and shoulder injuries, but not for the alleged neck injury, and paid § 34 total incapacity benefits commencing on June 5, 2002. (Dec. 6.) On February 21, 2003, the employee filed a claim for §§ 13 and 30 medical benefits, seeking treatment at the Spine Center for his alleged cervical injury. Following a § 10A conference, a different administrative judge, who allowed the insurer's motion to join a complaint for discontinuance of weekly compensation, denied the employee's claim and did not rule on the insurer's complaint. (Dec. 2.) Both parties appealed to a hearing de novo. (Dec. 3.)

On July 24, 2003, Dr. Lawrence Geuss conducted an impartial medical examination of the employee pursuant to § 11A. In his report dated August 11, 2003, he opined the employee had right carpal tunnel impingement requiring surgery, as well as a rotator cuff injury to his right shoulder, which did not appear to need surgery. (Ex. 2.) He further noted the employee had cervical arthritis. Dr. Geuss felt the employee could engage in light to moderate work, though he would have difficulty with repetitive activities of the right hand. (Dec. 4.)

The employee underwent a right carpal tunnel release in February 2004. (Dec. 3.) On June 12, 2004, without re-examining the employee, Dr. Geuss performed a medical records review and issued an addendum report. He opined that the carpal tunnel release had been successful, and the employee ought to be able to return to work as of the time of his record review. (Dec. 4.) At his deposition on April 14, 2005, the doctor testified that the employee had pre-existing cervical arthritis which could have been aggravated by repetitive overhead work, and that treatment for this condition at the Spine Center was reasonable. (Dec. 5.)

In his decision, the judge credited the employee's testimony that he continued to have pain, weakness and, more significantly, numbness and fatigue in his right hand. (Dec. 3-4.) He further found that Dr. Geuss's opinions were consistent with

the reports of the employee's surgeon, Dr. Mark Belsky. (Dec. 4.)[1] Identifying three distinct injuries claimed by the employee -- right carpal tunnel, right rotator cuff and cervical -- the judge found there was no dispute among the medical experts that the carpal tunnel and rotator cuff injuries were caused by the employee's work activities, and that, in fact, the insurer had accepted liability for those injuries.

Because the insurer had raised the affirmative defense of § 1(7A)[2] with respect to the employee's cervical condition, and his claim for evaluation and treatment at the Spine Center, the judge analyzed that condition as required by Vieira v. D'Agostino Assoc., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005). Based purportedly on the opinion of Dr. Geuss, the judge found the employee suffered from a pre-existing condition of cervical arthritis, which was likely aggravated by

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[1] The judge allowed the employee's motion to submit "gap" medicals only in part, ruling that additional medical evidence was admissible for the period between Dr. Guess's July 24, 2003 § 11A examination of the employee, and the doctor's deposition on April 15 [sic], 2005. (June 7, 2005 letter from administrative judge to parties.) The employee submitted his records from Dr. Mark Belsky, who performed his carpal tunnel surgery, consisting of office notes for the period from November 2003 through April 2004, and the operative report of February 24, 2004. (Ex. 4; June 15, 2005 letter from employee to administrative judge.) We take judicial notice of these documents contained in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). The insurer offered no additional medical evidence. See footnote 5, infra.

[2] General Laws Chapter 152, § 1(7A), provides, in relevant part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

his repetitive work activities. He found such aggravation represented a combining of the pre-existing condition and the work injury under § 1(7A), thereby placing the burden on the employee to prove his work injury remained "a major" cause of his disability or need for treatment. Concluding that the employee had failed to produce any expert medical evidence which satisfied this burden, (Dec. 6), the judge found that the claimed treatment at the Spine Center, although reasonable, was not causally related to the employee's industrial injury. (Dec. 7.)

The judge then purported to address the employee's disability with respect to the two accepted injuries:

> As indicated earlier there are two distinct issues to consider with regard to the employee's degree and periods of impairments; the **accepted** carpel [sic] tunnel and **shoulder injuries** and disputed neck injuries. Given my finding above with regard to the provisions of § 1(7A) there is no need to consider the degree of impairment the employee suffers . . . resulting from the cervical condition. Regarding the **accepted injuries** the employee was examined by Dr. Geuss on July 24, 2003 at which time Dr. Geuss felt that the employee **could return to light to moderate work duties but with difficulty with repetitive right handed activity**. The employee is right handed and has only been trained, and engaged, in work that requires extensive use of his appendages, particularly his dominant one. I find that **this restriction essentially eliminates any meaningful work opportunities** that the employee might find.
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> The employee did, however, undergo a surgical correction of his **carpel**[sic] **tunnel injury** in February of 2004. This procedure was successful and the office notes of Dr. Belsky, the treating surgeon, and the addendum report of Dr. Geuss indicate that **by June 12, 2004 the condition had been corrected**. As such, as of that date I find that the employee was no longer disabled as a result of his industrial carpel [sic] tunnel syndrome.

(Dec. 6-7; emphases added.) The judge ordered the insurer to provide reasonable medical benefits for the employee's right carpal tunnel and rotator cuff injuries, and to pay the employee § 34 total incapacity benefits from July 24, 2003 to June 12, 2004 only. (Dec. 8.) Although an overpayment of approximately a year's worth of incapacity benefits was created by his decision, the judge, without explanation or

analysis, denied the insurer's "claim" for recoupment of § 34 benefits paid after June 12, 2004. Id. We address the parties' arguments on appeal.

The Insurer's § 1(7A) Defense

The employee contends the judge erred in allowing the insurer to assert a defense under § 1(7A), and in holding him to the higher burden of proving "a major" causation as to his alleged cervical injury and the need for treatment. He argues the insurer failed to meet its burden of producing evidence of a) a pre-existing, non-compensable injury or disease which, b) combined with his compensable work injury. MacDonald's Case, Mass. App. Ct. 08-P-187 (February 9, 2009), citing Johnson v. Center for Human Dev., 20 Mass. Workers' Comp. Rep. 351, 355 (2006)(fourth sentence of § 1(7A) must be raised as an affirmative defense; insurer bears burden of production demonstrating combination element); Doucette v. TAD Technical Institute, 22 Mass. Workers' Comp. Rep. 99 (2008); Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2002), citing Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000).

Although it is true the insurer did not submit any medical reports or records in response to the judge's allowance of the employee's motion for additional medical evidence, see footnote 1, supra, it was entirely permissible for the insurer to rely on the August 11, 2003 report of the § 11A impartial medical examiner, his June 12, 2004 records review addendum report, and the doctor's deposition testimony, to satisfy at least part of its burden of production under § 1(7A). See Motherway v. City of Westfield, 23 Mass. Workers' Comp. Rep. ____ (2009).[3] In his initial report, Dr. Geuss wrote:

[3] 452 Code Mass. Regs. § 1.11(6) provides that upon an administrative judge's finding "that additional medical testimony is required due to the complexity of medical issues involved or the inadequacy of the report submitted by the impartial medical examiner, a party may offer as evidence medical reports prepared by physicians engaged by said party. . . ." "Nothing in c. 152, or in the applicable regulations, operates to prevent an insurer from relying on the § 11A report to support a § 1(7A) defense." Motherway, supra at n.6.

> No evidence of right cervical radiculopathy was noted. [The employee] had an MRI of his neck showing some basic arthritis in his neck but no significant mass effect on the cord. He gets occasional discomfort in his right shoulder. His shoulder films apparently showed some mild degenerative arthritis in the clavicle area.

(Ex. 2.) In his addendum report, Dr. Geuss stated: "[The employee] had pre-existing degenerative joint disease in his neck. The EMG did not show any signs of any impingment on the neck." (Ex. 3.) At his deposition, the doctor confirmed, "[t]here was no herniated disc, no disc bulging, no nerve root impingement, nothing pressing on the spinal cord . . . [n]othing to explain numbness down his arms." (Dep. 31-32.)

The judge considered Dr. Geuss's opinion as establishing the first of the three prongs set forth in Vieira, supra: whether a pre-existing condition which resulted from a non-compensable injury or disease exists. We will not disturb his finding in that regard. However, we do take issue with the judge's finding that the second prong of Vieira, regarding combination, was satisfied. The judge wrote:

> According to Dr. Geuss the employee's work activities, particularly the repetitive overhead work **could likely** aggravate this condition to some extent, and this would represent a combining of the pre-existing condition and the industrial work pursuant to § 1(7A).

(Dec. 6; emphasis added.) This characterization takes some liberties with the doctor's deposition testimony.[4] In our view, the totality of Dr. Geuss's testimony

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[4] The following exchange at deposition is noteworthy:

> Q.: Doctor, you were asked several questions by insured [sic] counsel about degenerative, prior degenerative condition in the neck. Doctor, again, were you given some indication from Mr. Anderson's nature of work, correct?
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> A.: Yes.
>
> Q.: And it's fair to say that it involves a lot of repetitive pulling, overhead reaching, correct?

expressed no more than the possibility the employee's work activities had aggravated his pre-existing cervical arthritis. Thus, as to combination, the judge erred in finding Dr. Geuss's opinion satisfied the insurer's burden of production as to the second prong of Vieira.[5] See Oberlander's Case, 348 Mass. 1 (1964);

A.: Correct.

Q.: And would it not be fair to say in and of itself that type of activity in a repetitive basis back and forth *can* have some negative effect on the cervical spine, correct?

A.: Correct.

Q.: Especially when you're working overhead, your neck is always in an awkward position looking up, correct?

A.: Correct.

Q.: And assume, Doctor, that prior to, we'll say, May, June of 2002, that Mr. Anderson had no symptoms whatsoever in his neck or upper extremity and assume further, Doctor, that subsequent to that point in time that he has had this description of discomfort in his right upper extremity, numbness in the right hand . . . [would it] be fair to say that that activity with no previous symptomatology . . . at least played a contributing role to the onset of his symptoms?

A.: *I mean, it's a possibility. I mean, I don't know if it's probable*, but, I mean, I don't know if, you know, he's ever injured his neck. He wasn't complaining of neck pain when I saw him, but sure, any repetitive overhead activity where you have to have your neck - you're hyperextended on a regular basis *could* aggravate your neck.

(Dep. 42-43; emphases added.)

[5] The opinions of Dr. George Ousler, the insurer's evaluating physician, clearly would have satisfied the insurer's burden of showing the employee's work activities combined with his pre-existing cervical condition:

Hachadourian's Case, 340 Mass. 81 (1959)(opinion of medical expert amounting to no more than expression of possibility or chance of causal connection insufficient to meet claimant's burden of proof). Therefore, the judge erred in applying the provisions of § 1(7A) to the employee's claim and in holding him to proving "a major" causation as to his claimed neck condition.[6] On recommittal, the employee

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> [The employee's] symptoms appeared to be related to continuing work in placing wire and cable in overhead ceilings which required frequent extension and tilting of the cervical spine. . . . By history, it is felt, within reasonable medical probability, Mr. Anderson developed progressive mild carpal tunnel syndrome to both wrists superimposed on transient right upper extremity parasthesias involving the right 3 rd and 4 th fingers *secondary to aggravation of the C5-6 pathology involving intermittent nerve pathology at C5-C6 from the posterior osteophyte formation with prolonged and abnormal positioning of the cervical spine while working on ceilings.*

(Ex. 4 to Dr. Geuss deposition - March 23, 2004 report of Dr. Ousler; emphases added.) Ironically, however, at the § 11A deposition, that report was marked for identification only, pending the judge's ruling on the employee's motion for the submission of additional, so-called "gap," medical evidence. (Dep. 14-17.) In June 2005, the judge allowed the motion in part, limiting additional medical evidence to the period between July 24, 2003 and April 15 [sic] 2005. See footnote 1, supra. By virtue of its date, Dr. Ousler's report was otherwise admissible as a "gap" medical opinion, but the insurer never offered it into evidence and the employee could not have done so. See footnote 3, supra. Indeed, in a July 25, 2005 letter to the judge, contained in the board file and of which we take judicial notice, Rizzo, supra, insurer's counsel strongly objected to, and moved to strike, all references to Dr. Ousler's report in the employee's written closing argument, as the report "was never placed in evidence."

[6] The insurer also argues that the "a major" cause standard under § 1(7A) applies to the employee's right shoulder injury, as well as to his cervical injury. (Ins. br. 8.) We see no indication this argument was made at hearing, and therefore deem it waived. Rezendes v. City of New Bedford Water Dept., 21 Mass. Workers' Comp.

need prove only simple causation between his work activities and/or injury and his cervical condition. See Doucette, supra at 104.

The Right Shoulder Injury

We also see merit in the employee's argument that the judge erred by failing to consider the impact on his incapacity of his right shoulder injury, for which the insurer had accepted liability. It is axiomatic that the judge must address all issues before him.

Gleason v. Toxikon Corp., 22 Mass. Workers' Comp. Rep. 39 (2008). By virtue of the insurer's complaint to discontinue weekly incapacity benefits, and the employee's testimony that he continued to experience symptoms due to his right shoulder condition, (Tr. 40-42), the employee's incapacity with respect to his accepted shoulder injury was at issue. The judge found the employee's training and work experience since 1995 -- installation of cable and satellite dishes, primarily in commercial buildings -- involved extensive use of his [upper] "appendages," particularly his dominant one, and the restrictions against repetitive right-handed activity identified by Dr. Geuss when he examined the employee pre-surgery on July 24, 2003, "eliminate[d] any meaningful work opportunities that the employee might find." (Dec. 7.) However, the judge also adopted the impartial physician's June 12, 2004 addendum opinion that the employee should have recovered from his carpal tunnel release some six to eight weeks after the February 2004 surgery, and he was then ready to return to work. That opinion, however, addressed only the status of the employee's right carpal tunnel injury, without considering the impact of his accepted right shoulder injury, which potentially incriminated his ability to perform work involving his "appendages."

The insurer counters that the residual effects of the employee's right shoulder injury were minimal, and thus the judge did not err in failing to address them. However, whether the shoulder injury was impacting the employee's ability to work, minimally or otherwise, was for the judge to determine, based on the record

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Rep. 47, 51 n.2 (2007), citing Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001).

medical evidence. Indeed, there was medical evidence from which the judge could have concluded the employee's ability to work continued to be affected by his shoulder problems.[7] The judge's failure to consider the effects of all of the employee's accepted injuries is error requiring recommittal.

The Issue of Recoupment

The insurer contends the judge erred by failing to make any subsidiary findings of fact on what was plainly an anticipatory claim for recoupment. At the time of the hearing, the insurer anticipated an overpayment would result from the judge's decision. It later alleged the overpayment to be in excess of $25,000. (Ins. br. 10.) The record confirms the insurer raised the issue of recoupment at hearing.[8] Although there was no testimony or other evidence adduced at hearing on the issue of whether recoupment would be warranted, should there be a resulting overpayment, the judge denied the claim without analysis. (Dec. 8.) We agree that subsidiary findings on recoupment are necessary where an overpayment occurs which cannot be recouped by the insurer's unilateral reduction of benefits under §

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[7] Both Dr. Belsky and Dr. Geuss offered opinions which could have supported a finding of shoulder-related incapacity. On March 9, 2004, Dr. Belsky examined the employee and opined that he "continues to experience shoulder pain despite his surgery, and says it feels exactly like that pre-operatively." (Dec. 4.) On April 23, 2004, Dr. Belsky reported that the employee's "right hand feels great although he still has occasional right shoulder . . . pain." Id. At deposition, Dr. Geuss conceded that since he had not examined the employee a second time, post-carpal tunnel surgery, he had no way of knowing what the employee's symptomatology was on June 12, 2004, the date of his addendum report. (Dep. 21.) When asked to consider a hypothetical question assuming, *inter alia*, the employee's "pain in the right upper extremity remained the same," (Dep. 23), the doctor opined: "There's a probability he's still limited, yes." (Dep. 27.)

[8] The "Insurer's Hearing Memorandum," as contained in the Board file and of which we take judicial notice, see Rizzo, supra, lists among the issues to be addressed at hearing, "Discontinuance + recoupment for overpayments."

11D.[9] Given the utter dearth of subsidiary findings here, the denial of recoupment is arbitrary and cannot stand.[10] We vacate the denial of recoupment and reserve to the insurer the right to renew its claim either at the hearing de novo on

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[9] General Laws Chapter 152, § 11D(3), provides:

> An insurer that has paid compensation pursuant to a conference order shall, upon receipt of a decision of an administrative judge or a court of the commonwealth which indicates that overpayments have been made be entitled to recover such overpayments by unilateral reduction of weekly benefits, by no more than thirty percent per week, of any remaining compensation owed the employee. *Where overpayments have been made that cannot be recovered in this manner, recoupment may be ordered pursuant to the filing of a complaint pursuant to section ten or by bringing an action against the employee in superior court.*

(Emphasis added.)

[10] Whether to order recoupment under such circumstances is a matter entirely within the judge's discretion. Murphy's Case, 53 Mass. App. Ct. 424, 429 (2001); Brown v. Highland House Apartments, 12 Mass. Workers' Comp. Rep. 322, 325 (1998). "Of course, [t]he exercise of discretion requires fact finding . . . ." Murphy's Case, supra at 429; Hilane v. Adecco Employment Services, 17 Mass. Workers' Comp. Rep. 465, 470 (2003). Otherwise, this board cannot perform its appellate function of determining whether correct rules of law were applied to facts that could properly be found. See Praetz v. Factory Mut'l Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). In determining whether to allow recoupment, the judge must apply a test of "fundamental fairness." Boyd v. Sciaba Constr., 12 Mass. Workers' Comp. Rep. 427, 429-430 (1998), citing Brown, supra at 326, n.7. After applying the test, the judge may "order none, some, or all of the overpayments as appropriate," Brown, supra at 326, but subsidiary findings are clearly required.

recommittal,[11] or in a separate complaint for recoupment, filed with this department or in the superior court.

We reverse the decision, and recommit this case for a de novo hearing on the issues of the nature, extent and causal relationship of the employee's incapacity, including the extent, if any, to which the employee's accepted right shoulder injury affects his capacity to work. The insurer having failed to meet its burden of production as to its defense under § 1(7A), on recommittal the employee need prove only simple, "as is," causation between his industrial injury and his medical condition.

We also reverse and vacate that aspect of the judge's decision denying recoupment by the insurer of the overpayment created by the original hearing decision. If the decision on recommittal results in an overpayment that cannot be recouped by the

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[11] In Murphy's Case, 53 Mass. App. Ct. 708 (2002), the court declined to require that the insurer file a separate complaint following entry of an administrative judge's decision in order to allow the judge to address the issue of recoupment. Id. at 717. In that case, however, there was an ongoing payment of partial incapacity benefits from which the insurer was entitled to unilaterally recoup up to thirty percent. The issue was whether the judge could sua sponte order a larger recoupment. The situation here is different because there are no ongoing benefits from which the overpayment may be recouped. Although we have not always required that the insurer file a separate recoupment complaint after a decision issues establishing an overpayment, see, e.g., Boyd, supra, Abebe v. Lowe's Home Centers, 21 Mass. Workers' Comp. Rep. 75, 79 (2007), recent decisions have moved strongly in that direction. In Hover v. Northern Foundations, Inc., 22 Mass. Workers' Comp. Rep. 123 (2008), we held: "When there are no ongoing payments of compensation, the insurer's remedy is to file a separate complaint for recoupment, either at the department or in the superior court. As no complaint had yet been filed, the judge here had no authority to address the issue of recoupment." Were we not recommitting this case for a hearing de novo, "a new § 10 complaint would be necessary to bring the matter back before [an] administrative judge," because there was no evidence offered at hearing from which the judge could have determined whether recoupment was warranted. Id.

insurer's unilateral reduction of the employee's benefits pursuant to G. L. c. 152, § 35D, the insurer has the right to file a separate complaint for recoupment with the department or in the superior court.

Because the administrative judge who decided this case no longer serves on the industrial accident board, we transfer the case to the senior judge for assignment to a different administrative judge.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **March 23, 2009**