COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 051656-92**

Harry Sherr Employee
City of Peabody Employer
Self-Insured

REVIEWING BOARD DECISION
(Judges Smith, McCarthy and Wilson)

APPEARANCES
Ronald L. St. Pierre, Esq., for the employee
Daniel Kulak, Esq., for the self-insurer

SMITH, J. The municipal self-insurer appeals a decision awarding more than fourteen years of retroactive § 34A permanent and total incapacity benefits. The decision did not credit the accidental disability retirement payments that the City had paid the employee. In this case of first impression, we discuss the coordination of benefits between the workers' compensation system, G.L. c. 152, and the contributory retirement system for public employees, G.L. c. 32. Because G.L. c. 32, § 14(2) places the ultimate responsibility for preventing a double recovery on the City, and the City did not avail itself of the statutory remedies provided by c. 152 and c. 32, we affirm the decision not to subtract the pension benefits from the workers' compensation award.

On January 28, 1977, Harry Sherr sustained an industrial injury to his lower back arising out of and in the course of his employment for the City of Peabody. The City, being self-insured, accepted liability for the injury, and paid § 34 temporary total incapacity benefits from the date of injury until their exhaustion on December 22, 1982. (Dec. 5.) Around that time, Sherr applied for and received accidental disability retirement benefits pursuant to G.L. c. 32.

Over ten years after retiring, on January 25 1993, Sherr filed the present claim for additional workers' compensation. (Dec. 7.) He claimed § 34A permanent and total in-

capacity benefits from December 23 1982, the date by when he had exhausted all the temporary compensation benefits that the law provided. By the time his case reached hearing, Sherr was eighty-two (82) years old. (Dec. 6.) After hearing, the judge concluded that Sherr was entitled to the workers' compensation benefits that he claimed, without any offset for the accidental disability retirement benefits that he had been paid over the prior fourteen plus years. (Dec. 18.)

The City appeals to the reviewing board, complaining that it is being made to pay twice for the same injury. It asserts that Sherr's claim should be time barred by the equitable doctrine of laches. The City's complaint has great superficial merit because the law abhors a double recovery for the same injury or loss. Pierce's Case, 325 Mass. 649, 658-659 (1950) (no workers' compensation for the same period during which employment security benefits paid); Mizrahi's Case, 320 Mass. 733, 737-738 (1947) (no compensation under G.L. c. 152 and under the Longshoremen's and Harbor Workers' Compensation Act for the same period of total incapacity); McLaughlin's Case, 274 Mass. 217, 222 (1931) (New Hampshire workers' compensation benefits credited against Massachusetts award). But the workers' compensation act, G.L. c. 152 § 73, together with the accidental disability retirement act, G.L. c. 32§ 14(2), provide an adequate remedy at law to prevent such unjust enrichment.

To understand the coordination between the workers' compensation system and the contributory retirement system for public employees, we turn to the applicable statutory provisions. Section 73 of the workers' compensation act, G.L. c. 152, provides, in pertinent part:

> Any person entitled under section sixty-nine to receive compensation from the . . . city . . . and who is also entitled to a pension by reason of the same injury, shall elect whether he will receive such compensation or such pension, and shall not receive both, except in the manner and to the extent provided by section fourteen of chapter thirty-two. (Emphasis added.)

Thus the provision establishes the general policy against double recovery: that an employee must "elect" either workers' compensation or his pension and "shall not receive both." However the key exception, under which the employee's case falls, is emphasized

above. An employee may receive those overlapping payments allowed by the contributory retirement statute. We therefore turn to its relevant provisions.

Section 14(2)(a) of the public employees' contributory retirement act, G.L. c. 32, provides, in pertinent part:

> All sums of money payable under the provisions of sections . . . thirty-four A, thirty-four B . . . of chapter one hundred and fifty-two directly to a retired member . . . shall be offset against and payable in lieu of any pension payable on his account under the provisions of section six, seven, or nine by reason of the same injury. . . . If any such pension exceeds the compensation payable on account of such member under such provisions of chapter one hundred and fifty-two when both are reduced to the same periodical basis, the excess only shall be paid as a pension so long as such compensation continues. If any such pension is less than or equal to such compensation, no pension shall be paid so long as such compensation continues to be equal to or greater than such pension.

The language of this subsection assumes that both workers' compensation and pension benefits are payable concurrently. Workers' compensation benefits are to be subtracted from the retirement payment.[1] The retiree only receives the balance of the pension, if any.

Section 14 goes on to specify how benefits are to be coordinated when an employee first receives pension benefits and later begins to receive workers' compensation, including an amount of back payments:

> In all cases where a member . . . receives delayed compensation payments . . . subsequent to his receipt of payments under any pension . . . no further pension payments shall be made unless and until such time as the total amounts which by then would have been payable as compensation and pension together as set forth in paragraph (a) of this subdivision, if there had been no delay in making such compensation payments, shall exceed the total amounts of compensation and pension actually paid by them after due allowance in either case for the allocation of any such lump sum settlement.

G.L. c. 32, § 14(2)(b), as amended by St. 1991, c. 398, §§ 9-12. Thus, an award of back workers' compensation only reduces future pension payments. Although this may allow a city to satisfactorily recoup payments made to a younger retiree, it is unlikely to provide

[1] Here the City is seeking to run the offset backwards. It wants to subtract the pension benefits it has paid from the workers' compensation award.

an adequate recovery from a man who is now beyond the average age of male mortality. At age eighty-two (82), it is doubtful that Sherr will live long enough to receive future pension benefits equal to his retroactive workers' compensation award.

Although the practical effect of the statutory limitation on recoupment appears to unjustly enrich the employee, the law does provide a mechanism to prevent such a situation from occurring. Section 14(2)(c) of the contributory retirement act requires a retiree to pursue his workers' compensation rights and permits the suspension of pension benefits if he does not do so. It provides, in pertinent part:

> If a member . . . entitled to a pension under the provisions of section six, seven or nine, and also having a right to compensation under the provisions of chapter one hundred and fifty-two by reason of the same injury . . . neglects or fails to prosecute fully such right . . . , the board may, during the period of such neglect or failure, suspend such member's . . . right to further payment under the provisions of section six, seven or nine.

G.L. c. 32, § 14(2)(c), as last amended by St. 1980, c. 556, § 9. Here, the City of Peabody's retirement board did not avail itself of this protection.

To further protect municipalities against paying twice for the same injury, once for workers' compensation and again for disability retirement, § 73 of the workers' compensation act provides for subrogation:

> A retirement board, for the purposes of the last-mentioned section, may prosecute in the name and for the benefit of a member . . . of its system . . . who is . . . entitled to a pension . . . , all claims which he . . . may have for compensation under this chapter, if such member . . . has failed . . . to make or prosecute such claim with reasonable promptness and diligence.

G.L. c. 152, § 73, as amended by St. 1984, c. 372, § 57. Prompt action by a retirement board in pursuing a retiree's claim for workers' compensation would prevent a large retroactive award. The City of Peabody's retirement board did not exercise this subrogation right.

Although both the workers' compensation act and the contributory retirement act place reciprocal duties on an injured worker and an employing municipality to protect a city against the payment of overlapping workers' compensation and disability retirement

benefits, the law clearly places the ultimate burden on the retirement board to act. The contributory retirement act provides that "[u]nder the circumstances set forth in [c. 152,] section seventy-three, the duty of the board to prosecute shall be mandatory." G.L. c. 32, § 14(2)(c). Here the City of Peabody's retirement board failed to fulfil its statutory duty to pursue Sherr's workers' compensation rights. The City slept on its remedy for over ten years.[2] It cannot now be heard to complain of the loss resulting from its inaction. See Brown v. Leighton, 385 Mass. 757, 760 (1982) (one who seeks equity must do equity; uninsured employer denied § 15 subrogation).

The industrial accident reviewing board "is an administrative tribunal and, accordingly, `possesses only such authority and powers as have been conferred upon it by express grant or arise therefrom by implication as necessary and incidental to the full exercise of the granted powers.' Levangie's Case, 228 Mass. 213, 217 (1917)." Taylor's Case, 44 Mass.App.Ct. 495, 497 (1998). The reviewing board only has the power to review the decision of a c. 152 administrative judge. G.L. c. 152, § 11C. It lacks general equity powers to compensate for errors made by a city's retirement board. See Gallant's Case, 329 Mass. 607, 610 (1953) (board lacks power to order insurer to reimburse the unemployment fund for mistaken payments).

The benefit coordination provisions of both the workers' compensation act and the contributory retirement act make workers' compensation the primary payment. In this regard, they do not differentiate between insured and self-insured municipalities. In the latter situation, c. 152, § 73 provides for separate legal counsel for the retirement board to pursue subrogation.[3] The statutory schemes of the two systems restrict the manner in which overlapping benefits may be offset. To the extent that, where municipalities are

[2] In all the years that Sherr has been receiving disability retirement benefits, no one from the retirement board has scheduled a medical examination for him. (September 12, 1996 Tr. 55-57.)

[3] Section 73 provides in pertinent part: "Said [retirement] board, so prosecuting such remedy, shall be deemed to be a party in interest and may take an appeal and institute any proceeding which the employee or his legal representative or dependent might take or institute. In proceedings where the commonwealth, county, city, town or district is represented by the attorney general, city solicitor, town counsel or other attorney, the retirement board may be represented by an attorney of its own selection."

self-insured, further adjustments between the two systems should be made to prevent the type of double payment[4] that occurred here, they require "legislative deliberation rather than judicial determination." See Leal v. Contributory Retirement Appeal Bd., 42 Mass. App. Ct. 330, 333 (1997) (employee may receive accidental disability benefits after receiving superannuation retirement benefits). We have no power to rewrite the statutes to reverse the offset, and order that Sherr's pension payments be credited against his delayed workers' compensation award. We affirm the award of compensation without offset.

As additional grounds for appeal, the City contends that the judge erred in finding that Sherr was permanently and totally incapacitated from December 23, 1982. We disagree. The judge found credible Sherr's testimony about his pain and restrictions. (Dec. 7-8, 10, 14, 18.) She found that the 1977 injury aggravated Sherr's preexisting condition, (Dec. 7-8), and he has never returned to his pre-injury baseline condition. (Dec. 8, 15.) In so concluding, the judge also relied upon the consistent medical evidence in the record. (Dec. 10-15.) She adopted Dr. Maddix's and Dr. Greenler's opinions that Sherr's continuing medical problems were causally related to his 1977 injury, which had aggravated his preexisting degenerative disc disease. (Dec. 10-11.) The record contains some evidence to support the facts found by the judge. See, e.g., September 12, 1996 Tr. 18-19, 24, 25, 29; Greenler Dep. 13-15; Statutory Ex. 1, p. 2. We have no power to reweigh the evidence. The conclusion of permanent and total incapacity is rationally drawn from these facts and is consistent with law. We therefore affirm it. G.L. c. 152, § 11C.

As the final issue on appeal, the self-insurer, citing Miller v. Metropolitan District Comm'n, 11 Mass. Workers' Comp. Rep. 355 (1997), contends that the award of counsel fees was contrary to G.L. c. 152, § 13A(9). The employee, who appealed the conference order, concedes this point. We therefore reverse the award of counsel fees for the § 11 hearing.

[4] To the extent that the employee's workers' compensation benefits have been long delayed, his recovery may not be fairly represented as a double one. Brown v. Leighton, 385 Mass. at 763.

Because the self-insurer appealed the administrative judge's decision to the reviewing board and the employee prevailed in part in this decision, the self-insurer shall pay a fee to the employee's attorney in the amount of $1,148.01, plus necessary expenses. G.L. c. 152, § 13A(9); Connolly's Case, 41 Mass.App.Ct. 35, 38 (1996).

So ordered**.**

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Suzanne E.K. Smith
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: February 17, 1999