COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 702541-72

Mary E. Atwood	Employee
Commonwealth of Massachusetts	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Carroll and Fabricant)

APPEARANCES

William A. LeDoux, Esq., for the employee
Robin Borgestedt, Esq., for the self-insurer

McCARTHY, J. Claiming that an administrative judge's award of posthumous back § 34A benefits to the deceased employee's estate was arbitrary, capricious and contrary to law for a variety of reasons, the self-insurer seeks reversal. We affirm the decision, and address only one issue. Following our opinion in Sherr v. City of Peabody, 13 Mass. Workers' Comp. Rep. 43 (1999), we conclude that the self-insurer is not entitled to offset the § 34A benefits against payments made under the contributory retirement act, G. L. c. 32.

The employee, a corrections officer at M.C.I. Framingham for over twenty years, sustained industrial injuries to her right arm and hip on March 6, 1972, at the age of 58. The self-insurer paid temporary total incapacity benefits for a closed period. The employee then filed for, and was granted, accidental disability retirement, effective August 10, 1973. Section 34 benefits resumed on April 1, 1974, resulting in offset of the employee's disability retirement payments. Temporary weekly workers' compensation benefits were paid to exhaustion as of February 27, 1978, and at that time the employee's disability retirement benefits were increased to their full value. (Dec. 2-3.)

On May 15, 1992, the employee and self-insurer entered into an agreement for the self-insurer to pay for the employee's hip replacement surgery, but the surgery was not performed. On or about February 15, 2001, the employee filed a claim for § 34A permanent and total incapacity benefits, which was denied at conference. While the

matter was in queue for an evidentiary hearing on the employee's appeal, the employee died. The matter was taken up by the employee's estate, which pursued the claim for back § 34A benefits from February 28, 1978 through the employee's death on January 27, 2002. (Dec. 3.)

We need not recount the medical evidence that the judge adopted in support of his § 34A award. The judge's findings pertinent to the issue we address on appeal were, in essence, a simple application of our Sherr opinion:

> The Commonwealth has argued that to allow [§ 34A] payments would allow for an unjust enrichment and that it should be authorized to return amounts that would have been offset had there been an earlier claim and order. As the Reviewing Board explained in Sherr v. City of Peabody, 13 Mass. Workers' Comp. Rep. 43, at 46-48 (1999), the offset provisions that coordinate these two benefit systems do not operate in that way. Both retroactive and continuing awards of workers' compensation are offset against future/ongoing pension payments. The workers' compensation benefits would continue, in any event, to be paid in full.
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> Chapter 32 grants the retirement board the right to prosecute a workers' compensation claim in the name of the disability retiree or, under certain circumstances, the right to suspend a disability retiree's pension for a failure to pursue a workers' compensation claim. Thus, the State Retirement Board had at its disposal the means to prevent its losing out on the potential offset. That it never availed itself of that opportunity should not serve to deprive this employee, or now her heir(s), of a proper entitlement to works' compensation benefits for the result of her on-the-job injury.

(Dec. 8.)

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

> All sums of money payable under the provisions of section[] . . . thirty-four A . . . of chapter one hundred and fifty-two directly to a retired member or to the legal representative or dependents of a deceased member on account of his death . . . 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 reasons of the same injury,

> but not against his accumulated total deductions or any annuity derived therefrom. . . . 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 periodic 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.

In Sherr, we addressed the same situation as obtains here - the coordination of benefits when the employee first receives pension benefits and later receives back workers' compensation benefits for the same period. The only distinction in Sherr was that the employee also received ongoing § 34A benefits, from which the self-insurer could recoup the earlier pension payments by means of an offset. Id. at 46. See G. L. c. 32, § 14(2)(b).[1] We noted, however, that the employee's 82 years of age at the time of the proceedings most likely made full reimbursement of the pension payments unlikely. Id. We continued:

> 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 benefits and permits the suspension of pension benefits if he does not do so. It provides, in pertinent part:
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> 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

[1] General Laws c. 32, § 14(2)(b), provides, in pertinent part:

> In all cases where a member or a beneficiary receives delayed compensation payments . . . subsequent to his receipt of payments under any pension granted under the provisions of section six, seven or nine by reason of the same injury, 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 as set forth in paragraph (a) of this subdivision, if there had been no delay in making such compensation payment, shall exceed the total amounts of compensation and pension actually paid by them . . . .

> of section six, seven or nine. Under the circumstances set forth in the said section seventy-three, the duty of the board shall be mandatory.

Sherr, supra, quoting G. L. c. 32, § 14(2)(c). As a result, we concluded that the municipality "did not avail itself of the [G. L. c. 32, § 14(2)(c)'s] protection." Id. We finally noted that G. L. c. 152, § 73, the section that brings the contributory retirement system within the ambit of the workers' compensation act, offered even further protection by providing for the specific right of the retirement board to be subrogated to the employee's compensation claim.[2] Id. at 46-47.

The self-insurer has advanced no persuasive argument for a departure from our analysis in Sherr, which the judge correctly identified as controlling authority. The self-insurer's argument actually attacks its own contributory retirement statute, G. L. c. 32, § 14. Sherr merely applied that statute and G. L. c. 152, § 73, as mandated by the plain meaning of both.[3]

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 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).

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[2] General Laws c. 152, § 73, provides, in pertinent part:

> Any person entitled under [the act] to receive compensation from the commonwealth . . . 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. 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.

[3] The self-insurer's argument that the judge's following of the applicable statutes works an unjust enrichment, (Self-Insurer's Brief, 9-12), would be more appropriately made in the Superior Court. See Taylor's Case, 44 Mass. App. Ct. 495 (1998).

Sherr, supra at 47.

Like the municipality in Sherr, the self-insurer here simply did not avail itself of its remedies in a timely fashion.[4] Its arguments at this late date lack merit, and would be more appropriately made to the Legislature.[5] See Sherr, supra at 48, citing Leal v. Contributory Ret. App. Bd., 42 Mass. App. Ct. 330, 333 (1997)(adjustments between two benefits systems require "legislative deliberation rather than judicial determination").

Accordingly, we affirm the decision. Pursuant to § 13A(9), the self-insurer is directed to pay claimant's counsel a fee of $1,312.21.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

[4] We cannot say if the case might have turned out differently had the contributory retirement board intervened in the legal representative's claim under its subrogation rights as embodied in G. L. c. 32, § 14(2)(a) and G. L. c. 152, § 73.

[5] For example, G. L. c. 32, § 14, could be re-drafted to accommodate the self-insurer's position in this litigation, and specifically bar a compensation award where the pension has been paid for the same injury and the same period of disability, but where there is no opportunity to recoup the payments against ongoing compensation payments. As we have stated, we simply do not see that option within the statutory language of either G. L. c. 32, § 14, or G. L. c. 152, § 73.

The self-insurer also contends that it could not pursue its clear subrogation rights and obligations set out in § 73, because "there is presently NO [sic] form at the Department of Industrial Accidents that would allow for the filing of such a claim." (Self-Ins. Br., 10.) We find no merit in this argument.

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Bernard W. Fabricant
Administrative Law Judge

Filed: August 23, 2005