COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 022563-02**

Richard Cleveland	Employee
P. J. Keating Materials Corp.	Employer
Liberty Mutual Fire Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Harpin)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
Steven M. Buckley, Esq., for the employee
Joseph B. Bertrand, Esq., for the employer and insurer

FABRICANT, J. The employee appeals from a decision ordering recoupment to the employer from the employee in the amount of $664,581.55. We affirm.

On July 28, 2008, then-Administrative Judge Koziol issued a decision in favor of the employee on his § 28[1] claim for a July 15, 2002 industrial injury. The decision awarded $644,581.55 to the employee, and denied motions filed by the employer/insurer[2] to stay the award or, alternately, to commit half the award to an interest-bearing escrow

[1] General Laws c. 152 § 28, provides, in pertinent part:

> If the employee is injured by reason of the serious and wilful misconduct of an employer or of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In case the employer is insured, he shall repay to the insurer the extra compensation paid to the employee. If a claim is made under this section, and the employer is insured, the employer may appear and defend against such claim only.

[2] The employer, P. J. Keating Materials Corp., and the insurer, Liberty Mutual Fire Insurance, have chosen to defend their interests in concert and have retained the same counsel to do so. These parties have consistently referred to themselves in their pleadings throughout this case as "the employer/insurer."

account, pending appeal.[3] It is stipulated by the parties that the employer subsequently paid $644,581.55 to the employee in accordance with Judge Koziol's order. (Dec. 5.)

On appeal, we reversed the § 28 award; the Appeals Court affirmed our decision. Cleveland v. Keatings Materials Corp., 24 Mass. Workers' Comp. Rep. 181 (2010), aff'd Cleveland's Case, 79 Mass. App. Ct. 1128 (2011)(Memorandum and Order Pursuant to Rule 1:28), further appellate review denied, 460 Mass. 1111 (2011). On July 14, 2010, the employer/insurer filed this claim for recoupment of the § 28 award. During the pendency of the hearing, the employee filed a "Motion to Join Section 14[4] and 28 Claims," which Judge Vendetti denied. Her decision awarding recoupment was filed on December 13, 2013.[5]

On this appeal, the only issue raised by the employee for our consideration is whether the judge's findings are erroneous, rendering her decision arbitrary and capricious.[6] The employee has cited four specific findings which we consider in turn.

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[3] We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[4] The employee's motion does not address the application of § 14 with specificity in this case. In general terms, § 14 provides for the assessment of costs and/or penalties in the event of illegal or fraudulent conduct, including the defense or prosecution of an action not based upon reasonable grounds.

[5] Subsequent to the filing of Judge Vendetti's decision, the employee attempted to file a new § 28 claim. When the conciliator refused to send the new claim forward, the employee appealed directly to Senior Judge Hernandez. In his May 6, 2014 correspondence, Judge Hernandez affirmed the conciliator's withdrawal of the claim, but deferred to the reviewing board any issues on appeal concerning the denial of the employee's "Motion to Join Section 14 and 28 Claims." On this issue, the employee has proffered what he alleges to be "new evidence" relating to the credibility of two witnesses who testified on behalf of the employer/insurer. (Oral Argument Tr. 11.) Reviewing that evidence in the light most favorable to the employee, we find that even if the proffered evidence fully discredited those witnesses, the employee still lacks any affirmative evidence of superintendence at the time of injury. Because evidence of superintendence is absolutely required for an award pursuant to § 28, the claim still fails. Therefore, we summarily affirm on this issue.

[6] We summarily affirm on all other issues.

The employee first takes issue with the judge's finding that, in spending the entire § 28 award in a short period of time, the employee acted with "cunning" and "wanton disregard of the possibility that the § 28 award would be overturned and with disregard for his own future as well." (Dec. 8.) The employee does not dispute the accuracy of these findings, and instead merely attempts to explain his motivation as, "a symptom, not only of his injury, but also of the psychological torment he endures daily." (Employee's br. 3.) Simply offering an alternate interpretation of the employee's motives does not negate the judge's findings. Indeed, there does not appear to be any disagreement that the employee did, in fact, spend the entire amount in controversy within a very short period of time. (Tr. 13-39.) The employee seems only to be concerned with providing an alternative explanation as to *why* he acted as he did, and this, of course, goes to the credibility findings that are the sole province of the hearing judge. Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007)("Findings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge"). We find no error.

Next, the employee takes issue with the finding that the employer had no alternative but to pay the § 28 award.[7] (Employee br. 3, 4.) There is no error. Although not specifically articulated by the employee in his brief, we presume that the significance of this finding is its relationship to the judge's ultimate finding that there was no negligence on the part of the employer in the payment of the full § 28 award to the employee. (Dec. 9.) As the judge points out in her decision, the employer tried to stay the award, and failing that, sought to place a portion of the award in escrow. (Dec. 9.) When those attempts failed, the award was promptly paid.

[7] The employee also makes the specious argument that the employer is not entitled to recoupment because the payment to the employee was made by the insurer, and there is no evidence of reimbursement. (Employee br. 3-4.) We find that no such evidence is required for a recoupment order in this case. The statutory requirement of reimbursement by the employer is only enforceable by the insurer. Further, and perhaps most definitively, the record reflects that the parties have stipulated the employer paid $644,581.55 to the employee in accordance with Judge Koziol's decision. (Dec. 5.)

The employee suggests that a viable alternative to paying the judgment in full was to simply not pay it at all. He points out that the only consequence of this course of action was the possibility of a $10,000 fine[8] which, when compared to the possible loss of $644,581.55, made it a practical strategy for minimizing the financial risk. (Employee br. 4.) The employee is incorrect as a matter of law, as the employer/insurer's failure to pay the amount ordered in the decision would have permitted him to seek immediate enforcement of it in the superior court.[9] Therefore, we reject the employee's argument.

The employee next takes issue with the judge's finding that he has discretionary income of $500 per month that may be allocated towards recoupment. (Employee br. 4, Dec. 9.) The employee argues that the judge based this on a monthly income that includes a monthly annuity payment that will exhaust in two years, leaving the employee with a monthly financial deficit, rather than a surplus, after expenses. (Employee br. 4.) Again, there is no error. The judge's calculations of current income and expenses are based upon the evidence. Contrary to the employee's assertion, the judge did not find that the employee only had a monthly surplus of $500. She found the employee had a monthly surplus of $1,008 and, *in addition*, many of the employee's expenses are discretionary, indicating that the surplus could be even higher. The $500 figure was not found to be the employee's financial surplus. It was found to be the amount which could reasonably be allocated toward a recoupment award. (Dec. 9.)

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[8] General Laws c. 152 § 8(1), provides, in pertinent part:

> Any failure of an insurer to make all payments due an employee under the terms of an order, decision, arbitrator's decision, approved lump sum or other agreement . . . shall result in a penalty of . . . ten thousand dollars if not made within ninety days.

[9] General Laws c. 152, § 12(1), provides, in pertinent part:

> Whenever any party in interest presents a certified copy of an order or decision of a board member . . . to the superior court department of the trial court for the county in which the injury occurred or for the county of Suffolk, the court shall enforce the order or decision, notwithstanding whether the matters at issue have been appealed and a decision on the merits of the appeal is pending.

Finally, the employee argues as erroneous the judge's finding that, "the size of the overpayment does not preclude the employer from attempting to recoup it in its entirety." (Employee br. 3,5; Dec. 9.) Again, we find no error. The employee takes this finding as an indication that the judge has considered the interests of the employer to the exclusion of any analysis of hardship to the employee. (Employee br. 5.) This is simply not the case. The employee's own argument on the issue of income analysis (above) reveals that the judge performed considerable analysis of the employee's ability to pay absent hardship.

In addition to the analysis of the employee's income and expenses, the judge also suggests that many of the assets which the employee acquired with the award money[10] could be liquidated and allocated toward recoupment. The judge never suggests that the employer reach all of the employee's assets in recoupment to the point of causing hardship. She does, however, conclude that the employer has the right to recoup all that it can, even though full recoupment may ultimately not be possible.

The decision is affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **May 18, 2015**

[10] Among the employee's expenditures were withdrawals of $277,022.51 in cash, including $30,000 to Mary Crowe, a $40,000 "gift" to his attorney, $15,000 to his sister, $50,000 to his mother, $20,000 for horse tack, $84,500 for his daughter's college expenses, $24,885 for an antique car, $20,000 to Full Speed Photo and $123,307 for various antiques. In addition, the employee also acquired two snowmobiles, a car, a boat and a stamp collection. (Dec. 6-7.)