

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF
INDUSTRIAL ACCIDENTS

BOARD NO. 056302-99

Robert Giancola
Price Chopper
Golub Corporation

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Levine)

The case was heard by Administrative Judge Hernández.

APPEARANCES

Robert Giancola, pro se
Robert F. Boyd, Esq., for the insurer at hearing¹

FABRICANT, J. The employee appeals from the administrative judge's decision awarding the insurer recoupment of benefits paid pursuant to a prior decision which the Appeals Court partially reversed. Because the judge failed to properly address the issue of recoupment, we recommit the case for further findings.

The employee was denied benefits at the § 10A conference, awarded benefits in a hearing decision that the reviewing board affirmed, and finally denied some of those benefits by the Appeals Court. A resulting overpayment of \$8,022.42 was the subject of the insurer's recoupment claim. The judge ordered the employee to pay the \$8,022.42 recoupment following the § 10A conference, and the employee appealed to an evidentiary hearing. (Dec. 2-3.)

In his decision, the judge erred in stating that the insurer's recoupment claim was controlled by G. L. c. 152, § 11D(3).² (Dec. 4.) This section only governs the

¹ The insurer did not submit a brief on appeal.

² General Laws c. 152, § 11D(3), provides, in pertinent part:

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

recovery of overpayments where benefits are ordered at conference. Here, no benefits were awarded at conference. Nonetheless, it has long been established that an equitable right to recoupment exists outside of the strict parameters of § 11D. See Brown v. Highland House Apts., 12 Mass. Workers' Comp. Rep. 322, 324-325(1998)(discussing equitable right to recoupment); Olivieri's Case, 42 Mass. App. Ct. 1115 (1997). Therefore, we address the employee's appeal under those equitable principles.

The recoupment hearing proceeded with the pro se employee testifying in narrative form, decrying the Appeals Court decision, his employer, and its examining physician. (Tr. 12-28.) The testimony served no purpose other than to indulge the employee in his attempt to persuade the judge to overturn the Appeals Court's decision.³ (Tr. 10-12.) Under the circumstances, we think the judge should have exercised his authority to conduct an examination of the employee pursuant to Brown, supra,⁴ and Boyd v. Sciaba Constr., 12 Mass. Workers' Comp. Rep. 427 (1998).

In Boyd, as in the present case, overpayments resulted from the retroactive termination of benefits, without the fault of either party. There we explained:

[W]e have never held that if a retroactive termination is ordered, then the judge must order full recoupment. The language of § 11D(3) is clear that an order of recoupment is discretionary. Beal v. City of Newton, 9 Mass. Workers' Comp. Rep. 248, 251 (1995). The judge's authority is thus not merely ministerial.

overpayments . . . [by] the filing of a complaint pursuant to section ten or by bringing an action against the employee in superior court.

³ The judge noted the employee's assertion at hearing was that the judge should "reduce the amount of the overpayment because the overpayment was not the fault of the Employee and would place the Employee in a difficult financial position." (Dec. 5.) The record does not support that the employee actually presented a means-based defense to the recoupment claim, although his testimony is replete with statements of financial hardship. As in any hearing, we think it is within the judge's authority to maintain the focus of the proceedings on the relevant issues in dispute.

⁴ Factors to be considered include the degree of culpability of the employee and the negligence of the insurer in the creation of the overpayments, as well as the amount of the overpayment, the employee's ability to repay, and the hardship the employee would suffer as a result of a recoupment order. Brown, supra at 326, n. 7.

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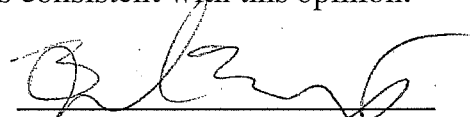
"[A] judge may order none, some or all of the overpayments as appropriate."
Brown, [supra] at 326.

Boyd, supra at 429. In Brown, the insurer's negligence resulted in overpayments. In Boyd, overpayments resulted from a conference order. Both cases were recommitted for application of the test of "fundamental fairness" governing the exercise of the judge's discretion, namely, "the worker's ability to repay, the hardship the worker would suffer, and the amount of the overpayment." Boyd, supra, quoting Brown, supra.

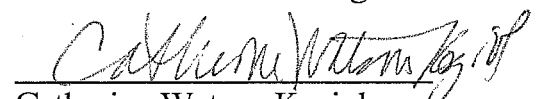
We recommit the case for further proceedings and findings addressing the employee's financial status relative to the \$8,066.52 overpayment. We emphasize this overpayment was the responsibility of neither party, and that there are no allegations of bad faith or negligence. See Boyd, supra at 430 (overpayment being the result of the proper course of legal proceedings is a further factor in recoupment calculation); see also D'Angeli v. McDonald's Restaurant, 1 Mass. Workers' Comp. Rep. 193, 196 (1987) ("Because the economic circumstances of the vast majority of injured workers is [sic] precarious, we anticipate that retroactive termination or modification [with its corresponding right to recoupment] is a power to be exercised by a [judge] with circumspection").

Accordingly, we reverse the decision, vacate the award of recoupment, and recommit the case for further proceedings and findings consistent with this opinion.

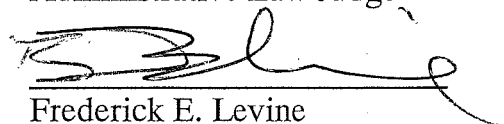
So ordered.



Bernard W. Fabricant
Administrative Law Judge



Catherine Watson Koziol
Administrative Law Judge



Frederick E. Levine
Administrative Law Judge

