

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO.: 018202-05

Robert J. Hover, Jr.
Northern Foundations, Inc.
Commerce & Industry Insurance

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Horan)

APPEARANCES

J. Peri Campoli, Esq., for the employee
Phillip R. Ronan, Esq., for the insurer at hearing and on appeal
John J. Canniff, Esq., for the insurer on appeal

FABRICANT, J. The parties cross-appeal a decision denying the employee's claim for benefits. We summarily affirm the decision as to the employee's appeal. The insurer appeals from the administrative judge's denial of recoupment for benefits it paid pursuant to a § 10A conference order.¹ See G. L. c. 152, §§ 10A(3), 11D(3). We conclude that the judge addressed the recoupment issue prematurely, and therefore vacate his denial.

The employee filed a claim for traumatically induced vision loss after he fell through staging at work, striking his head. Following the injury, the employee reported dizziness and blurred

¹ General Laws c. 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.

vision. Within two days, his vision had worsened, and it has continued to deteriorate to the point where he has been declared legally blind. (Dec. 4.)

The employee's treating physician originally considered his vision loss causally related to his fall, and on the strength of that opinion, the employee received an order of payment of § 34 benefits at the § 10A conference. The insurer appealed, and subsequent medical evidence provided by the employee's new physician, Dr. John Gittinger, indicated that the vision loss was more likely a congenital condition, without a verifiable causal connection to the trauma. (Dec. 4-5.) Adopting this opinion, the judge denied the employee's claim at hearing. (Dec. 6.)

The judge's decision contains the following findings on recoupment:

In as much as the insurer came to the conference without any medical evidence, and the employee pursued his workers' compensation claim on good faith based on the medical evidence known at the time, and pursuant to the administrative judge's equitable discretion, I decline to order any recoupment of benefits paid pursuant to the conference order.

(Dec. 6.)

General Laws c. 152, § 11D(3), specifically addresses the issue of recoupment where benefits are ordered at the § 10A conference, but are later reduced or denied entirely by a hearing or appellate decision. See footnote 1, supra. 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. See Halama v. Mestek, Inc., 17 Mass. Workers' Comp. Rep. 245, 247 (2003)(error for judge to award § 34A benefits not claimed); Medley v. E.F. Hauserman Co., 14 Mass. Workers' Comp. Rep. 327 (2000)(same).

We vacate the denial of recoupment, and preserve the insurer's right to file a complaint for recoupment with the department or in the superior court.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Robert J. Hoover, Jr.
DIA Board No.: 018202-05

William A. McCarthy
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: **June 9, 2008**