STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 13-0010
Decision No. 13-19

KEITH ANDREWS
(Appellee)

v.

SAVAGE SERVICES CORP.
(Appellant)

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA (AIG)
(Insurer)

Argued: September 4, 2013
Decided: December 16, 2013

Panel Members: Hearing Officers Pelletier, Greene, and Jerome
By: Hearing Officer Jerome

[¶1] Savage Services Corp. appeals from a decision of a Workers' Compensation Board hearing officer (*Knopf, HO*) granting Keith Andrews's Petitions for Award and for Payment of Medical and Related Services for an October 27, 2010 date of injury.[1] There is no dispute that Mr. Andrews suffers from work-related deep vein thrombosis and remains partially incapacitated to earn due to that injury. There is also no dispute that Mr. Andrews was terminated by Savage Services due to his own fault. At issue is whether 39-A M.R.S.A. § 214(1)(E) (Supp. 2012) applies in this case and if so, whether the fact that Mr. Andrews was fired for fault requires a reduction of his partial incapacity benefit.

[1] Savage Services does not dispute those portions of the decree that establish the occurrence of a work injury or the compensability of related medical bills.

[¶2] The hearing officer determined that under the circumstances of this case, section 214(1)(E) does not apply, and she calculated the benefit pursuant to 39-A M.R.S.A. § 213 (Supp. 2011).[2] We affirm the hearing officer's decision.

## I. BACKGROUND

[¶3] Keith Andrews worked for Savage Services, a bulk chemical distributor, as a tanker truck driver. Savage Services terminated Mr. Andrews's employment on October 27, 2010, for failing to follow mandatory safety procedures.

[¶4] Mr. Andrews had noticed swelling in his left leg in the summer of 2010. He consulted his primary care physician who told him to reduce his salt intake and to walk more often, but the swelling persisted. On December 28, 2010, Mr. Andrews was diagnosed with deep vein thrombosis. Mr. Andrews filed his petitions with the Board, seeking wage loss benefits and payment of medical bills, and contending that his medical condition was caused by his work with Savage Services as a truck driver. The evidence adduced at the hearing included an independent medical examiner's opinion, provided pursuant to 39-A M.R.S.A. § 312(7) (Supp. 2012), that (1) Mr. Andrews's deep vein thrombosis is work-related; (2) he continues to suffer its effects as well as effects from the long-term

[2] Title 39-A M.R.S.A. § 213 (Supp. 2011) has since been amended. P.L. 2011, ch. 647, § 7 (effective August 30, 2012).

use of Coumadin; and (3) his condition prevents him from returning to truck driving.

[¶5] The hearing officer granted Mr. Andrews's petitions, and calculated a fixed rate of partial incapacity benefits pursuant to 39-A M.R.S.A. § 213, imputing a wage earning capacity to Mr. Andrews based on multiple considerations including his age, education level, employment history, and his medical condition. The hearing officer was unpersuaded that Mr. Andrews could perform a local truck driving job that Savage Services asserted would have been offered to him at $600 to $700 per week had he not been terminated for fault. Thus, she declined to find a higher post-injury wage earning capacity based on employment that would have been offered absent his termination. Savage Services appeals.

## II. DISCUSSION

[¶6] Savage Services argues that Mr. Andrews's benefit should be calculated pursuant to section 214(1)(E) to reflect an earning capacity equivalent to what he could have earned with the company after the injury had he not been terminated for fault—otherwise, he will be compensated not for loss of earnings due to his injury, but for loss of earnings caused by his own conduct.

[¶7] "Title 39-A M.R.S. § 214(1) generally establishes the level of incapacity benefits due to an employee who has some work capacity and returns to

work or could return to work after an injury." *Williams v. Tyson's Food, Inc.*, 2006 ME 66, ¶ 5, 900 A.2d 195. "Section 214(1)(E) [specifically] establishes the level of benefits for employees whose post-injury employment lasts less than 100 weeks due to no fault of their own." *Id*. That provision states:

> **§ 214. Determination of partial incapacity**
>
> **1. Benefit determination.** While the incapacity is partial, the employer shall pay the injured employee benefits as follows.
>
> . . . .
>
> **E.** If the employee, after having been employed at any job following the injury for less than 100 weeks, loses the job through no fault of the employee, the employee is entitled to receive compensation based upon the employee's wage at the original date of injury.

[¶8] We agree with the hearing officer's conclusion that this provision does not apply in this case. Section 214(1)(E) is applicable only when there has been post-injury employment. In this case, the date of injury coincides with Mr. Andrews's last day of work; thus, there was no post-injury employment.

[¶9] Savage Services contends it is error to conclude that Mr. Andrews had no post-injury employment because the date of the gradual injury in this case was arbitrarily established as his last day of work, citing *Jensen v. S.D. Warren Co.*, 2009 ME 35, ¶ 13, 968 A.2d 528 ("Although establishing a specific date of injury for a gradual injury may be a medical fiction, establishing a date is legally important" for numerous reasons.). However, in this case, Mr. Andrews alleged

that the date of injury was his last day of work, and Savage Services did not challenge this before the hearing officer. Accordingly, it has forfeited consideration of any error regarding the date of injury on appeal. *See Berry v. Board of Trustees*, 663 A.2d 14, 18-19 (Me. 1995).

[¶10] Because we conclude that section 214(1)(E) does not apply, we do not reach the issue whether that provision authorizes the imposition of any particular consequence when an employee has been terminated for fault.

## III. CONCLUSION

The entry is:

The decision of the hearing officer is affirmed.

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Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2012).

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