DENNY BOURGOIN
(Appellee)
v.

CENTRAL MAINE CABINETRY & MILLWORK
(Appellant)

and

MAINE EMPLOYERS' MUTUAL INSURANCE CO.
(Insurer)

Conference held: April 12, 2018
Decided: December 14, 2018

PANEL MEMBERS: Administrative Law Judges Pelletier, Collier, and Hirtle
By: Administrative Law Judge Pelletier

[¶1] Central Maine Cabinetry and Millwork appeals from an order of a Workers' Compensation Board hearing officer (*Dunn, HO*) denying its Petition for Review. Central Maine Cabinetry sought review of an order granting employment rehabilitation services to Denny Bourgoin pursuant to 39-A M.R.S.A. § 217 (Supp. 2017). Because the plain language of section 217 does not allow for review of an order granting rehabilitation services, we affirm the decision.

I. BACKGROUND

[¶2] On July 14, 2015, Denny Bourgoin, a skilled cabinet maker with over twenty years' experience, sustained a serious work injury to his right hand involving multiple fractures and amputation of his ring finder. Unable to return to his regular job due to the injury, Mr. Bourgoin pursued employment rehabilitation

services under section 217. Central Maine Cabinetry did not object to the plan developed by a rehabilitation counselor for Mr. Bourgoin, which involved education and training in radiation technology.

[¶3] By order dated December 2, 2016, the hearing officer found that the plan is "appropriate and likely to return the injured employee to suitable employment at a reasonable cost" pursuant to section 217(2). The plan authorized and ordered payment for the employee to enroll in the Radiologic Technology Program at the Maine College of Health Professionals, a two-year program. Because the order came too late for the current school year, Mr. Bourgoin had to wait until the 2017 fall semester to begin class.

[¶4] In the meantime, Mr. Bourgoin found a job at TD Bank. On April 18, 2017, Central Maine Cabinetry filed a petition alleging that because Mr. Bourgoin had obtained gainful employment and his earnings at TD Bank surpassed his earnings when injured, his circumstances had changed, and therefore the board should vacate the December 2, 2016, order authorizing the implementation of the plan.

[¶5] The hearing officer denied Central Maine Cabinetry's petition, determining that the order is not subject to a petition for review on the basis of changed circumstances. Treating the petition as a petition to reopen under

39-A M.R.S.A. § 319 (2001),[1] the hearing officer also found that the petition did not meet the 30-day time limit contained in that provision. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶6] Central Maine Cabinetry contends that the hearing officer erred when interpreting section 217(2) to preclude a petition for review. "When construing provisions of the Workers' Compensation Act, our purpose is to give effect to the Legislature's intent." *Hanson v. S.D. Warren Co.*, 2010 ME 51, ¶ 12, 997 A.2d 730. "In so doing, we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results." *Id*. We also consider "the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Davis v. Scott Paper Co.*, 507 A.2d 581, 583 (Me. 1986). "If the statutory language is ambiguous, we then look beyond the plain meaning and consider other indicia of legislative intent, including legislative history." *Damon v. S.D. Warren Co.*, 2010 ME 24, ¶ 10, 990 A.2d 1028.

B. The Employment Rehabilitation Statute

[¶7] The employment rehabilitation provision of the Act, 39-A M.R.S.A. § 217(2), sets forth specific application and review procedures and provides in

[1] Central Maine Cabinetry contends that it was error to treat its petition as a petition to reopen. We agree. However, that error is of no consequence because our conclusion that the Act does not allow for the filing of a petition for review in these circumstances is dispositive.

pertinent part that "[t]he board's determination under this subsection is final."[2] The Law Court has interpreted section 217(2) to mean that no appeal is allowed from a

[2] Title 39-A M.R.S.A. § 217 provides:

> When as a result of injury the employee is unable to perform work for which the employee has previous training or experience, the employee is entitled to such employment rehabilitation services, including retraining and job placement, as reasonably necessary to restore the employee to suitable employment.
>
> **1. Services.** If employment rehabilitation services are not voluntarily offered and accepted, the board on its own motion or upon application of the employee, carrier or employer, after affording the parties an opportunity to be heard, may refer the employee to a board-approved facility for evaluation of the need for and kind of service, treatment or training necessary and appropriate to return the employee to suitable employment. *The board's determination under this subsection is final.*
>
> **2. Plan ordered.** Upon receipt of an evaluation report pursuant to subsection 1, if the board finds that the proposed plan complies with this Act and that the implementation of the proposed plan is likely to return the injured employee to suitable employment at a reasonable cost, it may order the implementation of the plan. Implementation costs of a plan ordered under this subsection must be paid from the Employment Rehabilitation Fund as provided in section 355, subsection 7. *The board's determination under this subsection is final.*
>
> **3. Order of implementation costs recovery.** If an injured employee returns to suitable employment after completing a rehabilitation plan ordered under subsection 2, the board shall order the employer who refused to agree to implement the plan to pay reimbursement to the Employment Rehabilitation Fund as provided in section 355, subsection 7.
>
> **4. Additional payments.** The board may order that any employee participating in employment rehabilitation receive additional payments for transportation or any extra and necessary expenses during the period and arising out of the employee's program of employment rehabilitation.
>
> **5. Limitation.** Employment rehabilitation training, treatment or service may not extend for a period of more than 52 weeks except in cases when, by special order, the board extends the period up to an additional 52 weeks.
>
> **6. Loss of or reduction in benefits.** If an employee unjustifiably refuses to accept rehabilitation pursuant to an order of the board, the board shall order a loss or reduction of compensation in an amount determined by the board for each week of the period of refusal, except for specific compensation payable under section 212, subsection 3.
>
> **7. Hearing.** If a dispute arises between the parties concerning application of any of the provisions of subsections 1 to 6, any of the parties may apply for a hearing before the board.
>
> **8. Presumption.** If an employee is participating in a rehabilitation plan ordered pursuant to subsection 2, there is a presumption that work is unavailable to the employee for as long as the employee continues to participate in employment rehabilitation.

(Emphasis added).

board order to implement a proposed rehabilitation plan. *McAdam v. United Parcel Serv.*, 2000 ME 5, ¶¶ 6-7, 743 A.2d 741.

[¶8] In *McAdam*, even though the employee had found post-injury employment as a bus driver, the board issued a rehabilitation plan ordering payment for the employee to attend a two-year physical therapy assistant training program. *Id.* ¶¶ 2-3. The employer appealed, arguing that (1) the word "final" was intended to clarify that a decision pursuant to section 217(2) is a "final judgment" and therefore subject to appellate review; and (2) the employee's post-injury employment rendered the plan unnecessary to restore the employee to suitable employment. *Id.* ¶ 5. The Law Court rejected these arguments, and construed the word "final" in section 217 to preclude an appeal at that stage. The Court reasoned:

> [T]he intent of the word "final" is to prevent an immediate appeal from a Board's decision to implement a vocational rehabilitation plan. Our conclusion is supported by the legislative scheme. Unlike most workers' compensation benefits that are initially the responsibility of the employer, e.g., incapacity and medical benefits, the initial cost of implementing a vocational rehabilitation plan, in the absence of a voluntary agreement, is borne by the Employment Rehabilitation Fund.
>
> . . . .
>
> The apparent purpose of this unique payment procedure is to encourage prompt delivery of vocational rehabilitation services and to permit an appeal only if the employer is ordered to pay 180% of the costs following completion of the rehabilitation plan.

Id. ¶ 6.

[¶9] Central Maine Cabinetry attempts to distinguish this case from *McAdam* by arguing that a petition for review based on changed circumstances is substantively different than an appeal. However, if the board were to entertain such a petition, the goal of prompt delivery of employment rehabilitation services would likely be frustrated, just as in the case of an appeal. Moreover, allowing a petition for review based on a change of circumstances after the order is entered would directly conflict with the Legislature's intent, as discerned by the Law Court in *McAdam*.

[¶10] Central Maine Cabinetry further argues that because orders awarding weekly benefits are subject to modification based on a change of circumstances, orders to implement a rehabilitation plan should be subject to the same process. *See* 39-A M.R.S.A. § 205(9) (Supp. 2017); *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 7, 837 A.2d 117. However, unlike the statutory provision governing ongoing benefit awards, the employment rehabilitation provision expressly provides that the board's order evaluating and implementing a plan is "final." Thus, the statute specifically prohibits challenges to the determination that an injured worker is entitled to employment rehabilitation. Moreover, unlike section 205(9)(B)(2), which specifically authorizes a review of an order for weekly benefit payments, no such procedure is authorized in the context of employment rehabilitation.

[¶11] Recently, the Law Court held that a changed circumstances analysis is not authorized with respect to permanent impairment decisions, because there is no specific statutory authority to review such determinations based on a subsequent change of circumstances. *See Bailey v. City of Lewiston*, 2017 ME 160, ¶ 13, 168 A.3d 762. Likewise, in this instance, the plain meaning of the word "final" in section 217 precludes resort to a process that applies to an entirely different type of benefit. Other provisions of the statute may provide a remedy. *See* 39-A M.R.S.A. § 217(6) ("If an employee unjustifiably refuses to accept rehabilitation pursuant to an order of the board, the board shall order a loss or reduction of compensation in an amount determined by the board for each week of the period of refusal. . . .").

III. CONCLUSION

[¶12] The hearing officer did not err when determining that the statutory language in section 217(2) precludes review of a decision to implement a rehabilitation plan based on a subsequent change of circumstances.

The entry is:

The hearing officer's decision is affirmed.

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. 2017).

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

Attorney for Appellant:
Matthew W. Marett, Esq.
MEMIC
P.O. Box 3606
Portland Maine, 04104

Attorney for Appellee:
Paul R. Dionne, Esq.
DIONNE & COUTURIER
465 Maine Street
Lewiston, ME 04240