STATE OF MAINE ISSUED: March 6, 1998
WORKERS' COMPENSATION BOARD DECISION NO.: 98-01

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Any party in interest may request an appeal to the Maine Law Court by filing a copy of this order and the Hearing Officer's decision with the clerk of the Law Court within 20 days of receipt of this order, and by filing a petition seeking appellate review with the Law Court within 20 days thereafter. *See* 39-A M.R.S.A. §322.

Pursuant to Board Rule Chapter 12 §19, all evidence and transcripts in this matter will be destroyed after 60 days unless (1) we receive written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed. The 60 days will not begin to run until all postndecree motions have been decided or otherwise disposed.

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ROBERT M. BOURASSA
(Employee-Appellee)

v.

TOWN OF FARMINGTON

and

MAINE MUNICIPAL ASSOCIATION
(Employer/Insurer-Appellant)

Before: WEEKS, CHAIR and GAUVIN, HAYES, MONFILETTO and PINETTE, DIRECTORS[1].

D E C I S I O N A N D O R D E R

PER CURIAM.

The employer, the town of Farmington (hereinafter "the town"), appeals from a decision of an individual hearing officer of the Workers' Compensation Board granting in part the employee's Petition for Review and the employee's Petition to Fix the Amount to be Allowed for Medical or Other Services and denying the employers' Petition for Review of Incapacity. The town contends that the hearing officer erred in (1) finding that the employee did not refuse an offer of suitable work and in determining the method by which an employer may suspend benefits when an offer of work is refused and (2) ruling that fringe benefits must be included in an employee's average weekly wage at any time that partial benefits fall below the 2/3 cap contained in 39-A M.R.S.A. '§102(4)(H).

The employee argues that because he did not refuse an offer of suitable work the issue of how to suspend benefits when an offer is refused is mooted; that the hearing officer erred in excluding from the average weekly wage calculation retirement benefits, to the extent that social security benefits are excluded; and that the hearing officer erred in finding that the employee has no ongoing loss of earning capacity. Neither party has appealed the hearing officer's decision on the Petition to Fix. For the reasons outlined below, we affirm, in part, the hearing officer's decision.

The facts may be briefly summarized as follows: Robert M. Bourassa injured his back in the course of his employment as a police officer on November 9, 1993. This injury required surgery which was performed on November 30, 1993 by Dr. Franck in Lewiston. The employee's condition improved gradually and in February of 1994 the employee was released to light duty work. On June 21, 1994, the town offered the employee a job and he returned to work, on a part-time basis, on July 11, 1994. He left that employment in August of 1994 for medical reasons unrelated to his work-related injury. Thereafter, the employer suspended benefits pursuant to 39-A M.R.S.A. §205(9). Several weeks later, the employee filed a Petition for Review and Request for Provisional Order. A Provisional Order was entered in December of 1994 reinstating benefits at a level of total. In January of 1995, the employer again offered Mr. Bourassa employment. This employment was not accepted. The employer also filed a Petition for Review of Incapacity arguing that the employee had refused an offer of suitable work and that his benefits should be suspended pursuant to either 39-A M.R.S.A. §218(5) or 39-A M.R.S.A. §214(1). In addition, the employee filed a Petition to Fix which is not the subject of this appeal.

In his decree dated November 27, 1996, the hearing officer granted the employee's Petition for Review, finding that the employee did not refuse an offer of suitable employment and that neither §218(5) nor §214(1) permitted the employer to suspend benefits under the circumstances of the case at hand. According to the hearing officer, §218 did not apply on the grounds that the filing of an employee's Petition for Reinstatement was a prerequisite to applying any subsection of §218. Moreover, §214(1) also did not support a suspension because Me. WCB Rule ch. 1 §2.2 (hereinafter "Board Rule ch. 1 §2.2") states that the "provisions of 39-A M.R.S.A. §214 do not apply to compensation payments that are made without prejudice." As a result, the hearing officer denied the employer's Petition for Review.

The hearing officer also ruled that the 2/3 cap contained in 39-A M.R.S.A. §102(4)(H) may apply to levels of partial incapacity even if the employee's benefit level at total exceeds the cap. Given that finding, the hearing officer went on to consider which benefits should be includable in an employee's average weekly wage. The hearing officer ruled that health insurance benefits should be included but that the portion of retirement benefits paid on behalf of a public employee that is equivalent to the payment made by private employers for social security should be excluded. Finally, the hearing officer ruled that the employee was not entitled to ongoing incapacity benefits given his established post-injury earning capacity. On December 31, 1996, the hearing officer issued findings of fact and conclusions of law, making no changes of significance to this appeal. We granted the hearing officer's request for Board review of a hearing officer's decision pursuant to 39-A M.R.S.A. §320.

Refusal of Suitable Work

The issue of whether the employee refused an offer of suitable work involves a factual finding, and as such, is not reviewable by this Board. 39-A M.R.S.A. §320 expressly states that: "There may be no such review of findings of fact made by a hearing officer." Because the hearing officer found that the employee had not refused an offer of suitable work, the issue of how to suspend benefits when work is refused is effectively mooted. We therefore decline to discuss the application of §218 to the facts at hand.

However, because confusion has apparently arisen with respect to the application and interpretation of Board Rule ch. 1 §2.2, we will describe the intended operation of this rule. Board Rule ch. 1 §2.2 reads, in pertinent part: "The provisions of 39-A M.R.S.A. §214 do not apply to compensation payments that are made without prejudice." What this means is that when an employer initially elects to pay without prejudice as outlined in Board Rule ch. 1 §1.1(B) and the employee is out of work, the employer must pay benefits at a level of total, not a level of partial. The purpose of this rule is to encourage early pick up of claims and it therefore sought to avoid requiring employers to assign a rate of partial under §214 until investigation was complete. Once it is, and the employer has generated evidence indicating some capacity for work, the employer has the option of filing a 21-day discontinuance and suspending benefits to a level of partial or suspending benefits completely. *See* 39-A M.R.S.A. §205(9)(B)(1).

Therefore, an allegation by an employer that an employee has refused an offer of suitable work is a valid basis on which to suspend benefits under 39-A M.R.S.A. §205(9)(B)[2]. This conclusion is supported by the plain language of §205(9)(B) as follows:

In all circumstances other than the return to work or increase in pay of the employee under paragraph A, if the employer, insurer or group self-insurer determines that the employee *is not eligible for compensation under this Act*, the employer, insurer of group self-insurer may discontinue or reduce benefits only in accordance with this paragraph.

(emphasis added). The rule was not intended to disallow relief under §205(9)(B) in cases in which there has been an offer of work. In fact, the Board prefers that the §205(9)(B) process be used in such cases due to the relative speed and fairness afforded to both the employer and employee.

Fringe Benefits

The issue before us is whether the 2/3 cap described in 39-A M.R.S.A. §102(4)(H)[3] applies only to the employee's average weekly wage when he or she is receiving total benefits or whether it applies at any time the employee's wage dips below the cap at a level of partial benefits. The hearing officer found that the cap applies to levels of partial benefits; the employer appealed that decision; and the employee argued to the contrary. We were unable to reach consensus on this issue. Therefore, because the result of the voting on the issue of the 2/3 cap is less than a majority vote, the decision of the hearing officer stands pursuant to 39-A M.R.S.A. §320.

With respect to which fringe benefits should be included in the employee's average weekly wage, the hearing officer included the health benefits and excluded the retirement benefits to the extent of a private employer's social security contribution. We were unable to reach consensus on this issue as well and therefore, the decision of the hearing officer stands pursuant to 39-A M.R.S.A. §320.

Extent of Incapacity

The hearing officer found that the employee no longer suffers from a loss of earning capacity as a result of his compensable injury and the employee has appealed this finding. However, because the hearing officer's finding with respect to the nature and extent of the employee's incapacity is a factual finding, it is not reviewable by the Board. *See* 39-A M.R.S.A. 320.

The decision of the hearing officer is AFFIRMED with respect to the issue of refusal of suitable work. The decision of the hearing officer shall STAND with respect to the issue of the 2/3 cap on fringe benefits and the exclusion of retirement benefits for a public employer.

SO ORDERED.

[1]DIRECTORS ACCOMANDO, O'MALLEY and RIDDELL did not participate.

[2] It should be pointed out that this option was not available to the employer at the time of the second job offer in January of 1995 because the hearing officer had entered a provisional order in December of 1994.

[3] 39-A M.R.S.A. §102(4)(H) reads as follows:

"Average weekly wages, earnings or salary" does not include any fringe or other benefits paid by the employer that continue during the disability. Any fringe or other benefit paid by the employer that does not continue during the disability must be included for purposes of determining an employee's average weekly wage *to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount that is greater than 2/3 of the state average weekly wage at the time of injury.* (emphasis added).

Please note that this is different from an affirmance of the hearing officer's decision.