

STATE OF MAINE
WORKERS' COMPENSATION BOARD
27 STATE HOUSE STATION
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Any party in interest may request an appeal to the Maine Supreme Judicial 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 decision, and by filing a petition seeking appellate review with the Law Court within 20 days thereafter. See 39-A M.R.S.A. '322.

ANTHONY W. RUDGE
(Employee)

v.

HOWARD A. YORK
(Employer)

and

COMMERCIAL UNION INSURANCE COMPANY
(Insurer)

BEFORE: Chairman Weeks; Directors Chaloux, Dionne, Hayes & Pinette

ORDER

On November 11, 1994, the members of the Workers' Compensation Board agreed to review the hearing officer's October 17, 1994 decision in the above-captioned case. Deliberation by a majority of Board members, upon the submitted briefs, occurred on May 25, 1995. The result of the deliberation resulted in less than the majority vote necessary to overturn the decision of the hearing officer. Accordingly, the decision of the hearing officer remains unchanged. 39-A M.R.S.A. Section 320.

WEEKS and DIONNE, dissenting:

The question before the Board is whether the employee who has a partial disability has an obligation to conduct a work search if the present employer has no work within the limits placed on the worker by the treating physician. The hearing officer below determined that Section 39-A M.R.S.A. Section 214 controlled. Section 214, which was taken almost verbatim from the Michigan Workers' Compensation Act, states that benefits paid to partially disabled workers must be reduced or discontinued upon return to work or refusal of an offer of suitable work without good cause. The hearing officer, in applying Section 214, found that the good faith work search provisions of Title 39 M.R.S.A. (the former statute) was repealed and that Section 214 was the sole applicable point of law. We note, however, that wording from the former statute regarding partial benefits was not repealed by the new law and still appears immediately before Section 214; ". . . the employer shall pay . . . compensation equal to a percentage of the difference between [the pre-injury] wage . . . and the . . . wage the injured employee is **able to earn** after the injury." 39-A M.R.S.A. Section 213(1)(emphasis added). Additionally, while there is scant documentary evidence of any legislative debate concerning the issue of work search, the views of the ad hoc "Workers' Compensation Group" on this subject were published in a 1992 letter to the Blue Ribbon Commission:

"As a Group, we feel it is important to maintain the Michigan plan which requires employees to look for work within their geographical vicinity as opposed to the statewide job search which Maine currently imposes."

The Workers' Compensation Group, therefore, intended a compromise between the previous law requiring statewide work search to a more restrictive work search within the geographical vicinity of the worker. Such a compromise might follow the formula advocated by Professor Arthur Larson, the nationally respected workers' compensation commentator, whose views have been regularly followed in the Maine Supreme Judicial Court. The "general purpose principle" he suggests is:

If the evidence of degree of obvious physical impairment, coupled with other facts such as claimant's mental capacity, education, training or age places claimant prima facie in the odd-lot category (i.e. virtually no suitable jobs available), the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant The corollary would be this: If the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or relegated to the odd-lot category, it is not unreasonable to place the burden of proof on him to establish the unavailability of work to a person in his circumstances, which normally would require a showing that he has made reasonable efforts to secure suitable employment. The effort to seek employment will not be deemed reasonable if the claimant places undue limitations on the kind of work he will accept, including limitations not justified by the character of his impairment.

Larson, *Workers' Compensation Law*, Section 57.6(c) at 10-405.

In view of the foregoing, we do not feel that the Legislature, in enacting Title 39-A M.R.S.A., did not intend that a partially impaired worker should have no obligation to seek work within the limitations placed upon him or her by the treating physician and within the geographical vicinity of the worker's

residence, and that it was error for the hearing officer to so find. A good faith work search determines the question of employability, not the interpretation of Section 214.

s/ Charles R. Weeks

Charles R. Weeks, Chair
Workers' Compensation Board

s/ Mark Dionne

Mark Dionne, Member
Workers' Compensation Board

HAYES, dissenting:

After consideration of the briefs filed in this case, I find that Hearing Officer Greene was correct in his interpretation of 39-A M.R.S.A. Section 214 when he found that Anthony Rudge remains entitled to full benefits under this section of the Worker's Compensation Act.

I base my conclusion upon the language of the Act. In my research on Section 214, I find no reference to a "work search" by the employee. Both the language and the legislative history of the 1992 Act demonstrate that the amount of weekly benefits payable to a partially disabled worker must be determined with reference to Section 214. The 1992 Act repealed the statutory work search requirements in their entirety and did not replace them with any comparable provisions. This fact alone furnishes sufficient evidence as to the Legislature's intent vis-a-vis the work search issue.

Consequently, I would not infer that the Act requires that an injured employee must conduct a work search in order to receive compensation.

s/ Frederick T. Hayes

Frederick T. Hayes, Member
Workers' Compensation Board

PINNETTE, dissenting:

I would affirm the Hearing Officer's decision in this case.

s/ Susan M. Pinette

Susan Pinette, Member
Workers' Compensation Board