STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
App. Div. Case No. 14-0035
Decision No. 16-16

KENNETH W. SYLVESTER
(Appellant)

v.

MARCO PETROLEUM INDUSTRIES, INC.
(Appellee)

and

CHARTIS CLAIMS, INC.
(Insurer)

Conferenced: March 18, 2015
Decided: May 10, 2016

PANEL MEMBERS: Administrative Law Judges Goodnough[1], Jerome, and Stovall
BY: Administrative Law Judge Goodnough

[¶1] Kenneth Sylvester appeals from a decision of a Workers' Compensation Board hearing officer (*Dunn, HO*), declining to impose a fine against Marco Petroleum Industries, Inc., pursuant to 39-A M.R.S.A. § 324(2) (Supp. 2015). On appeal, Mr. Sylvester contends that the hearing officer erred by (1) determining that the payments he received from Marco Petroleum Industries, Inc., for work performed at a non-profit agency were legitimate "earnings" sufficient to trigger the reduction provisions of 39-A M.R.S.A. § 205(9)(B)(2) (Supp. 2015), thereby failing to justify the imposition of a fine under section

[1] Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers licensed to practice law are now designated administrative law judges.

324(2); and (2) failing to hold an evidentiary hearing on the issue of whether the payments shield Marco Petroleum Industries, Inc. from the payment of any fines under section 324(2). We conclude that the hearing officer erred in failing to hold an evidentiary hearing on the issue of the nature of Mr. Sylvester's work and payment arrangement with the nonprofit agency. We accordingly vacate the decision below and remand for further proceedings.

I. BACKGROUND

[¶2] Kenneth Sylvester sustained work-related injuries while working for Marco Petroleum Industries, Inc., on January 18 and December 8, 2008. The injuries eventually caused Mr. Sylvester to be laid off effective June 2, 2009. Following litigation, the administrative law judge (*Collier, ALJ*) in a decree dated November 19, 2010, awarded Mr. Sylvester ongoing total incapacity benefits pursuant to 39-A M.R.S.A. § 212(1) (Supp. 2015).

[¶3] Marco Petroleum thereafter offered to pay Mr. Sylvester for work at Threads of Hope, a non-profit organization under the auspices of Catholic Charities of Maine. Marco Petroleum asserts that the offer was made pursuant to 39-A M.R.S.A. § 214(1)(A) (Supp. 2015).[2] Mr. Sylvester started at Threads of

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[2] Title 39-A M.R.S.A. § 214(1)(A) provides:

> If an employee receives a bona fide offer of reasonable employment from the previous employer or another employer or through the Bureau of Employment Services and the employee refuses that employment without good and reasonable cause, the employee is

Hope as a clothing clerk on or about December 23, 2013.[3] Mr. Sylvester is paid $7.50 per hour and is on-site at Threads of Hope about six hours per week.

[¶4] Marco Petroleum thereafter filed a Petition for Review of Incapacity, seeking to reduce Mr. Sylvester's benefits to reflect payments made to Mr. Sylvester. This petition is currently pending at the board's formal hearing level. After filing its Petition for Review, Marco Petroleum took advantage of 39-A M.R.S.A. § 205(9)(B)(2):

> Upon the filing of a petition [for review], the employer may discontinue or reduce the weekly benefits being paid [under a compensation payment scheme] … based on the actual documented earnings paid to the employee after filing the petition. The employer shall file with the board the documentation or evidence that substantiates the earnings and the employer may discontinue or reduce weekly benefits only for the weeks for which the employer possesses evidence of such earnings.

[¶5] Marco Petroleum filed the required documentation with the board and unilaterally reduced Mr. Sylvester's workers' compensation benefits to a partial rate reflecting its position that it had paid wages for his work at Threads of Hope. Mr. Sylvester then filed a Petition for Penalties with the board's Abuse Investigation Unit (AIU), alleging that Marco Petroleum had reduced his benefits in the absence of a board order. In the AIU proceeding, Mr. Sylvester specifically averred that he was volunteering, not working, at Threads of Hope and that Marco

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> considered to have voluntarily withdrawn from the work force and is no longer entitled to any wage loss benefits under this Act during the period of the refusal.

[3] The decree issued by the hearing officer incorrectly notes this date as December 23, 2014.

Petroleum was simply sending him checks in the amount of $7.50 per hour for his volunteer activities. Mr. Sylvester requested the imposition of a fine in the amount of $200.00 per day, pursuant 39-A M.R.S.A § 324(2), for each day Marco Petroleum was not paying him benefits reflecting total incapacity as set forth under the decree.[4]

[¶6] The hearing officer issued a scheduling order directing the filing of position papers. The hearing officer also noted that "[t]he AIU will issue a decision thereafter. Absent extraordinary circumstances, testimonial hearings will not be

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[4] Title 39-A M.R.S.A § 324(2) provides:

> **Failure to pay within time limits.** An employer or insurance carrier who fails to pay compensation, as provided in this section, is penalized as follows. For purposes of this subsection, "employer or insurance carrier" includes the Maine Insurance Guaranty Association under Title 24-A, chapter 57, subchapter 3.
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> > A. Except as otherwise provided by section 205, if an employer or insurance carrier fails to pay compensation as provided in this section, the board may assess against the employer or insurance carrier a fine of up to $200 for each day of noncompliance. If the board finds that the employer or insurance carrier was prevented from complying with this section because of circumstances beyond its control, a fine may not be assessed.
> >
> > > (1) The fine for each day of noncompliance must be divided as follows: Of each day's fine amount, the first $50 is paid to the employee to whom compensation is due and the remainder must be paid to the board and be credited to the Workers' Compensation Board Administrative Fund.
> > >
> > > (2) If a fine is assessed against any employer or insurance carrier under this subsection on petition by an employee, the employer or insurance carrier shall pay reasonable costs and attorney's fees related to the fine, as determined by the board, to the employee.
> > >
> > > (3) Fines assessed under this subsection may be enforced by the Superior Court in the same manner as provided in section 323.
> >
> > B. Payment of a fine assessed under this subsection is not considered an element of loss for the purpose of establishing rates for workers' compensation insurance.

held regarding complaints filed pursuant to section 205 or section 324(2)." This statement reflects the underlying board rule regarding the processing of section 324(2) Forfeiture Petitions. *See* Me. W.C.B. Rule, ch. 15, § 6(2)(C). Position papers were then filed and the hearing officer issued his decision, declining to impose a fine under section 324(2). He also found that Marco Petroleum's unilateral reduction was proper "*based on his earnings at Threads of Hope.*" (Emphasis added)

[¶7] Mr. Sylvester submitted a Motion for Further Findings of Fact and Conclusions of Law along with brief Proposed Findings. Mr. Sylvester requested that the hearing officer "take some testimony on this case or, based upon the written submissions, conclude that this is not a real job at all." The hearing officer declined to issue further findings or hold an evidentiary hearing. This appeal followed.

II. DISCUSSION

[¶8] The role of the Appellate Division on appeal is "limited to assuring that the [hearing officer]'s factual findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that application of the law to the facts was neither arbitrary nor without rational foundation." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). *See also Moore v. Pratt & Whitney Aircraft*, 669 A.2d

156, 158 (Me. 1995). In addition, since Mr. Sylvester requested further findings of fact and conclusions of law following the decision, the Appellate Division will "review only the factual findings actually made and the legal standards actually applied by the hearing officer." *Daley v. Spinaker*, 2002 ME 134, ¶ 17, 803 A.2d 446.

[¶9] The key factual determination made by the hearing officer in adjudicating Mr. Sylvester's Petition for Penalties was that the payments made to him by Marco Petroleum for his work at Threads of Hope were "earnings" as that term is used in 39-A M.R.S.A § 205(9)(B)(2) (Supp. 2015). Because the payments were viewed as earnings, Marco Petroleum was permitted to alter the established compensation payment scheme previously established by a board decree without penalty, and despite a pending Petition for Review of Incapacity that raises the same issue.[5]

[¶10] As a matter of process, Mr. Sylvester's Petition for Penalties cannot be viewed in isolation from the parallel proceeding pending at the formal hearing level. The issue of the propriety of the suspension of benefits is also at issue in that proceeding. Having the same issue pending in two separate proceedings before the board is inefficient and potentially problematic. It is unclear, for instance, whether the determination by the hearing officer in the AIU case may be entitled to *res*

[5] The issue of whether Marco Petroleum is actually entitled to the offset pending hearing is before the ALJ on Marco Petroleum's Petition for Review of Incapacity.

judicata effect in the proceeding before the ALJ on Marco Petroleum's Petition for Review. *See Ervey v. Northeastern Log Homes*, 638 A.2d 709, 711 (Me. 1994) ("[T]he decision of the [board] will have *res judicata* effect if it is "valid" and "final."). The board also has an interest in avoiding potentially inconsistent determinations within its dispute resolution process on the same issue.

[¶11] This is particularly troublesome because the process set forth in the board rule governing penalty hearings, as accurately reflected in the hearing officer's decision, does not provide for testimonial hearings, except in "extraordinary circumstances". *See* W.C.B. Rule, ch. 15, § (6)(2)(C). In contrast, petitions filed at the formal hearing level routinely involve hearings unless the parties agree to proceed without testimony, usually on stipulated facts. In the case before the AIU, Mr. Sylvester contested Marco Petroleum's assertion that he was working or had earnings at Catholic Charities. This is, at least in part, a factual determination not well suited to resolution on written briefs.

[¶12] We conclude that in situations where there are parallel proceedings before the board at the formal hearing level and the AIU level requiring resolution of the same or similar issues, best practices would call for deferring action on the request for penalties at the AIU level until such time as the formal case is decided. This procedure would serve to avoid potentially nettlesome *res judicata* and due process issues.

[¶13] Absent such a deferral, and in an effort to avoid potential *res judicata* and due process problems, we also find that "extraordinary circumstances" requiring the scheduling of a hearing are present at the AIU level if a party would have a right to a hearing at the formal hearing level on the specific issues that are also raised in the AIU case. There was a request for a hearing in the AIU case below on the same issues that are currently before the ALJ at formal hearing, and we find that it was error to reach a final decision in the AIU proceeding without granting that request.

[¶14] Absent the development of at least some evidence on the underlying factual issues in the case, i.e., the nature of the work performed by Mr. Sylvester and whether the payments made to him were *bona fide* earnings, it is procedurally and substantively unfair to conclude based solely on written argument that his board-ordered benefits were properly reduced under section 205(9)(B)(2). Lacking a factual finding on that issue, it then becomes untenable from a decisional point of view to determine whether or not a fine should be imposed under section 324(2).

III. CONCLUSION

[¶15] Under the circumstances of this particular case, where identical issues requiring hearing are also currently before an ALJ at the formal hearing level, the hearing officer erred in failing to provide for an evidentiary hearing, as provided for by board rule, on the issue of the nature of the Mr. Sylvester's work and

payment arrangement at Threads of Hope. It is only after taking such evidence that a decision can be made regarding the imposition of penalties.

The entry is:

> The decision of the hearing officer is vacated and the case is remanded for either an evidentiary hearing before the hearing officer, or a stay of the proceedings before the hearing officer until the ALJ reaches a decision on the pertinent issues in a formal decree.

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. 2015).

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