STATE OF MAINE ISSUED: February 6, 1996
WORKERS' COMPENSATION BOARD DECISION NO.: 96-01

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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.

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DONALD C. PRITCHARD, JR.
(Employee-Appellant)

v.

S.D. WARREN COMPANY
and

SEDGWICK JAMES OF NORTHERN
NEW ENGLAND
(Employer/InsurernAppellees)

Before: WEEKS, CHAIR, and DIONNE, HAYES, O'MALLEY, PINETTE, RIDDELL and VIGUE, DIRECTORS.[1]

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

PER CURIAM.

The employee, Donald C. Pritchard, Jr., appeals from a decision of an individual hearing officer of the Workers' Compensation Board granting in part the employee's Petition for Order of Payment/Petition for Relief under §205(9). Pritchard contends that the hearing officer erred in (1) determining under which date of injury the employee must be paid when the issue was not properly raised and (2) determining that the employer's suspension of benefits was appropriate under 39-A M.R.S.A. §205(9)(A). The employer, S.D. Warren, argues that it is legally entitled to take a credit for an admitted overpayment. Because the hearing officer correctly applied the law in all three instances, we affirm the decision.

The factual and procedural history of this case is very complicated and may be stated as follows. Pritchard suffered compensable injuries at S.D. Warren on November 14, 1986 and December 17, 1987. He did not lose any significant time from work until some time subsequent to December 17, 1987.

On January 15, 1988 the employer filed a Memorandum of Payment (hereinafter "MOP") reflecting a varying rates payment scheme based upon the December 17, 1987 date of injury. On June 2, 1988 the employer filed a MOP on the November 14, 1986 date of injury setting forth a varying rates compensation payment scheme from December 17, 1987 to the present and continuing.

On November 14, 1988 the employee filed a Petition for Restoration based upon the 1986 injury. By decree dated March 13, 1989, the former Workers' Compensation Commission denied any incapacity benefits based upon the 1986 date of injury for the period between November 14, 1986 and December 16, 1987. Ostensibly pursuant to that decree, the employer filed a "corrected copy" of a MOP dated March 28, 1989 stating that payments were being made on the 1987, not the 1986, date of injury. That MOP dealt with a period of incapacity starting on December 17, 1987.

The employee underwent carpal tunnel surgery on his right hand in April of 1988 and thereafter returned to work with the employer and has worked steadily and regularly to the present day.

On December 23, 1991 the employer filed a Petition for Review of Incapacity on the 1987 date of injury together with a Certificate of Suspension changing the varying rates payment scheme to a fixed rate payment scheme for partial compensation.

On July 16, 1992 the Commission issued an Interim Order, finding that the Certificate of Suspension was improper and ordering the employer to restore the varying rates payments to the employee. In what turned out to be a very costly oversight, the claims representative for the self-insured employer continued to pay at the fixed rate.

The newly-formed Workers' Compensation Board issued a final decree on the employer's Petition for Review, filed with respect to the 1987 injury, on March 25, 1993. That decree denied the employer's petition.

On June 9, 1993 the employer, realizing that it had overpaid the employee by continuing to pay him at a fixed rate, suspended all payments of compensation to him. The employer justified its action by stating that the considerable overpayment constituted an "increase in pay" pursuant to §205(9)(A). The employee responded by filing a Petition for Order of Payment (which was amended by the hearing officer to be a Petition for Relief under §205(9)) on the 1986 date of injury as well as numerous other petitions which were forwarded to the Abuse Investigation Unit for resolution.

On February 14, 1995 the Workers' Compensation Board issued a decree granting the employee's Petition for Relief under §205(9) and ordered that the employee be paid varying rates based on the 1986 date of injury for a closed-ended period. On February 28, 1995 the hearing officer referred this case to the full Board for review pursuant to 39-A M.R.S.A. §320. On March 28, 1995 the full Board voted to accept review.

However, the hearing officer substantially amended his original decree after the employer requested findings of fact and conclusions of law pursuant to 39-A M.R.S.A. §318. In the amended decree, the hearing officer granted in part the employee's Petition for Relief under §205(9), again ordering a varying rates payment scheme, but basing it on the 1987 date of injury, instead of the 1986 date of injury. As a result, the original appellant and appellee reversed roles and Board review continued pursuant to 39-A M.R.S.A. §320.[2]

Pritchard first contends that the hearing officer could not properly consider the issue involving the appropriate date of injury for payment because it had not been raised or pleaded in the employee's Petition for Order of Payment/Petition for Relief under §205(9). While it is true that the issue was not raised by the employee, the Board finds that the issue was ripe for decision by the hearing officer because the employer raised the issue as an affirmative defense in its answer.

It is black letter law in this state that an issue that has not been pleaded by either party may not be addressed by the fact finder unless it is tried by express or implied consent of the parties. M.R.Civ.P. 15(b). *See also Bolduc v. Watson,* 639 A.2d 629 (Me. 1994). It is equally as apparent that a defending party may raise in its answer "any other matter constituting an avoidance or affirmative defense." M.R.Civ.P. 8(c). *See also Blue Spruce Company v. Parent,* Me., 365 A.2d 797, 801 (1976). In the present case, the employer raised the date of injury issue as an affirmative defense in its answer. The issue of under which date of injury the employee should be paid was therefore ripe for decision by the hearing officer.

The Board specifically declines to review the merits of the date of injury issue. The decision of the hearing officer on this issue is a factual finding. The full Board has no authority to review findings of fact made by a hearing officer. 39-A M.R.S.A. §320.

The employee also challenges the legality of the employer's suspension of June 1993. The employer justified its suspension by calling the overpayment an "increase in pay" within the meaning of 39-A M.R.S.A. §205(9)(A). In his decree, the hearing officer found that this justification was improper and did not fall under the provisions of §205(9)(A). However, the hearing officer found that the suspension was justified on other grounds because the employee had consistently been earning more than his pre-injury average weekly wage. The decree reads, in pertinent part:

[The employee's] earnings in the six months before [the suspension] had consistently exceeded his average weekly wage and therefore the suspension was proper. . . Nevertheless, even in the face of a varying rates decree, §205(9) appears to be designed to enable an employer to take the good faith unilateral action which this employer has taken, not to recover any "overpayment," but simply because compensation need not continue to be paid.

Amended decree dated April 18, 1995, p. 12. The Board affirms the decision of the hearing officer in this regard.

Finally, the employer raises the issue of how to properly recoup an overpayment under Title 39-A. S.D. Warren argues that it is legally entitled to take a credit against future payments of benefits when an undisputed overpayment has occurred. The hearing officer addressed this issue as follows:

The decision in this matter concluded and these findings affirm that the present Act provides this employer with no mechanism to recover what the employer regards as an overpayment of compensation. This result is harsh but it is the choice the legislature made. While the legislature retained the third party set-off in §107 of Title 39-A, "66-A(6) and 100(6) which used to allow for recovery of overpayments are simply gone from the present Act.

Amended decree dated April 18, 1995, p. 8. The Board affirms the decision of the hearing officer on this issue as well.

To summarize, despite the complicated fact pattern contained in this case, the Board finds no error of law and therefore must affirm the decision of the hearing officer. Furthermore, the Board will not review the factual findings of one of its hearing officers regardless of whether "competent evidence" supports the findings. There is simply no statutory authority to do so. Section 320 of the Act plainly

states that "[t]here may be no such review of findings of fact made by a hearing officer." The decision of the hearing officer is AFFIRMED.

SO ORDERED.

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[1] DIRECTOR MACKIE did not participate

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[2]. In May of 1995, the employee filed a Petition to Reopen the evidence pursuant to 39-A M.R.S.A. §319. This petition was denied in June of 1995 and has no bearing upon this appeal.