DANIEL AXELSEN
(Appellee)

v.

INTERSTATE BRANDS CORPORATION
(Appellant)

and

ACE/ESIS
(Insurer)

Argued: September 1, 2015
Decided: October 22, 2015

EN BANC PANEL MEMBERS: Administrative Law Judges[1] Pelletier, Collier, Elwin, Goodnough, Hirtle, Knopf, and Stovall

BY: Administrative Law Judge Pelletier

[¶1] Interstate Brands Corporation appeals from a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) awarding Daniel Axelsen 100% partial incapacity benefits based upon Mr. Axelsen's active participation in a board-approved Vocational Rehabilitation Plan pursuant to P.L. 2011, ch. 647, § 14 (effective August 30, 2012), *codified at* 39-A M.R.S.A. § 217(8) (Supp. 2014). Interstate Brands contends that the administrative law judge (ALJ) erred by (1) applying section 217(8) retroactively to Mr. Axelsen's date of injury, which preceded section 217(8)'s effective date; and (2) by interpreting the

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

presumption of unavailability of work in section 217(8) as conclusive rather than rebuttable. Because we agree with the latter contention, we vacate the hearing officer's decision in part, and remand for further proceedings.

I. BACKGROUND

[¶2] Daniel Axelsen worked for Interstate Brands in the shipping and receiving department. His work included stacking baskets filled with bakery products onto flats and loading them in trucks, and required repetitive overhead lifting with both arms. On January 8, 2011, he sustained an injury to his left shoulder while at work. The left shoulder injury subsequently caused Mr. Axelsen to suffer right shoulder problems as well, and he underwent surgery on both shoulders. As a result, Mr. Axelsen has restrictions on the use of his upper extremities that preclude him from returning to his former job, or from taking any job involving the physical work he had performed before the work injury.

[¶3] Interstate Brands paid Mr. Axelsen full benefits voluntarily until April of 2013, when it filed a Certificate of Reduction of Benefits. *See* 39-A M.R.S.A. § 205(9)(B)(1) (Supp. 2014). In response, Mr. Axelsen filed a Petition for Review. *See id.* § 205(9)(C). He also filed a Petition for Award and a Petition for Payment of Medical and Related Services. While the Petitions were pending, on November 15, 2013, Mr. Axelsen filed an Application for Employment Rehabilitation Services. *See* 39-A M.R.S.A. § 217(1) (Supp. 2014). The Board's Office of

Medical/ Rehabilitation Services (OMRS) granted the application, and ordered implementation of an approved vocational rehabilitation plan on April 11, 2014. *See id.* § 217(2).

[¶4] After Mr. Axelsen's injury but before the present dispute arose, the Legislature amended section 217 to add subsection (8), which provides:

> **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.

P.L. 2011, ch. 647, § 14. This provision became effective August 30, 2012.

[¶5] The ALJ granted Mr. Axelsen's petitions. She concluded that the presumption in section 217(8) applies to dates of injury prior to its enactment, and awarded Mr. Axelsen 100% partial incapacity benefits from the date the approved plan was ordered on April 11, 2014. The ALJ determined "[b]ecause Mr. Axelsen is participating in a vocational rehabilitation plan ordered by the Board, . . . it is presumed as a matter of law, that work is unavailable to him for the duration of his participation in the plan." For the time before the plan was implemented, the ALJ awarded a period of varying partial incapacity benefits, followed by a period of partial incapacity benefits based on an imputed $400.00 per week earning capacity, due to Mr. Axelsen's failure to submit evidence of a work search. *See generally Monaghan v. Jordan's Meats*, 2007 ME 100, 928 A.2d 786 (discussing evidence required to establish 100% partial incapacity).

[¶6] Interstate Brands filed a Motion for Additional Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed. The appeal was originally argued before a three-member panel of the Appellate Division. Subsequently, the Executive Director of the Workers' Compensation Board determined that the issues presented on appeal warranted consideration by an *en banc* panel pursuant to Me. W.C.B. Rule, ch. 13, § 2(1)(C).

II. DISCUSSION

A. Standard of Review

[¶7] The Appellate Division's role on appeal is "limited to assuring that the [ALJ's] findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). The ALJ's findings of fact are not subject to appeal. 39-A M.R.S.A. § 321-B(2) (Supp. 2014).

[¶8] Additionally, "[w]hen 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).

B. Retroactive Application of Section 217(8)

[¶9] Interstate Brands contends that the ALJ erred by applying section 217(8) (which, it asserts, is a substantive provision) retroactively to a date of injury that preceded the provision's effective date. For the reasons that follow, we find no error.

[¶10] The Law Court restated the principles applicable to retroactive or prospective application of statutes in *Norton v. C.P. Blouin, Inc.*:

> [T]he application of a procedural statute to pending matters is not a retroactive application. If the statute effects a substantive change, that is, if it determines the legal significance of operative events occurring prior to its effective date by impairing rights or creating liabilities, the statute will govern matters arising before its effective date only if legislative intent favoring such a retroactive application is clearly expressed or necessarily implied. If the legislature intends for a statute to apply retroactively, however, the statute will be so applied unless a specific provision of the state or federal constitution is demonstrated to prohibit such action by the Legislature.

511 A.2d 1056, 1061 (Me. 1986).

[¶11] Further, "the application of a statute remains prospective if it governs operative events that occurred after its effective date, even though the entire state of affairs includes events predating the statute's enactment." *Barnes v. Comm'r of the Dep't of Human Serv.*, 567 A.2d 1339, 1341 (Me. 1989) (quotation marks omitted); *see also Norton*, 511 A.2d at 1060 n.5. In determining what the operative

event is in particular case, we look to the events the Legislature intended to be significant when enacting the new legislation. *Liberty Mutual Ins. Co. v. Superintendent of Ins.*, 1997 ME 22, ¶¶ 9, 13, 689 A.2d 600; *Barnes*, 567 A.2d at 1341. Interstate Brands contends that the "operative event" in this case was the work injury itself. We disagree.

[¶12] Section 217(8) went into effect on August 30, 2012. The change in the law—the presumption—is applied "[i]f an employee is participating in a rehabilitation plan." It is apparent that the event the Legislature deemed legally significant is not the date of injury, but the employee's participation in a rehabilitation plan. Therefore, the operative event for purposes of determining prospective or retroactive application of section 217(8) is the employee's participation in the plan.

[¶13] Mr. Axelsen filed his Application for Employment Rehabilitation Services on November 15, 2013, and began participating in the plan thereafter. He sought the rehabilitation services that triggered the statute's application more than one year after the statute took effect. Accordingly, "[t]his is not a case where 'settled expectations honestly arrived at with respect to substantial interests' will be defeated." *Shannon v. Roy W. Foster*, 115 N.H. 699, 701, 349 A.2d 591, 593 (1975) (applying statute providing for loss of benefits upon refusal of rehabilitation services, that became effective after an award of benefits but before the employee's

refusal, constituted prospective application; plaintiff's refusal to accept rehabilitation services was the event that triggered operation of statute) (quoting 2 J. SUTHERLAND, STATUTORY CONSTRUCTION § 41.05, at 261 (4th ed. 1973)); *see also Liberty Mutual*, 1997 ME 22, ¶¶ 9, 13, 689 A.2d 600 (concluding that a statutory amendment that changed the method of calculating assessments owed to MIGA was not applied retroactively to Liberty Mutual when the operative event—the need to make the assessment—occurred after the effective date of the statute).

[¶14] The ALJ did not err when determining that the presumption in 217(8) applies in this case. Because we conclude that the operative event occurred after the statute's effective date, and the statute was not applied retroactively, we do not reach the issue of whether the statute effectuates a change in substantive or procedural law.

C. Application of the Presumption

[¶15] After determining that the presumption applied, the ALJ interpreted section 217(8) to mean that once an employee establishes that he is participating in a rehabilitation plan, it is then conclusively established that work is unavailable to the employee while participating in the plan, and thus, the employee is entitled to 100% partial incapacity benefits. Interstate Brands contends it was error to treat section 217(8) as providing for a conclusive rather than rebuttable presumption, and asserts that it should have been permitted to present evidence to prove the

nonexistence of the presumed fact (that work is unavailable to the employee while participating in the plan). We agree.

[¶16] The Advisory Note following M.R. Evid. 301, applicable to presumptions, explains the difference between rebuttable and conclusive presumptions:

> [T]he word presumption should be reserved for the convention that when a designated fact called the basic fact exists, another fact called the presumed fact must be taken to exist *in the absence of adequate rebuttal*. . . . Laymen and courts as well, frequently use it as a synonym for "inference" ("Dr. Livingston, I presume"), a matter of logic and experience, not of law. . . . The phrase "conclusive presumption" is not a presumption in any useful sense, but a rule of law that if one fact, the basic fact, is proved, no one will be heard to say that another fact, the presumed fact, does not exist.

(Emphasis added); *see also C.F. Ladner v. Mason Mitchell Trucking Co.*, 434 A.2d 37, 42 (Me. 1981) ("A conclusive presumption is not really a presumption at all. It is a rule of law.") In the case of a conclusive presumption, the Legislature does not establish a presumption in the ordinary sense of the term, but establishes that in the specified case, if one fact is proved, the nonexistence of the presumed fact is immaterial. *Albee's Case*, 128 Me. 126, 128, 145 A. 742, 743 (1929). In the Workers' Compensation Act, there are three legislatively-created, explicitly conclusive presumptions. *See* 39-A M.R.S.A. § 102 (8) (Supp. 2014) (defining "dependent" to include certain persons conclusively presumed to be dependent); 39-A M.R.S.A. § 212(2) (Supp. 2014) (establishing a conclusively presumptive

period of incapacity for certain injuries); 39-A M.R.S.A. § 401 (Supp. 2014) (creating a conclusive presumption that a predetermination under 39-A M.R.S.A. § 105 is correct for persons engaged in forest products harvesting).

[¶17] Because of the significance afforded to conclusive presumptions, and the absence of legislative designation as a conclusive presumption, we conclude that section 217(8) affords an ordinary, rebuttable presumption only. When the ALJ treated Mr. Axelsen's participation in the rehabilitation plan as establishing the unavailability of work as a matter of law, she erroneously gave the presumption conclusive effect. Although the presumption relieves the employee of the burden of having to introduce evidence of a work search or other evidence of the unavailability of work, the employer is entitled to submit evidence designed to overcome the presumption.

[¶18] Accordingly, we vacate the hearing officer's award of 100% partial incapacity benefits. Consistent with our recent decision in *Lavalle v. Town of Bridgton,* Me. W.C.B. No. 15-13, ¶ 13 (App. Div. 2015) (citing as persuasive authority *Estate of Gregory Sullwold v. The Salvation Army,* Me. W.C.B. No. 13-13, ¶ 21 (App. Div. 2013) (en banc)), we hold that the order and presentation of proof when section 217(8) is invoked is as follows: after the employee establishes the basic fact that the employee is participating in a board-ordered rehabilitation plan, the burden shifts to the employer to prove that the nonexistence of the

presumed fact (that work is unavailable to the employee) is more probable than its existence. When evaluating whether the employer has established that it is more probable than not that work is available to an employee who is participating in a board-ordered rehabilitation plan, the hearing officer should consider not only labor market evidence (including work search), but also the practical effect participation in the plan may have on the employee's availability for work, including but not limited to the amount of time participation in the plan requires, whether the plan requires homework in addition to on-site training, and the employee's restrictions.

III. CONCLUSION

[¶19] The ALJ did not err in determining that the presumption contained in 39-A M.R.S.A. § 217(8) applies in the circumstances of this case. However, the ALJ did err when concluding that Mr. Axelsen established entitlement to 100% partial incapacity merely by showing that he is participating in a Board-ordered rehabilitation plan, without considering evidence of the availability of suitable work in the labor market.

The entry is:

> The award of 100% partial incapacity benefits from April 11, 2014, is vacated, and the case is remanded for additional proceedings consistent with this opinion. In all other respects, the 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. 2014).

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