LORRAINE SOMERS
(Appellant)

v.

S.D. WARREN
(Appellee)

and

CONSTITUTION STATE SERVICES
(Insurer)

Argued: February 7, 2018
Decided: January 29, 2020

PANEL MEMBERS: Administrative Law Judges Knopf, Jerome, and Stovall
BY: Administrative Law Judge Knopf

[¶1] Lorraine Somers appeals from a decision of a Workers' Compensation Board Administrative Law Judge (*Elwin, ALJ*) denying her Petition for Reinstatement. Ms. Somers contends that the ALJ erred in determining that S.D. Warren was authorized to discontinue partial incapacity benefit payments pursuant to a board decree despite its failure to comply with Me. W.C.B. Rule, ch. 2, § 5(1), which requires an employer to notify the employee of the right to request an extension for financial hardship before discontinuance.[1] Ms. Somers further argues

[1] Me. W.C.B. Rule ch. 2, § 5(1) was amended effective September 1, 2018. The amendment added subsection 1-A, which places the obligation to notify an employee of the right to request an extension for financial hardship on the board when benefits paid pursuant to an order or award are terminated pursuant to a petition and subsequent decree.

that the ALJ erred in concluding that S.D. Warren was not prohibited from stopping payment on a check to recover an overpayment. We vacate the ALJ's decision.

I. BACKGROUND

[¶2] Ms. Somers suffered an injury to her right knee in a vehicle accident while working for S.D. Warren on December 6, 2000. She went out of work in 2005. Pursuant to a 2008 board decree (*Elwin, HO*), S.D. Warren was ordered to pay ongoing 100% partial incapacity benefits.

[¶3] In March 2013—one year before the maximum number of partial incapacity benefit payments would have been paid to Ms. Somers under 39-A M.R.S.A. § 213 (Supp. 2018) and Rule, ch. 2, § 2(5)—S.D. Warren filed a Petition for Review seeking to discontinue Ms. Somers's benefits.

[¶4] In a decree dated December 30, 2014, the board (*Elwin, HO*) found that Ms. Somers's permanent impairment percentage was below the applicable threshold for duration of disability benefits, *see* Rule, ch. 2, § 1(1), and that the maximum number of weekly benefit payments had been made, *see id.* § 2(5). Thus, the ALJ ordered that S.D. Warren could discontinue payments. The parties have stipulated that S.D. Warren has not notified Ms. Somers of her right to request an extension of benefit payments for extreme financial hardship pursuant to Rule, ch. 2, § 5(1).

[¶5] Following that decree, S.D. Warren issued a check through its automatic payment system for benefits beginning the week of January 4, 2015. Ms. Somers's

attorney received the check on January 13, 2015; deposited the check into his IOLTA account; and issued a check to Ms. Somers, minus attorney's fees. Before the check cleared, S.D. Warren stopped payment, and it has declined to reimburse Ms. Somers's attorney for the payment. The date of the stop payment order was January 16, 2015.

[¶6] In May 2015, Ms. Somers filed a Petition for Reinstatement of Benefits, arguing that S.D. Warren had failed to meet the notice requirements in Rule, ch. 2, § 5(1) and was obligated to continue making benefit payments until it did. She also argued that the check received by her attorney in January 2015 constituted an overpayment that S.D. Warren was not authorized to recoup under the Workers' Compensation Act.

[¶7] In a 2017 decision, the ALJ (*Elwin, ALJ*) determined that Rule, ch. 2, § 5(1) does not apply to cases like Ms. Somers's in which benefits are discontinued immediately pursuant to a board decree, but rather only to cases in which discontinuance is prospective. She reasoned:

> Requiring an employer to provide 21 days' notice of the right to file an appeal based on financial hardship would conflict with the employer's statutory right (under Section 205(9)(B)(2)) to terminate benefits pending a motion for findings of fact or an appeal. In order to exercise its right to cease payments immediately after issuance of a favorable decree, an employer would have to notify an employee of his or her right to a financial hardship appeal during the pendency of the petition for review. However, Board Rule, ch. 2, § (5)(1) requires an employer to "include the date the lost time benefits are due to expire"—in cases in which a petition for review has been filed seeking authorization to

> discontinue benefits, that is the date of the issuance of the decree, a date the employer has no way of knowing in advance.
>
> Considering the plain language of the Rule, and in order to avoid absurd results, Board Rule, ch. 2, § (5)(1) must apply only in cases in which employers seek prospective discontinuance of benefits, either by means of a 21-day discontinuance under 39-A M.R.S.A. § 205(9)(B)(1), or perhaps a prospective order issued in response to a petition filed under § 205(9)(B)(2).

[¶8] Accordingly, the ALJ concluded that S.D. Warren had no obligation to provide notice to Ms. Somers, and that S.D. Warren was entitled to cease benefit payments pursuant to the December 2014 decree. Additionally, the ALJ rejected Ms. Somers's assertion that S.D. Warren was not entitled to stop payment on the benefit check, reasoning that S.D. Warren's obligation to pay Ms. Somers ended on the date of the December 30, 2014, decree. The ALJ also determined that "stopping payment on a check it was not required to issue is a matter beyond the board's jurisdiction."

[¶9] Ms. Somers filed a Motion for Additional Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A § 318 (Supp. 2018), which the ALJ denied. Ms. Somers appeals.

II. DISCUSSION

A. Me. W.C.B. Rule, ch. 2, § 5(1)

[¶10] Ms. Somers contends that the ALJ misinterpreted Rule, ch. 2, § 5(1). She contends the rule, correctly construed, makes providing notice of an employee's right to request an extension for financial hardship a mandatory prerequisite for discontinuing benefits. S.D. Warren contends that to the extent the rule is construed

as requiring notice after a decree has authorized discontinuance, it is invalid as exceeding the board's statutory grant of authority.

1. Interpretation of the Rule

[¶11] The applicable version of Rule, ch. 2, § 5(1) requires employers to notify employees that their lost time benefits are due to expire at least 21 days in advance of the expiration date and to advise employees of their right to request an extension in cases of extreme financial hardship.[2] Me. W.C.B. Rule, ch. 2, § 5(1). "Failure to send the required notice will automatically extend the employee's entitlement to lost time benefits for the period that the notice was not sent." *Id.*

[¶12] Ms. Somers argues that the plain language of the rule requires that employers must give employees the required notice before benefits may be discontinued, regardless of whether by board decree pursuant to 39-A M.R.S.A.

[2] The full text of the applicable version of Rule, ch. 2, § 5(1) reads:

> 1. Prior to cessation of benefits pursuant to 39-A M.R.S.A. § 213(1), the employer must notify the employee that the employee's lost time benefits are due to expire. The notice must be sent at least 21 days in advance of the expiration date, and must include the date the lost time benefits are due to expire and the following paragraph:
>
> > If you are experiencing extreme financial hardship due to inability to return to gainful employment, you may be eligible for an extension of your weekly benefits. To request such an extension, you must file a Petition for Extension of Benefits within 30 calendar days of the date that benefits expire, or, in cases where the expiration date is contested, within 30 calendar days of a final decree as to the expiration date.
>
> Failure to send the required notice will automatically extend the employee's entitlement to lost time benefits for the period that the notice was not sent.
>
> Notice shall be considered "sent" if it is mailed to the last address to which a compensation check was sent.

§ 205(9)(B)(2) (Supp. 2018) or by 21-day certificate pursuant to 39-A M.R.S.A. § 205(9)(B)(1), and that benefits must continue until the notice is provided. We agree.

[¶13] The Law Court has applied the general rules of statutory construction in construing board rules. *See generally Doucette v. Hallsmith/Sysco Food Servs., Inc.*, 2011 ME 68, ¶¶ 22-26, 21 A.3d 99; *Bridgeman v. S.D. Warren Co.*, 2005 ME 38, ¶ 17, 872 A.2d 961. Accordingly, in construing board rules, our purpose is to give effect to the board's intent. *Cf. 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 rule's language, and construe that language to avoid absurd, illogical, or inconsistent results. *Id*. If the language of the rule is ambiguous, we then look beyond the plain meaning and consider other indicia of regulatory intent, including regulatory history. *Cf. Damon v. S.D. Warren Co.*, 2010 ME 24, ¶ 10, 990 A.2d 1028.

[¶14] After scrutinizing the language in Rule, ch. 2, § 5(1), we conclude that the ALJ's interpretation is inconsistent with its plain meaning. The rule provides that "Prior to the cessation of benefits . . . notice must be sent at least 21 days in advance of the expiration date." By its terms, the rule applies to any cessation of benefits pursuant to section 213(1) and the applicable durational limit; it does not distinguish, as the ALJ here did, between "cessation of benefits pursuant to [section 205(B)(2)]"

and "cessation of benefits pursuant to [section 205(B)(1)] where the date of cessation is known prior."[3]

[¶15] Moreover, the ALJ construed the term "expiration date" in such cases to mean the date the decree is issued. "Expiration date," however, read consistently with section 213 and Rule, ch. 2, § 2(5)—which sets the durational limit for partial incapacity benefits—means the date on which the employer's obligation to make payments is fully met. Thus, under the rule, the employer may notify an employee 21 days before its obligation to make benefit payments is fully met, but that obligation to pay does not cease until after the notice is sent (plus 21 days) and the requirements of section 205(9)(B) are met. This version of the rule, as written, does not relieve the employer of its obligation to provide notice if there is a pending petition for review or a board decree in the case.

[¶16] This interpretation is consistent with the Law Court's express direction that when a statute provides for notification of certain rights, those rights not be cut off before the employee is made aware of them. *See Wilson v. Bath Iron Works*, 2008 ME 47, ¶¶ 10, 15, 942 A.2d 1237 (affirming the construction of 39-A M.R.S.A § 306(1) as tolling the statute of limitations until a first report of injury is filed, in

[3] Pursuant to title 39-A M.R.S.A. § 205(9)(B), benefits that have been ordered or awarded may be discontinued only by an order pursuant to a petition, *id.* § 205(9)(B)(1), while benefits paid voluntarily may be discontinued by mailing of a certificate with certain information and notice to the employee at least 21 days before discontinuance, *id.* § 205(9)(B)(2).

part because the first report triggers notification of certain important employee rights and obligations); *Graves v. Brockway-Smith Co.*, 2012 ME 128, ¶ 18, 55 A.3d 456 (stating that employees must be notified of their rights before they can be extinguished).

[¶17] Our interpretation is also consistent with decisions of the board applying Rule, ch. 2, § 5(1) prior to the recent amendment. *See Smith v. Cummings Health Care*, W.C.B. 94-00-27-05 (Me. 2007) (*Pelletier, ALJ*) (rejecting the argument that the rule was inapplicable to a discontinuation by board decree); *Bridgeman v. S.D. Warren Co.*, W.C.B. 98-122021 (Me. 2016) (*Collier, ALJ*) (same); *Waters v. Sappi Fine Paper*, W.C.B. 99-01-98-48 (Me. 2017) (*Jerome, ALJ*) (concluding that "neither the statute nor the rule specifically exempts cases that are paid pursuant to Board order" from the notification requirement).

[¶18] S.D. Warren was not permitted to cease payment of benefits until after it provided the notice required by former Rule ch. 2, § 2(5).

2. Validity of the Rule

[¶19] S.D. Warren argues that construing the rule to require that it send the 21-day notice before ceasing payment—after the board has issued a decree allowing it to discontinue benefits—renders the rule invalid because such a construction extends an employee's entitlement to incapacity benefits beyond the durational limit established in 39-A M.R.S.A. § 213(1), and is therefore inconsistent with the Act.

[¶20] The board derives its rulemaking authority from 39-A M.R.S.A. § 152(2) (Supp. 2018), which provides in part that the rules "may define terms, prescribe forms and make suitable orders of procedure to ensure the speedy, efficient, just and inexpensive disposition of all proceedings under this Act." *Id.* The Law Court has recognized "a legislative intent to delegate broad authority to the Board to interpret the Act, either by rule or through its decision-making authority when the statutory language is ambiguous." *Baker v. S.D. Warren*, 2010 ME 87, ¶ 10, 3 A.3d 380. Rules may be struck down when they are in direct conflict with express statutory language. *Bridgeman v. S.D. Warren Co.*, 2004 ME 38, ¶ 12, 872 A.2d 961 (citing *Lydon v. Sprinkler Servs.*, 2004 ME 16, ¶ 15, 841 A.2d 793).

[¶21] In *Bridgeman*, the Law Court considered the validity of the "fourteen-day rule," Me. W.C.B. Rule, ch. 1, § 1, which attached a penalty for failure to either timely pay or controvert a claim, pursuant to 39-A M.R.S.A. § 205 (2001). *See Bridgeman*, 2005 ME 38, ¶ 15, 872 A.2d 961. The employers in that case had failed to pay or controvert the employee's claim within fourteen days, and therefore were ordered to pay total benefits for a period required by the rule. *Id.* ¶¶ 2-5. The Court upheld the rule as valid, and wrote that "[a]lthough the rule attaches a greater penalty . . . than provided in section 205, that does not compel a conclusion that the Board exceeded its authority in promulgating [the rule] . . ." *Id.* ¶ 15. Further, the Court reasoned that the rule was promulgated "to accomplish the purposes of [the] Act,"

as set forth in 39-A M.R.S.A § 152(2) (2001). *Bridgeman*, 2005 ME 38, ¶ 14, 872 A.2d 961 (reasoning that the rule "reasonably sought . . . to ensure 'the speedy, efficient, just and inexpensive disposition of all proceedings under [the] Act.'").

[¶22] In this case, Rule, ch. 2, § 5(1) similarly does not conflict with the procedures required by section 205(9)(B)(2); nor does it conflict with the substantive provisions of section 213(1). Although section 205(9)(B)(2) does not require that notice of financial hardship rights be given within 21 days or that that benefits must continue until notice is given, that does not mean that the board has exceeded its authority in promulgating the rule. As in *Bridgeman*, the rule accomplishes the purposes of the Act, to ensure the prompt delivery of benefits legally due, 39-A M.R.S.A. § 151-A (2001), and the "just . . . disposition of all proceedings under this Act, *id.* § 153. Furthermore, as previously noted, such requirements comport with the policy considerations noted by the Law Court that employees be informed of important rights, such as the right to request an extension of benefits for extreme financial hardship, before those rights are extinguished. *See Wilson*, 2008 ME 47, ¶¶ 10, 15, 942 A.2d 1237*; Graves*, 2012 ME 128, ¶ 18, 55 A.3d 456.

B. Res Judicata

[¶23] S.D. Warren next argues that Ms. Somers's claim is barred by res judicata. It contends: if notice is a prerequisite to discontinuance, and the 2014 decree ordered benefits to be discontinued and that decree was not appealed, the

issue of proper notice was decided in 2014 and the issue became final as a matter of law. We disagree.

[¶24] Regarding the application of res judicata to workers' compensation proceedings, the Law Court has stated:

> [V]alid and final decisions of the Workers' Compensation Board are subject to the general rules of res judicata and issue preclusion, *see Ervey v. Northeastern Log Homes, Inc.*, 638 A.2d 709, 710 (Me. 1994) (res judicata); *Crawford v. Allied Container Corp.*, 561A.2d 1027, 1028 (Me. 1989) (issue preclusion), not merely with respect to the decision's ultimate result, but with respect to all factual findings and legal conclusions that form the basis of that decision, *see* [*McIntyre v. Great No. Paper, Inc.*], 2000 ME 6, ¶¶ 7-8, 743 A.2d at 747.

Grubb v. S.D. Warren Co., 2003 ME 139, ¶ 9, 837 A.2d 117.

[¶25] In certain cases, the doctrine of res judicata may bar "the relitigation of issues that were tried, or that may have been tried, between the same parties or their privies in an earlier suit on the same cause of action." *Blance v. Alley*, 1997 ME 125, ¶ 4, 697 A.2d 828 (citations and quotation marks omitted). "A party is precluded from relitigating an issue that has been (1) actually litigated, (2) determined by a final judgment, and (3) the determination was essential to the judgment." *Traussi v. B & G Foods, Inc.*, Me. W.C.B. No. 15-10, ¶ 10 (App. Div. 2015).

[¶26] The issue of whether proper notice was given before discontinuance was not raised before the ALJ in 2014. Although S.D. Warren could have provided the notice required by the rule earlier, it did not violate the rule until it ceased paying benefits. The claim that benefits should automatically continue pursuant to the rule

is independent from a Petition for Review to determine whether benefits may be discontinued under sections 213(1) and 205(9)(B)(2).

[¶27] Because S.D. Warren did not cease paying benefits until after the 2014 decree, the factual issue of whether notice was provided to Ms. Somers was not before the board during that litigation, and res judicata does not bar it now.

C. Substantial Compliance

[¶28] S.D. Warren further argues that it substantially complied with Rule, ch. 2, § 5(1) because Ms. Somers and her attorney were aware that her benefits were being discontinued and she was represented by an attorney who presumably knew of Ms. Somers's right to request an extension of benefits. Thus, S.D. Warren argues, it should be deemed in compliance with the rule. We disagree.

[¶29] Workers' compensation law in Maine is uniquely statutory in nature. *See Hird v. Bath Iron Works*, 512 A.2d 1035, 1037 (Me. 1986). When the Legislature intends substantial compliance to satisfy a notice requirement, it may explicitly provide for that by statute. *See, e.g.,* 14 M.R.S.A. § 8107(4) (2003) (providing that substantial compliance is sufficient for notice to a governmental entity of a claim under the Maine Tort Claims Act); 28-A M.R.S.A. § 2513 (Supp. 2018) (providing that substantial compliance is sufficient for notice to a defendant of a claim under the Maine Liquor Liability Act). Nothing in Rule, ch. 2, § 5(1) indicates an intent to provide that substantial compliance is adequate in the circumstances, and we decline

to read such a provision into the rule. Because the parties stipulated that S.D. Warren has not sent the written notification required by the rule, we conclude that S.D. Warren has not complied with the notification requirement.

D. Overpayment

[¶30] Finally, Ms. Somers contends that S.D. Warren was not entitled to stop payment on the check already received and deposited by Ms. Somers's counsel. Ms. Somers asserts the payment was properly due because S.D. Warren had not provided the required notice, or alternatively, constituted an overpayment, which S.D. Warren has no authority to recoup under the Act. We agree with Ms. Somers. S.D. Warren's payment obligation automatically continues until proper notice is provided, and in any event, an employer may not recoup benefits paid absent specific statutory authority. *Doucette v. Hallsmith/Sysco Food Servs., Inc.*, 2010 ME 138, ¶ 5, 10 A.3d 692; *Larochelle v. Crest Show Co.*, 655 A.2d 1245, 1246.

III. CONCLUSION

[¶31] The applicable version of Me. W.C.B. Rule, ch. 2, § 5(1) was promulgated within the board's rulemaking authority and requires an employer or insurer to provide notice of the employee's right to request an extension of benefits for financial hardship before partial incapacity benefit payments are discontinued. Ms. Somers's claim was not barred by res judicata, and S.D. Warren is not excused from its obligation under the rule by purported substantial compliance. S.D. Warren

was not entitled to stop payment on the benefit check issued before it complied with the notice requirement of Rule, ch. 2, § 5(1).

The entry is:

> The decision of the ALJ is vacated, and S.D. Warren shall pay all benefits owed to Ms. Somers from the date benefits were discontinued pursuant to the December 2014 decree until it has provided notice as required by the applicable version of Me. W.C.B. Rule, ch. 2, § 5(1), plus 21 days.

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. 2018).

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

Attorneys for Appellant:
James J. MacAdam, Esq.
Nathan A. Jury, Esq.
Donald M. Murphy, Esq.
MacADAM JURY, P.A.
208 Fore Street
Portland, ME 04101

Attorney for Appellee:
Daniel F. Gilligan, Esq.
TROUBH HEISLER
PO Box 9711
Portland, ME 04104