FAY JOHNSON
(Appellant)

v.

HOME DEPOT USA, INC.
(Appellee)

and

HELMSMAN MANAGEMENT SERVICES, LLC/
LIBERTY MUTUAL, TPA
(Insurer)

Decided: January 21, 2014
Argued: September 4, 2013

Panel Members: Hearing Officers Pelletier, Greene, and Stovall
By: Hearing Officer Greene

[¶1] This is an appeal of a Workers' Compensation Board hearing officer's (*Jerome, HO*) decision permitting Home Depot USA, Inc., on its Petition for Review,[1] to immediately suspend payment of incapacity benefits owed to Fay Johnson pursuant to a prior consent decree. Counsel appeared at the hearing on behalf of Ms. Johnson, who has been missing since March 2012. Counsel argues on appeal that the hearing officer erred (1) when finding that Home Depot's petitions had been effectively served pursuant to 39-A M.R.S.A. § 307(2) (2001), (2) by issuing a preliminary order authorizing Home Depot to hold Ms. Johnson's

[1] Home Depot USA also filed a Petition for Forfeiture, which the hearing officer dismissed. The employer has not cross-appealed the dismissal of its petition for forfeiture, but argues that the hearing officer's decision could be affirmed based on the alternative ground that forfeiture was warranted. Because we affirm the hearing officer's decision as within the authority granted by the Act, we do not reach the merits of the forfeiture petition.

incapacity benefit payments in a segregated account for her benefit; and (3) by issuing a decree permitting Home Depot to suspend payment of Ms. Johnson's benefits because her whereabouts are unknown. We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Fay Johnson suffered an injury while working for Home Depot on January 9, 2009. The parties entered into a consent decree on September 10, 2010, by which Home Depot agreed to pay Ms. Johnson ongoing partial incapacity benefits. The decree drafted by the parties also provided that it would "not have res judicata effect" on the level of incapacity and that either party could "move[]to alter the extent of incapacity" without the need "to show a change in condition."

[¶3] In connection with the consent decree Ms. Johnson was represented by attorney Douglas Kaplan. She designated Mr. Kaplan's firm, Kaplan & Grant, as the location for delivery of benefit checks pursuant to 39-A M.R.S.A. § 205 (Supp. 2013). She also granted the firm limited power of attorney to endorse and deposit her benefit checks into its client trust account for later disbursement pursuant to a fee agreement.

[¶4] Ms. Johnson underwent surgery in April of 2011**,** shortly after which Home Depot began voluntarily paying her total incapacity benefits. Thereafter, in July 2011, Attorney Kaplan filed Petitions for Review and for Payment of Medical

and Related Services on behalf of Ms. Johnson. After Ms. Johnson did not appear at a March 15, 2012, hearing on her petitions, Attorney Kaplan learned that she had been missing since March 6, 2012. Her family was unable to locate her, and the authorities had investigated without result. The board dismissed Ms. Johnson's petitions without prejudice.

[¶5] On May 14, 2012, the Oxford County Judge of Probate appointed Ms. Johnson's daughter, Joleen Mitchell, temporary guardian and conservator with limited powers, including the power to act on Ms. Johnson's behalf in receiving and depositing her workers' compensation checks and "dealing with her workers' compensation settlement issues with Attorney . . . Kaplan." Attorney Kaplan proceeded to forward incapacity payments for Ms. Johnson to Ms. Mitchell.

[¶6] Home Depot, having been paying total incapacity benefits voluntarily, filed a certificate of reduction pursuant to 39-A M.R.S.A. § 205(9)(B)(1) (Supp. 2011), after which it reduced Ms. Johnson's benefit payment, effective July 12, 2012, back to the partial level established in the consent decree. Home Depot also scheduled a medical examination pursuant to 39-A M.R.S.A. § 207 (Supp. 2012). As expected, Ms. Johnson did not appear for the medical examination.

[¶7] Home Depot then filed Petitions for Review and for Forfeiture, and sent the petitions by certified mail to Kaplan & Grant, to Ms. Johnson's last known address, and to Ms. Mitchell in her capacity as temporary guardian and

conservator. An employee at Kaplan & Grant signed for receipt of the mailings. The hearing officer found that delivery of the petitions by certified mail to Ms. Johnson's address and to Ms. Mitchell was not confirmed by return receipts. During a non-testimonial hearing October 22, 2012, for which neither Ms. Johnson nor Ms. Mitchell appeared, Attorney Kaplan asserted that the hearing officer could take no action on the petitions because service had not been effectuated pursuant to 39-A M.R.S.A. § 307(2).

[¶8] Acknowledging the unusual situation, the hearing officer ordered on the record that Home Depot be permitted immediately to stop sending payments to Attorney Kaplan for Ms. Johnson, and instead, to hold the payments in a segregated account for her benefit until the underlying petitions could be resolved.

[¶9] After considering the parties' written submissions, the hearing officer issued a decree in which she found, based upon the representations of the attorneys, that Ms. Johnson's whereabouts remained unknown despite a police investigation, and determined that under the circumstances, Home Depot had adequately complied with the requirements of section 307(2). The hearing officer further ordered that Home Depot was entitled to suspend payment of her benefits, while preserving Ms. Johnson's right to resume receiving any benefits she is entitled to from the point of suspension forward, should she appear and assert her rights.

[¶10] Attorney Kaplan filed a motion for additional findings of fact and conclusions of law. The hearing officer issued additional findings reaffirming her initial decision, after which Attorney Kaplan filed an appeal on behalf of Ms. Johnson.

II. DISCUSSION

A. Standard of Review

[¶11] 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 the 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). When called on to construe provisions of the Workers' Compensation Act,

> our purpose is to give effect to the Legislature's intent. 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. 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. If the statutory language is ambiguous, we then look beyond the plain meaning and consider other indicia of legislative intent, including legislative history.

Graves v. Brockway-Smith Co., 2012 ME 128, ¶ 9, 55 A.3d 456 (quotation marks and citations omitted).

[¶12] The appellant contends that the hearing officer (A) erred when determining that Home Depot accomplished service pursuant to 39-A M.R.S.A. § 307(2) because Ms. Johnson did not personally receive the petition, and (B) lacked authority to issue either (1) an interim order allowing Home Depot to hold Ms. Johnson's workers' compensation benefit payments in a segregated account or (2) a final order allowing it to "suspend" or "cease" payment of those benefits due to her status as a missing person.

B. Service

[¶13] With regard to service of the petitions, 39-A M.R.S.A. § 307(2) provides, in relevant part:

> **Service upon responding party.** Copies of all petitions filed under this Act must be served by certified mail, return receipt requested, to the other parties named in the petition.

Home Depot sent the certified mailings to Ms. Johnson's last known address, to Ms. Mitchell, and to Kaplan & Grant. An employee of Kaplan & Grant signed for the receipt of the mailings. Ms. Johnson had chosen Kaplan & Grant as the designated agent to receive her workers' compensation benefit payments pursuant to 39-A M.R.S.A. § 205(1).

[¶14] We conclude that in the circumstances of this case, Kaplan & Grant had the authority to receive petitions on Ms. Johnson's behalf addressing Home Depot's obligation to continue such payments. To construe section 307(2)

otherwise would deprive Home Depot of its right to seek relief from its obligations under the consent decree indefinitely, in light of Ms. Johnson's missing status. *See* 7 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 124.05 (Matthew Bender, Rev. Ed. 2013) ("Rules as to service of process, like rules as to pleadings, should be construed with an eye to fairness rather than literal construction.").

C. Interim Order and Final Decree

[¶15] With regard to the interim order, Attorney Kaplan argues that pursuant to 39-A M.R.S.A. § 205(9)(B)(2) (Supp. 2011),[2] a hearing officer is authorized to reduce or discontinue benefits only by issuing a decree. Title 39-A M.R.S.A. § 205(9)(B)(2), provides in relevant part:

> If an order or award of compensation or a compensation payment scheme has been entered, the employer . . . shall petition the board for an order to reduce or discontinue benefits and may not reduce or discontinue benefits until the matter has been finally resolved through the dispute resolution procedures of this Act, any appeal proceedings have been completed and an order of reduction or discontinuance has been entered by the board.

However, by issuing the interim order, the hearing officer did not authorize Home Depot to "reduce or discontinue" benefit payments in the ordinary sense. The interim order required Home Depot to continue to make the payments in the amount required by the consent decree, but instead of sending them to Kaplan

[2] Title 39-A M.R.S.A. § 205(9)(B)(2) has since been amended. P.L. 2011, ch. 647, § 2 (effective Aug. 30, 2012), codified at 39-A M.R.S.A. § 205(9)(B)(2) (Supp. 2013).

& Grant, the location designated by Ms. Johnson for the delivery of payments before she went missing, required it to preserve them in a segregated account for Ms. Johnson until such time as a final decree could be entered.

[¶16] With regard to the final order authorizing suspension of benefit payments, Attorney Kaplan argues because the 1992 Act no longer contains a provision permitting an *employer* unilaterally to suspend payments when the employee's whereabouts are unknown, *see* 39 M.R.S.A. §100(4)(B)(1989) (repealed by P.L. 1992, ch. 885, § A-7 (effective January 1, 1993)), the *hearing officer* lacked the authority to order such a remedy even when, as in this case, the employee has been missing for some time.[3] Nothing in the language of section 205(9)(B)(2) precludes the "resolution" reached by the hearing officer here, whereupon Home Depot was permitted to "discontinue" (in the terms of the decree, "suspend") payment of benefits.

[¶17] Although we recognize that workers' compensation rights are strictly statutory, *Doucette v. Hallsmith/Sysco Food Services, Inc.*, 2010 ME 138, ¶ 5, 10

[3] The appellant also contends that it was error to suspend payments without evidence that Ms. Johnson's medical or economic circumstances have changed. *See Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 7, 837 A.2d 117. Home Depot points out that the consent decree expressly states that the parties would not need to prove changed circumstances in order to alter the level of incapacity. Moreover, the decree here did not alter the level of benefits, but merely authorized suspension of payment of those benefits without prejudice to Ms. Johnson's right to "reappear . . . [and] petition for resumption of her worker's compensation benefits as of the date they cease."

A.3d 692,[4] we also acknowledge that situations arise from time to time that are not governed by any express provision of the Act, and yet must be resolved by the board. For example, in *Foley v. Verizon*, 2007 ME 128, ¶ 16, 931 A.2d 1058, the Law Court affirmed the hearing officer's decision to use a method of calculating an offset from a lump-sum settlement that had not been contemplated by statute or rule. The Court stated:

> We affirm the hearing officer's use of the [method of calculating the offset] because it is a common sense and practical method that meets the overall purpose of the coordination of benefits provision; is not otherwise prohibited by statute or rule; utilizes as much of the statutory requirements as can be used given the lack of a provision for lump-sum retirement benefits; and is better than any of the alternatives offered by the parties.

Id. In addition, the Law Court has acknowledged the board's broad decision-making authority to interpret the Act, and to fill in the "gray areas" left in the Act. *Baker v. S.D. Warren Co.*, 2010 ME 87, ¶ 10, 3 A.3d 380.

[¶18] In this case, the hearing officer was bound to resolve issues that are not addressed in the Act. The remedy fashioned by the hearing officer is a common sense and practical remedy that is otherwise not specifically prohibited by statute

[4] In *Doucette*, the Law Court denied the employer's request for a stay pending appeal, which would have relieved the employer of its obligation to pay a substantial penalty pursuant to Me. W.C.B. Rule, ch. 1, § 1.1 until the issues in the case were finally resolved. The Law Court denied the request because the Act did not provide for a stay of an award pending appeal, but contained other remedies for repayment of benefits ultimately determined not to be properly paid. 2010 ME 138, ¶ 5, 10 A.3d 692. Here, although the Act does not expressly provide for the requested relief, it also does not provide any other specific remedies that address the current circumstances. Thus, the decision does not circumvent any statutorily prescribed methods for dealing with potential overpayments.

or rule, and that preserves Ms. Johnson's right to receive all benefits to which she is entitled, should she appear and assert her rights.

[¶19] Our decision is consistent with the rules of statutory construction requiring us to read the statutory scheme as a whole in order to achieve a harmonious result, and to avoid absurd, illogical, and inconsistent results. *Graves*, 2012 ME 128, ¶ 9, 55 A.3d 456. The Workers' Compensation Act imposes certain obligations on employees who receive benefits, including attending medical examinations when requested by the employer, *see* 39-A M.R.S.A. § 207, and filing employment status reports, *see* 39-A M.R.S.A. § 308(2) (2001). In addition, the death of an employee automatically ends the employer's liability for payment of ongoing incapacity benefits. *See* 39-A M.R.S.A. § 215(2) (Supp. 2012). And, although an employee may designate an alternate location for delivery of payments, that employee is not relieved, thereby, of her obligation to keep the employer and the board informed of a current mailing address for these and other matters and to remain available for examinations. When an employee's whereabouts are unknown, these statutorily prescribed methods for monitoring the employee's right to continued receipt of benefits are thwarted.

III. CONCLUSION

[¶20] In summary, in the circumstances of this case, we conclude that Home Depot's efforts were sufficient to accomplish service pursuant to section 307(2).

We further conclude that the hearing officer did not exceed her authority when she issued the interim order permitting Home Depot to hold payments in a segregated account or when she issued the final order authorizing suspension of payments while safeguarding Ms. Johnson's right to receive benefits retroactive to the date of suspension, should she be located.[5] The decision involved no misconception of applicable law and the application of the law to the facts was neither arbitrary nor without rational foundation.

The entry is:

The hearing officer's 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. 2012).

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[5] Because we affirm the hearing officer's decision in favor of Home Depot, we do not address the employer's contention that Attorney Kaplan does not have standing to pursue an appeal on Ms. Johnson's behalf.