

SCOTT A. RICHARDS
(Appellant)

v.

D.P. INDUSTRIES, INC.
(Appellee)

and

T.D. INSURANCE/ME MERCHANTS-
WORKERS' COMPENSATION TRUST FUND
(Insurer)

Argument held: June 8, 2016
Decided: May 31, 2017

PANEL MEMBERS: Administrative Law Judges Stovall, Hirtle, and Pelletier
BY: Administrative Law Judge Stovall

[¶1] Scott Richards appeals from a decision of a Workers' Compensation Board hearing officer (*Dunn, HO*) granting in part his Petition to Determine Entitlement to Rehabilitation Services pursuant to 39-A M.R.S.A. § 217 (Supp. 2016). Mr. Richards contends that the ALJ erred by (1) failing to award reimbursement for actual expenses beyond those proposed in the rehabilitation plan; (2) denying Mr. Richards' motion to reopen the evidence; and (3) denying Mr. Richards' motion to recover attorney's fees and expenses. We affirm the hearing officer's decision in all respects.

I. BACKGROUND

[¶2] Scott Richards injured his back, wrist, and elbow when he fell while working as a machinist for D.P. Industries, Inc., on March 27, 2001. Consequently, Mr. Richards remains under significant work restrictions. A rehabilitation plan was developed by Debra Raymond at the Department of Labor's Division of Rehabilitation Services on November 12, 2014. Because D.P. Industries did not agree to pay for the cost of the plan, Mr. Richards filed a Petition to Determine Entitlement to Rehabilitation Services pursuant to 39-A M.R.S.A § 217(2).

[¶3] The proposed plan sought payment of \$8,918.00 from the Employment Rehabilitation Fund for equipment, training, and vocational counseling. At hearing, Mr. Richards testified that his actual expenses were \$15,000.00, which included the purchase of an existing business, startup costs, equipment, training, and vocational counseling. Mr. Richards also submitted exhibits documenting these expenses. The hearing officer granted the motion approving the plan, and ordered the Employment Rehabilitation Fund to pay the amount of the proposed plan, \$8,918.00.

[¶4] After the order was issued, Mr. Richards filed three motions. The first motion was for findings of facts and conclusions of law. The hearing officer granted the motion and amended the order, but did not alter the outcome. In the amended order, the hearing officer clarified that while Mr. Richards sought

payment of approximately \$15,000.00 in costs associated with the acquisition and start-up expenses of the business, because the expenses were not part of the rehabilitation plan as submitted and some of the expenditures were made prior to a plan being developed, the expenses were not authorized pursuant to section 217. The second motion was for allowance of attorney's fees and costs, which the hearing officer denied, concluding that because the "common fund" rule did not apply to this case, attorney's fees are not recoverable against amounts paid by the Rehabilitation Fund. The third motion was to reopen the evidence, which the hearing officer denied, concluding that the motion did not meet the criteria contained in 39-A M.R.S.A § 319 (2001). This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶5] 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 6 156, 158 (Me. 1995). In addition, because Mr. Richards 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. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446.

B. Vocational Rehabilitation Award

[¶6] Mr. Richards contends that the hearing officer erred when concluding that section 217 precluded reimbursement for certain expenses, including \$5,000.00 incurred prior to the development of the plan for the purchase of a business, and additional expenses that he contends were endorsed and found necessary by the vocational counselor to effectuate his approved vocational rehabilitation plan.

[¶7] Section 217 provides, in relevant part:

When as a result of injury the employee is unable to perform work for which the employee has previous training or experience, the employee is entitled to such employment rehabilitation services, including retraining and job placement, as reasonably necessary to restore the employee to suitable employment.

1. Services. If employment rehabilitation services are not voluntarily offered and accepted, the board on its own motion or upon application of the employee, carrier or employer, after affording the parties an opportunity to be heard, may refer the employee to a board-approved facility for evaluation of the need for and kind of service, treatment or training necessary and appropriate to return the employee to suitable employment. The board’s determination under this subsection is final.

2. Plan ordered. Upon receipt of an evaluation report pursuant to subsection 1, if the board finds that the proposed plan complies with this Act and that the implementation of the proposed plan is likely to

return the injured employee to suitable employment at a reasonable cost, it may order the implementation of the plan. Implementation costs of a plan ordered under this subsection must be paid from the Employment Rehabilitation Fund as provided in section 355, subsection 7. The board's determination under this subsection is final.

3. Order of implementation costs recovery. If an injured employee returns to suitable employment after completing a rehabilitation plan ordered under subsection 2, the board shall order the employer who refused to agree to implement the plan to pay reimbursement to the Employment Rehabilitation Fund as provided in section 355, subsection 7.

[¶8] The Appellate Division addressed an employee's attempt to obtain reimbursement for costs incurred prior to the development of the rehabilitation plan in *Deroche v. Ethan Allen*, Me. W.C.B. No. 15-21 (App. Div. 2015). The Division affirmed the hearing officer's conclusion that under section 217, an employee cannot be reimbursed for costs that are incurred before the development of the rehabilitation plan. The Division further held:

The plain language of section 217 contemplates an evaluation and a proposal for future action, which an employer can choose to accept and fund, or contest and risk having to reimburse the Employment Rehabilitation Fund up to 180% of the implementation cost, should it be implemented and succeed. The hearing officer correctly decided that costs incurred before the development of the plan are simply beyond the ambit of section 217.

Id. at ¶ 12. Because the request for reimbursement for costs incurred before the development of the plan is not authorized in section 217, we find no error in the hearing officer's denial of reimbursement for those costs.

[¶9] As to the other costs, Mr. Richards asserts that he and his counsel had no control or input into what Ms. Raymond considered in determining the total cost of the plan. He further argues that the additional costs are reimbursable pursuant to 39-A M.R.S.A. § 217(4), which provides:

4. Additional payments. The board may order that any employee participating in employment rehabilitation receive additional payments for transportation or any extra and necessary expenses during the period and arising out of the employee's program of employment rehabilitation.

Section 217(4) contemplates items such as transportation and necessary expenses incidental to plan participation, not costs that would significantly increase the total amount of the plan. Moreover, it appears from the record that Mr. Richards was aware that his expenses may have been above the requested amount at the time he filed the petition.

[¶10] Mr. Richards filed the Petition, requested \$8,918.00 for the total estimated cost of the vocational rehabilitation plan, and was awarded exactly what he requested. We find no error in the hearing officer's decision to award the amount requested in the petition.

C. Attorney's Fees

[¶11] Mr. Richards contends that the hearing officer erred by denying his motion to recover attorney's fees and costs from the "common fund" of \$8,918.00

awarded to reimburse the Maine Department of Labor by the Employment Rehabilitation Fund.¹

[¶12] The common fund doctrine provides that when a fund is created to which more than one party is entitled, each party must pay a share of the expenses incurred in creating the fund, including reasonable attorney's fees. *York Ins. Grp. of Maine v. Van Hall*, 1997 ME 230, ¶ 4, 704 A.2d 366. See also *Doucette v. Pathways, Inc.*, 2000 ME 164, ¶ 7, 759 A.2d 718. In order for the common fund doctrine to apply, (1) there must be a common fund, such as a settlement of judgment; and (2) more than one party must be entitled to the fund. *Doucette*, 2000 ME 164, ¶¶ 7-8.

[¶13] In *Doucette*, the only case that has addressed the common fund doctrine in a workers' compensation context, the Law Court vacated a hearing officer's decision that ordered medical providers to pay a portion of the employee's attorney's fees from the sum of money the insurance company paid to the providers for payment of medical services for the employee. *Id.* at ¶ 14. In vacating the order, the Law Court reviewed the plain language of the Workers' Compensation Act regarding the payment of attorney's fees.² The Law Court held

¹ The Abuse Investigation Unit of the Workers' Compensation Board submitted an amicus curiae brief to dispute Mr. Richards' contention that the common fund doctrine applies in this case. D.P. Industries took no position on this issue.

² 39-A M.R.S.A. § 325(1) provides:

that the common fund doctrine did not apply, and that an employee's right to attorney's fees is solely governed by section 325. *Doucette*, 2000 ME 164, ¶¶ 12-14. Because there was no exception authorizing the payment of attorney's fees from a third party's reimbursement for services in section 325, the Court found the award of fees was improper. *Id.* at ¶ 14.

[¶14] We find no error in the hearing officer's determination that, like in *Doucette*, the common fund rule does not apply to this case because there is "no common fund, such as a settlement or judgment against which many may be entitled to make claims." *Id.* at ¶ 8. The award at issue here is not a settlement or judgment, but rather Mr. Richards' entitlement to vocational programs. Because the right to attorney's fees is solely governed by section 325 and there is no exception for the authorization of attorney's fees, in these circumstances, we find no error in the hearing officer's denial of the motion.

D. Petition to Reopen

[¶15] Mr. Richards contends that the hearing officer erred by denying his petition to reopen the evidence pursuant to section 319 to allow evidence purported to explain why the vocational rehabilitation counselor did not list his actual out of pocket expenses in her proposed plan. We review the hearing officer's decision on

Costs and attorney's fees. Except as otherwise provided by law, by the Maine Rules of Civil Procedure or by rule of court, each party is responsible for the payment of the party's own costs and attorney's fees. In the event of a disagreement as to those costs or fees, an interested party may apply to the board for a hearing.

a petition to reopen for abuse of discretion. *Matthews v. Shaw's Supermarkets*, Me. W.C.B. No. 15-25, ¶ 20 (App. Div. 2015).

[¶16] Mr. Richards attempted to offer into evidence a letter from Ms. Raymond dated September 10, 2015. In that letter she wrote in part, “When the plan that was just awarded was proposed last November, Mr. Richards and I were still learning and defining all of the expenditures that would need to be made to get his business fully operational.”

[¶17] Section 319 provides:

Upon the petition of either party, the board may reopen and review any compensation payment scheme, award or decree on the grounds of newly discovered evidence that by due diligence could not have been discovered prior to the time the payment scheme was initiated or prior to the hearing on which the award or decree was based. The petition must be filed within 30 days of the payment scheme, award or decree.

[¶18] The hearing officer denied the motion, concluding that the criteria of section 319 were not met. We find no abuse of discretion in the hearing officer's denial of the motion to reopen. The cost of the plan was not newly discovered evidence “that by due diligence could not have been discovered prior to the time the payment scheme was initiated or prior to the hearing on which the award or decree was based.” It appears that Mr. Richards' Petition may have been premature given the aforementioned statement by Ms. Raymond. However, that is not a basis to reopen the evidence under section 319.

III. CONCLUSION

[¶19] The hearing officer’s decision is supported by competent evidence, involved no misconception of applicable law, and the application of the law to the facts was neither arbitrary or without rational foundation. *Moore*, 669 A. 2d at 158. Further, the hearing officer did not abuse his discretion in denying the motion to reopen the case.

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. 2016).

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