STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 16-0048
Decision No. 19-08

KATHLEEN EATON
(Appellant)

v.

S.D. WARREN COMPANY
(Appellee)

and

LIBERTY MUTUAL INSURANCE CO./HELMSMAN
(Administrator)

and

CCMSI
(Administrator)

Argued: July 20, 2017
Decided: March 15, 2019

PANEL MEMBERS:

Majority: Administrative Law Judges Collier and Pelletier
Dissent: Administrative Law Judge Stovall

BY: Administrative Law Judge Collier

[¶1] Kathleen Eaton appeals from a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) denying her Petition for Assessment of Forfeiture and Penalties pursuant to 39-A M.R.S.A. §§ 324, 359 (Supp. 2018). The appeal turns on the interpretation of a board decree, as amended pursuant to a Motion for Findings of Fact and Conclusions of Law. Ms. Eaton contends that the ALJ erred in concluding that the amended decree did not alter the mandate of

the original decision, which directed payment based on the average weekly wage for her 1998 work injury. We conclude that the ALJ did not err when denying the Petition, and we affirm the decision.

I. BACKGROUND

[¶2] Kathleen Eaton sustained multiple injuries while working for S.D. Warren. In 1998 and 1999 she filed Petitions for Restoration and Award on injury dates in 1983 and 1990, and Petitions for Award on injury dates in 1995, 1996, and 1998. On November 3, 2000, a board hearing officer (*McCurry, HO*) granted the petitions. The decree expressly directed S.D. Warren to pay incapacity benefits based on the average weekly wage (AWW) for the 1998 injury date, stating: "Payments of compensation to her must be based upon the average weekly wage in 1998 which was $844.70. . . . Her benefits are capped at $458.83 pursuant to §§ 102(4)H [sic], 211 and A-10." S.D. Warren began paying weekly incapacity benefits of $458.53 pursuant to the decree.

[¶3] Ms. Eaton filed a Motion for Findings of Fact and Conclusions of Law. On February 7, 2001, the hearing officer issued an amended decree that included an introductory statement and one additional paragraph. The introduction stated: "The initial decree of NOVEMBER 3, 2000 stands unless specifically contradicted" by the amended decree. The new paragraph stated:

> As set forth above, all of the established claims contribute to Ms. Eaton's physical restrictions and her earning incapacity and to the psychological condition which now contributes to her total incapacity. There is no evidence that Ms. Eaton's average weekly wage since September of 1998 was reduced by the continuing effects of the earlier injuries. Neither is there any evidentiary record or argument on which to base an analysis of what effect, if any, the court's decision in *Bernard v. Mead Publishing Paper Division*, 2001 Me. 15 (January 24, 2001) would have on this matter. *Since Ms. Eaton is receiving total compensation based upon her $342.57 average weekly wage that the original compensation rate of $228.38 must be inflated pursuant to the law in effect on that date of injury and stands as of August 30, 2000, at $455.06 in weekly compensation.*

(Emphasis added). The AWW cited in the last sentence of the amended decree, $342.57, was the AWW for the 1983 injury.

[¶4] S.D. Warren began paying Ms. Eaton $458.83 per week, based on her 1998 AWW as directed in the initial decree. Concluding that the amended decree did not alter the original mandate, it continued to pay that amount after the amended decree issued. Annually from 2001 through 2004, S.D. Warren increased Ms. Eaton's weekly compensation rate as of July 1 to the maximum weekly benefit rate published by the board, filing a Modification of Compensation form each time referencing the "new max rate."

[¶5] On January 13, 2005, S.D. Warren/Helmsman filed a Modification of Compensation form reducing the compensation rate from $523.20 to $455.51, noting "EXCEEDED ORIGINAL CR IN ERROR . . . CORRECTING . . . NO MORE COLA INCREASES DUE." S.D. Warren/Helmsman then filed another

Modification in August of 2005 adjusting the compensation rate to $462.27, noting "EXCEEDED ORIGINAL CR IN ERROR TO CR OF $462.27 INSTEAD OF $455.51." That rate, $462.27, is the accurate weekly compensation rate for total incapacity benefits based on Ms. Eaton's 1998 AWW of $844.70.

[¶6] In Ms. Eaton's view, the amended decree required that she be paid compensation based on the 1983 AWW, with annual inflation adjustments. *See* 39 M.R.S.A. § 54-A, *repealed by* P.L. 1987, ch. 559 § B. In 2008, she filed a Petition for Assessment of Forfeiture and Penalties pursuant to 39-A M.R.S.A. §§ 324, 359 (providing for penalties for failure to make timely compensation payments and mishandling claims, respectively), asserting that S.D. Warren had failed to pay full compensation within statutory time limits as ordered by the amended decree, and had mishandled her claim because it reduced her compensation without seeking a board order. S.D. Warren's position was that the amended decree did not change the earlier ruling that payment should be based on the 1998 AWW, capped by the maximum compensation rate. It contends that it adjusted the amount annually not to pay inflation adjustments, but as the maximum rate increased, up to the point in 2005 when it realized that had exceeded the total compensation rate based on the 1998 AWW. For reasons not apparent from this record, the Petitions were not referred to the formal hearing process until May of 2016.

[¶7] On August 9, 2016, the ALJ denied Ms. Eaton's Petition, concluding that the amended decree did not alter the original mandate to pay benefits based on the 1998 AWW. Ms. Eaton filed a Motion for Findings of Fact and Conclusions of Law. The ALJ issued an amended decree that did not alter the outcome. Ms. Eaton then filed this appeal.

II. DISCUSSION

[¶8] Ms. Eaton contends that the ALJ was bound by the doctrine of *res judicata* to follow the February 2001 amended decree, which, she further contends, required S.D. Warren to pay benefits based on the 1983 AWW with annual inflation adjustments.[1] There is no question that the ALJ was bound by and adhered to the 2001 amended decree. The issues are whether the ALJ erred when interpreting the amended decree, particularly whether the last sentence required the benefit payment to be calculated with reference to the 1983 AWW; and if so,

[1] S.D. Warren/CCMSI asserts that because this Petition for Penalties was not first reviewed by the board's Abuse Investigation Unit pursuant to Me. W.C.B. Rule, ch. 15, § 6(2), the ALJ lacked jurisdiction to impose penalties in excess of $5000. Because the ALJ did not impose any penalties, and because we affirm that decision, we do not need to address that argument.

Ms. Eaton asserts in her Reply Brief that the ALJ lacked jurisdiction in this case because the Abuse Investigation Unit did not first review the Petition. She cites *Maddox v. Rite of Me., Inc.,* W.C.B. 14-0260348 (Me. 2016), for the proposition that failing to file a petition for penalties with the Abuse Unit results in the ALJ lacking authority to decide the case. However, it appears from the face of the record that the Petition in this case was *filed* with the Abuse Unit, but there is no indication that it was initially reviewed by the Abuse Unit. Moreover, Ms. Eaton failed to raise this argument before the ALJ. Unlike S.D. Warren/CCMSI, Ms. Eaton did not raise any objection to proceeding before the ALJ, either before the decision or in her Motion for Findings of Fact and Conclusions of Law. Having failed to raise the issue at any point in this litigation prior to her Reply Brief to this panel, she has waived that issue. *See Pelletier v. Irving Forest Prods., Inc.*, Me. W.C.B. No. 17-39, ¶ 11 (App. Div. 2017).

whether penalties should have been imposed against S.D. Warren pursuant to sections 324 and 359.

[¶9] Ambiguity has been defined as language that is "reasonably susceptible of different interpretations." *Blanchard v. Sawyer*, 2001 ME 18, ¶ 4, 769 A.2d 841 (quotation marks omitted). When an ALJ acts to clarify an ambiguity in a judgment, the ALJ's interpretation of the ambiguity is reviewed for a reasonable exercise of discretion. *See Thompson v. Rothman*, 2002 ME 39, ¶¶ 6-8, 791 A.2d 921. The issue of whether ambiguity exists is reviewed de novo as a question of law. *Id.*

[¶10] The ALJ interpreted the amended decree as follows:

> I am not persuaded that the Board's February 2001 findings changed the *mandate* of its initial decision that Ms. Eaton must be paid based on the 1998 average weekly wage. I conclude that the findings are completely consistent with the underlying decree, except for the last sentence, which simply doesn't make sense in the context presented. In addition, there is no finding of apportionment or explanation why the 1983 average weekly wage would control the benefit. Finally, there is no mandate or order contained in the language of the findings.

[¶11] We conclude that the 2001 amended decree is ambiguous on its face. The 2001 amended decree itself is internally inconsistent. The ALJ agreed that it is "indecipherable and ungrammatical." It refers in the second sentence to the 1998 AWW, as if that were controlling, and then concludes in the final sentence by stating incorrectly that the employee is being paid pursuant to the 1983 AWW.

This ambiguity is only compounded when the original and amended decrees are considered together. The 2001 amended decree must be read in conjunction with the 2000 original decree. It cannot stand alone because it consists entirely of one additional paragraph, numbered 15, which begins: "[a]s set forth above. . . ." When read together with the original decree, which (in paragraph 14) clearly directs payment based on the 1998 AWW, it is confusing and unclear which AWW should control, the 1983 or the 1998.

[¶12] In the absence of any language in paragraph 15 explicitly stating that the 1983 AWW is to be adopted in place of the previously adopted 1998 AWW, we conclude that the ALJ's assessment of the 2001 amended decree falls well within the bounds of a reasonable exercise of her discretion. As she found, the final sentence of the additional paragraph contained in the 2001 amended decree does not fit in the context of this case. It was reasonable to construe that sentence as not mandating payment based on the 1983 AWW, including annual inflation adjustments. It was also reasonable to conclude that S.D. Warren was instead required by the original 2000 decree to pay based on the 1998 average weekly wage, as capped by the maximum compensation rate, and that it actually overpaid for several years. Because S.D. Warren was erroneously paying more than the decree required, it did not act improperly when adjusting the benefit to the correct weekly rate in 2005, along with filing a Modification of Compensation form. Thus,

the ALJ did not err when concluding that Ms. Eaton had not established a violation of either section 324 or 359.

III. CONCLUSION

The entry is:

The administrative law judge's decision is affirmed.

Administrative Law Judge Stovall, dissenting

[¶13] I respectfully dissent. As the majority notes, "The [November 3, 2000] decree expressly directed S.D. Warren to pay incapacity benefits based on the average weekly wage (AWW) for the 1998 injury date, stating: 'Payments of compensation to her must be based upon the average weekly wage in 1998 which was $844.70. . . . Her benefits are capped at $458.83 pursuant to §§ 102(4)H [sic], 211 and A-10.' S.D. Warren began paying weekly incapacity benefits of $458.53 pursuant to the decree."

[¶14] In response to Ms. Eaton's Motion for Findings of Fact and Conclusions of Law, the hearing officer on February 7, 2001, issued an amended decree that stated in part: "The initial decree of NOVEMBER 3, 2000 stands *unless specifically contradicted*" by the amended decree. (Emphasis added). The new paragraph stated in part:

> Since Ms. Eaton is receiving total compensation based upon her \$342.57 average weekly wage that the original compensation rate of \$228.38 must be inflated pursuant to the law in effect on that date of injury and stands as of August 30, 2000, at \$455.06 in weekly compensation.

[¶15] There seems to be no dispute that the AWW cited in the amended decree, \$342.57, was the AWW for the 1983 injury. In my opinion, the change of payments from the 1998 date of injury to the 1983 date of injury, along with the explicit language regarding inflation adjustments, specifically contradict the original decree.

[¶16] The ALJ in the August 16, 2016, decree wrote:

> The notation "no more COLA increases" contained in the January 13, 2005 MOD, as well as the Employer's practice of checking the "COLA" box on MOD's filed in previous years, adds some level of confusion to the analysis in this matter.
>
> I note, however, that the MOD's also state "increase to maximum compensation rate" and I find it likely that was the Employer's intent. I base this finding on the fact that they were *advised* to pay on the 1998 wage and that the amounts paid over the years are consistent with that *choice*. *If the Employer had been paying on the 1983 wage, for instance, I find that the Employee's benefit would have been reduced from \$458.83 to \$455.06 as a result of the Board's February 2001 findings.*

(Emphasis added).

[¶17] First, I do not believe S.D. Warren has a choice on which date to make payment after a decree. S.D. Warren had no authority to invalidate the amended decree by choosing to pay under another date of injury. Second, the ALJ's August 16, 2016, decree indicates that *had* the payments gone from \$458.83

to $455.06, that would be evidence that the payments were made under the 1983 date of injury.

[¶18] What is important to acknowledge is that this is *exactly* what the amended decree ordered. The original decree of November 3, 2000, ordered payments in the amount of $458.83. The amended decree ordered payments in the amount of $455.06.

[¶19] S.D. Warren's claim that the amended decree did not change the earlier ruling that payment should be based on the 1998 AWW is unpersuasive. This argument suggests that the new paragraph was added for no purpose. By the amended decree's plain language, the order of payment changed to the average weekly wage related to the 1983 date of injury. I am unable to find ambiguity in that fact.

[¶20] It appears to me that S.D. Warren understood that it was to pay under the 1983 date of injury and resorted to improper self-help to change this fact. On January 13, 2005, S.D. Warren/Helmsman filed a Modification of Compensation form reducing the compensation rate from $523.20 to $455.51, noting "EXCEEDED ORIGINAL CR IN ERROR … CORRECTING … NO MORE COLA INCREASES DUE." Because COLA increases only apply to pre-1993 dates of injury it seems that S.D. Warren was aware that Ms. Eaton was to be paid under the 1983 date of injury.

[¶21] I believe S.D. Warren's argument is off the mark. A mistake that was not appealed and has the effect of *res judicata* is being interpreted as an ambiguity. While the original hearing officer appears to have made a mistake in his amended decree, this cannot be corrected by a later judge without a proper motion to correct.[2] *Chmielewski v. J.C. Management*, 2001 ME 160, ¶¶ 7-8, 785 A.2d 338. It is well established that a valid judgment entered by a court, if not appealed from, generally becomes *res judicata* and is not subject to later collateral attack." *Standish Tel. Co. v. Saco River Tel. & Tel. Co*., 555 A.2d 478, 481 (Me. 1989).

---

[2] In *Ervey v. Northeastern Log Homes*, the employer argued that it was not obligated to abide by an original decree because the original ordered benefits to the employee to which he was never entitled and therefore the decree was void when issued in 1986. 638 A.2d 709, 709 (Me. 1994). In 1993, a hearing officer agreed and declared the 1986 decree invalid. *Id.* The Law Court found that the board had no authority to do this, stating: "[T]here was no indication in the record that Northeastern was prevented in any way from appealing the Commission's 1986 decision. Instead, Northeastern chose to wait seven years before attempting to invalidate the 1986 decree. Moreover, Northeastern cites no statutory authority for the action of the Board." *Id.* at 711-12.

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.
45 Mallett Drive
Freeport, ME 04032

Attorneys for Appellees:
Cara Biddings, Esq.
Timothy J. Wannemacher, Esq.
ROBINSON, KRIGER & McCALLUM
12 Portland Pier
Portland, ME 04112

Thomas E. Getchell, Esq.
TROUBH HEISLER
P.O. Box 9711
Portland, ME 04112