State of Maine	Supreme Judicial Court sitting as the Law Court Docket no. WCB-24-163
Katherine Stovall, Appellee, v. New England Telephone Co., Appellant.	Appeal from Maine Workers' Compensation Board

Appellee's Reply Brief

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Issues Presented for Review

(1) The distinction between the issue preclusion and claim preclusion prongs of res judicata and whether the Appellate Division erred in its interpretation or application of claim preclusion in this case.

(2) Whether the statute of limitations period was effectively tolled by the Employer-Appellant's failure to follow the required procedure for discontinuance.

(3) Whether Verizon's assertion about an offset has been preserved for appeal, whether remand to the Appellate Division for clarification of the Appellant-Employer's payment obligations would be moot, and whether the Appellate Division's disposition of the appeal was affected by an error of law.

Summary of the Appellee's Argument

(1) The Appellant-Employer ("Verizon") has not properly distinguished the two prongs of res judicata in its brief. Regardless, the Appellate Division did not err when it interpreted and applied res judicata precedents.

(2) The Appellate Division did not err when it determined that the statutory limitations period had been extended because a 2006 decree has decided that the 2001 injury significantly aggravated the 1996 injury and because the ongoing payment scheme gives Verizon contemporaneous notice that its payments for the 2001 injury are in part necessitated by the 1996 injury. Moreover, issue preclusion should preclude re-litigation of this issue.

(3) Finally, the Appellate Division did not err by declining to issue a remand instead of ordering specific relief itself. Verizon did not necessarily preserve this argument for appeal. The proper procedure for Verizon is to make payment as required for the accepted claim and then petition the Workers' Compensation Board for a reduction or termination of benefits. Also, Verizon is not entitled to its requested offset, and a remand would be moot.

Appellee's Argument

Introduction

1. Now that Verizon's appellate brief can be reviewed, the Employee-Appellant ("Stovall") and her undersigned counsel can respond to its arguments. *See* M.R. App. P. 23(c)(2(C). Verizon's arguments, in the parts where they are clear despite repeated failures to follow important rules of appellate procedure,[1] suggest that Verizon has brought this appeal for improper purposes. Its arguments about res judicata, contemporaneous notice, and the calculation of retrospective offsets are simply unsupported by the black-letter law or applicable precedent. In addition, its concern about the calculation of offsets on a prospective basis have to be dealt with by the Workers' Compensation Board (the "Board").

Res Judicata

The res judicata issue here, as discussed previously, may be subject to one of two different standards of review. If the dispositive issue is whether the Appellate Division erred in its exercise of discretion over procedural matters, then the review is deferential

[1] The undersigned counsel is filing separately a motion to strike.

and seeks to ensure there was no abuse of discretion. *See Bailey v. City of Lewiston*, 2017 ME 160, ¶ 9, 168 A.3d 762. But if the issue is whether the Appellate Division erroneously interpreted Law Court precedents about res judicata, then the review may be *de novo*. *Michaud v. Caribou Ford Mercury Inc.*, 2024 ME 74, ¶ 13, _A.3d_.

2. Because Verizon has not made any argument about the appropriate standard of review in its brief, *see* M.R. App. P. 7A(a)(1)(G), Stovall's position here is that Verizon has forfeited any argument in favor of the more stringent *de novo* review, *see Holland v. Sebunya*, 2000 ME 160, n. 6, 759 A.2d 205 ("The failure to mention an issue in the brief or at argument is construed as either an abandonment or a failure to preserve that issue."). Hence, the Court's review should be for abuse of discretion only, and the Court only has to ensure, in effect, that the decision made: fell within the accepted range of choices available to the Appellate Division, *Forest Ecology Network v. Land Use Reg. Comm'n*, 2012 ME 36, ¶ 28, 39 A.3d 74; was reasonable under the circumstances, *see Johnson v. Home Depot USA, Inc.*, 2014 ME 140, ¶ 11, 106 A.3d 401; and was not fundamentally unfair, *Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 807 (Me. 1985).

3. A fair reading of Verizon's brief indicates that the essence of its res judicata argument, *see*, *e.g.* Blue Br. 15 ("res judicata includes claims that 'may have been' litigated"), concerns the prong of res judicata called "claim preclusion," which "bars the relitigation of claims if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, *or might have been*, litigated in the first action," *Federal National Mortgage Ass'n v. Deschaine*, 2017 ME 190, ¶ 15, 170 A.3d 230 (quotation marks omitted and emphasis added). The claim at issue here has not been litigated to anything like a final judgment, and the Appellate Division was not obligated under binding case law or the governing statute to expand administrative res judicata to encompass the "might have been litigated" principle. It did not abuse its discretion by rejecting an employer's proposal for a broad expansion of claim preclusion that might run afoul of the statutory scheme.

4. Even if the Court engages in a *de novo* review of the Appellate Division's decision on the res judicata issue, it should find no error of law. Verizon's brief asserts: "There is absolutely no

question that" the Court's res judicata precedents "include[s] claims that 'may have been' litigated." Blue Br. 15. But that brief has pointed to no Law Court precedent that applied that principle to a workers' compensation matter. *See*, *e.g.*, *Grubb v. S.D. Warren Co.*, 2003 ME 139, 837 A.2d 117 (issue preclusion); *Blance v. Alley*, 1997 ME 125, 697 A.2d 828 (civil case). The undersigned counsel has researched the issue extensively and is not aware of any. On the contrary, the Law Court has held that a workers' compensation decision is not given res judicata effect if, *inter alia*, "the scheme of remedies permits assertion of the second claim" or "giving res judicata effect to the [Board's] decision would be incompatible with [a] legislative policy." *Ervey v. Northeastern Log Homes, Inc.*, 638 A.2d 709, 711 (Me. 1994). Title 39-A has no provision requiring the kind of mandatory consolidated litigation that the Employer is proposing, *see* § 305 (requirements of petition for award), and imposing one judicially would be incompatible with the legislative goal of "just" administration of claims, § 153. The Appellate Division has explained elsewhere: "Workers' compensation cases can last for many years and involve multiple rounds of litigation, as an injured worker's entitlement to benefits can extend for a lifetime and will

often involve many issues over time. It is often not apparent whether an issue should have been litigated at one time as opposed to another." *Madore v. Antonio Levesque & Sons, Inc.*, Me. W.C.B. No. 21-29, ¶ 10 (App. Div. 2021).

Contemporaneous Notice Issues

5. The appellee's brief's arguments on the contemporaneous notice issue — *i.e.* that it may be a factual finding not subject to appellate review and that, in any event, issue preclusion bars reconsideration of it at this late date, *see* Red Br. 20 – 21 — addressed Verizon's arguments on this issue. It bears reiterating that Verizon has forfeited any argument about the appropriate standard of review by failing to discuss it at all, *see Holland* n. 6, and, thus, the Court should adopt Stovall's proposal that this issue should not be reviewable at all because it is a factual determination, *see* 39-A M.R.S. § 322(3).

6. Moreover, its argument about contemporaneous notice, *see* Blue Br. 18 – 24, is contravened by binding precedents, *see*, *e.g. Klimas v. Great Northern Paper Co.*, 582 A.2d 256, 257 (Me. 1990) ("a workers' compensation payment by an employer [on a second injury] … with notice that the payment related in part to the

first injury does toll the statute of limitations on first-injury claims"). Finally, the statutory deadline to petition for compensation was tolled for the duration of Verizon's obligation to make payments to Stovall, *cf. Charest v. Hydraulic Hose & Assemblies, LLC*, 2021 ME 17, 247 A.3d 709 ("offsetting Social Security old-age insurance benefits must be treated as primary payments of workers' compensation" for tolling purposes), which, at the time of the Appellate Division's second decision, had not terminated because Verizon had not followed the required procedure to obtain permission from the Board to discontinue benefits, A. 68 – 69. *See also Johnson v. Bath Iron Works Corp.*, 551 A.2d 838, 839 – 840 (Me. 1988) (employer's "unconditional obligation" to pay employee's attorney's fee under Title 39 tolled limitations period).

Remand Issue

7. Verizon's brief suggests that the Appellate Division's exercise of its discretion about whether to vacate and remand or to directly modify the contract ALJ's decree was "an error of law that must be corrected." Blue Br. 26. That is not correct, even if read as Verizon's description of the standard of review. The Appellate Division had clear statutory authority under § 321-B(3) to "modify"

the contract ALJ's decision rather than remanding the decision to that ALJ, and, therefore, this part of its decision comes under the deferential standard of review for abuse of discretion. *See McAdam v. United Parcel Service*, 2001 ME 4, ¶¶ 31 – 35, 763 A.2d 1173. The Court may, however, instead review the decision to discern whether is was "affected … an error of law." *Bailey* ¶ 9 (quotation marks omitted). The Appellate Division's construction of the black-letter law is given significant deference by the Court. *Huff v. Regional Trans. Program*, 2017 ME 229, ¶ 9, 175 A.3d 98 (court "will uphold the Appellate Division's interpretation unless the plain language of the statute and its legislative history compel a contrary result") (quotation marks omitted).

8. As a threshold matter, it is fair to question whether Verizon actually preserved this argument for appellate purposes. The Law Court generally will hear an unpreserved argument in an appeal from a civil or administrative case only if "a fundamental liberty interest is at stake." *Warren Construction Group, LLC v. Reis*, 2016 ME 11, ¶ 9, 130 A.3d 696. "An issue is raised and preserved if there was a sufficient basis in the record to alert the court and any opposing party to the existence of that issue." *Id.* (quotation marks

removed). As far as the undersigned counsel can see in the record, Verizon did not make any argument about offsets for post-injury earnings before the Workers' Compensation Board at any point and did not file a motion with the Appellate Division seeking an amendment of its decision. In addition, Verizon's brief has not cited to any part of the record that would show that evidence of those earnings.

9. The only fundamental liberty interests that the Law Court's civil precedents seem to recognize involve a parent's "right to direct and control a child's upbringing," *Rideout v. Riendeau*, 2000 ME, ¶ 18, 761 A.2d 291, and the calculation of workers' compensation benefits is not even remotely similar to such an interest. It is not certain that Verizon preserved this argument for consideration here, and it is not an argument about an issue that should be considered if it is unpreserved.

10. Moreover, this issue may become partially moot soon. Mootness is "the doctrine of standing set in a time frame" because it requires a party to maintain its standing throughout the course of litigation. *Madore v. Me. Land Use Regulation Comm'n*, 1998 ME 178, ¶ 8, 715 A.2d 157. "A court confronted with a claim of

mootness must determine whether there remain sufficient practical effects flowing from the resolution of the litigation to justify the application of limited judicial resources." *Id.*

11. Verizon's brief indicates that it has filed a petition for review. Blue Br. 26. The petition for review is a mechanism to get the Board's permission to reduce or discontinue benefits. § 205(9)(B)(2). It is governed in part by a Board rule, *see* 90-351 C.M.R. ch. 8, § 15, and it is subject to "an expedited procedure" upon request, 39-A M.R.S. § 205(9)(E). If the Board reduces or discontinues Stovall's compensation payments to account for post-injury earnings in accordance with § 205(9)(B)(2), then the calculation of Stovall's weekly benefit amount on an ongoing basis obviously will be moot.

12. Again, the Court may review the decision to see whether it was affected by an error of law rather than an abuse of discretion. Verizon obviously failed to follow the requisite procedure for discontinuance of benefits after it accepted Stovall's claim, and that means the calculation of a possible offset against retroactive compensation for her earnings is likewise moot because there is no basis in the law for the proposed offset under these circumstances.

If an employer wants to reduce or discontinue compensation benefits for any reason "other than the return to work or increase in pay of the employee" with that same employer, then it must follow specific statutory requirements. 39-A M.R.S. § 205(9)(B). If the employer has an ongoing payment obligation pursuant to a "compensation scheme," then it "shall petition the board for an order to reduce or discontinue benefits and may not reduce or discontinue benefits until the matter has been resolved by a decree issued by an administrative law judge." 39-A M.R.S. § 205(9)(B)(2). The use of *shall* here, of course, "indicate[s] a mandatory duty. 1 M.R.S. § 71(9-A).

13. The Appellate Division stated: "A memorandum of payment marked 'your claim is accepted' serves the same legal function as a board decision on the merits of a claim." A. 67. This is based on a logical reading of the Board's rules, which provide a gloss on the statute as well as procedural requirements. "'Compensation payment scheme' means the procedure whereby an employer is required to provide compensation or other benefits under this Act to an employee." 39-A M.R.S. § 102(7). An employer has three options when presented with an employee's claim for

incapacity benefits: acceptance of the claim, voluntary payment without prejudice, and denial. 90-351 C.M.R. ch. 1, § 1. "Payment without prejudice does not constitute a payment scheme." 90-351 C.M.R. ch. 1, § 2(1). Denial of a claim cannot logically constitute a payment scheme, of course, but it makes intuitive sense that acceptance of a claim for compensation would create a payment scheme. Moreover, by way of analogy, one expressly included kind of *compensation payment scheme* (from the non-exhaustive list) is acceptance under the "early-pay system" from Title 39, 39-A M.R.S. § 102(7), and under that system if an employer filed an acceptance of a claim then it was bound by that acceptance in the absence of fraud, *Ingalls v. State Dep't of Conservation*, 556 A.2d 1089 (1989). Hence, the Appellate Division's construction of the black-letter law, which is given reasonable deference by the Court, *Huff* ¶ 9, was not erroneous.

14. Verizon (or its predecessor company) "created a compensation payment scheme when it filed the memorandum of payment" in 2005, A. 68 (2024 appellate division decision at ¶ 25), but it did not make all the payments that it was obligated to make, A. 58 (2024 appellate division decision at ¶ 5), because it did not

petition the Board for permission to reduce or terminate its payment obligation, A. 68 – 69 (2024 appellate division decision at ¶ 25). Verizon is, in effect, asking for this to be done on an *ex post facto* basis, but neither the Court nor the Board has the authority to grant such a request.

15. Because of its failure to follow the required procedure, Verizon, as a matter of law, had no basis under the statute to offset its benefit obligations to account for Stovall's earnings. There is nothing that a remand to the Board, whether ultimately decided by the Appellate Division or another contract ALJ, would achieve because the Board could only decide whether Verizon hypothetically would have been able to reduce or discontinue benefits if it had in 2011, for example, followed the legal mechanism that could give it the authority to do so. That would be an absurd waste of time.

Conclusion

16. In summary, this Court has no valid reason to vacate the Appellate Division's decision, and it should issue a summary order to the effect that the appeal was improvidently granted, applying M.R. App. P. 23(c)(4), unless the Court dismisses the appeal for failure to comply with the appellate rules, *see generally* Appellee's

Mot. Strike Brief. Otherwise, Stovall would request a memorandum decision pursuant to M.R. App. P. 12(c) that briefly affirms the agency's decision. *See, e.g. Harris v. Kelley Mech., Inc.*, Mem-07-155 (Jan. 16, 2007) (finding no error and affirming hearing officer's decision).

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date

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