GARY DAY
(Appellant)

v.

S.D. WARREN CO.
(Appellee)

and

CCMSI

and

LIBERTY MUTUAL INSURANCE CO.
(Insurer)

Argued: September 4, 2013
Decided: May 1, 2014

PANEL MEMBERS: Hearing Officers Pelletier, Greene, Stovall
BY: Hearing Officer Greene

[¶1] Gary Day appeals a decision of a Workers' Compensation Board hearing officer (*Jerome, HO*) granting in part his Petitions for Award related to February 2007 and October 2010 work injuries; denying his Petition for Payment of Medical and Related Services related to the October 2010 date of injury; denying S.D. Warren Co.'s Petition to Determine Extent of Permanent Impairment related to a November 1998 date of injury; and granting in part S.D. Warren's Petition for Review pertaining to that same injury.[1] Mr. Day contends that the

[1] S.D. Warren was insured by Liberty Mutual at the time of the 1998 injury, and CCMSI at the time of the 2007 and 2010 alleged work injuries.

hearing officer erred mainly when: (1) determining that his ongoing earning incapacity is not causally related to his 2007 and 2010 work injuries; and (2) calculating his ongoing partial incapacity benefit based on the difference between the average weekly wages associated with the 1998 injury and the October 2010 injury, without considering evidence of his work search. We affirm the hearing officer's decision.

## I. BACKGROUND

[¶2] Mr. Day, now 62, worked for S.D. Warren at its Westbrook paper mill from 1972 until 2012, mostly as pipefitter/welder. Mr. Day suffered a work-related gradual injury to his neck on February 28, 1992. He underwent cervical fusion surgery at the C5-6 level, which was performed by Dr. D'Angelo. The present proceeding did not involve a claim based on this injury.

[¶3] On November 23, 1998, Mr. Day suffered a work-related injury to his hands and wrists, for which he underwent bilateral carpal tunnel release surgeries in 1999. His doctor restricted him from working overtime and limited the amount of lifting he could do to no more than 50 pounds. Mr. Day experienced wage loss as a result, and S.D. Warren voluntarily paid Mr. Day partial incapacity benefits at varying rates.

[¶4] By Board decision dated May 11, 2006, it was determined that Mr. Day's 1998 work injury resulted in a 12% whole person permanent impairment

from his bilateral upper extremity condition and therefore there was no durational limit applicable to Mr. Day's receipt of partial incapacity benefits under 39-A M.R.S.A. § 213(1) (Supp. 2013) for that injury.

[¶5] Mr. Day was subsequently injured at work on two more occasions. On February 1, 2007, an overhead door fell and struck Mr. Day, causing an injury to his neck, arms, and shoulders. He was out of work for about two months, and was treated with osteopathic manipulation. No additional work restrictions were imposed. Mr. Day experienced infrequent neck pain and C7 radicular symptoms both before and after the 2007 injury.[2]

[¶6] On October 29, 2010, Mr. Day suffered a work-related injury when he hit his head against a large metal hopper. He was wearing a hard hat at the time, and did not immediately lose any time from work or seek medical treatment. He went on vacation two weeks after the incident. On December 12, 2010, Mr. Day woke with severe pain in his neck and left arm that impelled him to go to the emergency room. He was later seen by Dr. D'Angelo, who diagnosed him with a cervical disc herniation at C6-7. In March 2011, Mr. Day underwent a surgical microlaminotomy and microdiscetomy.

[2] The hearing officer found that Mr. Day did not suffer an injury to his low back or right leg as a result of the 2007 event, as he had claimed.

[¶7] Mr. Day returned to work as a pipefitter after recovering from the surgery, but he had continuing problems that resulted in increased restrictions, which S.D. Warren could not accommodate. He has been out of work since July 21, 2011.

[¶8] S.D. Warren filed a Petition for Review and a Petition to Determine the Extent of Permanent Impairment, seeking to reduce or terminate benefits related to the 1998 injury. Mr. Day filed Petitions for Award with respect to the 2007 and 2010 injuries, and a Petition for Payment of Medical and Related Services with respect to the 2010 injury.

[¶9] The hearing officer granted Mr. Day the protection of the Act for the 2007 and October 2010 injuries, thus establishing the compensability of these occurrences, but awarded no additional wage loss or medical payments for those injuries. She specifically determined that the effects of those injuries had resolved before Mr. Day began experiencing the symptoms in December 2010 that required surgery.

[¶10] The hearing officer also granted S.D. Warren's Petition for Review in part, and awarded ongoing partial incapacity benefits for the 1998 injury, specifically excluding any incapacity or medical payments for the December 2010 neck condition and surgery, pursuant to 39-A M.R.S.A. § 201(5) (Supp. 2013).

[¶11] The hearing officer issued additional findings of fact and conclusions of law, but did not alter the outcome. Mr. Day appeals.

## II. DISCUSSION

### A. The 2007 and October 2010 Work Injuries

[¶12] Mr. Day argues that the hearing officer erred when finding that the effects of the 2007 and October 2010 work injuries had ended, and that the December 2010 neck condition was causally unrelated to these prior work injuries. He contends that it was error to reject causation opinions in written reports provided by Dr. D'Angelo, Mr. Day's surgeon, and Dr. Herzog, who examined Mr. Day pursuant to 39-A M.R.S.A. § 207 (Supp. 2013), at the request of the insurer, Liberty Mutual, for the 1998 work injury. He asserts particular error in the hearing officer's selectively adopting an opinion expressed by Dr. Herzog in his deposition that is inconsistent with the opinion expressed in his written report. We disagree with Mr. Day's contentions.

[¶13] The hearing officer was entitled to reject the written opinions of Dr. Herzog and Dr. D'Angelo, and accept as more persuasive the opinion expressed by Dr. Herzog during his subsequent deposition testimony. The hearing officer specifically found the written opinions of Dr. D'Angelo and Dr. Herzog to be unpersuasive because they were both "based on a misapprehension of the actual facts." After being provided with a hypothetical version of the underlying facts,

which the hearing officer found to more closely resemble the credible record evidence, Dr. Herzog testified that Mr. Day's onset of symptoms on December 12, 2010 and his resulting inability to earn was not caused by the 2007 or October 2010 work injuries.

[¶14] Mr. Day, having the burden of proof on this issue, must demonstrate on appeal that the record compelled a conclusion contrary to that reached by the hearing officer. *See Anderson v. Me. Pub. Employees Ret. Sys.*, 2009 ME 134, ¶ 28, 985 A.2d 501; *Kelley v. Me. Pub. Employees Ret. Sys.*, 2009 ME 27, ¶ 16, 967 A.2d 676; *see also Savage v. Georgia Pac. Corp.*, Me. W.C.B. No. 13-5, ¶ 7 (App. Div. 2013). Because the hearing officer's findings are supported by competent evidence, the record does not compel such a conclusion.

B. The Measure of Partial Benefits for the 1998 Injury

[¶15] When determining the amount of Mr. Day's partial incapacity benefit for the 1998 work injury, the hearing officer used the average weekly wage associated with the October 29, 2010 work injury ($1020.80) as the measure of Mr. Day's earning capacity before going out of work in December 2010 due to the nonwork injury. She then concluded that the difference between this amount and the average weekly wage for the 1998 work injury ($1249.09) was the level of earning incapacity resulting from 1998 injury itself, without consideration of any additional disability resulting from the subsequent, nonwork-related condition.

[¶16] Mr. Day argues that calculating his benefit without regard to the evidence of his work search was error. He raises a novel question: what is the appropriate level of partial incapacity benefits for an employee who has physical limitations resulting from the combined effects of a work injury and a subsequent nonwork-related injury, and who has conducted an unsuccessful search for work?[3]

1. Subsequent Nonwork-Related Injury

[¶17] Subsequent nonwork-related injuries are governed by 39-A M.R.S.A. § 201(5), which provides:

> If an employee suffers a nonwork-related injury or disease that is not causally connected to a previous compensable injury, the subsequent nonwork-related injury or disease is not compensable under this Act.

[¶18] In *Pratt v. Fraser Paper, Ltd.*, 2001 ME 102, ¶¶ 6, 15, 774 A.2d 351, the Law Court held that an employee who had suffered a work-related right knee injury and a subsequent nonwork-related heart attack could not be awarded total

[3] Mr. Day also argues that the because the hearing officer found no change in his medical circumstances with respect to the 1998 carpal tunnel injury since the 2006 decree, S.D. Warren did not meet the burden of proof that would justify altering the compensation rate that had been in effect. *See Grubb v. S.D. Warren Co*., 2003 ME 139, ¶ 7, 837 A.2d 117. ("In order to prevail on a petition to increase or decrease compensation in a workers' compensation case when a benefit level has been established by a previous decision, the petitioning party must first meet its burden to show a 'change of circumstances' since the prior determination, which may be met by either providing 'comparative medical evidence,' or by showing changed economic circumstances."). S.D. Warren was paying Mr. Day varying rates partial benefits voluntarily and without prejudice at the time of the 2006 decree, and its petition for review, filed in conjunction with its petition to determine extent of permanent impairment, sought only a determination the durational limit for partial benefits under section 213 had expired due to the level of permanent impairment. Thus, the only issue adjudicated at that time was permanent impairment. No benefit level had been established; therefore res judicata did not limit the hearing officer in addressing the compensation level in these proceedings.

incapacity benefits pursuant to the applicable total incapacity statute, 39 M.R.S.A. § 54-B (1989), based on the "totality of [his] physical limitations" from both conditions if the work injury itself was only partially incapacitating. The Court explained that 39-A M.R.S.A § 201(5) "requires the Hearing Officer to separate out the effects of the subsequent nonwork-injury in calculating the amount of benefits and in determining whether the compensation level for the benefits is governed by the partial incapacity section or the total incapacity section." *Pratt*, 2001 ME 102, ¶ 12. This process does *not* involve apportioning the disability between the work and nonwork-related injuries. *Id.*

[¶19] Thus, *Pratt* requires that the physical limitations from the work injury be looked at in isolation to determine the amount of partial incapacity benefits to be awarded, or entitlement to total versus partial incapacity benefits. *See also Roy v. Bath Iron Works*, 2008 ME 94, ¶ 15, 952 A.2d 965 (reiterating, in a case involving a totally incapacitating work-related injury and a totally incapacitating subsequent nonwork-related condition, that "the purpose of section 201(5) is to assure that the impact of subsequent nonwork-related injuries is separated from the impact of work injuries for which benefits are paid, so that subsequent nonwork injuries do not increase the level or duration of workers' compensation benefits paid for work injuries.").

[¶20] It remains to be decided whether the hearing officer erred when calculating Mr. Day's partial compensation rate given his physical limitations from the combined effects of work and nonwork-related injuries, and the evidence of a work search he submitted in an attempt to prove entitlement to 100% partial incapacity benefits.

2. Work Search Rule

[¶21] "[A] partially incapacitated employee may be entitled to '100% partial' incapacity benefits . . . based on the combination of a partially incapacitating work injury and the loss of employment opportunities that are attributable to that injury." *Monaghan v. Jordan's Meats*, 2007 ME 100, ¶ 13, 928 A.2d 786. "In order to obtain the 100% [partial] benefit, the employee must demonstrate, pursuant to the 'work search rule,' that work is unavailable within the employee's local community as a result of the work injury." *Avramovic v. R.C. Moore Transp., Inc.*, 2008 ME 140, ¶ 16, 954 A.2d 449. Where work is unavailable due to factors other than the employee's work-related physical limitations, such as a "general unavailability of jobs" in the community due to economic circumstances, the employee may not be entitled to an award of 100% partial incapacity benefits. *Coty v. Town of Millinocket*, 393 A.2d 156, 157 (Me. 1978); *see also Adams v. Mt. Blue Health Center*, 1999 ME 105, ¶ 18 & n.4, 735 A.2d 478; *Flanigan v. Ames Dep't Store*, 652 A.2d 83, 85 (Me. 1995) ("An

employee is only entitled to compensation for wages that are lost 'due to the injury,' and not due to general economic conditions.").

[¶22] The employer in *Pratt* did not challenge the hearing officer's finding that there was no "available work within the employee's community . . . within the employee's physical ability, considering his age, education, experience, *and multiple physical conditions*." 2001 ME 102, ¶ 14 & n.7, 774 A.2d 351. Therefore, the Court declined to address "this conclusion as a basis for a partial incapacity determination." *Id.* And, because Pratt did not appeal the hearing officer's decision to reduce the award of 100% partial benefits to 80% using the apportionment process expressly eschewed by the Court, the Court did not explain how to otherwise "separate out the effects of the subsequent nonwork-injury" when considering work search evidence. *Id.* ¶¶ 12, 15.

[¶23] Mr. Day presented evidence of an unsuccessful work search he performed beginning in March 2012, one year after his nonwork-related neck surgery and eight months after he last worked for S.D. Warren. The hearing officer's decision did not address whether the work search evidence established entitlement to 100% partial incapacity benefits. The hearing officer concluded, instead, that "the difference between Mr. Day's wage on the 2010 date of injury and his wage on the 1998 injury is a reasonable estimate of the extent of his incapacity related to his bilateral upper extremity issues."

[¶24] The requirement that the hearing officer separate out the effects of the subsequent, nonwork-related injury in a combined effects case, without the tool of apportionment, calls into question the usefulness of work search evidence in such a situation. As a practical matter, the availability of suitable employment in the community would ordinarily depend on the totality of an employee's physical limitations, and a work search geared only toward finding employment suited to the work-related restrictions—without considering the nonwork-related limitations—is likely to be a futile exercise. Where the work-related physical limitations themselves play a substantial role in limiting the availability of *any* suitable employment, an unsuccessful work search could be relevant in establishing an entitlement to 100% partial incapacity benefits. However, where the subsequent nonwork injury is the direct cause of the loss of a post-work-injury job, and plays a more dominant role in the inability to find work thereafter, work search evidence may not be relevant to whether work is unavailable in the community *as a result of the work injury*.

[¶25] The hearing officer measured Mr. Day's compensable earning incapacity by comparing the pre-injury average weekly wage with his average weekly wage in late 2010—a point close in time but prior to the nonwork-related

injury.[4] She found that additional restrictions imposed by Mr. Day's doctor in July 2011, which prevented him from continuing his job with the employer, were due to "ongoing effects of Mr. Day's cervical surgery." Moreover, she did not find any change in Mr. Day's physical limitations from the 1998 injury—the restrictions imposed due to the 1998 work injury remained in place. In effect, the hearing officer determined that after his 1998 work injury and before the totally disabling nonwork injury, Mr. Day had acquired a new wage earning capacity consisting of his actual earnings as of that point.[5]

[¶26] In view of (1) the stability of Mr. Day's condition from his 1998 injury, (2) the totally disabling nature of the December 2010 nonwork-related

[4] Mr. Day also contends that his earnings as of October 29, 2010, were not an accurate measure of his earning capacity because at that point S.D. Warren was providing him with sheltered work within his restrictions. *See Mailman v. Colonial Acres Nursing Home*, 420 A.2d 217, 220 (Me. 1980). The hearing officer, however, found as fact that the October 29, 2010, wage reflects a diminished earning capacity consistent with Mr. Day's restrictions against working overtime and lifting more than 50 pounds. The October 2010 wage constitutes competent evidence of Mr. Day's ability to earn after the 1998 work-related injury. And despite Mr. Day's contention that the hearing officer improperly based the burden of proof on the issue of residual earning capacity on him, evidence of his actual earnings alone was sufficient to meet S.D. Warren's burden of proof on the issue. *See Fecteau v. Rich Vale Constr., Inc.*, 349 A.2d 162, 165-66 (Me. 1975); *see also Flanigan v. Ames Dep't Store,* 652 A.2d 83, 84-85 (Me. 1995).

[5] The Act itself provides that an employee's post-injury employment for 100 weeks or more may establish a "new wage earning capacity," so that the loss of such employment, even without fault, may limit the employee to "wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of the termination of the employment of the employee, and the wages paid at the time of the injury." 39-A M.R.S.A. § 214 (1)(D)(2) (2001). And where, as here, that post-injury employment has totaled 250 weeks or more, "[t]here is a presumption of wage earning capacity established" by such employment. *Id. See also Maier v. Gen. Tel. Co. of Mich.*, 637 N.W.2d 263, 269 (Mich. App. 2001) (holding that presumption under nearly identical Michigan statute, from which Maine's section 214 was derived, is rebuttable). In determining whether a new wage earning capacity has been attained, Michigan courts have suggested that the following factors are relevant: "(1) the severity of the injury, (2) the severity of the resultant disability, (3) the nature of the reasonable employment performed, and (4) the reasons for the loss of the reasonable employment." *Doom v. Brunswick Corp.*, 535 N.W.2d 244, 246 (Mich. App. 1995).

condition (until Mr. Day returned to work in March 2011 following his cervical disc surgery), and (3) his removal from work on July 20, 2011, due solely to increased restrictions from his nonwork-related condition, we cannot say that the hearing officer's approach to excluding compensation for the nonwork-related injury to determine the proper compensation rate, consistent with Mr. Day having acquired a new wage earning capacity prior to the nonwork injury, was arbitrary or irrational, or involved a misapplication of law, particularly given the bar against an apportionment approach. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983); *see also Pratt*, 2001 ME 102, ¶ 12, 774 A.2d 351.

## III. CONCLUSION

[¶27] Competent evidence supports the hearing officer's conclusion that the Mr. Day's ongoing earning incapacity is not causally connected to work injuries he incurred in 2007 and in October 2010. Additionally, the hearing officer did not misconceive or misapply the law when establishing Mr. Day's partial compensation rate in a manner that separates out a subsequent, nonwork-related injury.

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. 2013).

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