MICHAEL D. PARENT
(Appellee/Cross-Appellant)

v.

NEWPAGE CORPORATION
(Appellant/Cross-Appellee)

and

SEDGWICK CMS
(Appellant/Cross-Appellee)

Argued: January 29, 2014
Decided: October 8, 2014

PANEL MEMBERS: Hearing Officers Collier, Elwin, and Pelletier
BY: Hearing Officer Pelletier

[¶1] NewPage Corporation appeals from a Workers' Compensation Board hearing officer decision (*Goodnough, HO*) granting Michael Parent's petitions and awarding him partial incapacity benefits for compensable injuries sustained while at work. NewPage contends that the award of partial benefits is not authorized by 39-A M.R.S.A. § 201(5) (2001) and is contrary to the Law Court's decision in *Roy v. Bath Iron Works*, 2008 ME 94, 952 A.2d 965. Mr. Parent cross-appeals, asserting that his disabling condition preexisted and was aggravated by his work injuries, and therefore he should have been awarded total incapacity benefits pursuant to 39-A M.R.S.A. § 201(4) (2001). We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Michael Parent worked at NewPage from 1990 until 2010, mainly as a millwright. In 2005 or 2006, he began to suffer from a nonwork-related inner-ear condition, vestibular dysfunction, which caused him to experience vertigo and balance problems. Due to that condition, he was restricted from working overtime, and from performing any work that involved climbing ladders or balancing at heights. NewPage accommodated these restrictions. Around that time, Mr. Parent also began to suffer from nonwork-related depression.

[¶3] In 2008 and 2009, Mr. Parent sustained work-related injuries to both elbows and his low back, respectively, as a result of forceful use of heavy tools at work.[1] He was given work restrictions related to these injuries, and continued to work under the restrictions related to the vestibular dysfunction, all of which NewPage accommodated.

[¶4] Mr. Parent was taken out of work on May 14, 2010, due to a mental condition diagnosed as severe, recurrent depression accompanied by anxiety and panic attacks. At that time, he was no longer working under restrictions from his work-related injuries, which had been lifted in late 2009. He has not returned to work since.

[1] The gradual injuries to the elbows were assigned an injury date of November 5, 2008, and the gradual low back injury occurred on or about November 30, 2009.

[¶5] Mr. Parent filed Petitions for Award related to the two work injuries. He argued that his totally disabling mental condition was a sequela of his work injuries. Mr. Parent claimed that his mental condition resulted from a hostile work environment at the mill, including demeaning work assignments and resentment by co-workers who were forced to work overtime when he was restricted from doing so.

[¶6] The hearing officer did not credit the evidence Mr. Parent adduced in support of his arguments, including an expert psychiatric opinion that a hostile work environment related to his work restrictions caused the recurrence of depression and anxiety in 2010. Instead, the hearing officer found, based largely on the contemporaneous history Mr. Parent gave his health care providers, that his work injuries were not the relevant stressors at the time leading to the recurrence of his depressive disorder, nor did a hostile work environment cause his condition.

[¶7] The hearing officer nevertheless awarded Mr. Parent partial benefits based upon light duty restrictions related to the work injuries to his elbows and back recommended by Dr. Pavlak in May 2011, a year after he last worked at NewPage. The hearing officer specifically found that Mr. Parent continued to suffer the effects of the two work injuries, and that he had misrepresented his condition to his doctor (who was also the mill doctor) in order to get the restrictions related to his elbow and back injuries removed in 2009.

[¶8] Both parties filed motions for further findings of fact and conclusions of law, which were denied by the hearing officer. NewPage filed this appeal, and Mr. Parent filed a cross appeal.

II. DISCUSSION

A. Subsequent Nonwork-Related Injury under 39-A M.R.S.A. § 201(5)

[¶9] NewPage contends the hearing officer misapplied 39-A M.R.S.A. § 201(5) when awarding ongoing partial benefits. Section 201(5) 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.

"[T]he 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." *Roy*, 2008 ME 94, ¶ 15, 952 A.2d 965; *see also Pratt v. Fraser Paper, Ltd.*, 2001 ME 102, ¶ 12, 774 A.2d 351. Thus, under section 201(5), after the effects of the subsequent nonwork injury are separated out, if the work injury is revealed to cause no work incapacity, the employer would have no continued liability for that injury. *See Roy*, 2008 ME 94, ¶ 24, 952 A.2d 965 (*Levy, J., concurring*). Conversely, after the effects of the subsequent nonwork injury are separated out, if the work injury is

revealed to continue to cause incapacity, the employer would have continued liability for that injury. *Cf. id.*

[¶10] The hearing officer here found as fact that Mr. Parent's mental condition in 2010 was not causally connected to his work injuries, and expressly stated in the decree that partial benefits were being awarded "solely in connection with his work-related orthopedic injuries, and nothing more." Thus, the hearing officer properly separated out the effects of the unrelated, subsequent nonwork injury.

[¶11] NewPage points to the language in *Roy* that indicates that under section 201(5), subsequent nonwork injuries cannot serve to increase or decrease compensation *benefit payments*, *see id.* ¶¶ 11, 15, and argues that because Mr. Parent was not receiving benefit payments at the time he became disabled by the nonwork-related condition, *Roy* should not be extended to authorize benefits in this case.

[¶12] We disagree with NewPage's interpretation of *Roy*. The hearing officer found that although NewPage was fully accommodating Mr. Parent at an undiminished rate of pay when he became totally disabled, Mr. Parent was nevertheless suffering the effects of compensable work injuries at that time. *See Bernier v. Data General Corp.*, 2002 ME 2, 787 A.2d 144 (remanding for application of section 201(5) to employee who was not receiving benefits at the

time she became partially incapacitated as a result of the combined effects of work and nonwork-related injuries). The hearing officer expressly found that Mr. Parent was working without elbow or back restrictions in May 2010 only because he had concealed his incapacity. The record supports this finding, as well as the hearing officer's determination that Dr. Pavlak's restrictions should apply retroactively to May 14, 2010.

[¶13] The hearing officer further found, supportably, that without normal use of his back and arms, Mr. Parent's employment options were quite limited, given his educational background and his lack of vocational experience beyond millwright work. The hearing officer was not compelled to find that NewPage was willing to accommodate the work-related restrictions indefinitely.

[¶14] Although Mr. Parent's subsequent disabling mental condition is not compensable, "[s]ection 201(5) says nothing about reducing or eliminating payments to disabled workers for their work-related injuries." *Roy*, 2008 ME 94, ¶ 11, 952 A.2d 965. Thus, after separating out the effects of the subsequent nonwork-related condition, the hearing officer neither misconceived nor misapplied the law when awarding partial benefits to Mr. Parent, whose partial disability made it unlikely that he could work as a millwright or in any other job

requiring heavy, physical labor.[2] *See Moore v. Pratt & Whitney Aircraft,* 669 A.2d 156, 158 (Me. 1995).

B. Preexisting Condition

[¶15] Mr. Parent cross-appeals contending that the hearing officer erred by not treating his depression dating back to 2006 as a preexisting condition which, in combination with his work injuries of 2008 and 2009, would entitle him to compensation for total incapacity pursuant to 39-A M.R.S.A. § 201(4).[3]

[¶16] Before the decree issued, Mr. Parent's primary contention had been that his disabling mental condition was a causally connected sequela of his work-related elbow and back injuries, and therefore was itself compensable. After the hearing officer found as a fact that Mr. Parent's depression began before his work-related injuries, and recurred sometime after his work-related injuries for reasons not causally connected to those injuries, Mr. Parent raised the argument in his motion for findings that the hearing officer was obliged to undertake an analysis pursuant to section 201(4).

[2] NewPage also contends that the hearing officer erred by not disqualifying Mr. Parent from receiving incapacity benefits based on an unreasonable refusal of a bona fide offer of employment pursuant to 39-A M.R.S.A. § 214(1)(A) (Supp. 2013). However, the record shows that this argument was raised for the first time after the decree issued, in NewPage's request for further findings. Because NewPage bore the burden of proof on this issue, *Avramovic v. R.C. Moore Transp., Inc*., 2008 ME. 140, ¶¶ 13-14; 954 A.2d 449, it is an affirmative defense, and NewPage was required to raise it in the Joint Scheduling Memorandum. Me. W.C.B. Rule, ch. 12, § 13. Because NewPage raised it so belatedly, it has waived consideration of the issue. *Id.* ("Any affirmative defenses must be raised in the Joint Scheduling Memo or will be deemed waived."); *cf. Waters v. S.D. Warren Co.*, Me. W.C.B. No. 14-26, ¶¶ 16-18 (App. Div. 2014).

[3] Title 39-A M.R.S.A. § 201(4) provides: "If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner."

[¶17] This argument fails for two reasons. First, the hearing officer found that employee's *recurrent* psychological condition, including depression, anxiety, and panic attacks, was a subsequent nonwork injury, not a preexisting condition. This is a finding of fact which we do not disturb on appeal. 39-A M.R.S.A. § 321-B(2) (Supp. 2013).

[¶18] Second, section 201(4) limits compensation for disability that results from work injuries that combine with, aggravate or accelerate preexisting *physical* conditions. *See Waters v. S.D. Warren Co.*, Me. W.C.B. No. 14-26, ¶ 15 (App. Div. 2014). Accordingly, even if it were a preexisting condition, it is not a physical condition, therefore section 201(4) is inapplicable. Based upon the facts as found by the hearing officer, which are supported by competent evidence, the employee is not entitled to total incapacity based on the combined effects of his work injuries and his mental condition.

III. CONCLUSION

[¶19] The hearing officer did not err when he declined to apply section 201(4) or section 214(1)(A) to the facts as found in his initial decree. Further, the hearing officer properly separated out the effects of the subsequent nonwork condition when awarding partial benefits pursuant to section 201(5).

The entry is:

The decision of the hearing officer 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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