JASON STEELE
(Appellant)

v.

STEVEN McGEE CONSTRUCTION
(Appellee)

and

AMERICAN INTERSTATE INSURANCE CO.
(Insurer)

Conference held: July 24, 2013
Decided: March 3, 2014

PANEL MEMBERS: Hearing Officers Elwin, Stovall, and Collier

Majority: Hearing Officers Collier and Elwin
Dissent: Hearing Officer Stovall

By: Hearing Officer Collier

[¶1] Jason Steele appeals from a decision of a Workers' Compensation Board hearing officer (*Knopf, HO*) granting Steven McGee Construction's (McGee Construction) Petition for Review related to a 2002 work injury.[1] Mr. Steele contends that the hearing officer erred by requiring him to prove that he suffers additional incapacity from a psychological condition that resulted from his work injury, and argues that instead, McGee Construction should have borne the

[1] Also decided by the hearing officer were McGee Construction's Petition to Determine Extent of Permanent Impairment and Mr. Steele's Petition for Payment of Medical and Related Services. The parties do not raise any issues related to these petitions on appeal.

ultimate burden to prove that he did not suffer additional incapacity from that condition. We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Jason Steele injured his low back and neck while working for McGee Construction on July 22, 2002. In a 2005 decree, the board (*Knopf, HO*) awarded him the protection of the Act for the injury, but awarded no ongoing incapacity benefits because he was able to continue working. Since that time, Mr. Steele's condition has deteriorated. He was taken out of work in May 2008, and McGee Construction began paying him 100% partial incapacity benefits. Those payments were made voluntarily—not pursuant to an "order or award of compensation or compensation scheme." *See* 39-A M.R.S.A. § 205(9)(B)(1) (Supp. 2013).

[¶3] In 2011, McGee Construction sought to reduce Mr. Steele's benefit. Instead of filing a 21-day certificate pursuant to section 205(9)(B)(1), McGee Construction filed a petition for review. During a two-day hearing, Mr. Steele submitted evidence that he suffered from depression as a result of his work injury.

[¶4] The hearing officer granted the petition for review. Based on the independent medical examiner's (IME) report, *see* 39-A M.R.S.A. § 312(7) (Supp. 2013), which in turn was based in part on a functional capacity evaluation, the hearing officer determined that Mr. Steele's benefit should be reduced to reflect a work capacity of twenty hours per week at minimum wage. The IME was not

asked to and did not consider the effect of Mr. Steele's depression on his capacity for work. The hearing officer noted that his counselor did not indicate that he was incapacitated as a result of his depression.

[¶5] Mr. Steele filed a Motion for Findings of Fact and Conclusions of Law, asking for specific findings regarding whether he suffers additional incapacity due to his psychological condition. The hearing officer issued additional findings, in which she stated as follows:

> Although the medical records make clear that Mr. Steele does suffer from depression and that the depression is related to the work injury, the board determined in its earlier decision that there was insufficient evidence to suggest that his depression added to his incapacity or totally incapacitated him. The board continues to so find. As such, the employer was not required to disprove incapacity related to the depression.

Mr. Steele filed this appeal.

II. DISCUSSION

[¶6] Mr. Steele contends that the hearing officer improperly allocated the burden of proof to him on the issue of whether he suffers incapacity as a result of the psychological component of his work injury. He contends that McGee Construction bore the burden to disprove incapacity related to his depression, or at most, that he bore only a burden of production on the issue of incapacity due to depression which, once met, shifted the ultimate burden of proof back to McGee Construction.

[¶7] The procedural posture of this case is anomalous. McGee Construction was paying Mr. Steele 100% partial incapacity benefits on a voluntary basis, rather than pursuant to an order or award establishing a fixed level of benefits subject to review. McGee Construction could have reduced Mr. Steele's incapacity benefits by filing a 21-day certificate pursuant to 39-A M.R.S.A. § 205(9)(B)(1), in which case, Mr. Steele could then have challenged the reduction by filing a petition for review and borne the burden of proof. Instead, McGee Construction chose to file a petition for review, as if it were seeking review of an order, award, or compensation scheme under 39-A M.R.S.A. § 205(9)(B)(2). This procedure, although not prohibited, is nevertheless not expressly contemplated by the Act. At issue is whether in these circumstances, the hearing officer improperly placed the ultimate burden of proof on Mr. Steele regarding incapacity due to work-related depression.

[¶8] "[A]s a general matter, the petitioning party bears the burden of proof on all issues." *Fernald v. Dexter Shoe Co*., 670 A.2d 1382, 1385 (Me. 1996). The Law Court has authorized a deviation from the general rule in certain cases "when placing the burden on the moving party is impractical or unreasonable." *Id*. For example, in *Farris v. Georgia-Pacific Corp.*, 2004 ME 14, ¶ 9, 844 A.2d 1143, the Court recognized that when application of the statutory cap on partial benefits is at issue, the moving party varies depending on whether there has been a formal

compensation scheme, or whether the employer is voluntarily paying benefits. *See also* 39-A M.R.S.A. § 205(9)(B)(1), (2). The Court therefore established a burden-shifting scheme to avoid the "potential for mischief" that would exist if the burden followed the moving party in these types of cases. *Farris*, 2004 ME 14, ¶ 12, 844 A.2d 1143.

[¶9] Pursuant to *Farris*, when it is the employer's petition for review under section 205(9)(B)(2) and the employee wishes to establish entitlement to partial benefits beyond the durational limit, the employee must meet a burden of production sufficient to raise a genuine issue whether the permanent impairment level exceeds the statutory threshold. The employer bears the ultimate burden to prove that the employee's permanent impairment does not exceed the threshold. *Id*. at ¶¶ 16-17. *See also Bisco v. S.D. Warren Co.*, 2006 ME 117, ¶¶ 12-14, 908 A.2d 625 (holding that the employee bears burden of production regarding whether permanent impairment ratings should be combined pursuant to 39-A M.R.S.A. § 213(1-A)(A) for purposes of imposing statutory cap on partial benefits, even when the employer bears the burden of proof).

[¶10] Mr. Steele contends that McGee Construction bore a never-shifting burden to disprove additional incapacity due to his work-related depression. Alternatively he argues because the posture of this case is similar to *Farris*, that once he presented evidence sufficient to meet a burden of production that he

suffers from work-related depression, McGee Construction bears the burden to prove that he did not suffer from additional incapacity from depression.

[¶11] In fact, the posture of this case differs from *Farris* in that here, there was no compensation scheme establishing the employee's initial entitlement to incapacity benefits. Nevertheless, we agree that in the somewhat unusual circumstances of this case, when there has been no previously adjudicated determination of work capacity yet the employer files a petition for review, McGee Construction, as petitioner, bore the ultimate burden of proof. However, to the extent that Mr. Steele sought to have the issue of incapacity resulting from the psychological consequences of his physical work injury considered, he bore an initial burden to produce evidence demonstrating the existence of a genuine issue (1) that he suffers from depression resulting from his work injury, and (2) that his work-related depression contributed to his work incapacity. *Cf. Farris*, 2004 ME 14, ¶ 16, 844 A.2d 1143 ("[T]he employee must produce competent evidence to suggest that the employee's whole body permanent impairment may be above the threshold for purposes of obviating the durational cap."); *Bisco*, 2006 ME 117, ¶¶ 12-14, 908 A.2d 625 (stating that the burden of production on the issue of whether work injuries should be stacked pursuant to 39-A M.R.S.A. § 213 requires the employee to create a genuine issue regarding whether one injury aggravates or accelerates another).

[¶12] The evidence submitted by Mr. Steele includes (1) medical records from his treating physicians indicating that he suffers from depression as a result of his work injury; (2) letters from a licensed clinical professional counselor stating that in her opinion, Mr. Steele suffers from Major Depressive Disorder, Severe, with a Global Assessment of Function (GAF) score of 35, which is indicative of impairment in several areas, and also stating that "Mr. Steele's mental health may, more likely than not, be negatively impacted by the demands of an employment setting"; and (3) notes from the treating physician for Mr. Steele's back condition, indicating that he is not sure that Mr. Steele could perform a work-at-home job because "his depression worsens when he is home all day and it has been worsening of late due to the pain exacerbations." No health care professional imposed any work restrictions or took Mr. Steele out of work due to his depression.

[¶13] While this evidence supports the hearing officer's factual finding that Mr. Steele suffers from depression as a result of his work injury, it does not create a genuine issue regarding whether Mr. Steele suffers *additional incapacity* due to his depression. It suggests at most that his psychological condition might get worse if he goes back to work or if he were to work at home. The hearing officer did not misconceive the law when stating that the evidence was not sufficient in this regard. *See Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995). To

the extent the hearing officer's decision on the Motion for Findings of Fact and Conclusions of Law may suggest that McGee Construction did not continue to bear the ultimate burden of proof, the error was harmless. *See Wescott v. S.D. Warren*, 447 A.2d 78, 81 (Me. 1982) (affirming hearing officer's decision because certain reference made, whether appropriate or not, caused no harm by affecting the result).

The entry is:

The hearing officer's decision is affirmed.

Hearing Officer Stovall, dissenting

[¶14] Although I tentatively agree with the majority's conclusion that Mr. Steele bore a burden of production regarding the psychological component of his work injury, I respectfully dissent from the majority's further conclusion that Mr. Steele did not meet that burden. In my view, the evidence submitted by Mr. Steele was sufficient to create a genuine issue that his depression contributed to his incapacity. Thus, the hearing officer should have shifted the burden of proof to McGee Construction to disprove incapacity related to depression.

[¶15] "The burden of production does not require that the employee *convince* the hearing officer on the ultimate issue." *Farris v. Georgia-Pacific Corp.*, 2004 ME 14, ¶ 16, 844 A.2d 1143. The employee need only create a

genuine issue, and can do so with his own testimony. *Bisco v. S.D. Warren Co.*, 2006 ME 117, ¶ 14, 908 A.2d 625 (holding burden of production that a later back injury aggravated a prior hand/wrist injury was met by employee's testimony that the back injury caused him to make physical adjustments when driving that caused pain in his hands and wrists).

[¶16] In this case, Mr. Steele submitted medical records from Dr. Barus, his primary care physician, including office notes indicating that he has been treated for depression since 2004 and that the depression is secondary to his chronic pain. The treating physician for his back condition, Dr. Jorgenson, stated in an office note from February 2012 that he is not sure that Mr. Steele could perform a work-at-home job offered to him because "his depression worsens when he is home all day and it has been worsening of late due to the pain exacerbations." Mr. Steele also points to reports from Kathleen Danforth, a licensed clinical professional counselor, who opined that Mr. Steele suffers from Major Depressive Disorder, Severe, that is directly related to his work injury. She assigned him a Global Assessment of Functioning (GAF) score of 35, which she described as meaning "major impairment in several areas, such as work or school, family relationships, judgment, thinking, or mood." She further stated that "Mr. Steele's mental health may, more likely than not, be negatively impacted by the demands of an employment setting." Finally, Mr. Steele testified that he battles depression, and

that his "biggest fight every day is just to get up and get going" because of depression.

[¶17] In my view, this is adequate to meet a burden of production that Mr. Steele suffers from depression as a result of his work injury and that the work-related depression contributed to his work incapacity. I would remand to the board for a determination whether McGee Construction met its burden to disprove that Mr. Steele suffers incapacity resulting from depression.

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).

Attorneys for Appellant:
Jeffrey L. Cohen, Esq.
Katherine M. Gatti, Esq.
McTEAGUE HIGBEE
P.O. Box 5000
Topsham, ME 04086

Attorney for Appellee:
Alan M. Muir, Esq.
PIERCE ATWOOD, LLC
Merrill's Wharf
254 Commercial Street
Portland, ME 04101