EDWARD DAMON
(Appellant)

v.

S.D. WARREN COMPANY
(Appellee)

and

ESIS/CCMSI
(Insurer)

v.

SCARBOROUGH SCHOOL DEPARTMENT
(Appellee)

and

MAINE EMPLOYERS' MUTUAL INSURANCE COMPANY
(Insurer)

Conference held: November 19, 2014
Decided: April 9, 2015

PANEL MEMBERS: Hearing Officers Greene, Elwin, and Stovall
BY: Hearing Officer Greene

[¶1] Edward Damon appeals a decision of a Workers' Compensation Board hearing officer (*Collier, HO*) granting his Petition for Review concerning a 1991 work injury with S.D. Warren Company, and S.D. Warren's Petition for Award/Apportionment concerning a 2010 work injury with the Scarborough School Department. Mr. Damon contends that the hearing officer erred by not using his 1991 average weekly wage as the basis for his ongoing partial benefit,

pursuant to *Warren v. H.T. Winters Co.*, 537 A.2d 583 (Me. 1988). We affirm the hearing officer's decision.

## I. BACKGROUND

[¶2] Edward Damon worked at S.D. Warren Company for 36 years, mainly as a rigger and millwright. He developed bilateral carpal tunnel syndrome in 1991 and underwent release surgery on both wrists in 1992. Mr. Damon was released to work at full duty in 1993, but his symptoms gradually returned. He was diagnosed in 2000 with chronic work-related tendonitis as well as persistent carpal tunnel syndrome and was restricted from high impact and heavy work.

[¶3] In 2003, during a period of downsizing at S.D. Warren, Mr. Damon opted to accept an early retirement package, and he retired effective February 1, 2004. Anticipating his departure, Mr. Damon found a job as a custodian with the School Department. He began working there part-time before he retired and full-time thereafter. Although he continued to experience symptoms from his hand injury, the work at the School Department was lighter and less intensive than his work at S.D. Warren, and he could vary his tasks.

[¶4] In a 2008 decree, Mr. Damon was awarded ongoing partial incapacity benefits based on the 1991 average weekly wage at S.D. Warren, stipulated at $970.10, and a post-injury earning capacity of $529.84, based on his average weekly earnings for 2007 at the School Department, with statutory offsets.

[¶5] In 2008, Mr. Damon decided to reduce his work hours to twenty hours per week in order to rest his hands. His symptoms persisted, however, and he underwent a repeat left carpal tunnel release surgery in 2010. He was out of work for six weeks, for which S.D. Warren paid him total incapacity benefits. He returned to work at the School Department on June 14, 2010, working twenty hours per week. He subsequently filed his Petition for Review and for Payment of Medical and Related Services pertaining to the 1991 work injury. S.D. Warren filed a Petition for Award and for Apportionment alleging a separate work injury at the School Department as of January 21, 2010.

[¶6] The hearing officer granted the petitions. In so doing, he found that Mr. Damon suffered a new, gradual work injury at the School Department as of January 21, 2010, that "probably accelerated his need for a repeat surgery on his left wrist" and, thus, significantly aggravated his underlying work-related carpal tunnel condition, so as to render his disability compensable pursuant to 39-A M.R.S.A. § 201(4) (Supp. 2014). He further found that Mr. Damon's average weekly wage for the 2010 date of injury is $282.20, calculated from the wage statement for that date, and that his a current earning capacity, since returning to work following his 2010 surgery, is $300.00 per week. The hearing officer apportioned the benefit by attributing 75% responsibility to S.D. Warren and 25% to the School Department.

[¶7] Mr. Damon filed a motion for additional findings of fact and conclusions of law, which the hearing officer denied except to clarify applicable offsets. Mr. Damon now appeals.

## II. DISCUSSION

[¶8] Mr. Damon contends, pursuant to *Warren v. H.T. Winters*, that the hearing officer erred when using the 2010 average weekly wage when calculating his level of compensation for the 2010 date of injury. Because the 1991 work injury affected his average weekly wage in 2010, he contends the 1991 wage should govern.

[¶9] The Appellate Division's role on appeal is "limited to assuring that the [hearing officer's] . . . decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995). (quotation marks omitted). The hearing officer's findings of fact are not subject to appeal. 39-A M.R.S.A. § 321-B(2) (Supp. 2014). When a party requests and proposes additional findings of fact, as in this case, we "review only the factual findings actually made and the legal standards actually applied by the hearing officer." *Daley v. Spinnaker Inds., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

[¶10] For an employee injured in 2010, the "weekly compensation is equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage the injured employee is able to earn after the injury, but no more than the maximum benefit under section 211." 39-A M.R.S.A. § 213 (Supp. 2014). Average weekly wage is defined as "the amount that the employee was receiving at the time of the injury for the hours and days constituting a regular full working week in the employment or occupation in which the employee was engaged when injured[.]" 39-A M.R.S.A. § 102(4)(A) (Supp. 2014). When an employee has suffered more than one injury, the average weekly wage is, in ordinary circumstances, the amount that "will reasonably represent the employee's weekly earning capacity at the time of the later injury in the employment in which the employee was working at that time, and [is] computed according to and subject to the limitations of this subsection." 39-A M.R.S.A. § 102(4)(G). This statutory language "is designed to provide a method of arriving at an estimate of the employee's future earning capacity as fairly as possible." *Warren v. H.T. Winters Co.*, 537 A.2d 583, 585 (Me. 1988) (quotation marks omitted) (construing a prior version of the statute containing nearly identical language, 39 M.R.S.A. § 2(2)(F) (1989)).

[¶11] With respect to cases such as this, involving more than one work injury, the Law Court has explained:

> We have recognized that in multiple injury cases, when the employee earns lower wages at the time of a later injury *as a result of a prior injury*, the later average weekly wage does not always fairly represent the employee's future earning capacity. [*Warren*, 537 A.2d] at 586. Thus, we have noted an exception to the general rule of section 102(4)(G): if "the second injury average weekly wage would not provide a fair and accurate basis for determining the loss of . . . future earning capacity due to the work-related injuries," the average weekly wage at the time of the second injury is not used to compute benefits. *Warren*, 537 A.2d at 586. Instead, when the average weekly wage at the time of the later injury is lower because of a prior injury, the hearing officer should calculate the benefit based on "the average weekly wage that best reflects the employee's uninjured work-capacity." *Dunson v. So. Portland Hous. Auth*., 2003 ME 16, ¶ 11 n.7, 814 A.2d 972, 978; *see also McDonald v. Rumford Sch. Dist*., 609 A.2d 1160, 1161 (Me. 1992); *Warren*, 537 A.2d at 586.

*Legassie v. Securitas, Inc.*, 2008 ME 43, ¶ 25, 944 A.2d 495 (legislatively overruled in part on other grounds by P.L. 2009, ch. 301, § 1, codified at 39-A M.R.S.A. § 354(2) (Supp. 2014)).

[¶12] Mr. Damon contends that it was error to use the 2010 average weekly wage for purposes of calculating his incapacity benefit for the 2010 injury because the hearing officer found as fact in the 2008 decree that 1991 injury contributed to his reduced earning incapacity. He argues that even though he experienced a reduction in earnings between 2008 and 2010, not from the prior work injury but due to his choice, he also experienced a reduction in earnings from 1991 to 2008 that—as recognized in the prior decree—did result from the prior injury. Because the *entire* reduction in earnings results in part from the 1991 injury, the 1991 average weekly wage should apply. We disagree with Mr. Damon's contentions.

[¶13] In the 2008 decree, the hearing officer based Mr. Damon's benefit on the stipulated 1991 average weekly wage of $970.10 per week, and an ability to earn $529.84 per week, which was consistent with his actual, current earnings. The hearing officer stated in the 2008 decree:

> I find that Mr. Damon has established ongoing incapacity as a result of his 1991 work injury. . . . I find and conclude that Mr. Damon's present employment with the Scarborough School Department best establishes his post-injury earning capacity, and that his earnings for 2007, from which he averaged $529.84 a week, reflects his current earning capacity.

[¶14] In the 2014 decree, however, the hearing officer found as fact that at this stage of his working life, Mr. Damon desired more flexibility, greater personal time, and the ability to work with less supervision. Although those factors contributed to his decision go to work at the School Department when he left S.D. Warren (along with the effects of the 1991 work injury), at that time, he also chose to work full time. The hearing officer found that when Mr. Damon returned to work in 2010 after his second carpal tunnel surgery, he chose, for reasons unrelated to his injuries, to work only twenty hours per week, turning down the School Department's offer of additional hours and electing not to look for additional work. Thus, the 2010 average weekly wage "more accurately reflect[s] the actual loss of the employee's *future* earning capacity, which the compensation based on the average weekly wage is designed to accomplish." *Warren*, 537 A.2d at 586 (emphasis added).

## III. CONCLUSION

[¶15] The hearing officer's findings are supported by competent evidence in the record, and the hearing officer neither misconceived nor misapplied the law when determining that the 2010 average weekly wage provided a fair and accurate basis for determining the loss of his future earning capacity. *See Legassie*, 2008 ME 43, ¶ 27.

The entry is:

The hearing officer's decision is affirmed.

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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. 2014).

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Attorneys for Appellant:
James J. MacAdam, Esq.
Nathan A. Jury, Esq.
David E. Hirtle, Esq.
208 Fore Street
Portland, ME 04101

Attorney for Appellee,
Scarborough School Dep't:
Dana Gillespie Herzer, Esq.
MEMIC
P.O. Box 3606
Portland, ME 04104

Attorney for Appellee,
S.D. Warren Co.:
Thomas E. Getchell, Esq.
TROUBH HEISLER
P.O. Box 9711
Portland, ME 04104-5011