

DANIEL CROSS
(Appellant)

v.

LLP TRANSPORT, LLC
(Appellee)

and

GREAT FALLS INSURANCE CO.
(Insurer)

Conference held: July 23, 2015

Decided: September 3, 2015

PANEL MEMBERS: Hearing Officers Collier, Hirtle, and Knopf
BY: Hearing Officer Hirtle

[¶1] Daniel Cross appeals from a decision of a Workers' Compensation Board Hearing Officer (*Elwin, HO*) granting in part his Petition for Award of Compensation brought pursuant to 39-A M.R.S.A. §§ 212, 213 (Supp. 2014). The hearing officer found that Mr. Cross's July 4, 2013, work-related neck injury was a compensable aggravation of his preexisting cervical spine condition and awarded a period of total incapacity benefits, but declined to award ongoing incapacity benefits even though Mr. Cross was released to work with restrictions that precluded a return to his pre-injury job. Mr. Cross contends that the hearing officer erred in denying his claim for ongoing incapacity benefits on the basis that his present restrictions are no different than the restrictions he "would have been"

under if his preexisting spinal condition had been diagnosed prior to his work-related injury. We agree with Mr. Cross's argument, vacate the decision in part, and remand for further proceedings.

I. BACKGROUND

[¶2] Daniel Cross is a 50 year old resident of Thomaston who has worked as a truck driver for the last 30 years. He began working for LLP Transport, LLC, in January of 2011. LLP Transport operates flatbed tractor trailers exclusively. Due to the nature of these trailers, each vehicle carries large tarps weighing 75-100 pounds that are sometimes used to cover the trailer's payload. Mr. Cross's duties for LLP Transport included lifting the tarps, spreading them over the vehicle's payload, and securing them. Before his injury, he was able to perform these tasks and was under no activity restrictions. Although she later determined that prior to his injury Mr. Cross had degenerative changes in his cervical spine, the hearing officer found that his preexisting condition was asymptomatic before July 4, 2013.

[¶3] Mr. Cross injured his neck at work on July 4, 2013, while pulling a 75-100 pound tarp over his flatbed trailer's payload.¹ On July 19, 2013, he underwent a surgical fusion of cervical vertebrae from C5-T2, performed by Dr. Rajiv Desai. On December 11, 2013, Dr. Desai released him to return to work with restrictions that precluded lifting the 75-100 pound tarps and climbing ladders to

¹ The hearing officer denied a Petition for Award related to a claimed neck injury of June 14, 2013. Mr. Cross has not appealed that ruling.

reach the top of trailer payloads. LLP Transport was not able to accommodate these restrictions because covering the payloads is essential to a flatbed truck driver's job. As a result, Mr. Cross was unable to return to work for his employer.

[¶4] Mr. Cross filed his Petition for Award. The hearing officer found that he had suffered a work-related neck injury on July 4, 2013, and that his employment contributed to his disability in a significant manner, thus satisfying the requirements of 39-A M.R.S.A. § 201(4) (Supp. 2014). The hearing officer further found that Mr. Cross was totally incapacitated to earn between July 5, 2013, and December 11, 2013, while he underwent and recovered from surgery.

[¶5] Mr. Cross testified that he had begun to look for work as a regular truck driver, but as of the date of the hearing on March 6, 2014, he had not returned to work.

[¶6] Although the hearing officer found that Mr. Cross could not go back to work as a flatbed truck driver due to his restrictions, she nevertheless determined that Mr. Cross was not entitled to any incapacity benefits following Dr. Desai's release to restricted work on December 11, 2013. She based this ruling on the medical opinion of Dr. Alexander Mesrobian, who stated that if he had known Mr. Cross was suffering from the preexisting degenerative changes in his cervical spine prior to the work injury, he would have placed the same restrictions on Mr. Cross pre-injury as Dr. Desai placed on him post-operatively. The hearing officer also

found, based on medical opinions of Dr. Desai and Dr. Mesrobian, that Mr. Cross's cervical spine is more stable now than it was before his surgery.

[¶7] The hearing officer concluded that “[b]ecause Mr. Cross’s ongoing restrictions are no different from what they would have been before his work injury (had his pre-existing cervical condition been diagnosed), the Board finds that he has not suffered earning capacity [sic] due to his July 4, 2013 work injury since being released to return to work by Dr. Desai on December 11, 2013.”

[¶8] Mr. Cross filed a Motion for Additional Findings of Fact and Conclusions of Law, which the hearing officer denied. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶9] Appeals from hearing officer decisions are governed by 39-A M.R.S.A. § 321-B (Supp. 2014). Section 321-B(2) provides that “[a] finding of fact by a hearing officer is not subject to appeal under this section.” The role of the Appellate Division “is limited to assuring that the [hearing officer’s] findings are supported by competent evidence, that [the] 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). Because Mr. Cross requested findings of fact and conclusions of law following the decision, the Appellate

Division will “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, 451-52.

B. Incapacity After December 11, 2013

[¶10] Mr. Cross contends that the hearing officer erred as a matter of law when determining that he has no ongoing earning incapacity because he “would have been” under the same medical restrictions before the injury as afterwards, had his preexisting condition been diagnosed prior to the injury. The hearing officer found as fact that Mr. Cross was asymptomatic and able to perform the essential duties of his job before the work injury and now has restrictions resulting from the work injury and surgical fusion that prevent him from performing those duties. Mr. Cross asserts that the hearing officer committed reversible error when determining that in these circumstances, he suffers no ongoing incapacity. We agree.²

[¶11] In general, a partially incapacitated employee may claim up to “2/3 of the difference, due to the injury, between the employee’s average gross weekly wages, earnings or salary before the injury and the average gross weekly wages, earnings or salary that the employee is able to earn after the injury[.]”

² LLP Transport asserts that whether an employee suffers earning incapacity is a question of fact. Our analysis, however, centers on whether the hearing officer misconceived or misapplied case and statutory law when evaluating whether Mr. Cross suffered earning incapacity. As such, it is within the proper scope of appellate review. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983).

39-A M.R.S.A. § 213(1)(B) (Supp. 2014). In discussing this standard, the Law Court has stated that the:

[T]raditional standard for determining work incapacity pursuant to the Maine Workers' Compensation Act hinges on both *inability* to work and *unavailability of employment*. In other words, a determination of incapacity in [contexts other than the retiree presumption] often turns on the resolution of two essential issues: (1) the employee's physical ability to perform work; and (2) the availability of work to the employee as a result of an injury.

Costales v. S.D. Warren Co., 2003 ME 115, ¶ 9, 832 A.2d 790 (comparing the general incapacity standards to the heightened incapacity standard described in 39-A M.R.S.A. § 223 (2001)).

[¶12] Moreover, the Law Court has held that the inability to perform one's pre-injury work because of even a "negligible" work restriction establishes a degree of partial disability, and may establish partial earning incapacity depending upon what the employee is able to earn within the restrictions. *St. Amand v. Edwards Manufacturing Co., Inc.*, 386 A.2d 730, 731 (Me. 1978); *see also* 39-A M.R.S.A. § 213(1)(B).

[¶13] In *St. Amand*, the employee suffered a herniated disc in his back and underwent surgery. *Id.* at 730. Following the surgery, the employee had a restriction against lifting over 100 pounds on account of his injured back. *Id.* On the employee's initial petition, the Commissioner awarded a period of total incapacity benefits while the employee recovered from surgery and then awarded

no further benefits at that time, finding that the 100 pound restriction was “negligible,” although the employee could not return to his old job because it required heavy lifting. *Id.* The Commissioner further stated that “[i]f he is unable to secure employment within this limitation, a Petition for Further Compensation may be filed for determination.” *Id.* When Mr. St. Amand filed a later Petition for Further Compensation and presented evidence of a work search, the Commissioner denied the claim finding that the prior order established “no continuing incapacity[.]” *Id.* at 731.

[¶14] On appeal, the Law Court concluded that the Commissioner’s finding of no continuing incapacity constituted error. *Id.* The Court determined that the restriction against lifting more than 100 pounds, along with the finding that the employee could no longer perform his old job because that job required heavy lifting, “constituted a finding of partial disability.” *Id.* Because the incapacity determination involved an assessment of both the inability to perform work and the ability to earn resulting from the work injury, the Law Court remanded the case for consideration of the evidence “relating to appellant’s ability to obtain employment within his limitations.” *Id.*³

[¶15] Like the employee in *St. Amand*, Mr. Cross has what may be perceived as a “negligible” physical restriction, but it nevertheless precludes him

³ The remand order was for the Commissioner to conduct an analysis of “incapacity that might result from unavailability of work” pursuant to *Bowen v. Maplewood Packing Co.*, 366 A.2d 1116 (Me. 1976), a predecessor case to 39-A M.R.S.A. § 213 (1)(B) regarding an employee’s ability to earn post-injury.

from performing his pre-injury work driving flatbed trucks. The hearing officer determined that the physical restrictions related to the work were legally insufficient to establish any earning incapacity because if Mr. Cross's preexisting cervical condition had been diagnosed, he would have been under the same restrictions before the injury. This analysis is based on a misconception of applicable law.

[¶16] Consistent with the Court's reasoning in *St. Amand*, Mr. Cross's work-related restrictions, coupled with his inability to perform his pre-injury job because of those restrictions, establish partial disability as a matter of law. The Workers' Compensation Act thus required an analysis of Mr. Cross's ability to earn as described in 39-A M.R.S.A. § 213(1)(B) with reference to either work search, labor market, or other persuasive evidence on the subject. *See Monaghan v. Jordan's Meats*, 2007 ME 100, ¶ 16, 928 A.2d 786, 791.⁴ On remand, the hearing officer should determine what Mr. Cross is "able to earn" post-injury within the language of 39-A M.R.S.A. § 213(1)(B).

⁴ Mr. Cross also contends that the hearing officer erred when finding no incapacity, despite having concluded that his work injury aggravated a preexisting condition, and his employment contributed to the resulting disability in a significant manner, pursuant to 39-A M.R.S.A. § 201(4). Because we decide the appeal on other grounds, we address this issue only to say that comparing restrictions that would have been applied had the preexisting condition been diagnosed before the injury, to those applicable after the injury, may run afoul of the Legislature's intent that that the "resulting disability" from the work-related injury and the preexisting condition be compensable when the legal standard under section 201(4) is met. *See Celentano v. Dep't of Corr.*, 2005 ME 125, ¶ 19, 887 A.2d 512, 516. An injured worker need not prove disability *in spite of* a preexisting condition, and having met the requirements of section 201(4), could be entitled to incapacity benefits provided that resulting disability affects the worker's ability to earn.

III. CONCLUSION

[¶17] To the extent the hearing officer's decision determines as a matter of law that Mr. Cross suffers no incapacity as a result of the work injury because he would have been under the same work restrictions had the preexisting condition been diagnosed before the injury, it is vacated. Based on the facts as found by the hearing officer, we conclude that Mr. Cross has established partial disability. The case is remanded for a determination of Mr. Cross's ability to earn after December 11, 2013, pursuant to section 213(1)(B).

The entry is:

The hearing officer's decision is vacated in part, and remanded for proceedings consistent with this decision.

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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