MARK D. MATTHEWS
(Appellee)

v.

SHAW'S SUPERMARKETS
(Appellant)

and

HELMSMAN MANAGEMENT SERVICES, INC.
(Third-Party Administrator)

and

THE EMERY WATERHOUSE COMPANY
(Appellee/Cross-Appellant)

and

WILLIS OF NORTHERN NEW ENGLAND
(Third-Party Administrator)

Argued July 24, 2014
Decided: October 2, 2015

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

[¶1] Shaw's Supermarkets appeals from a Workers' Compensation Board hearing officer (*Stovall, HO*) decision regarding Mark Matthews' Petitions for Restoration and Petitions for Payment of Medical and Related Services concerning June 20, 1992, August 18, 1992, August 29, 1992, and September 28, 1994, injuries incurred at Shaw's Supermarkets. Shaw's contends that the hearing officer erred when (1) determining that Mr. Matthews' claims associated with the 1992

injuries were not barred by the statute of limitations[1]; (2) concluding that Mr. Matthews' ongoing incapacity results from the 1992 injury; and (3) awarding partial incapacity benefits at varying rates.

[¶2] The Emery Waterhouse Company also appeals the decision insofar as it grants Mr. Matthews' Petition for Award related to an April 25, 2005, injury incurred at Emery Waterhouse. It contends the hearing officer erred, after reopening the evidence, by revisiting the issue of causation of the 2005 injury. Emery Waterhouse contends the evidence had been reopened to address the level of incapacity resulting from post-hearing knee surgery only.

[¶3] We affirm the hearing officer's decision.

I. BACKGROUND

[¶4] This case has followed a protracted procedural path. Although there was a previous round of petitions, the current appeal arises from litigation surrounding petitions filed in 2005 asserting claims relating to numerous dates of

[1] The statute of limitations applicable to the 1992 claims, 39 M.R.S.A. § 95 (Supp. 1992) (repealed and replaced by P.L. 1991, ch. 885, §§ A-7, A-8 (effective Jan. 1, 1993) (codified at 39-A M.R.S.A § 306 (Supp. 2014)) provides:

> Any employee's claim for compensation under this Act is barred unless an agreement or petition . . . is filed within 2 years after the date of the injury, or, if the employee is paid by the employer or the insurer, without the filing of any petition or agreement, within 2 years of any payment by such employer or insurer for benefits otherwise required by this Act. The 2-year period in which an employee may file a claim does not begin to run until the employee's employer, if the employer has actual knowledge of the injury, files a first report of injury as required by section 106 of the Act. . . No petition of any kind may be filed more than 6 years following the date of the latest payment made under this Act.

injury against Shaw's, and an April 25, 2005, date of injury against Emery Waterhouse. The proceedings were initially bifurcated to address Shaw's statute of limitations defenses. In a 2007 decree, the hearing officer ruled that Mr. Matthews' claims for injuries incurred on June 20, 1992, August 18, 1992, August 29, 1992, and September 28, 1994, were not barred by the statute of limitations.[2] Shaw's filed a Petition for Appellate Review with the Law Court, which the Court denied on December 14, 2007.

[¶5] The hearing officer proceeded to hold a hearing over several days, and issued a decree on the merits on May 27, 2010. The hearing officer granted the Petitions for Restoration and for Payment of Medical and Related Services pertaining to the June 20, 1992, injury. He awarded a closed end period of partial incapacity benefits at varying rates for that injury.

[¶6] As to the August 18, 1992, August 29, 1992, September 28, 1994, injuries, the hearing officer denied the Petitions for Restoration, but granted the Petitions for Payment of Medical and Related Services. The hearing officer denied the Petition for Award for the April 25, 2005, date of injury.

[¶7] Mr. Matthews filed a Petition to Reopen the May 27, 2010, decree, seeking to introduce evidence of his April 10, 2010, total left knee replacement

[2] Shaw's asserted other defenses, and Mr. Matthews claimed other dates of injury, which are not at issue here. Mr. Matthews also filed Petitions to Remedy Discrimination against Shaw's related to several dates of injury. The hearing officer denied those petitions and Mr. Matthews does not appeal that determination.

surgery, which occurred after the hearing on the merits. Both Shaw's and Emery Waterhouse objected. Emery Waterhouse objected specifically on the ground that the decree established that no injury occurred at Emery Waterhouse, and thus it should not be involved in further litigation regarding Mr. Matthews' level of incapacity. The hearing officer granted the Petition to Reopen.

[¶8] After receiving additional evidence, the hearing officer rescinded the May 27, 2010, decree and replaced it with a decree issued on January 17, 2012. The hearing officer granted the Petitions for Restoration and for Payment of Medical and Related Services as to the June 20, 1992, left knee injury.

[¶9] As to the August 18 and August 29, 1992, and the September 28, 1994, injuries, the hearing officer denied the Petitions for Restoration and granted the Petitions for Payment of Medical and Related Services for back treatment only.

[¶10] Further, the hearing officer now granted Mr. Matthews' Petition for Award for the April 25, 2005, left knee injury at Emery Waterhouse.

[¶11] The hearing officer awarded partial incapacity benefits at varying rates from April 25, 2005, until April 22, 2010, and total incapacity benefits thereafter. The hearing officer determined that the June 20, 1992, and April 25, 2005, injuries were equally responsible for Mr. Matthews' left knee condition, and ordered Emery Waterhouse to pay Mr. Matthews at his 2005 average weekly wage,

and Shaw's to reimburse Emery Waterhouse at 50% of Shaw's 1992 average weekly wage.

[¶12] Mr. Matthews, Shaw's, and Emery Waterhouse filed Motions for Additional Findings of Fact and Conclusions of Law. On May 16, 2012, the hearing officer issued an order that denied Mr. Matthews' motion and Emery Waterhouse's motion, but did not specifically reference Shaw's motion.

[¶13] Shaw's and Emery Waterhouse filed Petitions for Appellate Review with the Law Court. The Law Court dismissed the Petitions on the ground that they were not ripe for appellate review because Shaw's Motion for Additional Findings of Fact and Conclusions of Law had not been ruled on.

[¶14] Upon remand, in a decree dated January 30, 2014, the hearing officer addressed Shaw's Motion for Additional Findings of Fact and Conclusions of Law. He also rescinded the May 12, 2012, order denying Emery Waterhouse's and Mr. Matthews' motions for additional findings of fact and conclusions of law.

[¶15] In the additional findings and conclusions, the hearing officer reaffirmed his prior ruling that Mr. Matthews' claim regarding the June 20, 1992, left knee injury at Shaw's was not barred by the statute of limitations, and he declined to revisit that issue despite Shaw's contention that the issue had not finally been decided by the Law Court. The hearing officer also reiterated the

decision that the 1992 knee injury contributed to Mr. Matthews' current knee condition and need for total knee replacement surgery in 2010.

[¶16] With regard to the April 25, 2005, injury, the hearing officer denied Emery Waterhouse's claim that he exceeded the scope of the order granting the Petition to Reopen when he found, after considering the new evidence, that the 2005 injury causally contributed to Mr. Matthews' need for surgery in 2010. The hearing officer further reiterated his decision, based on the independent medical examiner's deposition testimony given in the context of the Petition to Reopen and upon consideration of all the medical records, that the 2005 injury significantly aggravated Mr. Matthews' preexisting knee condition, and contributed to the need for knee replacement surgery.

[¶17] Shaw's and Emery Waterhouse appeal the hearing officer's decision.

II. DISCUSSION

A. The Petition to Reopen

[¶18] Emery Waterhouse contends that the hearing officer erred when, pursuant to the Petition to Reopen, he reversed his prior decision and concluded that Mr. Matthews suffered a work-related injury to his left knee in April 2005. Emery Waterhouse argues that the scope of the Petition to Reopen was limited to Mr. Matthews' incapacity level after the 2010 left knee surgery, and the

compensability of the 2005 injury was no longer an issue for decision. We find no error.

[¶19] Title 39-A M.R.S.A. § 319 (2001) provides:

> Upon the petition of either party, the board may reopen and review any compensation payment scheme, award or decree on the grounds of newly discovered evidence that by due diligence could not have been discovered prior to the time the payment scheme was initiated or prior to the hearing on which the award or decree was based. The petition must be filed within 30 days of the payment scheme, award or decree.

[¶20] When addressing an appeal from a decision on a petition to reopen, we review the hearing officer's action to see whether, in light of all the circumstances, the hearing officer acted beyond the scope of his allowable discretion. *See Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 (Me. 1985) (applying abuse of discretion standard of review for administrative body's ruling on a motion to dismiss). We will vacate the hearing officer's decision if the proceedings were fundamentally unfair. *See id.*

[¶21] When Mr. Matthews filed his Petition to Reopen on June 25, 2010, he asked the hearing officer to stay the pending motions for additional findings of fact and conclusions of law until after deciding the Petition to Reopen. The hearing officer granted the Petition and set the case for a conference by order dated August 16, 2010. After the conference, the hearing officer issued an order setting the Petition for a hearing, allowing additional position papers to be filed, and noting

that an "amended decree will be issued if necessary." In a further order dated June 3, 2011, the hearing officer limited new evidence to the knee surgery, dismissed the motions for findings of fact and conclusions of law related to the May 27, 2010, decree, and indicated that a new decree would be issued and new motions for additional findings could be filed.

[¶22] Although the hearing officer limited the evidence that could be submitted pursuant to the Petition to Reopen, he did not restrict the issues that could be decided, and he put the parties on notice that a new decree would be issued. Section 319 specifically authorizes reopening of the entire decree based upon the newly discovered evidence. Given these facts and circumstances, we cannot say the proceedings were fundamentally unfair or that the hearing officer exceeded the bounds of his discretion when issuing a new decree that included a new ruling on whether the 2005 injury was compensable.

[¶23] Emery Waterhouse further contends that testimony from the independent medical examiner regarding causation of the 2005 injury could not be characterized as newly discovered, and that Dr. Herzog's testimony does not support the hearing officer's decision. We disagree on both counts.

[¶24] Dr. Herzog issued a report, and was deposed before and after Mr. Matthews' total left knee replacement surgery. Before the surgery, Dr. Herzog opined that he could not state on a more probable than not basis that Mr.

Matthews' work at Emery Waterhouse contributed to the gradual left knee injury. However, after the surgery, having considered the new medical evidence regarding Mr. Matthews' knee condition and all prior medical records, Dr. Herzog offered a different opinion, testifying that the work Mr. Matthews performed for Emery Waterhouse up to 2005 contributed to the knee condition and the need for the surgery.

[¶25] The hearing officer carefully considered Dr. Herzog's report and deposition testimony, including any inconsistencies, resolved the inconsistencies to his satisfaction, and adopted the opinion expressed in the latest deposition testimony. The hearing officer did not err or exceed the bounds of his discretion when adopting Dr. Herzog's opinion expressed in his deposition after the surgery and in the context of the Petition to Reopen. *See Traussi v. B & G Foods, Inc.*, Me. W.C. B. No. 15-10, ¶ 17 (App. Div. 2015).

[¶26] Moreover, competent evidence supports the finding that the 2005 left knee injury contributed to Mr. Matthews' need for surgery in 2010. *See Dillingham v. Great N. Paper*, Me. W.C.B. No. 15-7, ¶ 3 (App. Div. 2015).

B. Statute of Limitations

1. Appeal of the Statute of Limitations Decision

[¶27] Shaw's initially asserts that the hearing officer erred when determining that the 2007 ruling on the statute of limitations, an interlocutory

order, was not subject to revision after the Law Court denied the petition for appellate review because, it contends, a final order adjudicating all claims had not yet been entered.

[¶28] While this contention may have merit,[3] any error in this regard was harmless. To say that the ruling could have been revised is not to say that the hearing officer was required to revise it. As Shaw's admits, the hearing officer had broad discretion to conduct the bifurcated hearing as he saw fit. The hearing officer held a full and fair hearing on this issue in the first stage, and was well within the bounds of that discretion to deny Shaw's request to reconsider the earlier ruling in the second stage.

2. Waiver

[¶29] That being said, the January 30, 2014, decree is now a final, appealable order that has resolved all claims and all issues in the case, and all properly preserved issues are now ripe for appellate review. *Estate of James Cole v. Girl Scouts of Maine*, Me. W.C.B. No. 14-27, ¶¶ 3, 4 (App. Div. 2014) (dismissing appeal from first stage of bifurcated proceedings in which employment status was initially decided, but stating: "After the hearing officer issues a final

[3] The hearing officer concluded that, under 39-A M.R.S.A. § 322(3) (Supp. 2014), he was not authorized to alter the statute of limitations ruling after the Law Court denied the petition for appellate review. *But see* DONALD G. ALEXANDER, MAINE APPELLATE PRACTICE 220-21 (Tower 4th ed. 2013) (stating that under the Maine Rules of Civil Procedure, a preliminary ruling on some claims, before all claims are resolved, is subject to revision at any time before a final order is issued); *see also, e.g., Wilcox v. City of Portland*, 2009 ME 53, ¶ 15, 970 A.2d 295 (holding that a preliminary ruling on a statute of limitations issue is an interlocutory ruling not subject to immediate appeal).

decision that fully decides and disposes of all claims, either party may appeal any earlier ruling that was properly opposed at the time.").[4]

[¶30] Mr. Matthews contends, however, that Shaw's did not preserve its contention that the 1992 injury claim was barred by the statute of limitations because it failed to make a timely objection on that basis to Mr. Matthews' 1999 motion for Award of Fees and Disbursements. Shaw's contends that the statute expired before the attorney fee motion was filed and could not be revived thereafter, citing *Harvie v. Bath Iron Works Corp.*, 561 A.2d 1023, 1025 (Me. 1989). We agree with Mr. Matthews' position.

[¶31] In *Norton v. Penobscot Frozen Food Lockers, Inc*., the Law Court stated that the statute of limitations "is procedural, capable of being waived, and requiring an affirmative assertion as a defense." 295 A.2d 32, 33 (Me. 1972), *superseded by statute on other grounds as recognized in Deabay v. St. Regis Paper Co.*, 442 A.2d 963, 964 (Me. 1982); *see also Lister v. Roland's Serv., Inc.*, 1997 ME 23, ¶ 8, 690 A.2d 491. Shaw's waiver occurred as follows.

[4] The denial of a petition for appellate review from an interlocutory order does not preclude later appellate review of that decision. "[T]he Law Court's denial of review in a workers' compensation case does not constitute a ruling on the merits, nor does it carry with it any implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Lagasse v. Hannaford Bros. Co.*, 497 A.2d 1112, 1115 n.5 (Me. 1985) (quotation marks omitted). If we were to decline to review issues decided in the first phase of bifurcated proceedings that are prematurely taken to the Law Court by petition, those issues would consistently evade appellate review. Moreover, appeals to the appellate division are limited to final decisions "that fully dispose[] of the matters pending before the hearing officer" and do "not include interlocutory or non-final decisions." Me. W.C.B. Rule, ch. 13, § 3. An issue raised in a premature appeal may be raised again, if properly preserved, after a final order is issued. *Cole*, Me. W.C.B. No. 14-27, ¶ 4 (App. Div. 2014).

[¶32] On or around September 5, 1995, Mr. Matthews filed numerous petitions, including his Petition for Award seeking to establish the June 20, 1992, date of injury. In March of 1996, he filed a Petition to Remedy Discrimination, pertaining to the September 28, 1994, date of injury. On April 2, 1998, a hearing officer (*McCurry, HO*) issued a decree by which, among other things, he granted Mr. Matthews the protection of the Act for the June 20, 1992, date of injury, but awarded no incapacity benefits at that time. The hearing officer also granted the Petition to Remedy Discrimination, specifically awarding, among other things, payment of reasonable attorney fees. At that time, Shaw's filed a Motion for Additional Findings of Fact and Conclusions of Law, but did not challenge the award as it related to the 1992 date of injury.

[¶33] Thereafter, Mr. Matthews filed a Motion for Award of Fees and Disbursements, pursuant to the statutory provisions in effect at the time of the 1992 injuries, which allowed for an award of attorney fees to a prevailing employee. 39 M.R.S.A. §§ 110(2), 111 (1989), *repealed by* P.L. 1991, ch. 885, §§ A-7 (effective January 1, 1993). He listed four dates of injury in the motion, including June 20, 1992. Without elaboration, on December 17, 1999, the hearing officer ordered Shaw's to pay $17,300.00 in attorney fees and disbursements. Shaw's paid the fees on February 1, 2001.

[¶34] In its response to the fee motion, Shaw's did not contest that Mr. Matthews' motion sought fees related to prosecuting the petition for the 1992 date of injury, nor did it assert that the statute of limitations barred the payment of attorney fees for that claim. Rather, Shaw's conceded that Mr. Matthews prevailed on the 1992 injury, but argued that the fees were excessive and should have been reduced by the amount related to prosecuting the claims on which he did not prevail. Shaw's reiterated these arguments in a Motion for Additional Findings of Fact and Conclusions of Law, which was denied.

[¶35] Shaw's contends that the arguments made in response to the fee motion cannot be attributed to it because, although self-insured at all relevant times, its claims were administered by a different third-party administrator (TPA) in 1992 (Liberty/Helmsman) than for the remaining dates of injury (Sedgwick). Shaw's further asserts that the attorney fee motion was brought against Shaw's/Sedgwick only, and that the two TPAs are adverse to each other on the statute of limitations issue.

[¶36] The hearing officer (*Stovall, HO*), however, construed the 1999 attorney fee motion as applying to the 1992 date of injury. This is supported on the face of the motion, where the 1992 date is plainly listed. Thus, Shaw's assertion that the attorney fee motion was directed only at Shaw's/Sedgwick lacks merit. We fail to see how Shaw's/Liberty/Helmsman, if it had different interests, was unable

to assert its statute of limitations defense at that time. Moreover, given that Shaw's was self-insured at all relevant times and would be paying all claims, the record does not demonstrate any real adversity between the two TPAs.

[¶37] Accordingly, by failing to assert the statute of limitations defense at the appropriate time, Shaw's forfeited consideration of its statute of limitations defense. *See Morey v. Stratton*, 2000 ME 147, ¶¶ 8-10, 756 A.2d 496 (emphasizing "the importance of bringing the specific challenge to the attention of the trial court at a time when the court may consider and react to the challenge"); *Waters v. S.D. Warren Co.*, Me. W.C.B. No. 14-26, ¶ 18 (App. Div. 2014).

C. Medical Causation of 1992 Left Knee Injury

[¶38] Shaw's contends that the hearing officer erred when determining that Mr. Matthews' current left knee condition is causally related to the 1992 injury. Mr. Matthews underwent surgery on his left knee in 1994. In the 1998 decree, despite awarding protection of the Act for the 1992 left knee injury, the hearing officer determined that the 1992 injury did not contribute to Mr. Matthews' need for surgery in 1994. Shaw's contends this factual finding in 1998 precluded a later finding that the 1992 injury contributed to the need for surgery in 2010. We disagree.

[¶39] The finding regarding causation of the knee condition in 1994 does not preclude a finding that Mr. Matthews continues to suffer effects from the 1992

injury. Moreover, there is competent evidence in the record to support the hearing officer's finding that the effects of the 1992 injury contribute to Mr. Matthews' ongoing knee condition. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983).

D. Varying Rates for Closed End Period of Partial Incapacity

[¶40] The hearing officer awarded payment of partial incapacity benefits from April 25, 2005, through April 22, 2010. Shaw's contends this was error. However, the hearing officer found as fact that Mr. Matthews' earnings were inconsistent during that period. We cannot say on this record that the hearing officer erred when determining that a fixed percentage of incapacity benefits was "particularly inappropriate or particularly difficult to set." *Lagasse v. Hannaford Bros. Co.*, 497 A.2d 1112, 1119 (Me. 1985).

III. CONCLUSION

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. 2014).

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