BRENDA L. FREEMAN
(Appellant)

v.

NEWPAGE CORPORATION
(Appellee)

and

AMERICAN ZURICH INSURANCE COMPANY
(Insurer)

and

SEDGWICK CLAIMS MANAGEMENT SERVICE

Argued: November 19, 2014
Decided: March 18, 2015

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

[¶1] Brenda L. Freeman appeals from a decision of a Workers' Compensation Board hearing officer (*Knopf, HO*) granting in part her Petition for Award regarding a December 31, 2011, shoulder injury. Ms. Freeman also suffered a previously established respiratory injury on November 6, 2007, for which she was awarded ongoing partial incapacity benefits. She contends the hearing officer erred by failing to award benefits over and above the maximum weekly benefit payable pursuant to 39-A M.R.S.A. § 211 (Supp. 2014) for a period during which

she was incapacitated as a result of both the 2011 shoulder injury and the 2007 respiratory injury. We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] The parties submitted the case to the hearing officer on the following stipulated facts. On November 6, 2007, Brenda Freeman suffered a respiratory injury while working for NewPage Corporation, caused by exposure to chemicals in the papermaking process. At the time of the injury, her average weekly wage was $2,044.87. She was able to continue working for NewPage in an accommodated position, for which she was paid a lower hourly rate. In a 2009 decision, the hearing officer found that Ms. Freeman was partially incapacitated from work due to the respiratory injury, and awarded partial incapacity benefits based on an $850.00 per week post-injury earning capacity. These benefit payments were subject to the maximum weekly benefit section of the Act. *See* 39-A M.R.S.A. § 211.

[¶3] While working in her new position, Ms. Freeman suffered a work-related injury to her right shoulder on December 31, 2011. At that time, her average weekly wage was $1,071.84. As a result of the 2011 right shoulder injury, Ms. Freeman was totally incapacitated from March 30, 2012, until September 10, 2012. During that period, NewPage paid her 100% partial incapacity benefits for

her respiratory injury based on the 2007 average weekly wage, entitling her to the maximum compensation rate pursuant to 39-A M.R.S.A. § 211.

[¶4] Ms. Freeman filed a Petition for Award related to the 2011 date of injury, seeking additional wage loss benefits for the period she was out of work from March 30, 2012, until September 10, 2012. She contends that under section 211, she is entitled to the maximum rate of benefits for each injury she suffered.

[¶5] The hearing officer awarded the protection of the Act for the 2011 shoulder injury, but no additional wage loss benefits.[1] Ms. Freeman filed a Motion for Additional Findings of Fact and Conclusions of Law, which the hearing officer denied. She now appeals.

II. DISCUSSION

[¶6] Ms. Freeman contends that pursuant to section 39-A M.R.S.A. § 211, she is entitled to receive wage loss benefits for her 2011 injury because the benefits she received for the 2007 injury did not compensate her for the additional wage loss she suffered as a result of the later injury. She asserts that section 211 allows for recovery at the maximum rate for each compensable work injury when, as in this case, (1) she established a second, post-injury earning capacity; and (2) receiving the maximum rate for each compensable work injury would not result in her being compensated more in weekly benefits than what she earned prior to her

[1] The hearing officer also denied a Petition for Award asserting a 2006 shoulder injury. Neither party has challenged that aspect of the decision on appeal.

work injuries. She contends that capping the total weekly benefits for both injuries at the statutory maximum level penalizes high-wage earning employees who return to work. We disagree with Ms. Freeman's interpretation of section 211.

[¶7] Title 39-A M.R.S.A. § 211 provides:

> Effective January 1, 1993, the maximum weekly benefit payable under section 212, 213 or 215 is $441 or 90% of state average weekly wage, whichever is higher. Beginning on July 1, 1994, the maximum benefit level is $441 or 90% of the state average weekly wage as adjusted annually utilizing the state average weekly wage as determined by the Department of Labor, whichever is higher. If the injured employee's date of injury is on or after January 1, 2013, the maximum benefit level is $441 or 100% of the state average weekly wage as adjusted annually utilizing the state average weekly wage as determined by the Department of Labor, whichever is higher.

[¶8] The hearing officer concluded that section 211 provides for a maximum benefit level for incapacity from all work injuries, and thus, Ms. Freeman was not entitled to any additional benefits. In support, the hearing officer quoted Professor Larson's treatise:

> The three kinds of maximum limit[s] that may give rise to questions in case of successive or concurrent injuries are maximum dollar limits on weekly benefits, maximum number of weeks allowable for certain injuries, and overall maximum dollar limits on benefits.
>
> There is both a theoretical and a practical reason for the holding that awards for successive or concurrent permanent injuries should not take the form of weekly payments higher than the weekly maxima for total disability. The theoretical reason is that, at a given moment in time, a person can be no more than totally disabled. The practical reason is that if the worker is allowed to draw weekly benefits simultaneously from a permanent total and a permanent partial award,

> it may be more profitable for him or her to be disabled than to be well—a situation which compensation law studiously avoids in order to prevent inducement to malingering.

8 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 92.01[1] (2012).

[¶9] Looking also to Michigan case law and to Maine's historical treatment of supplemental benefits for specific loss, the hearing officer concluded that "[b]enefits for overlapping periods of incapacity caused by separate and distinct injuries appear to be subject to the overall maximum benefit provision in §211."

[¶10] We agree with the hearing officer's interpretation of section 211. Although the Law Court has not spoken directly on this issue, the Court has consistently expressed disfavor with any interpretation of the Act that would allow for recovery of more than one wage for multiple injuries for a single period of incapacity. *See, e.g., Miller v. Spinnaker Coating*, 2011 ME 79, ¶ 11, 25 A.3d 954, *Cust v. University of Maine*, 2001 ME 29, ¶ 15, 766 A.2d 566; *Edwards v. Travelers Ins. Co*., 2001 ME 148, ¶ 10, 783 A.2d 163; *Lapointe v. United Eng'rs & Constructors*, 680 A.2d 458, 461 (Me. 1996). While the practical reason mentioned by Professor Larson for not allowing two weekly, maximum benefit payments may not apply to Ms. Freeman's situation, the logical (or theoretical) reason does: in a given week, she cannot be more than totally disabled.

[¶11] Accordingly, we conclude that the maximum weekly benefit established in section 211 is just that—a maximum benefit. It establishes a ceiling that weekly benefit payments, even for multiple injuries, may not exceed.[2]

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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[2] The Hearing Officer was not persuaded by Ms. Freeman's references to the term "injury" in the singular in other sections of the Act. Nor are we.