JON DELANO
(Appellee)
v.

CITY OF SOUTH PORTLAND
(Self-Insured) (Appellee)

and

CITY OF SOUTH PORTLAND
(Maine Municipal Association) (Appellant)

Decided: October 9, 2013
Conferenced: July 24, 2013

Panel Members: Hearing Officers Elwin, Stovall, and Knopf
By: Hearing Officer Stovall

[¶1] The City of South Portland, insured by Maine Municipal Association (the City/MMA), appeals from a decision of a Workers' Compensation Board hearing officer (*Collier, HO*) granting Jon Delano's Petitions for Restoration and for Payment of Medical and Related Services against the City of South Portland/self-insured (the City/self-insured) for a February 28, 1991 work injury, and the City/MMA for a December 14, 2007 work injury. The hearing officer also allocated responsibility for ongoing incapacity benefits 90% to the City/self-insured, and 10% to the City/MMA. The City/MMA contends that the hearing officer erred when ordering the City/self-insured to reimburse it pursuant to 39-A M.R.S.A. § 354 (Supp. 2012) at the 1991 compensation rate, but without inclusion

of the inflation adjustments provided for in 39 M.R.S.A. § 54-B (1989). We agree, and vacate the hearing officer's decision in part.

I. BACKGROUND

[¶2] Jon Delano suffered a low back and bilateral hip injury when he fell on a downed tree at work on February 28, 1991. That injury was established by way of a Consent Agreement dated November 1, 1993. He also sustained a gradual neck injury that manifested on December 14, 2007, established by a decree dated November 30, 2009. Subsequent to the November 30, 2009, decree Mr. Delano went out of work as a result of his work injuries.

[¶3] During the current litigation, Mr. Delano sought total wage loss benefits from December 22, 2009 through May 31, 2010, and again from June 16, 2010 and ongoing. The hearing officer determined that the City/self-insured is solely liable for payment of total incapacity benefits from December 22, 2009 through May 31, 2010. The Board also determined that as of June 16, 2010, the City/self-insured is responsible for 90% of the employee's ongoing incapacity and the City/MMA is responsible for 10%. The City/MMA, as the last employer/insurer, paid the employee all benefits to which he is entitled related to the 1991 injury, and sought reimbursement from the City/self-insured for 90% benefits paid, based on the 1991 compensation rate, including inflation adjustments. The hearing officer ordered the City/self-insured to reimburse the

City/MMA without any adjustments for inflation. The City/MMA filed a motion for additional findings of fact and conclusions of law, which the hearing officer denied. The City/MMA appeals.

II. DISCUSSION

[¶4] The City/MMA asserts that the hearing officer erred when requiring the City/self-insured to reimburse the City/MMA in an amount that does not include inflation adjustments. The City/self-insured contends that neither the statute nor case law expressly requires reimbursement of inflation adjustments, and the hearing officer's decision fell within the bounds of his discretion. We agree with the City/MMA.

[¶5] The role of the Appellate Division on appeal is "limited to assuring that the [hearing officer]'s factual 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." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). Thus, the issue is whether the hearing officer misapplied the law when ordering reimbursement of an amount that does not include inflation adjustments.

[¶6] In a multiple injury case such as this one, the employer/insurer covering the most recent date of injury is required to pay the employee all benefits payable under the Act, then is subrogated to the employee's rights against other

employers or insurers responsible for earlier dates of injury. 39-A M.R.S.A. § 354 (Supp. 2012)[1]; *Juliano v. Ameri-Cana Transport*, 2007 ME 9, ¶ 10, 912 A.2d 1244. Specifically, section 354(2) provides "the insurer providing coverage at the time of the last injury shall initially be responsible to the employee for *all benefits* payable under this Act," and section 354(3) provides that the most recent insurer is then "subrogated to the employee's rights under this Act *for all benefits* the insurer has paid and for which another insurer may be liable." 39-A M.R.S.A. § 354 (emphasis added.)

[¶7] Further, entitlement to benefits for multiple injuries is governed by the law in effect at the time of each injury. 39-A M.R.S.A. § 201(6) (2001)[2]; *Dunson*

[1] Title 39-A M.R.S.A. § 354 provides, in relevant part:

> **1. Applicability.** When 2 or more occupational injuries occur, during either a single employment or successive employments, that combine to produce a single incapacitating condition and more than one insurer is responsible for that condition, liability is governed by this section.
>
> **2. Liability to employee.** If an employee has sustained more than one injury while employed by different employers, or if an employee has sustained more than one injury while employed by the same employer and that employer was insured by one insurer when the first injury occurred and insured by another insurer when the subsequent injury or injuries occurred, the insurer providing coverage at the time of the last injury shall initially be responsible to the employee for all benefits payable under this Act.
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> **3. Subrogation.** Any insurer determined to be liable for benefits under subsection 2 must be subrogated to the employee's rights under this Act for all benefits the insurer has paid and for which another insurer may be liable. Apportionment decisions made under this subsection may not affect an employee's rights and benefits under this Act. . . .

[2] Title 39-A M.R.S.A.§ 201(6) (2001) provides:

v. So. Portland Housing Auth., 2003 ME 16, ¶ 16, 814 A.2d 972. The law in effect at the time of the 1991 injury provided for annual inflation adjustments for total incapacity benefits after a three-year waiting period. 39 M.R.S.A. § 54-B(1).

[¶8] Accordingly, pursuant to sections 201(6) and 354, (1) Mr. Delano's rights as against the City/self-insured must be determined with reference to the law in effect at the time of the 1991 injury; (2) the City/MMA's rights against the City/self-insured are co-extensive with Mr. Delano's rights against the City/self-insured, *cf. Trottier v. Thomas Messer Builders*, 2007 ME 64, ¶ 18, 921 A.2d 163; and (3) the City/MMA is entitled to be reimbursed all of the benefits it has paid for which the City/self-insured is liable. Because Mr. Delano's rights against the City/self-insured include the right to be paid benefits adjusted for inflation, the City/MMA is entitled to be reimbursed by the City/self-insured in an amount that includes inflation adjustments.

The entry is:

> The hearing officer's decision is vacated in part, consistent with this decision, and modified such that the final sentence of paragraph fourteen shall read: "The employer/self shall reimburse the employer/MMA 90% of total incapacity benefits

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6. Prior work-related injuries. If an employee suffers a work-related injury that aggravates, accelerates or combines with the effects of a work-related injury that occurred prior to January 1, 1993 for which compensation is still payable under the law in effect on the date of that prior injury, the employee's rights and benefits for the portion of the resulting disability that is attributable to the prior injury must be determined by the law in effect at the time of the prior injury.

based on the 1991 AWW, with adjustment for inflation." In all other respects, 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. 2012).

Attorney for Appellant,
City of South Portland/MMA:
Stephen Moriarty, Esq.
NORMAN HANSON & DeTROY
P.O. Box 4600
Portland, ME 04112-4600

Attorneys for Appellee:
City of South Portland/self-insured:
Evan M. Hansen, Esq.
John J. Cronan III, Esq.
PRETI FLAHERTY BELIVEAU & PACHIOS
One City Center, P.O. Box 9546
Portland, ME 04112-9546

Attorney for Employee:
Nathan A. Jury, Esq.
MacADAM JURY
208 Fore Street
Portland, ME 04101