NANCY J. PASTULA
(Appellee)

v.

LANE CONSTRUCTION CORP.
(Appellant)

and

LIBERTY MUTUAL INSURANCE COMPANY
(Insurer)

Conference held: July 23, 2014
Decided: June 1, 2015

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

[¶1] Nancy Pastula filed Petitions for Award and for Payment of Medical and Related Services for a June 20, 2011, work injury to both knees and both wrists.[1] The hearing officer (*Greene, HO*) granted the petitions in part, awarding ongoing total incapacity benefits, deferring decision on medical payments for the bilateral wrist injury, and denying the petitions as they relate to the asserted bilateral knee injury.

[¶2] Lane Construction Corporation appeals, contending that the hearing officer erred when (1) determining that Ms. Pastula suffered a *gradual* bilateral

[1] Ms. Pastula also filed a Petition for Award claiming an August 22, 2011, mental stress injury. The hearing officer denied that petition, and Ms. Pastula did not appeal that decision.

wrist injury; (2) awarding total incapacity benefits while Ms. Pastula went out of work for a nonwork-related mental health condition; and (3) imputing wages to Ms. Pastula during a seasonal layoff for the purpose of calculating her average weekly wage. Ms. Pastula cross-appeals, contending that the hearing officer incorrectly rejected the independent medical examiner's opinion that her bilateral knee injury is work-related. *See* 39-A M.R.S.A. § 312 (Supp. 2014).

[¶3] We vacate that portion of the hearing officer's decision related to Ms. Pastula's knee condition. In all other respects, we affirm.

I. BACKGROUND

[¶4] Ms. Pastula began working for Lane Construction in 2002, first as a truck driver, then as a paving equipment operator. Each year, Lane Construction laid her off during the winter months when its business slowed down.

[¶5] On June 20, 2011, Ms. Pastula fell at work while she was working with a hand-operated machine called a "whacker." She landed on her right hand and right knee, struck her left hand or grabbed the handle on the whacker, and strained her left knee. She sought medical treatment for pain first in her wrists, and later in her wrists and knees, but she was able to continue working in an accommodated position. However, she stopped working at Lane Construction on August 22, 2011, due to a nonwork-related mental health condition and has not returned to work.

[¶6] Thereafter, Ms. Pastula filed her Petitions for Award and for Payment of Medical and Related Services, and she continued to seek treatment for her wrists and knees. She underwent MRI scans of her knees on December 12, 2011. The images showed meniscal tears, mild tricompartmental osteoarthritis, myxoid degeneration of the posterior horn of the medial meniscus in both knees, an old partial tear of the ACL, and a small effusion in the left knee. Dr. White surgically repaired the meniscal tears on March 20, 2012.

[¶7] Following additional MRI scans on March 18, 2012, Ms. Pastula was diagnosed with triangular fibrocartilage complex (TFCC) tears in both wrists. The MRI also showed preexisting ulnar impaction syndrome. Dr. Rogers performed surgery on her right wrist on August 2, 2012, and her left wrist on October 4, 2012.

[¶8] Dr. Kimball, who examined Ms. Pastula pursuant to 39-A M.R.S.A. § 207 (Supp. 2014), as well as her surgeons, Dr. Rogers and Dr. White, all opined that Ms. Pastula's ongoing disability resulting from her wrists or knees was caused by the June 20, 2011, fall at work.

[¶9] Ms. Pastula also was evaluated by Dr. Bradford, the independent medical examiner (IME) appointed pursuant to 39-A M.R.S.A. § 312. Dr. Bradford opined that Ms. Pastula's bilateral wrist and knee complaints were causally related to the June 20, 2011, fall at work. He stated "I am convinced that she sustained TFCC tears to both wrists at the time of her fall and also meniscal tears to the

medial menisci bilaterally. In both cases, the wrists and knees had been asymptomatic prior to 6/20/11 and were convincingly symptomatic thereafter."

[¶10] In his initial decree, the hearing officer rejected the IME's medical findings. He granted Ms. Pastula's Petition for Award in part, finding that she had suffered work-related injuries to her right hand and right knee due to her fall on June 20, 2011, but that those injuries had resolved and therefore the work injury was not a cause of any ongoing incapacity. He awarded no incapacity benefits.

[¶11] Ms. Pastula filed a Motion for Additional Findings of Fact and Conclusions of Law. The hearing officer granted the motion and issued additional findings. He found that the June 20, 2011, work injury ". . . consisted of a right knee contusion and a left knee strain, both of which [had] resolved, a right hand contusion, and an aggravation (either as a result of her fall or other work activities on or about that date) of pre-existing pathology in both wrists. . . ." He referred to the wrist injury as a "gradual and/or acute process." The hearing officer further found that the employment contributed in a significant manner to Ms. Pastula's disability, *see* 39-A M.R.S.A. § 201(4) (Supp. 2014), and awarded Ms. Pastula ongoing total incapacity benefits from October 18, 2011, based on an average weekly wage of $773.75 (exclusive of fringe benefits), *see id* §§ 102(4), 212(1).

[¶12] Lane Construction filed this appeal, and Ms. Pastula cross-appealed.

II. DISCUSSION

A. Did the hearing officer err when rejecting the IME's medical finding that Ms. Pastula's ongoing knee problems resulted from the June 20, 2011, work injury?

[¶13] We address the issue raised by Ms. Pastula first. She contends that the hearing officer erred when rejecting the IME's opinion that her bilateral knee condition was caused by the June 20, 2011, fall at work. We agree.

[¶14] The hearing officer was required to adopt the IME's medical findings absent clear and convincing contrary evidence in the record. 39-A M.R.S.A. § 312(7) (Supp. 2014). When considering whether the evidence permitted a rejection of the IME's medical findings, "we determine whether the hearing officer could have been reasonably persuaded by the contrary medical evidence that it was highly probable that the record did not support the IME's medical findings." *Dubois v. Madison Paper Co*., 2002 ME 1, ¶ 14, 795 A.2d 696 (quotation marks omitted). When an IME's opinion is rejected, the hearing officer must explain the reasons for that rejection in writing. 39-A M.R.S.A. § 312(7).

[¶15] The hearing officer explained that he rejected the IME's medical findings for two reasons: (1) Dr. Bradford did not have an accurate understanding of the mechanics of Ms. Pastula's fall; and (2) Dr. Bradford did not appreciate that Ms. Pastula had a preexisting degenerative condition in her knees.

1. Mechanics of the Fall

[¶16] In his report, Dr. Bradford describes Ms. Pastula as having "landed on both knees and both wrists" when she fell. The hearing officer found as fact, based on competent evidence in the record, that neither Ms. Pastula's left knee nor her left wrist hit the ground when she fell. However, both Dr. Kimball, who examined Ms. Pastula pursuant to section 207, and Dr. White, who performed the surgical repair of the torn menisci, documented that only her right wrist and right knee hit the ground when she fell, yet both doctors found that both torn menisci resulted from the fall at work. Dr. Bradford considered both Dr. Kimball's and Dr. White's reports when formulating his findings, and he specifically stated that "there is nothing to contradict the conclusion that her meniscal tears were indeed related to the injury of 6/20/11."

[¶17] The hearing officer did not point to any medical evidence in the record that assumes facts consistent with his factual findings regarding the fall that contradicts or undermines the IME's medical findings pertaining to the cause of Ms. Pastula's knee condition.

2. Preexisting Knee Condition

[¶18] The hearing officer also rejected the IME's medical findings because Dr. Bradford assumed that Ms. Pastula had no preexisting knee problems, even though in the hearing officer's view, the medical records disclosed evidence of

preexisting degenerative conditions that likely caused Ms. Pastula to collapse, and the meniscal tears themselves were degenerative. The hearing officer also did not believe Ms. Pastula's assertion that she had no prior knee problems.

[¶19] Dr. Bradford, however, reviewed the MRI results when formulating his findings, and explicitly noted in the report that the MRI showed a degenerative process in both knees, and an old ACL tear and a small effusion in the left knee. In listing his diagnoses, Dr. Bradford specifically noted "internal derangement and early degenerative joint disease, bilateral knees." Therefore the hearing officer's assumption that Dr. Bradford did not take evidence of other conditions into consideration when concluding that the meniscal tears were caused by the work injury is unfounded.

[¶20] Further, other medical evidence in the record is consistent with and does not contradict the IME on the issue of causation of the meniscal tears. Dr. Kimball and Dr. White both evaluated the MRI or MRI report, and both concluded that her torn menisci were a direct result of her fall at work. Dr. White read the MRI as showing no significant preexisting osteoarthritis of the knees. He also explicitly noted that Ms. Pastula reported no history of prior knee pain, despite working 60 hours per week with no restrictions in the two months before her fall.

[¶21] Given that (1) the record contains medical findings from two other physicians (a) who understood the facts as consistent with the hearing officer's

factual findings, and (b) whose reports are nevertheless consistent with the IME's medical findings; and (2) the hearing officer does not cite to any medical opinion that is contrary to the IME's findings, we conclude that the hearing officer could not have been reasonably persuaded by the contrary medical evidence that it was highly probable that the record did not support the IME's medical findings. *Cf. Dubois*, 2001 ME 1, ¶ 15, 795 A.2d 696 (upholding rejection of IME's medical finding of no causation when hearing officer recited evidence that included two contrary medical opinions and other medical evidence that was inconsistent with the IME's assumptions regarding the severity of the work injury and preexisting conditions); *Bean v. Charles A. Dean Mem'l Hosp.*, Me. W.C.B. No. 13-6, ¶¶ 18-19 (App. Div. 2013) (upholding rejection of the IME's medical findings when the IME had credited employee's version of events that the hearing officer found not credible; medical findings consistent with IME's findings were likewise based on employee's assertions; and there was a contrary medical opinion in the record that the hearing officer found to be more persuasive than the IME's opinion).

[¶22] Accordingly, we vacate the hearing officer's decision insofar as it determines that Ms. Pastula's bilateral knee condition is not work-related.

B. Did the hearing officer err when determining that Ms. Pastula suffered a gradual injury to her wrists?

[¶23] Lane Construction asserts that the hearing officer erred when determining that Ms. Pastula experienced a *gradual* injury to her wrists, which she

had not alleged and no physician had diagnosed. Although the hearing officer did find a gradual injury, he also found—in the alternative—that her sudden fall at work aggravated a preexisting condition in both wrists. *See* 39-A M.R.S.A. § 201(4). Provided there is competent evidence in the record supporting the occurrence of a sudden aggravation injury, we will uphold the hearing officer's findings. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983).

[¶24] The hearing officer specifically found that Ms. Pastula (1) had a preexisting anatomic abnormality, ulnar impaction syndrome, that made her more vulnerable to TFCC tears; and (2) when she fell at work, her right hand struck the ground forcefully and she either grabbed the whacker handle or hit it with her left hand; thus (3) aggravating the preexisting bilateral wrist condition. The underlying factual findings regarding her fall are supported by Ms. Pastula's testimony and the testimony of an eye-witness coworker, as well as notations in the contemporaneous medical records. The medical findings are supported by the reports of Dr. Bradford, Dr. Kimball, and Dr. Rogers, all of whom noted the preexisting ulnar impaction syndrome which made Ms. Pastula more susceptible to injury upon impact.

[¶25] Accordingly, we uphold the hearing officer's decision as it pertains to a sudden aggravation injury to both wrists. Any findings regarding a gradual injury are mere surplusage.

C. Did the hearing officer err when awarding total compensation?

[¶26] Lane Construction contends that the hearing officer erred when awarding Ms. Pastula total incapacity benefits for her work-related physical injuries when she was taken out of work on August 23, 2011, not for the physical injuries, but due to a non-compensable mental health condition. Lane Construction points out that before that date, it had been accommodating Ms. Pastula's physical knee and wrist limitations.

[¶27] Lane Construction appears to argue that Ms. Pastula's disability stemming from her non-compensable mental health condition precludes entitlement to benefits on account of her work-related knee and wrist injuries. We conclude, however, that the fact that Ms. Pastula went out of work initially as a result of a nonwork-related mental health condition does not insulate the employer from liability for work injuries that occurred prior to that event.

[¶28] In this case, the work injury occurred on June 20, 2011. Ms. Pastula went out of work on account of the effects of a nonwork-related mental health condition in August of 2011. The hearing officer found, however, that as of October 18, 2011, Ms. Pastula's wrist and knee condition rendered her totally incapacitated. The hearing officer's finding that Ms. Pastula's knee and wrist conditions together rendered her totally incapacitated is a finding of fact supported by competent evidence, which we will not disturb.

[¶29] Despite Lane Construction's contention, *Roy v. Bath Iron Works*, 952 A.2d 965 (Me. 2008) does not compel a different result. In that case, a hearing officer held that Mr. Roy's two work-related injuries had combined to render him totally incapacitated. *Id.* ¶ 5. Nevertheless, the hearing officer discontinued ongoing compensation after Mr. Roy suffered a totally disabling, nonwork-related liver condition. *Id*. The Law Court vacated that decision pursuant to 39-A M.R.S.A. § 201(5), holding that, while a subsequent nonwork-related injury or disease cannot increase the level of workers' compensation benefits, section 201(5) does not authorize reducing or eliminating payments to disabled workers for their work injuries. *Roy* 2008 ME 94, ¶ 11.

[¶30] Thus, if Ms. Pastula had first become disabled by her work injury, *Roy* would clearly not allow a reduction or suspension of compensation benefits at a later time when she became independently disabled from a nonwork-related mental health condition. In this case, Ms. Pastula first became disabled from a nonwork-related mental health condition. Ms. Pastula's work-related bilateral wrist and knee injuries thereafter combined to render her totally incapacitated as of October 2011.

[¶31] The Employer argues that *Roy* essentially insulates it from liability in this situation because Ms. Pastula was already disabled by a nonwork-related condition. We conclude, however, that the Court has held that nothing in section

201(5) authorizes a reduction or elimination of benefits on account of incapacity caused by a subsequent intervening event (such as Ms. Pastula's nonwork-related mental health disability) and for this reason we conclude that the award of total incapacity benefits as of October 18, 2011, was not error.

[¶32] Finally, the hearing officer's finding that it was unlikely that Lane Construction would have accommodated Ms. Pastula indefinitely in view of her physical limitations is immaterial, given the hearing officer's finding that Ms. Pastula subsequently became totally physically incapacitated due to her wrist and knee conditions.

D. Did the hearing officer err when determining the average weekly wage?

[¶33] Lane Construction contends the hearing officer misapplied the law to the facts when calculating Ms. Pastula's average weekly wage pursuant to 39-A M.R.S.A. § 102(4)(D), and by imputing earnings to Ms. Pastula during her annual layoff period. It contends the reasonable and fair way to establish Ms. Pastula's future earning capacity is to divide her annual earnings by 52 weeks. We find no error in the hearing officer's method of calculation.

[¶34] "The average weekly wage is intended to provide a fair and reasonable estimate of what the employee in question would have been able to earn in the labor market in the absence of a work-injury." *Alexander v. Portland Natural Gas*, 2001 ME 129, ¶ 8, 778 A.2d 343. *See also Nielsen v. Burnham &*

Morrill, Inc., 600 A.2d 1111, 1112 (Me. 1991) ("[T]he purpose of calculating an average weekly wage is to arrive at an estimate of the employee's future earning capacity as fairly as possible." (quotation marks omitted)).

[¶35] As in *Gushee v. Point Sebago*, Me. W.C.B. No. 13-1 (App. Div. 2013), the issue in this case is how to calculate average weekly wage when the employee is subject to periodic layoffs associated with the nature of the employer's business. The methods of calculating average weekly wage are set forth in paragraphs A through D of 39-A M.R.S.A. § 102(4),[2] and the appropriate method

[2] Title 39-A M.R.S.A. § 102(4) provides, in relevant part:

> A. "Average weekly wages, earnings or salary" of an injured employee means 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. . . . In the case of piece workers and other employees whose wages during that year have generally varied from week to week, wages are averaged in accordance with the method provided under paragraph B.
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> B. When the employment or occupation did not continue pursuant to paragraph A for 200 full working days, "average weekly wages, earnings or salary" is determined by dividing the entire amount of wages or salary earned by the injured employee during the immediately preceding year by the total number of weeks, any part of which the employee worked during the same period. The week in which employment began, if it began during the year immediately preceding the injury, and the week in which the injury occurred, together with the amounts earned in those weeks, may not be considered in computations under this paragraph if their inclusion would reduce the average weekly wages, earnings or salary.
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> C. Notwithstanding paragraphs A and B, the average weekly wage of a seasonal worker is determined by dividing the employee's total wages, earnings or salary for the prior calendar year by 52.
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> 1) For the purposes of this paragraph, the term "seasonal worker" does not include any employee who is customarily employed, full time or part time, for more than 26 weeks in a calendar year. The employee need not be employed by the same employer during this period to fall within this exclusion.

is chosen by proceeding sequentially through the four alternatives. *Bossie v. S.A.D. No. 24*, 1997 ME 233, ¶ 3, 706 A.2d 578. Subsection 102(4)(D) is a fallback provision applicable when none of the preceding methods can be "reasonably and fairly applied." *Alexander*, 2001 ME 129, ¶ 10, 778 A.2d 343. "[T]he party asserting the application of subsection D . . . [bears] the burden of providing evidence to support a determination pursuant to that subsection." *Bossie*, 1997 ME 233, ¶ 6, 706 A.2d 578. Paragraph D requires the examination of comparable employees' earnings to ascertain what a reasonable average weekly wage for the employee would be, but otherwise does not require strict adherence to an exact mathematical formula, *Alexander*, 2001 ME 129, ¶ 17, 778 A.2d 343.

[¶36] The hearing officer found (by implication) that paragraph A does not apply and that paragraph B cannot fairly be applied. And, although Ms. Pastula's job with the paving crew arguably was "seasonal" in nature, the hearing officer

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> 2) Notwithstanding subparagraph (1), the term "seasonal worker" includes, but is not limited to, any employee who is employed directly in agriculture or in the harvesting or initial hauling of forest products.
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> D. When the methods set out in paragraph A, B or C of arriving at the average weekly wages, earnings or salary of the injured employee can not reasonably and fairly be applied, "average weekly wages" means the sum, having regard to the previous wages, earnings or salary of the injured employee and of other employees of the same or most similar class working in the same or most similar employment in the same or a neighboring locality, that reasonably represents the weekly earning capacity of the injured employee in the employment in which the employee at the time of the injury was working.

concluded paragraph C does not apply because Ms. Pastula worked more than twenty-six weeks per year. Instead, the hearing officer held that Ms. Pastula's pattern of regular, yearly layoffs over a period of nine years constitutes a "consistently intermittent" relationship with the labor market, making application of subsection D appropriate. *See Alexander*, 2001 ME 129, ¶ 18, 778 A.2d 343 (applying paragraph D was appropriate when facts demonstrated that the employee had a consistently intermittent relationship with the labor market).

[¶37] Lane Construction submitted evidence of earnings of comparable employees who shared Ms. Pastula's pattern of winter layoffs, demonstrating that the layoff periods were consistent in that industry. Because there was no evidence of Ms. Pastula's actual earnings (if any) during the yearly layoff periods, the hearing officer imputed to her a $360 per week earning capacity for the 24 weeks she was laid off. Adding this amount to Ms. Pastula's total earnings during the 28 weeks she worked for the employer, then dividing by 52, yielded an average weekly wage of $773.75 (excluding fringe benefits).

[¶38] Under the particular circumstances of this case, we conclude that the hearing officer neither misconceived nor misapplied the law when applying paragraph D. *See Bossie*, 1997 ME 233, ¶ 5 (suggesting paragraph D is best method of determining average weekly wage when employee has chosen a consistent part-time relationship to the labor market). Because calculation pursuant

to that paragraph is flexible as long as comparable earnings are considered, we cannot say that it was error to impute $360 per week in wages during Ms. Pastula's layoff period in order to fairly and reasonably estimate what she "would have been able to earn in the labor market in the absence of a work-injury." *Alexander*, 2001 ME 129, ¶ 8, 778 A.2d 343.

The entry is:

> The hearing officer's decision is vacated insofar as it concludes that Ms. Pastula's bilateral knee condition is not work-related. 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. 2014).

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