

RICHARD PARKS
(Appellee)

v.

THE HOME DEPOT USA, INC.
(Appellant)

and

HELMSMAN MANAGEMENT SERVICES, INC.
(Insurer)

Argued July 24, 2014
Decided: July 20, 2015

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

[¶1] The Home Depot USA, Inc., appeals from a decision of a Workers' Compensation Board Hearing Officer (*Greene, HO*) granting Richard Parks' Petition for Restoration concerning an April 3, 2007, left knee injury, and awarding 100% partial incapacity benefits for the period beginning June 12, 2012.¹ Home Depot maintains that it was error to fail to reduce benefits to reflect (1) the absence of a good faith work search; and (2) additional incapacity due to a subsequent nonwork-related right knee condition, pursuant to 39-A M.R.S.A. § 201(5) (Supp. 2014). We vacate the decision insofar as it awarded ongoing 100% partial

¹ The hearing officer also awarded partial incapacity benefits at varying rates for the period March 10, 2012, to June 12, 2012. That award is not challenged on appeal.

incapacity benefits after November 6, 2012, without proof of the unavailability of work in Mr. Parks' community. In all other respects, we affirm.

I. BACKGROUND

[¶ 2] Mr. Parks began working as a retail sales associate for Home Depot in 2001. He suffered a work-related injury to his left knee on April 3, 2007, including a tear of the medial meniscus. Mr. Parks had arthroscopic surgery on his left knee on March 12, 2008. He returned to work at Home Depot on a full-time basis thereafter, subject to restrictions. Mr. Parks also began to suffer from right knee pain in October 2007, which he thought might be related to his left knee problem.

[¶ 3] A consent decree, issued on May 17, 2011, established that the left knee injury is work-related and awarded a retroactive period of incapacity benefits and payment of related medical expenses. The consent decree also established that the subsequent right knee injury is not work-related.

[¶ 4] On March 6, 2012, Mr. Parks' treating physician restricted him to working twenty hours per week due to his bilateral knee problems. Home Depot believed that the request for accommodation was related to Mr. Parks' nonwork-related right knee condition and therefore directed him to seek approval from the human resources department for medical leave. On June 12, 2012, Mr. Parks was placed on administrative leave and thereafter was placed on medical leave for a period of twelve weeks. When that leave expired in October of 2012, Home

Depot initially terminated Mr. Parks' employment, although he was subsequently reinstated. Mr. Parks' employment was terminated once again after he told Home Depot that he would be undergoing surgery on his right knee. Mr. Parks has not worked since June 12, 2012. He filed his Petition for Restoration on June 27, 2012.

[¶5] On November 6, 2012, Mr. Parks underwent surgery for his nonwork-related right knee condition. At a post-operative visit later on November 19, 2012, his doctor advised him to stay out of work for at least two more weeks. He submitted no other medical evidence regarding the extent of his incapacity thereafter.

[¶6] The Board issued a decision on August 30, 2013, and later, pursuant to a Motion for Findings of Fact and Conclusions of Law, modified that decision on January 17, 2014. In that modified decision, the hearing officer awarded Mr. Parks 100% partial incapacity benefits from June 12, 2012, to the present and continuing. Home Depot appeals.

II. DISCUSSION

[¶7] Home Depot challenges the award of ongoing 100% partial incapacity benefits beginning on June 12, 2012, on two bases: that Mr. Parks' work search was inadequate to establish the unavailability of work, and that the award should have been reduced pursuant to section 201(5) on account of the subsequent nonwork-related injury.

A. Standard of Review

[¶8] The Appellate Division’s “role 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).

B. June 12, 2012, through November 6, 2012

[¶9] “[A] partially incapacitated employee may be entitled to 100% partial incapacity benefits pursuant to [39-A M.R.S.A. § 213] based on the combination of a partially incapacitating work injury and the loss of employment opportunities that are attributable to that injury.” *Monaghan v. Jordan’s Meats*, 2007 ME 100, ¶ 13, 928 A.2d 786 (quotation marks omitted). In order to obtain the 100% partial benefit pursuant to the “work search rule,” the employee must establish that work is unavailable within the local community as a result of the work injury, by submitting “competent and persuasive evidence” that may include a work search, “labor market surveys, or other credible evidence regarding availability of work for a particular employee in the local community.” *Id.* ¶ 16.

[¶10] The Law Court has set forth several factors for consideration when evaluating work search evidence. Those factors are not exhaustive and the Court

has stated that a hearing officer should utilize a “broad lens” in evaluating whether the employee has satisfied his or her burden of proof. *Id.* ¶ 22.

[¶11] The hearing officer in this case considered the following factors. With respect to the period from June 12, 2012, until his surgery on November 6, 2012, Mr. Parks was on a medical leave of absence from Home Depot. Although Home Depot was unable to accommodate Mr. Parks’ increased work incapacity during this period, his status as an employee had not been terminated. Both parties expected that Mr. Parks would return to work for Home Depot during this time. In addition, Mr. Parks submitted evidence of a work search undertaken from August until his surgery in November 2012, during which time he collected unemployment benefits. Finally, during this period, Mr. Parks was expecting to undergo additional surgery that would keep him out of work for some time, a factor that complicates any search for employment.

[¶12] In light of these factors specific to Mr. Parks’ situation, we conclude that the hearing officer did not err when awarding partial incapacity benefits at a level of 100% from June 12 to November 6, 2012.

C. November 6, 2012, and ongoing

[¶13] We conclude, however, that an award of 100% partial incapacity benefits after November 6, 2012, was error. As of November 6, 2012, Mr. Parks’ circumstances changed in two significant ways. First, his employment relationship

with Home Depot was formally terminated.² Second, his incapacity increased, at least for a period of time, from a partial incapacity to earn to a total incapacity to earn on account of his nonwork-related right knee surgery. These factors require a re-examination of his entitlement to partial incapacity benefits at a level of 100% after that date.

[¶14] An award of 100% partial during a short period of time when employment is expected to continue is not inconsistent with the rationale set forth in *Monaghan*. Once that employment relationship is severed, however, it is incumbent upon the employee to demonstrate that work has become unavailable to him in the local community due to restrictions from his work injury, in order to establish entitlement to 100% partial incapacity benefits. *See Monaghan*, 2007 ME 100, ¶¶ 13-14.

[¶15] When concluding that Mr. Parks was entitled to 100% partial incapacity benefits after he became totally incapacitated due to his nonwork-related right knee surgery, the hearing officer looked mainly to *Pratt v. Fraser Paper*, 2001 ME 102, 774 A.2d 351. In *Pratt*, the Law Court held that an employee who became totally incapacitated on account of the combination of a partially incapacitating work injury and a subsequent nonwork-related injury was not entitled to benefits under the statute governing *total* incapacity. 2001 ME 102,

² It appears that Mr. Parks' employment was terminated at approximately the same time that he had surgery for his nonwork-related right knee condition, on November 6, 2012.

¶ 12, 774 A.2d 351. The Court reasoned that an employee’s entitlement to workers’ compensation benefits in such a circumstance was controlled by the extent of incapacity related solely to the work injury, and held that section 201(5) “requires the Hearing Officer to separate out the effects of the subsequent nonwork injury in calculating the amount of benefits and in determining whether the compensation level for the benefits is governed by the partial incapacity section or the total incapacity section.” *Id.*

[¶ 16] The hearing officer had concluded in *Pratt* that the employee met his burden of establishing the lack of available work in his community as a result of his limitations, including those resulting from the nonwork-related condition, and that finding was not challenged on appeal. 2001 ME 102, ¶ 14 & n.7, 774 A.2d 351. The Law Court accounted for separating out the effects of the nonwork-related injury by reducing the 100% partial award by the percentage the employer agreed was attributable to the nonwork-related injury. *Id.* ¶ 15.

[¶17] The hearing officer in this case noted that the Law Court did not explain in *Pratt*, and has not explained in any other case, how the availability of work is to be assessed without considering all of an employee’s limitations, including those that arise from the subsequent nonwork-related injury. The hearing officer determined that in the circumstances of this case, where “an employee has been terminated by an employer and access to the labor market of the employee’s

community is unavailable because of physical restrictions stemming from both work and non-work conditions,” no work search or labor market evidence was required. He reasoned that when “it is impossible to separate out the effects of the work injury, in terms of access to suitable and available work, by testing the labor market with a work search, none should be required.”

[¶18] The hearing officer misconceived the law on this point. An employee bears the burden of demonstrating the nature and extent of earning incapacity when making a claim for benefits. *See Fernald v. Dexter Shoe Co.*, 670 A.2d 1382, 1385 (Me. 1996); *see also Monaghan*, 2007 ME 100, ¶ 14. In this case, Mr. Parks brought the Petition for Restoration. During the period at issue, he remained able to work on a part-time basis subject to certain activity restrictions related to his work injury. It was incumbent upon him to provide evidence in the nature of work search, labor market evidence, or other evidence upon which his earning capacity could be assessed.

[¶19] The suggestion that evidence of the unavailability of work is not required for purposes of an award of 100% partial incapacity during this period because he was totally incapacitated by a subsequent nonwork-related injury is inconsistent with the Law Court’s holdings in *Monaghan* and *Roy*. *Monaghan* requires proof of the unavailability of work due to the employee’s work-related limitations as a condition of an award of 100% partial benefits. 2007 ME 100,

¶¶ 13-14, 16. *Roy* holds that when there is a subsequent nonwork-related condition, section 201(5) requires that incapacity benefits compensate the employee for the work-related limitations only. 2008 ME 94, ¶ 15. Based on these authorities, we conclude that an employee is not relieved of the burden to establish that work was unavailable to him in his local community with evidence of an adequate work search, a labor market survey, or other competent evidence, even when that that employee suffered a subsequent nonwork-related injury.

[¶20] Absent such proof, Mr. Parks was not entitled to an award of 100% partial benefits; instead, the hearing officer was bound to establish benefits at a level that reflects incapacity caused by his work-related left knee injury alone.³

The entry is:

The hearing officer's decision is vacated to the extent that it awards 100% partial incapacity after November 6, 2012, and is remanded for findings on the extent of incapacity related to the employee's work-related left knee injury as of November 6, 2012.

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).

³ Because Mr. Parks' incapacity was partial until the nonwork-related right-knee surgery, section 201(5) would prohibit the receipt of total incapacity benefits as of November 6, 2012, and would prohibit the receipt of 100% partial benefits absent proof of the unavailability of work in his local community *resulting from the work-related left knee injury only*. Prior to Mr. Parks' increased disability resulting from the nonwork-related surgery, section 201(5) had no consequence because the hearing officer found that Mr. Parks' restrictions from his right and left knees were exactly the same.

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