RONALD WATERS
(Appellant)

v.

S.D. WARREN COMPANY
(Appellee)

and

CONSTITUTION STATE
and
HELMSMAN MANAGEMENT
(Appellees)

Argued: January 29, 2014
Decided: September 18, 2014

PANEL MEMBERS: Hearing Officers Collier, Elwin, and Pelletier

Majority: Hearing Officers Elwin and Pelletier
Dissent: Hearing Officer Collier

BY: Hearing Officer Elwin

[¶1] Ronald Waters appeals from a decision of a hearing officer (*Jerome, HO*) denying his Petitions for Review and to Reopen regarding three work-related injuries incurred while working for S.D. Warren Company. The issues on appeal are whether the hearing officer erred when (1) determining that permanent impairment from Mr. Waters's preexisting psychological condition could not be stacked with permanent impairment from his work-related physical conditions

pursuant to 39-A M.R.S.A. § 213(1-A)(A) (Supp. 2011)[1]; (2) determining that Mr. Waters had forfeited consideration of a constitutional argument; (3) adopting the independent medical examiner's opinion regarding permanent impairment; and (4) denying Mr. Waters's motion to reopen the evidence. We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Mr. Waters worked at S.D. Warren's Westbrook mill, where he suffered three compensable work injuries to his: (1) bilateral shoulders on May 8, 1998; (2) bilateral shoulders, wrists and elbows on May 21, 1999; and (3) back on December 23, 1999. Pursuant to the board's August 26, 2011, decision, Mr. Waters was awarded partial incapacity benefits due to the ongoing effects of all three work injuries.

[¶3] Mr. Waters subsequently filed a petition for review, seeking an increase to total incapacity benefits.[2] In the March 20, 2013, decision which is the subject of this appeal, the hearing officer concluded that neither Mr. Waters's physical condition nor his psychological condition had worsened since the prior decree; thus, the hearing officer denied the petition for review. *See Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 12, 837 A.2d 117.

[1] Title 39-A M.R.S.A. § 213 has since been amended. *See* P.L. 2011, ch. 647, §§ 7-9 (effective Aug. 30, 2012).

[2] Mr. Waters also filed a Petition to Determine Offset, which the hearing officer determined to be moot. That petition is not at issue in this appeal.

[¶4] S.D. Warren filed a Petition for Review with respect to the December 1999 back injury, Petitions to Terminate Benefits pursuant to section 213 with respect to the 1998 and May 1999 injuries, and Petitions to Determine Extent of Permanent Impairment with respect to all three dates of injury. Section 213 provides a durational limit of 520 weeks for receipt of partial incapacity benefits where an employee's level of permanent impairment is below the threshold level of 11.8%. *See also* Me. W.C.B. Rule, ch. 2, §§ 1, 2. S.D. Warren established that it has paid Mr. Waters more than 600 weeks of partial incapacity benefits on all dates of injury. At issue was whether Mr. Waters suffered permanent impairment in excess of 11.8%.

[¶5] Dr. Bradford, an orthopedic surgeon, performed an independent medical evaluation of Mr. Waters pursuant to 39-A M.R.S.A. § 312. Dr. Bradford assessed 6% whole person permanent impairment to the right shoulder and 5% to the left shoulder, for a combined permanent impairment of 11%. Dr. Bradford assessed no permanent impairment for the wrist or elbow conditions, which he found had resolved, or for the December 23, 1999, back injury, which he did not believe to be permanent. The hearing officer adopted Dr. Bradford's medical findings pursuant to 39-A M.R.S.A. § 312(7) (Supp. 2013).

[¶6] Mr. Waters also suffered from a preexisting psychological condition, which the hearing officer found was exacerbated by his 1998 and 1999 work

injuries. Dr. Lobozzo, a psychiatrist, performed an independent psychiatric evaluation of Mr. Waters pursuant to 39-A M.R.S.A. § 312. Dr. Lobozzo assessed 7% whole person permanent impairment for Mr. Waters's psychological condition.

[¶7] The hearing officer concluded that "stacking" of Mr. Waters's permanent impairment for his psychological condition onto that assessed for his work-related physical conditions was not permitted under 39-A M.R.S.A. § 213(1-A)(A). And, because the level of permanent impairment due to Mr. Waters's work-related shoulder injuries fell below the 11.8% threshold, the durational cap in section 213(1)(A) and board rules applied. The hearing officer therefore granted S.D. Warren's Petitions for Review and to Terminate Benefits, and authorized discontinuance of Mr. Waters's partial incapacity benefits. Pursuant to Mr. Waters' motion for additional findings of fact and conclusions of law, the hearing officer issued additional findings, but did not alter the outcome of her decision. Mr. Waters's appeal followed.

II. DISCUSSION

[¶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).

A. Psychological Permanent Impairment

[¶9] Title 39-A M.R.S.A. § 213(1-A)(A) provides, in pertinent part, as follows:

> For purposes of this section, "permanent impairment" includes only permanent impairment resulting from:
>
> > A. The work injury at issue in the determination and any preexisting physical condition or injury that is aggravated or accelerated by the work injury at issue in the determination.

[¶10] Mr. Waters contends that the hearing officer should have included the percentage of permanent impairment attributable to his psychological condition in the total percentage pursuant to section 213(1-A)(A). For the reasons that follow, we disagree with that contention.

[¶11] When construing a statutory provision, we are required to "give statutory language its plain meaning, and . . . not treat language as superfluous or meaningless." *State v. Thompson*, 2008 ME 166, ¶ 12, 958 A.2d 887; *see also Stromberg-Carlson Corp. v. State Tax Assessor*, 2001 ME 11, ¶ 9, 765 A.2d 566.

[¶12] The hearing officer determined that Mr. Waters's psychological condition preexisted and was exacerbated by his work-related physical injuries. This is a factual finding not subject to appellate review. 39-A M.R.S.A. § 321-B(2) (Supp. 2013). The plain language of section 213(1-A)(A) does not authorize including permanent impairment from a preexisting psychological condition when

applying the durational limit on partial incapacity benefits. It states only that impairment from preexisting physical conditions should be included.

[¶13] Mr. Waters contends the Law Court's decision in *Smart v. Department of Public Safety*, 2008 ME 172, 959 A.2d 756, authorizes the inclusion of impairment from a preexisting psychological condition. In that case, the employee suffered from both a preexisting psychological condition and a different work-related mental stress injury. *Id.* ¶ 2. The issue in that case was "whether the hearing officer erred by assigning a percentage of permanent impairment resulting from an employee's psychological work injury when the AMA *Guides* does not assign numerical percentages to non-neurological mental impairments." *Id*. ¶ 7. The Court held that the hearing officer was authorized to assign a numeric percentage of permanent impairment to "mental injuries resulting from work-related stress," *id.* ¶ 9, but remanded the case for a redetermination of the percentage using the prescribed methodology, *id*. ¶ 16. Whether section 213(1-A)(A) barred including a percentage of permanent impairment from the preexisting psychological condition was not at issue in the case, and the Court did not address it.

[¶14] Mr. Waters further argues that section 213(1-A)(A) should be construed to include permanent impairment from the aggravation of his psychological condition because it is part of the "work injury at issue"; that is, because it resulted from the physical work injuries. However, to construe "injury at

issue" to include impairment from an aggravated preexisting psychological condition would render the language in the statute regarding the treatment of preexisting physical conditions superfluous.

[¶15] Accordingly, looking only at the plain language of the statute, we conclude that the Legislature did not intend to include permanent impairment from preexisting psychological conditions in the calculation of permanent impairment, and the hearing officer did not err when excluding the 7% permanent impairment assessed by Dr. Lobozzo.

B. Waiver

[¶16] Mr. Waters contends that the hearing officer erred when determining that he had waived consideration of an equal protection challenge to section 213(1-A)(A) because he did not raise the issue until after the decision had been issued in the case. Mr. Waters asserts that he timely raised the issue before the decision was issued, in his response to S.D. Warren's position paper.

[¶17] In his response, Mr. Waters suggested that treating a preexisting psychological condition differently would "raise serious due process and equal protection concerns," citing *Breen v. Carlsbad Municipal Schools*, 120 P.3d 413 (N.M. 2005), and he urged the hearing officer to avoid an unconstitutional construction of the statute. However, this argument merely invokes a rule of statutory construction, and is a far cry from the overt facial challenge to section

213(1-A)(A) asserted after the decision in his motion for additional findings of fact and conclusions of law. *See Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 (stating "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived" and "[a]n issue that is barely mentioned in a brief is in the same category as an issue not mentioned at all").

[¶18] Moreover, the belated assertion of the argument did not give opposing counsel fair notice of the issue; nor did it provide the hearing officer with an opportunity to assess whether any factual predicate was necessary to decide the issue or whether she had the authority to rule a provision of the Act unconstitutional. *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"). The hearing officer did not err when concluding that Mr. Waters had forfeited consideration of the equal protection issue.

C. The Independent Medical Examiner's Opinion

[¶19] Mr. Waters argues that, because there was no "dispute" sufficient to trigger appointment of a section 312 independent medical examiner pursuant to 39-A M.R.S.A. § 312(3), the hearing officer should have excluded Dr. Bradford's opinion or not afforded it the enhanced weight of a section 312 opinion. *See id.* at

§ 312(7). This argument lacks merit because (1) Mr. Waters was the party who requested the section 312 exam; (2) Mr. Waters did not object to Dr. Bradford's assessment of permanent impairment prior to issuance of the decree; and (3) the level of permanent impairment was plainly in dispute.

D. Petition to Reopen

[¶20] Finally, Mr. Waters contends that the hearing officer erred when she denied his Petition to Reopen pursuant to 39-A M.R.S.A. § 319 (2001). Section 319 provides that, within 30 days of an award or decree, the board may reopen a decree "on the grounds of newly discovered evidence that by due diligence could not have been discovered prior to . . . the hearing on which the award or decree was based."

[¶21] The last hearing in this case was held on July 18, 2012; the evidence closed on December 7, 2012; and the decree was issued on March 20, 2013. Mr. Waters filed his motion to reopen on May 6, 2013. The proffered evidence consisted of a report from a hand specialist indicating that Mr. Waters continued to suffer the effects of carpal tunnel syndrome from his work injuries.

[¶22] Despite Mr. Waters's history of bilateral carpal tunnel syndrome, and Dr. Bradford's August 7, 2012, report declining to assign permanent impairment for this condition, Mr. Waters was not evaluated by the hand specialist until seven months after Dr. Bradford's exam and three months after the evidence had closed.

The hearing officer acted within the bounds of her discretion in declining to reopen the evidence under these circumstances. *See Kuvaja v. Bethel Savings Bank,* 495 A.2d 804, 806 (Me. 1985) (applying abuse of discretion standard of review for administrative body's rulings on motions).

III. CONCLUSION

[¶23] The hearing officer neither misconceived nor misapplied the law when applying section 213(1-A)(A), and otherwise acted within the reasonable limits of her discretion.

The entry is:

The hearing officer's decision is affirmed.

Hearing Officer Collier, dissenting

[¶24] I respectfully dissent on the issue of whether Mr. Waters waived his equal protection challenge to section 213(1-A)(A). The panel concludes that Mr. Waters waived his equal protection argument before the hearing officer by raising it too late—only in a position letter filed in response to S.D. Warren's position letters—and by failing to state it as a facial challenge to section 213(1-A)(A) but rather as a matter of statutory construction, urging the hearing officer to avoid an allegedly unconstitutional construction of the Act.

[¶25] On the latter point, I do not see how urging a hearing officer to avoid an unconstitutional construction of the Act can constitute a failure properly to raise the constitutional issue. On the former, I would conclude that Mr. Waters in his "reply" position letter fairly raised the argument that interpreting the Act as S.D. Warren proposed (and as the hearing officer ultimately did) would violate the constitutional guarantee of equal protection by treating employees with mental injuries differently than those with physical injuries. His submission cited authority for that proposition. I would find this sufficient to spell out the issue and put it squarely before the hearing officer.

[¶26] Though late in the process, the equal protection issue was raised at the hearing level. The board's hearing officers are indisputably bound to abide by the Constitution of the United States and of this State. The hearing officer did not consider the issue, stating incorrectly in her additional findings that the employee had failed to raise the issue until his motion for findings. The panel concludes nevertheless that Mr. Waters waived the issue, but does not specify when this waiver occurred or how Mr. Waters should have preserved the issue. I would conclude that raising it in the reply to the position letters was sufficient. Therefore, I would remand this case for the hearing officer to consider and decide the equal protection challenge.

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. 2013).

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