STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 13-0040
Decision No. 14-29

BRUCE OLESON
(Appellant)
v.

INTERNATIONAL PAPER
(Appellee)

and

SEDGWICK CLAIMS MANAGEMENT SERVICE
(Appellee)

Argued: January 29, 2014
Decided: October 23, 2014

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

[¶1] Bruce Oleson appeals from a Workers' Compensation Board Hearing Officer (*Greene, HO*) decision granting him the protection of the Act for a 2001 injury to his left shoulder and assigning 7% permanent impairment to that injury, but denying him ongoing partial incapacity benefits on the ground that the statutory durational limit for that injury had expired. *See* 39-A M.R.S.A. § 213(1) (Supp. 2013). Because we conclude that the hearing officer erred when determining (1) that International Paper had made more than 520 weekly partial benefit payments for the 2001 shoulder injury concurrently with payments for a different work injury; and alternatively, (2) the claim for incapacity benefits is barred by res judicata, we vacate the hearing officer's decision in part.

I. BACKGROUND

[¶2] Mr. Oleson sustained two relevant work-related injuries while working for International Paper: a November 17, 2000, low back injury and a June 17, 2001, injury to his left shoulder. International Paper paid for all medical expenses relating to both injuries. In October of 2001, Mr. Oleson was taken out of work by his treating physician for low back pain resulting from the 2000 low back injury. International Paper began paying him total incapacity benefits and filed appropriate documents with the board referencing the 2000 low back injury.

[¶3] In 2010, International Paper filed Petitions for Review of Incapacity and to Determine Extent of Permanent Impairment, each referencing the 2000 low back injury. On December 9, 2011, the hearing officer issued a decision granting both petitions. The hearing officer found that Mr. Oleson had partial work capacity, awarded him partial incapacity benefits, and further found that he had sustained 10% whole person permanent impairment from the 2000 low back injury. This decision did not address Mr. Oleson's 2001 left shoulder injury.

[¶4] In February 2012, International Paper again filed a Petition for Review of Incapacity related to the 2000 injury date, alleging that Mr. Oleson had been paid in excess of 520 weeks of incapacity benefits, and seeking to discontinue payment. Mr. Oleson, in turn, filed Petitions for Award and to Determine Extent of Permanent Impairment related to the 2001 left shoulder injury. On April 4, 2013,

the hearing officer issued a decree (1) authorizing International Paper to cease payment on the 2000 low back injury based on the durational limit; (2) awarding Mr. Oleson the protection of the Act for the 2001 left shoulder injury; (3) assigning 7% permanent impairment for the 2001 left shoulder injury; and (4) denying the request for ongoing incapacity benefits for that injury, also based on the durational limit. The hearing officer concluded that "the incapacity payments made by the employer to date, based on the 2000 work injury, constitute payments for the 2001 work injury as well."

[¶5] The hearing officer also concluded, in the alternative, that "[e]ven assuming that the 520-week benefit durational limit has not expired for his 2001 left shoulder injury, the *res judicata* effect of the December 9, 2011, Board decision bars the employee from now asserting, absent a showing of a change in circumstances, a claim for incapacity benefits based upon that injury."

[¶6] Mr. Oleson filed a motion for additional findings of fact and conclusions of law. The hearing officer issued additional findings to add to his reasoning, but did not alter the decision. Mr. Oleson then filed this appeal.

II. DISCUSSION

[¶7] Appeals from hearing officer decisions to the Appellate Division are governed by 39-A M.R.S.A. § 321-B (Supp. 2013). Section 321-B(2) provides that "[a] finding of fact by a hearing officer is not subject to appeal under this section."

The role of the Appellate Division, therefore, "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).

A. Concurrent Payment

[¶8] Mr. Oleson contends that the hearing officer erred when determining that the durational limit had been reached for the 2001 shoulder injury, when all benefits paid had been designated as compensation for incapacity related to the 2000 low back injury, and no previous petition had been filed or award granted for the 2001 shoulder injury.

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

> **1. Benefit and duration.** While the incapacity for work is partial, the employer shall pay the injured employee a weekly compensation as follows.
>
> > **A.** If the injured employee's date of injury is prior to January 1, 2013, the weekly compensation is equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage that the injured employee is able to earn after the injury, but not more than the maximum benefit under section 211. Compensation must be paid for the duration of the disability if the employee's permanent impairment, determined according to subsection 1-A and the impairment guidelines adopted by the board pursuant to section 153, subsection

> 8, resulting from the personal injury is in excess of 15% to the body. In all other cases an employee is not eligible to receive compensation under this paragraph after the employee has received a total of 260 weeks of compensation under section 212, subsection 1, this paragraph or both.

The statutory durational limit has been extended by board rule from 260 to 520 weeks. Me. W.C.B. Rule, ch. 2, § 2.

[¶10] The hearing officer reasoned that because Mr. Oleson's 2001 shoulder injury had contributed to his loss of earning capacity during the time that he received benefits for the 2000 low back injury, the benefits were in fact paid for both injuries, and Mr. Oleson is not entitled to compensation for any additional incapacity he suffers as a result of the shoulder injury. According to the hearing officer, an employee should not be rewarded for "strategically with[holding] any claim for incapacity benefits for multiple work injuries concurrently contributing to his disability so long as full benefits are being voluntarily paid based on one of the injuries."

[¶11] Further, the hearing officer reasoned that Mr. Oleson bore the burden of establishing which of the 520 weekly benefit payments were made (if any) when the effects of his 2001 shoulder injury were latent or non-disabling and thus did not combine with the 2000 low back injury to cause the loss of earning capacity.

[¶12] We discern no foundation in the Act for the hearing officer's conclusion that the durational cap has expired for the 2001 shoulder injury. By the

current petition, Mr. Oleson is seeking prospective benefits for incapacity related to the 2001 shoulder injury. The hearing officer found that he continues to suffer physical limitations as a result of that injury. Benefits previously paid by International Paper were specifically designated for the 2000 low back injury, the 2011 decree awarded benefits for only that injury, and neither Mr. Oleson nor International Paper had filed a previous petition seeking compensation or disclaiming liability for the 2001 date of injury.

[¶13] An Appellate Division panel recently addressed a similar issue in *Jackson v. Pratt-Abbott Cleaners,* Me. W.C.B. No. 14-13 (App. Div. 2014). Pratt-Abbott Cleaners had filed a petition for review regarding only one work injury when it was established in a prior decree that three separate work injuries contributed to the employee's incapacity for work. *Id*. ¶¶ 12,13. The hearing officer had discontinued all benefits pursuant to the petition. *Id*. On appeal, the Appellate Division panel vacated the portion of the decision discontinuing benefits, and remanded the case for consideration with pending petitions for review that had been subsequently filed on the other recognized dates of injury. *Id*. ¶ 16. The panel reasoned:

> We agree with Ms. Jackson that the hearing officer could not properly address the level of incapacity attributable to the January 9, and January 30, 2009, dates of injury without having petitions related to those injuries before him. Because there were no petitions pending on the January 2009 work injuries, Ms. Jackson was not put on notice that her incapacity relating to those injuries was at issue.

> While it may seem formalistic to require Pratt-Abbott to file petitions on all dates of injury that are potentially at issue, it is the only way to afford Ms. Jackson with notice and an opportunity to present a defense to the employer's claim. For example, Ms. Jackson might have testified about her medical care and unpaid bills, but it would not be fair to order payment of those bills absent the filing of a petition that would put Pratt-Abbott on notice of that claim. A party is not compelled to present evidence on an issue absent formal notice of a claim.

Id. ¶¶ 14, 15. Similarly in this case, before the current round of litigation, Mr. Oleson had not been put on notice that the 2001 date of injury was in issue, and he was not given an opportunity to present evidence regarding the extent of incapacity related to that injury.

[¶14] International Paper argues that by enacting section 213, the Legislature intended to compensate employees for wage loss, not for specific injuries, and emphasizes an important policy consideration embodied in the Act—prevention of double recoveries. It further argues that Mr. Oleson should not be rewarded for sitting on his rights with regard to the 2001 date of injury.

[¶15] However, the record shows that prior to this litigation, neither Mr. Oleson nor International Paper had filed any petition regarding the 2001 shoulder injury, and International Paper did not indicate that it had been making payments for the shoulder injury as well as the low back injury. International Paper does not claim to have been unaware of the 2001 injury, nor does it explain why it did not code its payments to reflect all dates of injury contributing to the incapacity for

which it claims it was paying. More significantly, it did not file a separate petition related to the 2001 injury with its prior petition for review.

[¶16] In the present litigation, Mr. Oleson did not seek benefits for the same period for which he received benefits for the low back injury. He bore no burden with regard to past periods of incapacity or latency related to the shoulder injury. The hearing officer erred when determining that the 520 weeks of benefits paid for the 2000 date of injury precluded payment of benefits for ongoing incapacity related to the 2001 shoulder injury.

B. Res Judicata

[¶17] In the alternative, the hearing officer determined that Mr. Oleson was barred by res judicata from pursuing a claim for weekly compensation for the 2001 shoulder injury absent a showing of changed circumstances, because that claim could have been pursued at the time International Paper brought its Petition for Review related to the 2000 low back injury. Mr. Oleson contends it was error to apply the principles of res judicata so broadly in this case. We agree.

The Law Court has stated:

> [V]alid and final decisions of the Workers' Compensation Board are subject to the general rules of res judicata and issue preclusion, *see Ervey v. Northeastern Log Homes, Inc.*, 638 A.2d 709, 710 (Me. 1994) (res judicata); *Crawford v. Allied Container Corp*., 561 A.2d 1027, 1028 (Me. 1989) (issue preclusion), not merely with respect to the decision's ultimate result, but with respect to all factual findings and legal conclusions that form the basis of that decision, *see McIntyre* [*v. Great No. Paper, Inc*.], 2000 ME 6, ¶¶ 7-8, 743 A.2d at

> 747. Res judicata and issue preclusion in the workers' compensation setting is intended to promote "judicial economy and efficiency, the stability of final judgments, and fairness to litigants." *Crawford*, 561 A.2d at 1028.

Grubb v. S.D. Warren Co., 2003 ME 139, ¶ 9, 837 A.2d 117.

[¶18] In certain cases, the doctrine of res judicata may bar "the relitigation of issues that were tried, *or that may have been tried*, between the same parties or their privies in an earlier suit on the same cause of action." *Blance v. Alley*, 1997 ME 125, ¶ 4, 697 A.2d 828, 829 (citations and quotation marks omitted, emphasis added). When applying res judicata to bar Mr. Oleson's claim, the hearing officer relied on Michigan cases that have applied this broad view of res judicata in workers' compensation cases. *See Gose v. Monroe Auto Equip. Co.*, 294 N.W.2d 165 (Mich. 1980); *see also Williamson v. City of Livonia*, 720 N.W.2d 749 (Mich. 2006).

[¶19] However, in Maine, the Law Court has not extended the principle so far as to require an employee who suffers multiple injuries with a single employer to assert his or her rights with respect to all injuries at the time the employer initiates litigation limited to one of the injuries—or forego recovery—and we decline to do so. The Law Court has indicated that in administrative proceedings, including workers' compensation, whether a claim is precluded is governed by the Restatement (Second) of Judgments, § 83 (1982). *Ervey v. Northeastern Log Homes, Inc.*, 638 A.2d 709, 710-11 (Me. 1994). Section 83 provides:

Administrative Determinations by Administrative Tribunal

(1) Except as stated in Subsections (2), (3), and (4), a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

(a) Adequate notice to persons who are to be bound by the adjudication, as stated in § 2;

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

(c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;

(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and

(e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

(3) An adjudicative determination of a claim by an administrative tribunal does not preclude relitigation in another tribunal of the same or a related claim based on the same transaction if

> the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim.
>
> (4) An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that:
>
> (a) The determination of the tribunal adjudicating the issue is not to be accorded conclusive effect in subsequent proceedings; or
>
> (b) The tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question.

[¶20] Pursuant to the Restatement criteria, proceedings regarding prospective incapacity from the 2001 shoulder injury were not barred because they could have been brought in conjunction with the litigation that culminated in the 2011 decree. The Workers' Compensation Act does not preclude an award of benefits for one injury when there has been a prior adjudication regarding a different injury. *See id.*§ 83(3); *Wacome v. Paul Mushero Const. Co.*, 498 A.2d 593 (Me. 1985) (holding claimant who entered agreement for foot injury not barred by res judicata from later seeking compensation for back injury arising from same accident).

[¶21] The issue of Mr. Oleson's entitlement to incapacity benefits resulting from the 2001 shoulder injury was neither litigated by the parties nor decided in the 2011 decision. International Paper's petitions specifically referenced only the November 17, 2000, injury date. The 2011 decision described the petitions as

"both pertaining to an asserted November 17, 2000 work injury." In a thorough decision focused on the occurrence and effects of the claimed 2000 low back injury, the hearing officer mentioned the 2001 shoulder injury only once, referring to Dr. Pavlak's assessment of 7% permanent impairment for the shoulder in addition to 13% for the low back condition. The 2011 decree noted that International Paper sought through its petitions "a review of the employee's level of earning capacity resulting from his November 17, 2000 work-related injury and a determination of the employee's level of permanent impairment resulting from that injury."

[¶22] The 2011 decision does not analyze or assess incapacity, or determine permanent impairment, from the 2001 shoulder injury. In fact, the hearing officer specifically stated that the decision was addressing only the 2000 work injury claim: "The Board makes no determination at this time as to the level of permanent impairment resulting from any other work injury with the employer or whether, as an injury occurring prior to January 1, 2002, 'stacking' of the permanent impairment for purposes of 39-A M.R.S. §213 is required[.]" The decision set forth the medical history of Mr. Oleson's low back injury in some detail, but it included no mention of any symptoms of or treatment for the shoulder injury, apart from the reference to Dr. Pavlak's assessment of permanent impairment. Moreover, the

decision made no mention of any shoulder restrictions, nor did it mention any of the facts giving rise to a claim for a shoulder injury.

[¶23] We conclude that the doctrine of res judicata did not bar an award of ongoing benefits to Mr. Oleson for the 2001 left shoulder injury.

III. CONCLUSION

The entry is:

> The hearing officer's decision, insofar as it grants the employee the protection of the Act for the 2001 shoulder injury and determines that permanent impairment resulting from that injury 7%, is affirmed. However, that portion of the decision applying the statutory durational cap or res judicata to preclude an award of ongoing partial wage loss benefits for the 2001 shoulder injury is vacated. The case is remanded for a determination regarding the extent of the employee's entitlement to ongoing incapacity benefits.

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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