LOUIS CIVIELLO
(Appellee)

v.

COVANTA ENERGY
(Appellant)

and

INDEMNITY INSURANCE COMPANY/YORK RISK SERVICES GROUP
(Insurer)

Conference held: April 6, 2016
Decided: December 7, 2016

PANEL MEMBERS: Administrative Law Judges: Elwin, Goodnough, and Jerome
BY: Administrative Law Judge Elwin

[¶1] Covanta Energy appeals from a decision of a Workers' Compensation Board hearing officer (*Greene, HO*) denying Covanta's Petition for Review, finding that the effects of Louis Civiello's September 7, 2014, work injury had not ended, and leaving undisturbed the total compensation payment scheme. Covanta contends that the hearing officer erred (1) by determining that the effects of Mr. Civiello's significant aggravation of an underlying back condition have not ended, and (2) by applying an incorrect legal standard in determining that Mr. Civiello remains entitled to total incapacity benefits pursuant to 39-A M.R.S.A § 212 (Supp. 2015). We affirm the hearing officer's decision.

[¶2] Covanta argues that it met its burden of proving that the effects of Mr. Civiello's September 7, 2012, work injury had ended. A finding of fact by an

administrative law judge is not subject to appeal. 39-A M.R.S.A § 321-B (Supp. 2015). However, a determination that any party has or has not sustained the party's burden of proof is considered a conclusion of law and is reviewable. 39-A M.R.S.A. § 318 (Supp. 2015). Because Covanta had the burden of proof, and the hearing officer found that it failed to meet its burden, Covanta can prevail on appeal only if it can demonstrate that the facts as found by the hearing officer legally compelled the conclusion that the effects of Mr. Civiello's September 7, 2012, work injury had ended. *See Anderson v. Me. Pub. Employees Ret. Sys*., 2009 ME 134, ¶ 28, 985 A.2d 501; *Kelley v. Me. Pub. Employees Ret. Sys*., 2009 ME 27, ¶ 16, 967 A.2d 676.

[¶3] Based on the medical records and Mr. Civiello's testimony, the hearing officer was persuaded that the employment, specifically the September 7, 2012, work-related injury, continues to contribute to Mr. Civiello's disability in a significant manner. Because the hearing officer's findings in this regard are supported by competent evidence, the record does not compel a contrary conclusion. *See* 39-A M.R.S.A. § 201(4) (2001).

[¶4] Covanta also argues that the hearing officer applied an incorrect legal standard in determining that Mr. Civiello remains entitled to total incapacity benefits. Specifically, it alleges it was error to find Mr. Civiello entitled to total incapacity benefits because after testimony had been taken, Mr. Civiello's primary

care physician released him to part-time work, with restrictions on lifting, sitting, standing, bending, and driving. Covanta also contends that Mr. Civiello did not complete a work search, and that its labor market survey shows available work within Mr. Civiello's restrictions.

[¶5] There are two ways in which an injured employee can show entitlement to the total incapacity benefits pursuant to section 212: by establishing (1) a lack of physical ability to earn; or (2) the unavailability of work within his or her local community and the physical inability to perform full-time work in the state-wide labor market, regardless of availability. *Monaghan v. Jordan's Meats* 2007 ME 100 ¶¶ 11-12, 928 A.2d 786. Because Mr. Civiello is suffering only partial incapacity to earn, he had to establish entitlement to total incapacity pursuant to the second method. *Id.* at ¶ 12.

[¶6] The Law Court has outlined the burdens of proof with respect to an employee's post-injury ability to earn when raised in the context of an employer's petition for review as follows:

> On an employer's petition for review, the employer bears the burden of proof to establish the employee's earning capacity; however, when the employer shows that the employee regained partial work-capacity, the employee bears a burden of production to show that work is unavailable to him or her as a result of the injury. *Ibbitson v. Sheridan Corp*., 422 A.2d 1005, 1009 (Me. 1980). If the employee meets the burden of production, the employer's "never shifting" burden of proof may require it to show that it is more probable than not that there is available work within the employee's physical ability. 422 A.2d at

1009-1010; *Poitras v. R.E. Glidden Body Shop*, 430 A.2d 1113, 1118 (Me. 1981).

McIntyre v. Great N. Paper, Inc., 2000 ME 6, ¶ 6, 743 A.2d 744 (quoting *Dumond v. Aroostook Van Lines*, 670 A.2d 939, 941-42 (Me. 1996)).[1]

[¶7] Citing authority from other states, the hearing officer concluded that because Mr. Civiello reasonably relied, at the time of his testimony, on the unrefuted assessment that he had no work capacity, he was not obligated to perform a work search for part-time work in order to meet his burden of production because work capacity was not attributed to him until after the hearing, just before the close of evidence. The hearing officer concluded that, because Covanta failed to meet its burden of proof that suitable part-time work was available in Mr. Civiello's community, and that Mr. Civiello was not capable of performing any full-time work in the state-wide labor market, Mr. Civiello was entitled to ongoing total incapacity benefits.

[¶8] We disagree with the hearing officer that Mr. Civiello was relieved of his burden of production. However, to the extent that the hearing officer may have misstated the law, it was harmless error because Mr. Civiello met this initial burden through medical evidence. When his primary care physician was asked to review a list of potential jobs identified in the labor market survey, she opined that

[1] While this standard has been applied to employer petitions for review when the employee places the entitlement to 100% partial incapacity benefits pursuant to 39-A M.R.S.A § 213 (Supp. 2013) in issue, it likewise applies in circumstances where a partially incapacitated employee places entitlement to total incapacity benefits pursuant to section 212 in issue.

none of the jobs were suitable in light of Mr. Civiello's restrictions. Because Mr. Civiello generated some evidence regarding both the unavailability of work within his local community and his physical inability to perform full-time work in the statewide labor market, he satisfied his burden of production. Further, Covanta did not meet its "never shifting" burden of proof that it is more probable than not that there is available work within Mr. Civiello's physical ability, including in the statewide labor market. Thus, Mr. Civiello remains entitled to total incapacity benefits pursuant to section 212. *See Jensen v. S.D. Warren Co.,* 2009 ME 35, ¶12, 968 A.2d 528. There is competent evidence in the record to support these conclusions.

The entry is:

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. 2015).

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