NANCY THEW
(Appellant)

v.

SAUNDERS OF LOCKE MILLS, LLC
(Appellee)

and

MAINE EMPLOYERS' MUTUAL INS. CO.
(Insurer)

Decided: April 30, 2013
Conferenced: February 26, 2013

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

[¶1] Nancy Thew appeals from a decision of a Workers' Compensation Board hearing officer (*Goodnough, HO*) awarding her closed-ended periods of total and partial incapacity benefits, but not awarding her ongoing partial incapacity benefits because the hearing officer determined that she had a post-injury earning capacity at least equal to her pre-injury average weekly wage. *See* 39-A M.R.S.A. §§ 213(1), 214(1)(B) (2001).[1] Ms. Thew contends that the hearing officer erred by determining her ongoing earning capacity without reference to the

[1] Title 39-A M.R.S.A. §§ 213(1), 214(1)(B) (2001) have since been amended, *see* P.L. 2011, ch. 647, §§ 7-11 (effective Jan. 1, 2013, codified at 39-A M.R.S.A. §§ 213(1)(A), (B), 214(1)(B), (B-1) (Supp. 2012)).

provision that governs calculation of a seasonal worker's average weekly wage. *See* 39-A M.R.S.A. § 102(4)(C) (Supp. 2012). We conclude that the hearing officer did not commit legal error in determining Ms. Thew's post-injury earning capacity, and affirm the decision.

I. BACKGROUND

[¶2] In October of 2010 Nancy Thew was hired to work part-time at a woodworking mill owned by Saunders of Locke Mills. She typically worked three to four days per week. Ms. Thew also operated a craft business but she did not claim any concurrent income from that self-employment. Her pre-injury average weekly wage is $266.24. Ms. Thew sustained a gradual respiratory injury, occupational asthma, as of July 28, 2011, due to excessive exposure to wood dust at the mill. The hearing officer found that she was totally incapacitated for two weeks following the injury, and partially incapacitated thereafter. She was not able to return to work at Saunders because the conditions in the mill would have aggravated her asthma. She remained out of work until January 28, 2012, when she began working approximately 32 hours per week at Sunday River as an omelet cook. That job ended at the conclusion of the ski season, lasting fewer than twelve weeks. Thereafter, she did not actively seek employment. She filed Petitions for Award and for Payment of Medical and Related Services.

[¶3] The hearing officer determined that Ms. Thew was entitled to total incapacity benefits from July 28 through August 12, 2011; partial incapacity benefits from August 13 through October 1, 2011; and 100% partial incapacity benefits pursuant to proof of an adequate work search from October 2, 2011, until January 28, 2012, when she began working at Sunday River. Ms. Thew was awarded partial benefits at varying rates during her time at Sunday River.

[¶4] The hearing officer further found that following her employment at Sunday River, Ms. Thew was capable of earning at least her pre-injury average weekly wage of $266.24. He specifically found that she was capable of working at least 36 hours per week at the minimum wage of $7.50 per hour, which amounts to $270.00 per week. Accordingly, the hearing officer awarded no ongoing partial incapacity benefits.

[¶5] Ms. Thew filed a motion for additional findings of fact and conclusions of law, which the hearing officer denied, and she then filed this appeal.

II. DISCUSSION

[¶6] Ms. Thew contends that the hearing officer was required to determine her entitlement to ongoing partial benefits based on an earning capacity derived from her post-injury earnings and calculated pursuant to 39-A M.R.S.A. § 102(4)(C),[2] which governs average weekly wages for seasonal workers. She

[2] Title 39-A M.R.S.A. § 102(4)(C) provides:

argues that because she worked fewer than 26 weeks for Sunday River in the previous twelve months, her job as a cook was seasonal and her post-layoff earning capacity should have been calculated by dividing her total earnings at Sunday River by 52. She also contends that when determining whether to apply section 102(4)(C), the hearing officer was compelled to look at earnings in the twelve-month period prior to her hearing, not the calendar year (January to December) prior to her work injury. For the following reasons, we disagree.

[¶7] Section 102(4)(C) governs the calculation of an employee's pre-injury average weekly wage. Although section 102(4) may provide guidance when determining an employee's post-injury earning capacity, the hearing officer was not obligated to apply that provision when deciding what Ms. Thew was able to earn after her work injury. Because the hearing officer was not required to follow section 102(4)(C), and, as we discuss more fully below, he properly based his decision on other evidence of her ability to earn, his interpretation of the term "calendar year" in section 102(4)(C) was of no consequence to the decision.

> **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.
>
> > **(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.
> >
> > **(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.

[¶8] Moreover, based on her employment history, the hearing officer found that Ms. Thew had likely customarily been employed for more than 26 weeks per year. Section 102(4)(C) by its terms does not apply to a worker who is customarily employed for more than 26 weeks per year. Thus, even if the hearing officer had used section 102(4)(C) for guidance in determining Ms. Thew's post-injury earning capacity, her own work history of year-round employment (other than her brief stint at Sunday River) suggests that using the seasonal worker provision would not have been appropriate.

[¶9] Entitlement to ongoing partial incapacity benefits is generally calculated as a percentage of the difference between the pre-injury average weekly wage and post-injury earning capacity, pursuant to 39-A M.R.S.A. § 214(1)(B), which provides:

> If an employee is employed at any job and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee is entitled to receive weekly benefits under this Act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage that the injured employee is *able to earn* after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 211.

(Emphasis added.)

[¶10] The hearing officer made a number of factual findings concerning the employee's post-injury ability to earn, including that (1) she has a college degree; (2) she has a "wide-ranging" work history including work as a secretary, laborer,

clerk, cook at a convenience store and sandwich shop, and supervisory experience; (3) she likely was customarily employed for more than 26 weeks per calendar year before going to work at Saunders; (4) she operated her craft business while working at Saunders; (5) by August 12, 2011 (two weeks after the injury), her only restriction was to limit exposure to dust, fumes, vapors, gases, and extreme temperatures; (6) after her layoff from Sunday River she collected unemployment benefits, presented no evidence of work search, and did not appear to be actively seeking employment; and (7) by that point she had "a near full-time work capacity and relatively few restrictions" and that she had "not been limited to seasonal positions."

[¶11] The hearing officer declined to attribute a seasonal post-injury earning capacity to Ms. Thew not due to any misapplication of the law in failing to apply section 102(4)(C), but rather because he ultimately came to the conclusion, based on all of the evidence, that she was then capable of earning at least her pre-injury average weekly wage. [3]

[3] Ms. Thew also argues that unrebutted evidence of her actual post-injury earnings with the new employer, calculated on a seasonal basis, is conclusive evidence of her post-layoff weekly earning capacity, citing *Fecteau v. Rich Vale Constr., Inc.*, 349 A.2d 162, 165-66 (Me. 1975) and *Flanigan v. Ames Dep't Store,* 652 A.2d 83, 84-85 (Me. 1995). Having concluded that the hearing officer was not compelled to assess her post-layoff earning capacity by means of any interpretation or application of the seasonal worker average weekly wage statute, we do not reach that specific issue.

Even if we construe Ms. Thew's contentions as arguing that the holdings of *Fecteau* and *Flanigan* required the hearing officer to accept unrebutted evidence of Ms. Thew's weekly post-injury earnings, calculated as total earnings divided by the number of weeks worked, as conclusive on the issue of her earning capacity for the period following her layoff, we would find no legal error. The employee here bore the ultimate burden of proof on the issue of her post-injury ability to earn. *See Morse v. Fleet*

III. CONCLUSION

[¶12] The hearing officer neither misconceived the applicable law, nor applied the law to the facts in an arbitrary or irrational manner. *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983).

The entry is:

The decision of the hearing officer is affirmed.

Fin. Group., 2001 ME 142, ¶ 7 & n.2, 782 A.2d 769. The hearing officer was not compelled to accept that evidence as conclusive in light of other relevant evidence that persuaded him that she was able to earn at least as much as her pre-injury average weekly wage. In any event, such a calculation would result in a figure very close to Ms. Thew's pre-injury average weekly wage, depending on the actual number of weeks (or parts thereof) worked.

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. 2012).

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