SUSAN A. BELANGER
(Appellee)

v.

CITY OF LEWISTON
(Appellant)

and

CANNON COCHRAN MANAGEMENT SERVICES, INC.
(Insurer)

Conference held: January 31, 2014
Decided: August 13, 2014

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

[¶1] The City of Lewiston appeals from a Workers' Compensation Board hearing officer decision (*Goodnough, HO*) denying the City of Lewiston's Petition for Review related to a 2008 shoulder injury incurred by Susan A. Belanger while she was working as a custodian for the City School Department.[1] We affirm the hearing officer's decision.

[¶2] The City had been voluntarily paying Ms. Belanger 100% partial incapacity benefits related to her 2008 bilateral shoulder injury, and filed its petition for review seeking to reduce the benefit payment. The hearing officer

[1] The hearing officer also granted Ms. Belanger's Petitions for Award for injuries incurred in 2006, 2007, 2009, and 2010; and denied her Petition for Award for an injury incurred in 2011. These aspects of the decision are not questioned on appeal.

determined that (1) the City met its burden of proof that Ms. Belanger had regained partial work capacity; (2) Ms. Belanger met her "minimal burden" of production that work is unavailable as a result of the injury; but, (3) the City did not meet its '"never shifting' burden of proof . . . to show that it is more probable than not that there is work available in the community within the employee's physical ability." *See Monaghan v. Jordan's Meats*, 2007 ME 100, ¶ 15, 928 A.2d 786. The City appeals.

I. DISCUSSION

[¶3] The City contends the evidence of Ms. Belanger's work search (1) was insufficient as a matter of law to meet her burden of production and (2) the labor market evidence adduced by the City compels the conclusion that work is available to Ms. Belanger in her community. We disagree.

A. Employee's Burden of Production

[¶4] The hearing officer found (and there is no disagreement) that the City met its initial burden to prove that Ms. Belanger had regained partial capacity to work. Ms. Belanger thereafter bore a "minimal burden" of production to show that work is unavailable to her as a result of the injury. *Id.* This burden may be met with "any competent and persuasive evidence to show the unavailability of work . . . , including labor market surveys, or other credible evidence regarding availability of work for a particular employee in the local community." *Id*. at ¶ 16.

[¶5] The Law Court has described an adequate work search as follows:

> [Work search] evidence should disclose that the worker made a reasonable exploration of the labor market in his community for the kind of work [she] has regained some ability to perform and that [she] was unable to obtain such work for remuneration either because no stable market for it existed or, if there was such a market, the work was not available to [her] by reason of the continuing limitations, caused by [her] work-related injury, upon [her] ability to perform it.

Id. ¶ 17 (quoting *Ibbitson v. Sheridan Corp*., 422 A.2d 1005, 1009 (Me. 1980)).

[¶6] The Law Court has further stated:

> The issue of adequacy of a work search is a mixed question of fact and law. Findings regarding the actual efforts made by the employee to obtain work are factual. The evaluation of the reasonableness of those efforts, however, is a mixed question requiring us to examine the reasonableness and legality of the hearing officer's ultimate conclusion, with deference to her relevant expertise.

Monaghan, 2007 ME 100, ¶ 18, 928 A.2d 786 (citations omitted).

[¶7] The hearing officer considered the following evidence sufficient to meet Ms. Belanger's burden of production: (1) work search documentation covering the three month period running from April 30, 2012 – July 13, 2012, which shows 40 contacts with employers made in person, by mail, and on line; (2) Ms. Belanger's testimony regarding efforts to find employment; (3) evidence that she worked with the Maine Department of Labor (Vocational Rehabilitation) following her unsuccessful efforts to find work; (4) her current plans to open a home business with the assistance of a State vocational rehabilitation counselor; (5) that she holds only a GED and her work experience has been limited to jobs

that were very physical in nature; and (6) that the restrictions imposed by the independent medical examiner "effectively serve to foreclose the employee from employment in any of her former occupations or jobs for which she might have prior experience."[2]

[¶8] The Law Court has enumerated a nonexclusive list of factors that a hearing officer should consider when evaluating the legal adequacy of a work search.[3] *Monaghan*, 2007 ME 100, ¶ 21, 928 A.2d 786. The hearing officer here stated that he evaluated the *Monaghan* factors, but he did not explicitly relate his findings to the enumerated factors. The City contends this, in itself, constitutes error.

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[2] In addition to the compensable bilateral shoulder condition related to the 2008 work injury, the hearing officer also found, based on the independent medical examiner's medical findings, that Ms. Belanger continues to suffer the effects of carpel tunnel syndrome related to the 2010 work injury.

[3] The factors are:

> (1) The number of inquiries made or applications submitted by an employee.
> (2) Whether the search was undertaken in good faith.
> (3) Whether the search was too restrictive.
> (4) Whether the search was limited solely to employers who were not advertising available positions, or whether the employee also made appropriate use of classified ads or other employment resources in the search.
> (5) Whether the search was targeted to work that the employee is capable of performing.
> (6) Whether the employee over-emphasized work restrictions when applying for jobs.
> (7) Whether the employee engaged in other efforts to find employment or increase prospects for employment.
> (8) The employee's personal characteristics such as age, training, education, and work history.
> (9) The size of the job market in the employee's geographic area.

Monaghan, 2007 ME 100, ¶ 21, 928 A.2d at 793 (citations omitted).

[¶9] However, it is apparent from the decision that the hearing officer considered several of the factors, including: the inquiries she made and applications submitted (factor number 1); other efforts to find employment (factor number 7); efforts to increase prospects for employment (factor number 7); and the employee's personal characteristics[4] such as training, education, and work history (factor number 8).

[¶10] The City also argues that Ms. Belanger's work search evidence was inadequate because it covered a period of only two and one-half months and ended some seven months before the hearing. But the hearing officer expressly considered her testimony regarding her efforts up through the hearing date. The hearing officer undertook an appropriate analysis, and Ms. Belanger submitted sufficient evidence from which he could reasonably conclude that she met her burden of production on the issue of availability of work.

B. The Employer's Burden of Proof

[¶11] The City further contends that the hearing officer erred when he did not conclude, based on the City's labor market evidence, "that it is more probable

[4] The City also asserts that the hearing officer based his decision in part on a factual error in the decree regarding Ms. Belanger's age. Ms. Belanger was 46 years old at the time of the hearing, and the hearing officer stated alternately in the decree that she is 56 and 64 years old. In light of the numerous other considerations on which the hearing officer based the decision regarding the burden of production and the availability of work, we conclude that this error did not affect the City's substantial rights, and is therefore harmless. *See Morse v. Fleet Fin. Grp.*, 2001 ME 142, ¶ 9, 782 A.2d 769 (stating that personal characteristics are relevant but not determinative absent other evidence showing the unavailability of work within the employee's local community).

than not that there is work available in the community within the employee's physical ability." *See Monaghan,* 2007 ME 100, ¶ 15, 928 A.2d 786. In cases in which a hearing officer concludes that the party with the burden of proof failed to meet that burden, we will reverse that determination only if the record compels a contrary conclusion. *Dunlop v. Town of Westport Island,* 2012 ME 22, ¶ 13, 37 A.3d 300.

[¶12] The hearing officer evaluated the positions mentioned in the labor market survey for which the surveyor made direct employer contacts, and gave specific reasons why most of the positions would not accommodate Ms. Belanger's restrictions, or were not suited to her limited experience, education, and training. The hearing officer was not compelled to conclude that the labor market evidence established that work was available to Ms. Belanger.

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. 2013).

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