MICHAEL ALLARIE
(Appellee)

v.

JOLLY GARDENER PRODUCTS, INC.
(Appellant)

and

LIBERTY MUTUAL/PEERLESS INSURANCE COMPANY
(Insurer)

Conference held: February 3, 2016
Decided: November 8, 2016

PANEL MEMBERS: Administrative Law Judges Hirtle, Collier, and Knopf
BY: Administrative Law Judge Hirtle

[¶1] Jolly Gardener Products, Inc., appeals from a decision of a Workers' Compensation Board Administrative Law Judge (*Goodnough, ALJ*) denying its Petition to Stop Benefits regarding Michael Allarie's previously-established October 27, 2003, work-related injury to his cervical spine. Jolly Gardener contends that the ALJ erred because, although an independent medical examiner (IME) made a finding that Mr. Allarie suffered 25% permanent impairment, the IME also found that 0% of that permanent impairment is attributable to the work injury, and under 39-A M.R.S.A. § 312 (Supp. 2015), the ALJ was obligated to adopt that finding in the absence of clear and convincing contrary evidence.

Because certain findings in the IME's report are inconsistent with those in a prior decree, we disagree with Jolly Gardener, and affirm the ALJ's decision.

I. BACKGROUND

[¶2] Michael Allarie injured his left upper extremity and neck on October 27, 2003, while employed as a laborer by Jolly Gardener Products, Inc. In 1999, Mr. Allarie had undergone a three-level cervical fusion between the C4-5-6 levels. In 2006, the ALJ (*Goodnough, ALJ*) issued a decision finding that the 2003 injury "lit-up his pre-existing fusion site and accelerated disk degeneration at the C3-4 and C6-7 levels," and concluding that Mr. Allarie "satisfied the proof requirements imposed by 39-A M.R.S.A. § 201(4)." The ALJ further found that Mr. Allarie retained some work capacity, and awarded him partial incapacity benefits reduced by an imputed earning capacity of $200.00 per week. Mr. Allarie then went on to require a further fusion procedure in 2012 due to disk degeneration at the C3-4 and C6-7 levels.

[¶3] In this round of litigation, the only issue in dispute was Mr. Allarie's level of permanent impairment as Jolly Gardener sought to impose the 520 week durational limit on partial incapacity benefits for injured workers with whole person permanent impairment below 13.2%. *See* 39-A M.R.S.A. § 213(1)(A) (Supp. 2015); Me. W.C.B. Rules, Ch. 2, §§ 1(2), 2 (setting the 13.2% threshold for this date of injury and extending the statutory durational limit to 520 weeks). Mr.

Allarie underwent an independent medical examination with Dr. John Hall pursuant to 39-A M.R.S.A. § 312. Dr. Hall issued a report dated June 17, 2013, and concluded that Mr. Allarie's cervical spine condition was responsible for 25% whole person permanent impairment based on the AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed.). However, Dr. Hall stated in his report that Mr. Allarie's cervical spine condition and need for a second fusion procedure was due to a 1999 motor vehicle accident rather than his October 27, 2003, work-related injury. Additionally, in a follow up letter of January 7, 2014, Dr. Hall stated that, in his opinion, Mr. Allarie's work injury did not contribute to his ongoing cervical spine condition and was not responsible for any related permanent impairment.

[¶4] The ALJ adopted Dr. Hall's 25% whole person permanent impairment assessment, but rejected Dr. Hall's opinion that 0% of that impairment is attributable to the work injury as contrary to the "law of the case" as established in the 2006 decree. The ALJ instead found that the cervical degenerative disease at C3-4 and C6-7, previously found to have been accelerated by the 2003 work injury, necessitated a second, extensive fusion surgery in 2012. Based on these findings, the ALJ denied Jolly Gardener's Petition to Stop Benefits and found that Mr. Allarie was entitled to ongoing partial incapacity benefits beyond 520-week durational limit.

[¶5] Jolly Gardener filed a Motion for Additional Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.

II. DISCUSSION

[¶6] The role of the Appellate Division "is limited to assuring that the [ALJ's] 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." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted).

[¶7] Jolly Gardener argues that the ALJ was required to adopt Dr. Hall's medical finding of 0% work-related permanent impairment absent clear and convincing contrary evidence identified in the record. 39-A M.R.S.A § 312(7).[1] Mr. Allarie contends that the ALJ committed no legal error because it was established in the 2006 decree—and is the law of the case—that the 2003 work injury contributed to Mr. Allarie's ongoing disability in a significant manner. *See* 39-A M.R.S.A. § 201(4) (2001).[2]

[1] Title 39-A M.R.S.A. § 312(7) provides:

> The board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings. Contrary evidence does not include medical evidence not considered by the independent medical examiner. The board shall state in writing the reasons for not accepting the medical findings of the independent medical examiner.

[2] On appeal Jolly Gardener Products, Inc., did not dispute the ALJ's adoption of Dr. Hall's medical finding that Mr. Allarie suffered 25% permanent impairment as a result of his neck condition. The only

[¶8] The "law of the case" doctrine is "an articulation of the wise policy that a judge should not in the same case overrule or reconsider the decision of another judge of coordinate jurisdiction." *Blance v. Alley*, 404 A.2d 587, 588 (Me. 1979). It expresses "the practice of courts generally to refuse to reopen what has been decided[.]" *Id.* (quotation marks omitted). The doctrine relates only to questions of law, and it operates only in subsequent proceedings in the same case. *Id.* Rulings made by a trial court and not challenged on appeal become the law of the case. *United States v. Estrada-Lucas*, 651 F.2d 1261, 1263 (9th Cir. 1980).

[¶9] The Appellate Division, in its prior incarnation, has applied this doctrine to preclude reconsideration of legal decisions in successive rounds of workers' compensation litigation. *Graham v. Fitzpatrick*, Me. W.C.C. No. 89-55 (App. Div. 1989).[3]

[¶10] In the 2006 decree, the ALJ found

> . . . that the scope of the employee's October 27, 2003 injury includes his cervical spine. The injury has essentially combined with

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issue raised was the ALJ's refusal to adopt Dr. Hall's opinion that the 2003 work injury did not cause the permanent impairment.

[3] The law of the case doctrine resembles the doctrine of res judicata. *Blance*, 404 A.2d at 589. Parties before the Workers' Compensation Board have sometimes used the terms interchangeably. *Jackson v. Pratt-Abbott Cleaners*, Me. W.C.B. No. 14-13, ¶ 8, n.2 (App. Div. 2016). In *Jackson*, amid the appellant's reliance on both doctrines, the Appellate Division panel applied res judicata principles to test the preclusive effect of a causation finding in a prior decree. *Id. See also Ouellette v. Twin Rivers Paper Co.*, Me. W.C.B. No. 16-18 (App. Div. 2016); *Klein v. State of Me.*, Me. W.C.B. No. 15-5 (App. Div. 2015). Here, the ALJ relied upon the law of the case doctrine to support his conclusions. Analysis under the doctrine of res judicata in this case would lead to the same outcome because Jolly Gardener did not file a petition for review and made no persuasive argument that changed medical circumstances warrant revisiting the issue of ongoing causation; rather, the only issue for decision by the ALJ was Mr. Allarie's level of permanent impairment. *See Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶¶ 7- 9, 837 A.2d 117.

> his pre-existing condition to produce a partial incapacity and disability. The employment, in the form of the very heavy labor he performed in October 2003, contributed, and continues to contribute, to his disability and incapacity in a significant manner. The injury most likely lit-up his pre-existing fusion site and accelerated disk degeneration at the C3-4 and C-6-7 levels.

These findings were based on the medical opinions of two doctors, Dr. Guernelli and Dr. Franck.

[¶11] In this current proceeding, Dr. Hall opined that although Mr. Allarie suffered 25% permanent impairment as a result of his cervical spine condition, 0% of that impairment results from the 2003 work injury. Dr. Hall also stated that the 2012 revision fusion was attributable only to the preexisting condition. These findings are inconsistent with the 2006 finding that the work injury contributes to Mr. Allarie's disability. Because the 2006 decision was a valid and final resolution on the issue of causation, the law of the case doctrine barred Jolly Gardener from relitigating that issue regardless of a new medical opinion to the contrary. Thus, the ALJ did not err in rejecting Dr. Hall's medical opinion that the work injury caused 0% permanent impairment, and was not required to support that rejection by clear and convincing contrary evidence.

[¶12] Further, the ALJ did not err by accepting Dr. Hall's medical finding that Mr. Allarie suffered 25% permanent impairment as a result of his cervical spine condition. As the petitioning party seeking a finding that Mr. Allarie's whole person permanent impairment is below the applicable threshold and that it is

entitled to terminate benefits, Jolly Gardener bore the burden of persuasion on all relevant issues.[4] *Farris v. Georgia Pacific Corp.*, 2004 ME 14, ¶ 17, 844 A.2d 1143. Thus, it was incumbent on Jolly Gardener to elicit evidence regarding Mr. Allarie's whole person permanent impairment that did not contradict binding, prior determinations.

III. CONCLUSION

[¶13] The ALJ did not err when adopting the independent medical examiner's finding that Mr. Allarie suffered 25% whole person permanent impairment, and rejecting the finding that the permanent impairment was not attributable to the 2003 work injury. The ALJ's factual findings in this regard are supported by competent evidence, the decision involved no misconception of applicable law, and the application of the law to the facts was neither arbitrary nor without a rational foundation.

The entry is:

The administrative law judge's decision is affirmed.

[4] Dr. Hall's 25% whole body permanent impairment opinion met Mr. Allarie's limited burden of production, thus placing the ultimate burden of persuasion on Jolly Gardener. *Farris v. Georgia Pacific Corp.* 2004 ME 14, ¶ 17, 844 A.2d 1143 (stating this burden of production "does not require that the employee convince the [ALJ] on the ultimate issue of whole body permanent impairment, but merely that the employee must produce competent evidence to suggest that the employee's whole body permanent impairment may be above the threshold for purposes of obviating the durational cap pursuant to section 213(1).").

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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