

HAROLD TARDIFF
(Appellee/Cross-Appellant)

v.

AAA NORTHERN NEW ENGLAND, INC.
(Appellee)

and

MAINE EMPLOYERS' MUTUAL INSURANCE CO.
(Insurer),

and

AUTO SHINE CAR WASH
(Appellant)

and

ACADIA INSURANCE CO.
(Insurer)

Argued: December 1, 2016

Decided: March 21, 2018

PANEL MEMBERS: Administrative Law Judges Stovall, Goodnough, and Knopf
BY: Administrative Law Judge Knopf

[¶1] Auto Shine Car Wash appeals from a decision of a Workers' Compensation Board administrative law judge (*Collier, ALJ*) that granted in part Harold Tardiff's Petitions for Award related to work injuries incurred in 2008 and 2010, and awarded ongoing partial incapacity benefits. Auto Shine contends that the ALJ erred when relying on medical findings of an independent medical examiner (IME) appointed pursuant to 39-A M.R.S.A. § 312 (Supp. 2017), which

it contends lack evidentiary support or any reasonable basis in the record. Mr. Tardiff cross-appeals, contending that the ALJ erred when failing to adopt the IME's finding that he is totally incapacitated from work, without supporting the decision with clear and convincing contrary evidence. *See* 39-A M.R.S.A. § 312(7). We disagree with these contentions, and affirm the ALJ's decision.

I. BACKGROUND

[¶2] Mr. Tardiff began working for AAA Northern New England, Inc., in 1995. There is no dispute that while at AAA, he sustained work-related injuries to his left elbow and bilateral upper extremities on June 25, 2000, and to his low back and left leg on January 1, 2001, and that he continues to suffer the effects of those injuries.¹

[¶3] After Mr. Tardiff's employment with AAA ended, he went to work for John Chase, who owns several businesses. In 2006, Mr. Chase assigned Mr. Tardiff to manage the Auto Shine Car Wash. On November 10, 2008, Mr. Tardiff was working on a ladder when he lost his balance and fell, striking a copy machine. On the way to the hospital, he was in a motor vehicle accident. On October 1, 2010, he was using a pry bar when it slipped and hit him in the face,

¹ Mr. Tardiff filed Petitions for Restoration or Award related to six dates of injury. Four of those injuries, previously established by a 2006 Consent Decree, occurred while he worked for AAA. The Administrative Law Judge determined that two of those injuries, incurred in 1999 and 2000, had resolved, but the 2000 injury to his left elbow and bilateral upper extremities, and the 2001 injury to his low back and left leg, continue to contribute to Mr. Tardiff's incapacity. This aspect of the decision is not challenged on appeal.

resulting in a broken nose, chipped teeth, and neck and arm pain. Mr. Tardiff filed his petitions in 2012.

[¶4] The ALJ determined that Mr. Tardiff suffered compensable work injuries at Auto Shine (1) in 2008 that aggravated his left leg and low back conditions, and (2) in 2010 that caused symptoms in his neck and arms.² The ALJ further found that Mr. Tardiff sustained two sequelae as a result of his work injuries: constipation resulting from long-term use of pain medication, and depression. The ALJ thus granted the petitions in part, ordering Auto Shine to pay Mr. Tardiff ongoing partial incapacity benefits based on his 2010 average weekly wage, plus fringe benefits, apportioned between the two employers pursuant to 39-A M.R.S.A. § 354 (Supp. 2017).

[¶5] Mr. Tardiff and Auto Shine filed Motions for Additional Findings of Fact and Conclusions of Law, which the ALJ denied. Auto Shine appealed, and Mr. Tardiff cross-appealed.

II. DISCUSSION

A. Auto Shine's Appeal

[¶6] The medical findings of an independent medical examiner appointed pursuant to section 312 are entitled to increased weight in claims before an ALJ, and must be adopted absent clear and convincing evidence to the contrary.

² The ALJ also found that Mr. Tardiff suffered injuries to the jaw, abdomen, and knee in 2008, and to the nose and teeth in 2010, all of which had resolved. These findings are not at issue.

39-A M.R.S.A. § 312(7). The Law Court has interpreted the “clear and convincing evidence to the contrary” standard of section 312(7) to require a showing “that it was highly probable that the record did not support the IME’s medical findings.” *Dubois v. Madison Paper Co.*, 2002 ME 1, ¶ 14, 795 A.2d 696. However, when the ALJ adopts the IME’s findings, as in this case, we reverse only if those findings are not supported by competent evidence, or the record discloses no reasonable basis to support the decision. *Dillingham v. Great N. Paper*, Me. W.C.B. No. 15-7, ¶ 3 (App. Div. 2015); *May v. Saddleback, Inc.*, W.C.B. No. 16-2, ¶ 5 (App. Div. 2016).

[¶7] Auto Shine contends that the record lacks competent evidence or shows no reasonable basis to support the IME’s medical findings that Mr. Tardiff suffers ongoing back and left leg symptoms as a result of the 2008 injury, or ongoing neck and arm symptoms as a result of the 2010 work injury. Auto Shine asserts that records and testimony from other providers, particularly from Mr. Tardiff’s primary care physician, clearly and convincingly contradict the IME’s findings. This contention lacks merit.

[¶8] With respect to the 2008 incident, the ALJ based his determination on the IME’s opinion that the fall from the ladder and subsequent motor vehicle accident likely contributed to Mr. Tardiff’s low back and left leg symptoms. The ALJ also relied on contemporaneous hospital records that refer to tenderness and

chronic pain in the thoracic and lumbar back, and on Mr. Tardiff's testimony that his back and leg symptoms increased after the incidents.

[¶9] With respect to the 2010 incident, the ALJ considered IME's opinion that the 2010 incident contributed to Mr. Tardiff's low back, left leg, neck, and arm symptoms, in addition to causing a broken nose and broken teeth. Absent any additional explanation, and finding no other basis in the record in support, the ALJ rejected the IME's findings regarding the low back and left leg. However, the ALJ accepted the IME's explanation in his deposition that the blow to the face likely injured Mr. Tardiff's cervical nerve roots, thus giving rise to symptoms in the arms and neck. The IME also testified that the mechanism of injury was capable of, and in fact did, aggravate a preexisting upper extremity condition. Further, Mr. Tardiff testified that he experienced neck symptoms immediately after the 2010 incident, which have not resolved.

[¶10] Although there is contrary evidence in the record that might support a finding that Mr. Tardiff suffered no new or aggravated symptoms as a result of the 2008 or 2010 work incidents, the ALJ evaluated that evidence and determined that it did not contradict the IME's findings on a clear and convincing basis. The record contains competent evidence and a reasonable basis to support the finding that Mr. Tardiff suffers ongoing back and left leg symptoms as a result of the 2008 injury, and neck and arm symptoms as a result of the 2010 injury.

B. Mr. Tardiff's Appeal

[¶11] The IME stated in his written report that Mr. Tardiff has a limited work capacity with substantial restrictions on bending, stooping, lifting, and carrying on a repetitive basis, but that he could perform lighter, sedentary work. At his deposition, the IME initially testified that Mr. Tardiff has a limited work capacity, but later, when asked whether Mr. Tardiff retains any work capacity, the IME testified that he does not. The ALJ considered the IME's report and deposition testimony as a whole, and also considered the section 207³ physician's opinion that Mr. Tardiff retained a limited work capacity, and found that Mr. Tardiff has a work capacity consistent with in the IME's report.

[¶12] Mr. Tardiff contends that due to the clear statement of no work capacity in the IME's deposition, the ALJ was obligated to support the contrary finding of partial incapacity with clear and convincing evidence. We disagree.

[¶13] When confronted with potentially ambiguous language in a report from an IME, or when there is ambiguity between an IME's report and deposition testimony, "it is incumbent on the [ALJ] to consider the larger context in which those statements are offered to construe the intent of the examining physician." *Oriol v. Portland Housing Auth.*, Me. W.C.B. No. 14-35, ¶ 12 (App. Div. 2014);

³ 39-A M.R.S.A. § 207 (Supp. 2017).

see also Thurlow v. Rite Aid, Me. W.C.B. No. 16-23, ¶¶ 13-14 (App. Div. 2016) (holding that section 312 does not compel the adoption of IME’s medical findings when those findings are ambiguous).

[¶14] The ALJ’s interpretation of the IME’s deposition testimony regarding level of work capacity was preceded by a thorough analysis of the larger context of that testimony, the IME’s report, and other medical evidence. The ultimate finding that Mr. Tardiff retains some work capacity is supported by competent evidence and will therefore not be disturbed on appeal.

III. CONCLUSION

The entry is:

The administrative law judge’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. 2017).

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

Attorney for Appellant/Cross-
Appellee:
Stephen W. Moriarty, Esq.
NORMAN, HANSON, & DeTROY
P.O. Box 4600
Portland, ME 04122-4600

Attorney for Appellee/Cross-
Appellant:
James J. MacAdam, Esq.
Nathan A. Jury, Esq.
Donald M. Murphy, Esq.
MacADAM JURY, P.A.
45 Mallett Drive
Freeport, ME 04032

Attorney for Appellee:
Matthew W. Marett, Esq.
MEMIC
P.O. Box 3606
Portland, ME 04104-5036