JAMES J. SALVATORE
(Appellee)

v.

O' REILLY AUTO ENTERPRISES, LLC
(Appellant)

and

CORVEL ENTERPRISE CO., INC.
(Insurer)

and

ADVANCE AUTO PARTS
(Appellee)

and

SEDGWICK CLAIMS MANAGEMENT

Argued: February 3, 2022
Decided: November 18, 2022

PANEL MEMBERS: Administrative Law Judges Stovall, Hirtle, and Knopf
By: Administrative Law Judge Stovall

[¶1] O'Reilly Auto Enterprises, LLC (O'Reilly) appeals from a decision of a Workers' Compensation Board administrative law judge (*Chabot, ALJ*) granting Advance Auto Parts' (Advance) Petition for Apportionment/Award and determining that O'Reilly is 50% responsible for James Salvatore's single incapacitating condition resulting from injuries he sustained at both employers. *See* 39-A M.R.S.A. § 354. O'Reilly contends the ALJ erred when determining that Advance met its burden of persuasion that the left shoulder injury Mr. Salvatore sustained at O'Reilly continues to contribute to his incapacity. We disagree and affirm the ALJ's decision.

I. BACKGROUND

[¶2] The ALJ found the following facts, which have support in the evidentiary record. Mr. Salvatore began working for O'Reilly in March 2015. Before sustaining the relevant work-related injuries, Mr. Salvatore had undergone bilateral rotator cuff repair surgery in early 2000, and had a preexisting anterior and cervical fusion. On December 19, 2016, while working for O'Reilly, Mr. Salvatore sustained a left elbow and shoulder injury when he fell on ice while making a delivery. He sought treatment on the date of injury and underwent physical therapy. He was referred for an MRI in February 2017, which indicated interval changes since a 2011 study suspected an "additional partial-thickness tear of the supraspinatus and infraspinatus tendons." Mr. Salvatore was placed on restrictions of no lifting over 10 pounds, no pushing or pulling over 20 pounds, and to avoid lifting or reaching above shoulder level.

[¶3] On March 2, 2017, an orthopedic surgeon compared the February 2017 MRI with the 2011 MRI, and noted an "increase in rotator cuff damage," and recommended arthroscopy surgery. Mr. Salvatore was taken out of work on March 22, 2017, due to significant pain in his left shoulder. He underwent a left shoulder arthroscopy, RCR revision, and bicep tenotomy on May 16, 2017.

[¶4] Mr. Salvatore continued to have pain complaints after the surgery. A subsequent MRI showed a recurrent, full-thickness supraspinatus tendon tear.

A second surgery was scheduled for March 2, 2018; however, this surgery was halted when Mr. Salvatore experienced a cardiac event during the administration of anesthesia.

[¶5] Thereafter, Mr. Salvatore reported continued pain at a level of eight out of ten on the pain scale. His surgeon advised him that his options included pain control or surgery, including possible shoulder replacement, and released him to perform activity as tolerated as of September 19, 2018.

[¶6] Mr. Salvatore began working for Advance in October 2018, earning more than his pre-injury average weekly wage at O'Reilly. On February 15, 2019, Mr. Salvatore injured his neck and right arm when he again slipped and fell on ice at work. An April 2019 left shoulder MRI revealed a large chronic tear of the supraspinatus. Because his right arm pain due to the 2019 injury was more severe at the time, Mr. Salvatore decided to postpone left shoulder surgery.

[¶7] Mr. Salvatore underwent an examination pursuant to 39-A M.R.S.A. § 207 with Dr. John Herzog on September 4, 2019, focused on the 2019 neck and right arm injury. Dr. Herzog reported that Mr. Salvatore had no problems with his left side at that time, despite noting a chronic rotator cuff tear that was awaiting surgery.

[¶8] Mr. Salvatore underwent a second section 207 examination with Dr. Eric Omsberg. Dr. Omsberg opined that Mr. Salvatore continues to experience pain and

limitations due to the O'Reilly work injury, and that both the O'Reilly and Advance work injuries contribute to Mr. Salvatore's overall level of incapacity. Dr. Omsberg did not state a percentage to which each injury contributes to the single incapacitating condition.

[¶9] Advance and Mr. Salvatore entered into a Consent Decree on December 16, 2020. The Decree established the date of injury and awarded varying partial benefits from February 15, 2019, through March 17, 2019, and 100% partial benefits from March 18, 2019, forward. Advance filed a Petition for Apportionment against O'Reilly.

[¶10] After a hearing, the ALJ found Dr. Herzog's opinion internally inconsistent and unreliable, and adopted the opinion of Dr. Omsberg, apportioning responsibility to 50% to each employer.[1]

[¶11] O'Reilly filed a motion for Findings of Fact and Conclusions of Law. The ALJ issued an amended decision specifically addressing the inconsistency and unreliability of Dr. Herzog's opinion but did not alter the outcome. This appeal followed.

[1] In support of an equal apportionment, the ALJ cited *Kidder v. Coastal Construction Co., Inc.*, 342 A.2d 729, 734 (Me. 1975) ("In any case in which the causative contribution to the single indivisible injury by each respective employer may be ascertained, liability should be fixed in proportion to such contribution. Where . . . such apportionment is impossible, liability for compensation payments may properly be divided equally.").

II. DISCUSSION

A. Standard of Review

[¶12] 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).

[¶13] When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, "we review only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnaker Indus., Inc*., 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted). In addition, the Appellate Division will not disturb a factual finding made by the ALJ absent a showing that it lacks competent evidence to support it. *Dunkin Donuts of Am., Inc. v. Watson*, 366 A.2d 1121, 1125 (Me. 1976).

B. Burden of Persuasion

[¶14] O'Reilly contends that the ALJ erred when determining that Advance met its burden of persuasion that the O'Reilly injury contributed to a "single incapacitating condition" pursuant to 39-A M.R.S.A. § 354, such that O'Reilly is 50% responsible for Mr. Salvatore's condition.[2] We disagree.

[2] Title 39-A M.R.S.A. § 354 provides, in relevant part:

[¶15] The ALJ found that the left shoulder injury sustained at O'Reilly contributes to Mr. Salvatore's single incapacitating condition because Mr. Salvatore continued to experience pain from that injury, he continued to seek treatment for that injury, the injury limits his activities, and that he had discussed rescheduling the previously aborted surgery with his doctor.

[¶16] O'Reilly contends the evidence supporting these findings is inadequate to meet Advance's burden of persuasion because: it is based on subjective pain complaints from Mr. Salvatore; there were no restrictions in place on use of the left shoulder when Mr. Salvatore began working for Advance; the left shoulder pain did not prevent him from securing employment; Mr. Salvatore's average weekly wage was higher at Advance than at O'Reilly; Mr. Salvatore was able to perform all work duties required by Advance before he sustained the second injury; the left shoulder

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1. Applicability. When 2 or more occupational injuries occur, during either a single employment or successive employments, that combine to produce a single incapacitating condition and more than one insurer is responsible for that condition, liability is governed by this section.

2. Liability to employee. If an employee has sustained more than one injury while employed by different employers, or if an employee has sustained more than one injury while employed by the same employer and that employer was insured by one insurer when the first injury occurred and insured by another insurer when the subsequent injury or injuries occurred, the insurer providing coverage 5 at the time of the last injury shall initially be responsible to the employee for all benefits payable under this Act.

3. Subrogation. Any insurer determined to be liable for benefits under subsection 2 must be subrogated to the employee's rights under this Act for all benefits the insurer has paid and for which another insurer may be liable.

was unaffected by the second injury; and some of the medical records indicate that future left shoulder surgery may be unnecessary.

[¶17] O'Reilly would have Advance prove more than is required under section 354. Mr. Salvatore's testimony, the medical evidence documenting continued reports of left shoulder pain and limitations due to that pain, and an unrepaired left rotator cuff tear which Dr. Omsberg opined will require surgery, constitutes competent evidence sufficient to establish a contribution to Mr. Salvatore's single incapacitating condition.

[¶18] Advance further challenges the ALJ's decision not to adopt Dr. Herzog's statement that in September 2019, Mr. Salvatore was not having any problems with his left side. The ALJ found this opinion internally inconsistent and unreliable because: Dr. Herzog's examination was focused on the 2019 date of injury, which involved the neck and right arm; and Dr. Herzog noted that Mr. Salvatore had complained of pain in his rotator cuff which had a chronic tear and was awaiting surgery. Advance asserts that the ALJ was compelled to find that Dr. Herzog was referring to the *right* rotator cuff, which had a tear due to Mr. Salvatore's preexisting right shoulder injury that is referenced in the medical records.

[¶19] We find no error. Dr. Omsberg's opinion that Mr. Salvatore continued to experience the effects of the 2016 rotator cuff tear is sufficient competent evidence to support the ALJ's decision. It was within the ALJ's purview to credit Dr.

Omsberg's opinion and reject Dr. Herzog's. *Leo v. Am. Hoist & Derrick Co.*, 438 A.2d 917, 920-21 (Me. 1981). Moreover, in light of the other medical evidence in the record, the ALJ did not err when construing Dr. Herzog's ambiguous statement as referring to the left rotator cuff as opposed to the right. *Bouchard v. Central Me. Med. Ctr.*, Me. W.C.B. No. 22-22, ¶ 15 (App. Div. 2022).

[¶20] O'Reilly next contends that Dr. Omsberg was not qualified to render an expert opinion regarding the ongoing effects of Mr. Salvatore's work-related left shoulder injury because he stated that he would defer to the orthopedic surgeon on the issue of whether Mr. Salvatore needed another surgery. However, that Dr. Omsberg stated he would defer to a surgeon on that issue does not disqualify him from rendering an opinion on causation, and the ALJ did not err when adopting that opinion. *See Leo*, 438 A.2d at 920-21; *see also Cox v. Coastal Prods. Co., Inc*., 2001 ME 100, ¶ 12, 774 A.2d 347 (stating that review of a hearing officer's decision addressing whether an injury is compensable under the Act is deferential).

[¶21] O'Reilly further argues that because Mr. Salvatore earned a higher average weekly wage at Advance than he earned at O'Reilly, the 2016 work injury did not contribute to Mr. Salvatore's incapacitating condition. However, that an employee earned the same or more after a work injury than before does not preclude a finding of an earning incapacity. *Severy v. S.D. Warren Co.*, 402 A.2d 53, 55 (Me.

1979). A higher post-injury wage may be evidence of post-injury earning incapacity, but it is not dispositive. *Id.*

II. CONCLUSION

[¶22] The ALJ did not err in determining that Advance proved on a more probable than not basis that Mr. Salvatore's December 19, 2016, work-related left shoulder injury contributes to Mr. Salvatore's single incapacitating condition, and in apportioning liability equally among Advance and O'Reilly.

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.

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.

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