HOWARD STROUT
(Appellant/Cross-Appellee)

v.

BLUE ROCK INDUSTRIES,
(Appellee/Cross-Appellant)

and

CNA INSURANCE CO./VALLEY FORGE INSURANCE CO.,
(Insurer)

and

TROIANO WASTE SERVICES, INC.,
(Appellee/Cross-Appellant)

and

LIBERTY MUTUAL FIRE INSURANCE CO.
(Insurer)

Oral Argument: May 20, 2015
Decided: November 4, 2016

PANEL MEMBERS:

Majority: Administrative Law Judges Stovall and Jerome
Dissent: Administrative Law Judge Pelletier

BY: Administrative Law Judge Jerome

[¶1] Howard Strout appeals, and Blue Rock Industries and Troiano Waste Services, Inc., cross-appeal from a decision of a Workers' Compensation Board administrative law judge (*Collier, ALJ*) that (1) denied Mr. Strout's Petitions for Determination of Permanent Impairment; (2) denied Blue Rock's Petitions to

Terminate Benefit Payments; (3) denied Troiano's Petition to Reduce Benefits; and (4) granted Troiano's Petition for Review of Incapacity in part.

[¶2] The parties raise several issues on appeal. The employers contend that the ALJ erred when determining that they did not establish that Mr. Strout's permanent impairment (PI) level fell below the applicable 11.8% threshold for duration of disability benefits under 39-A M.R.S.A § 213 (Supp. 2015). They assert that the PI level of 11%, established in a prior decree, has res judicata effect in these proceedings, and was not overcome by proof of changed circumstances. Mr. Strout contends that the ALJ, when ruling on Troiano's Petition for Review, erred by altering a previous benefit award without a showing of changed circumstances, and by placing the burden of persuasion regarding eligibility for 100% partial incapacity benefits on him, when he was the non-moving party.

[¶3] We affirm the ALJ's denial of Blue Rock's Petitions to Terminate and Troiano's Petition to Reduce Benefits. However, with respect to Troiano's Petition for Review, we conclude that the ALJ improperly placed a burden of persuasion instead of a mere burden of production on Mr. Strout with respect to his work search. Accordingly, we vacate that decision, and order that Troiano's Petition for Review be denied.

I. BACKGROUND

[¶4] A decision of a Workers' Compensation Board hearing officer in 2004 (*Dunn, HO*) established that Mr. Strout sustained work-related low back injuries while working as a truck driver for Blue Rock in 1999 and 2001. In 2009, a subsequent board decision (*Collier, ALJ*) established that Mr. Strout sustained another work-related injury to his low back in 2007, this time while employed as a truck driver by Troiano. Based on the combined effects of the 1999, 2001, and 2007 work injuries, the ALJ awarded Mr. Strout (among other things), ongoing partial incapacity benefits at varying rates, apportioned equally between the three dates of injury. Troiano thus became responsible to pay Mr. Strout the full benefit to which he is entitled, and Blue Rock, to reimburse Troiano for its two-thirds proportional share pursuant to 39-A M.R.S.A § 354(2) (Supp. 2015).

[¶5] In addition, the 2009 decree established that Mr. Strout had sustained 11% whole person PI as the result of the 1999 and 2001 injuries at Blue Rock, based on the report of an orthopedic surgeon appointed as an independent medical examiner pursuant to 39-A M.R.S.A § 312 (Supp. 2015).

[¶6] When the varying-rate partial benefit scheme was instituted, Mr. Strout had just begun post-injury employment as a telemarketer. The ALJ described that employment as tenuous and uncertain, and for that reason ordered partial benefits at varying rates, rather than partial at a fixed rate.

[¶7] In the current round of litigation, both in response to the employers' Petitions to Terminate/Reduce Benefit Payments and in support of his Petitions for Determination of Permanent Impairment, Mr. Strout contended that he has experienced an additional 5% PI as the result of psychological sequelae of the 1999 and 2001 physical injuries. Mr. Strout asserted that the additional 5% should be added to the previous 11%, rendering the 520 week durational cap on partial incapacity benefit payments inapplicable.[1]

[¶8] Mr. Strout's psychiatrist, Dr. Voss, opined that Mr. Strout sustained 5% permanent psychological impairment as the result of the chronic pain and disability caused by his work injuries. However, the ALJ rejected Dr. Voss's opinion in favor of that of Dr. Barkin, who conducted an independent medical examination of Mr. Strout pursuant to 39-A M.R.S.A § 312 (Supp. 2015). Dr. Barkin opined that Mr. Strout suffers from a work-related mental, emotional, or behavioral condition, but has not reached maximum medical improvement (MMI) with respect to that condition. Accordingly, the ALJ determined that Mr. Strout did not meet his burden to establish that he suffered additional PI from the psychological condition.

[¶9] Further, because Dr. Barkin found that Mr. Strout has a work-related psychological condition that is not yet at MMI, the ALJ concluded that Blue Rock

[1] The permanent impairment threshold applicable to the 1999 and 2001 injuries is 11.8%. Me. W.C.B. Rule, Ch. 2, § 1(1). The durational limit in this case for partial incapacity payments is 520 weeks. 39-A M.R.S.A. § 213; Me. W.C.B. Rule, Ch. 2, § 2.

and Troiano did not meet their burden to establish that Mr. Strout's PI level was below the statutory threshold, and thus, Blue Rock remained obligated to pay Mr. Strout benefits even though it had done so for more than 520 weeks.

[¶10] In response to Troiano's Petition for Review related to the award of partial incapacity benefits at varying rates, Mr. Strout asserted that a work search conducted after he lost the telemarketing job shows that there is no work in his local community available to him, and thus, he is entitled to benefits for 100% partial incapacity apportioned in accordance with the 2009 decree between Blue Rock and Troiano.

[¶11] The ALJ considered Mr. Strout's work search, but was "not persuaded that Mr. Strout demonstrated that work is actually unavailable to him due to the persisting effects of his work injuries." Therefore, the ALJ denied Mr. Strout's request for 100% partial incapacity benefits, but otherwise denied Troiano's Petition for Review, thus continuing the varying rates partial scheme. Pursuant to a request for further findings of fact and conclusions of law, the ALJ determined that an award of partial benefits at varying rates was no longer appropriate because the telemarking job had terminated and Mr. Strout had remained unemployed ever since. The ALJ ordered that Mr. Strout be paid partial benefits at a fixed rate based on a $300.00 per week imputed earning capacity.

[¶12] Mr. Strout filed this appeal, and Blue Rock and Troiano cross-appealed.

II. DISCUSSION

A. Standard of Review

[¶13] Appeals from decisions of administrative law judges are governed by 39-A M.R.S.A §§ 321-B, 322 (Supp. 2015). Section 321-B(2) provides that "[a] finding of fact by an administrative law judge is not subject to appeal under this section." 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). When a party requests and proposes additional findings of fact and conclusions of law, as 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).

B. Petitions to Terminate or Reduce Benefits and Petitions to Establish Permanent Impairment.

[¶14] In their petitions to terminate or reduce benefits, the employers bore the burden of proof with respect to whether (1) the statutory maximum number of weeks of benefits had been paid; and (2) the employee's PI rating exceeded the

11.8% threshold for duration of disability benefits. *Farris v. Georgia-Pacific Corp.*, 2004 ME 14, ¶ 17, 844 A.2d 1143. There is no dispute that Blue Rock had paid benefits for more than 520 weeks. Moreover, the 2009 decree established, with respect to the 1999 and 2001 work injuries, that Mr. Strout had reached MMI and that his whole person PI was 11% for those injuries.

[¶15] The employers contend that Mr. Strout was barred by res judicata from relitigating the 2009 findings. The doctrine of res judicata, however, does not bar an employee from bringing a petition to determine extent of PI after the issue has already been adjudicated if there has been a change in medical circumstances sufficient to justify revisiting that issue. *Folsom v. New England Tel. and Tel*., 606 A.2d 1035, 1038 (Me. 1992). The extent of an employee's PI may increase based on a worsening of that employee's medical condition without violating the concept that MMI had been reached. *See Williams v. E.S. Boulos Co.*, 2000 ME 40, ¶¶ 9-10, 747 A.2d 181.

[¶16] In this case, however, we find that it is not necessary to address the employers' argument regarding changed circumstance because the ALJ properly determined that the employers failed to demonstrate that Mr. Strout had reached a date of maximum medical improvement with respect to his work-related psychological condition, and thus failed to carry their burden of demonstrating that Mr. Strout's permanent impairment was below the relevant statutory threshold.

[¶17] The ALJ accepted Dr. Barkin's finding that Mr. Strout has not achieved maximum medical improvement with respect to his work-related psychological condition. Dr. Barkin's opinion on this issue was somewhat inconsistent and confusing. On the one hand, his report states (several times) that Mr. Strout has not achieved MMI. On the other hand, the report also states that Mr. Strout is not permanently impaired from a mental, emotional or behavioral perspective, because his psychological issues stem from his poor attitude. The report ends with the observation, however, that "this examiner cannot assess permanent impairment at this time as Mr. Strout has not reached maximum medical improvement." The ALJ did not err in relying on the examiner's clear statements regarding MMI.

[¶18] "[P]ermanent impairment" is defined in the Workers' Compensation Act as "any anatomic or functional abnormality or loss existing after the date of maximum medical improvement that results from the injury." 39-A M.R.S.A. § 102(16) (Supp. 2015). Because PI, by definition, cannot be assessed absent a finding of MMI, the ALJ's finding that Mr. Strout had not reached MMI legally precludes the finding that he suffers—or does not suffer—additional PI from the psychological sequelae of his work injuries.[2]

[2] Troiano also argues that MMI was established for the 1999 and 2001 injuries in the 2009 decision and cannot be revisited as a matter of law, relying on *Williams*, 2000 ME 40, 747 A.2d 181. That case held that an employee could not establish a "new" date of MMI based on a worsening of the underlying

[¶19] The dissent would vacate the ALJ's decision and grant the petitions to terminate and reduce benefits on the basis that the IME's report supports the finding that Mr. Strout suffers no psychological PI due to the 1999 and 2001 work injuries. The dissent's reasoning is undergirded by the view, expressed in the IME's report, that Mr. Strout impeded his own psychological progress by discontinuing treatment and therefore should be deemed to have reached MMI. While in the right factual circumstances a finding of MMI may be appropriate when an employee refuses to comply with recommended treatment, those circumstances are not present in this case. Here, the ALJ made a factual finding that Mr. Strout had discontinued treatment not by choice but because Blue Rock's insurer had stopped paying for that treatment, and that he was unable to pay for it himself. This factual finding has support in the record and was no doubt influenced by the ALJ's credibility determination. Thus, a decision that would deem Mr. Strout as having reached MMI would contradict the ALJ's factual finding and exceed our scope of appellate review.

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condition, thus restarting the 400-week durational limit applicable to that date of injury. *Id.* ¶ 9. Under the law at that time (not applicable to this case) the durational period began with the date of MMI. *Id.* ¶ 1.

Williams, by its terms, does not bar a finding of increased PI. *Id.* ¶ 9. In this case, the impairment at issue is related to a sequela of the work injuries that is different in kind from the work injuries themselves. That impairment can only be measured once that condition is at MMI, as a matter of law. *See* 39-A M.R.S.A. §102(16). Thus, assuming that the employee is able to demonstrate a change in circumstance with respect to his psychological condition since the date of the 2009 decision, *Williams* does not prevent an assessment of whether MMI has been reached, with respect to that psychological condition.

[¶20] Accordingly, we affirm the ALJ's decision to deny the employers' Petitions to Reduce or Terminate Benefits.

C. Petition for Review of Varying Rates Partial Incapacity Benefits

[¶21] Mr. Strout contends that the ALJ erred by changing his award of varying rates partial incapacity benefits (1) without a showing of changed circumstances, and (2) by placing the ultimate burden of persuasion regarding availability of suitable work on him, the non-moving party, when determining earning capacity.

1. Res Judicata.

[¶22] The 2009 decree ordered Blue Rock and Troiano to pay partial benefits at varying rates, based on Mr. Strout's newly acquired (at the time) job as a telemarketer. In this proceeding, the ALJ also found as fact that the telemarketing job ended in October 2008, after the record closed on the 2009 decree. It is apparent from the ALJ's further findings of fact that he considered the loss of Mr. Strout's job since the last decree a change of economic circumstances sufficient to justify a review of the payment scheme for partial incapacity. Thus, it was appropriate for the ALJ to revisit the amount of Mr. Strout's partial incapacity benefit in the current litigation. *See Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 7, 837 A.2d 117.

2. Burden of Proof.

[¶23] Partial incapacity benefits are calculated as a percentage of the difference between the injured employee's pre-injury earnings and what the "injured employee is able to earn after the injury[.]" 39-A M.R.S.A. § 213(A) (Supp. 2015). The Law Court has outlined the burdens of proof with respect to an employee's post-injury ability to earn when raised in the context of an employer's petition for review as follows:

> On an employer's petition for review, the employer bears the burden of proof to establish the employee's earning capacity; however, when the employer shows that the employee regained partial work-capacity, the employee bears a burden of production to show that work is unavailable to him or her as a result of the injury. *Ibbitson v. Sheridan Corp*., 422 A.2d 1005, 1009 (Me. 1980). If the employee meets the burden of production, the employer's "never shifting" burden of proof may require it to show that it is more probable than not that there is available work within the employee's physical ability. 422 A.2d at 1009-1010; *Poitras v. R. E. Glidden Body Shop*, 430 A.2d 1113, 1118 (Me. 1981).

McIntyre v. Great N. Paper, Inc., 2000 ME 6, ¶ 6, 743 A.2d 744 (quoting *Dumond v. Aroostook Van Lines*, 670 A.2d 939, 941-42 (Me. 1996)).

[¶24] In response to Troiano's petition, Mr. Strout argued that he was entitled to an increase to 100% partial incapacity benefits. The ALJ initially determined that Mr. Strout's work search was insufficient to carry his burden of establishing entitlement to 100% partial, but denied Mr. Troiano's Petition for Review nonetheless. Thereafter, the ALJ granted Troiano's motion for findings,

concluding that assessment of a fixed rate of partial benefits was appropriate because varying rate payment schemes are disfavored.

[¶25] On appeal, Mr. Strout asserts that the ALJ erred by imposing on him the burden of proof, rather than production. Troiano contends that because Mr. Strout, was seeking an increase in benefits, he bore the burden of proof and persuasion on the issue of the extent of his incapacity, and that the ALJ's assessment of a fixed rate of partial as set forth in the additional findings should be affirmed. We agree with Mr. Strout.

[¶26] It is apparent that the ALJ evaluated Mr. Strout's work search evidence not in terms of whether Mr. Strout met his burden of production on the issue of availability of work, but in terms of whether he proved entitlement to 100% partial incapacity benefits. The ALJ concluded that Mr. Strout's work search evidence was insufficient to establish such entitlement.

[¶27] However, as it specifically relates to Troiano's Petition for Review, we conclude as a matter of law that the work search evidence submitted by Mr. Strout was sufficient to meet his minimal burden of production to show that work is unavailable to him as a result of the injury. Thus, Troiano retained the ultimate burden of proof on the issue of availability of suitable work on its Petition for Review. *Id.*; *see also Farris*, 2004 ME 14, ¶ 16, n.6; *Monaghan v. Jordan's Meats*, 2007 ME 100 ¶ 15, 928 A.2d 786.

[¶28] The fact that payments were being made on a varying rates basis does not obviate an employer's obligation to demonstrate the extent of an employee's earning incapacity on its petition for review. It was incumbent on Troiano to submit evidence on the issue of Mr. Strout's earning incapacity, including evidence of the availability of work in the form of labor market evidence or otherwise. Because Troiano failed to do so, it failed to carry its ultimate burden of proof on its Petition for Review. For this reason we conclude that it was error to grant Troiano's Petition for Review.

III. CONCLUSION

[¶29] The ALJ neither misconceived nor misapplied the law when denying Blue Rock and Troiano's Petitions to Terminate/Reduce Benefits. However, the ALJ erred when placing a burden proof on Mr. Strout to establish the availability of work as it relates to Troiano's petition for review.

The entry is:

> With respect to Troiano's Petition for Review, the administrative law judge's decision is vacated and the petition is denied. In all other respects, the decision is affirmed.

Administrative Law Judge Pelletier, dissenting

[¶30] The ALJ denied Blue Rock's Petitions to Terminate Benefit Payments and Troiano's Petition to Reduce Benefits on the basis that the employers did not

carry their burden to prove that Mr. Strout's permanent impairment level fell below the threshold for duration of disability benefits, and the majority affirms the denial. For the reasons that follow, I dissent from this conclusion. In all other respects, I join the decision.

[¶31] The ALJ accepted the findings of the independent medical examiner, Dr. Barkin, who found that although Mr. Strout has a work-related psychological condition, he is not permanently impaired by it. Although Dr. Barkin stated that Mr. Strout was not at MMI with respect to his adjustment disorder, the ALJ also found that MMI had not been reached because Mr. Strout had not engaged in counseling that could help the adjustment disorder. The effect of Dr. Barkin's findings was to leave Mr. Strout's overall PI rating at 11%. On this basis, the ALJ correctly denied Mr. Strout's petitions seeking an award of additional PI.

[¶32] However, the ALJ's denial of Mr. Strout's petitions seeking a higher PI rating does not dispose of Blue Rock/Troiano's petitions to terminate or reduce benefits. The employers retained the burden of proof with respect to whether (1) the statutory maximum number of weeks of benefits had been paid; and (2) the employee's PI rating did not exceed the 11.8% threshold for duration of disability benefits. *Farris v. Georgia-Pacific Corp.*, 2004 ME 14, ¶ 17, 844 A.2d 1143. There is no dispute in this case that Blue Rock has paid the statutory maximum number of partial benefit payments, and that PI was previously established at 11%.

[¶33] The majority suggests that the finding by Dr. Barkin that MMI had not been reached because Mr. Strout needs more treatment precludes a finding of no additional PI, particularly because the ALJ found that Mr. Strout ceased psychological counseling because the employer refused to pay for it, and not by his choice. The majority acknowledges that in some circumstances, if an employee refuses recommended treatment, a finding of MMI may be appropriate. However, in this case, it is immaterial whether Mr. Strout is not at MMI due to his own lack of desire to engage in necessary treatment or the employer's refusal to pay. Dr. Barkin's report, which the ALJ adopted without qualification, is clear: "while his back injury has contributed to his mental, emotional or behavioral problems as evidenced by his ongoing adjustment disorder, it is this examiner's belief that he is not permanently impaired from a mental, emotional or behavioral perspective." This is quite different from a case in which the medical examiner finds that a level of PI above zero is expected, but the exact amount cannot yet be determined because the injury is not at MMI without more treatment. In this case, the examiner is saying that with appropriate treatment PI will likely be zero.

[¶34] In my view, by adopting Dr. Barkin's opinion, the ALJ effectively determined that the employers met their burden to prove that Mr. Strout's PI level remained below the threshold and, therefore, the durational limits apply. Thus, Blue Rock should be entitled to an order terminating its obligation to pay ongoing

benefits for partial incapacity. Likewise, Troiano should be permitted to decrease its payment to Mr. Strout proportionately. *See Miller v. Spinnaker Coating*, 2011 ME 79, ¶¶ 17-18, 25 A.3d 954 (holding that the last employer in multiple injury case is entitled to a proportional reduction in the employee's benefit when liability for earlier injury expires as a result of the statutory durational limit).

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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