

SUZAN SAMUEL
(Appellee)

v.

MERCY HOSPITAL
(Appellant)

and

CROSS INSURANCE, TPA, INC.
(Administrator)

and

ESIS
(Insurer)

Argued: December 13, 2018

Decided: February 24, 2021

PANEL MEMBERS: Administrative Law Judges Pelletier, Hirtle, and Stovall
BY: Administrative Law Judge Hirtle

[¶1] Mercy Hospital appeals from a decision of a Workers' Compensation Board administrative law judge (*Collier, ALJ*) granting Suzan Samuel's petitions regarding two dates of injury: October 4, 2012, and August 2, 2014. The ALJ adopted the independent medical examiner's 50/50 apportionment finding and awarded Ms. Samuel 100% partial incapacity benefits. Mercy Hospital¹ contends that the ALJ erred in awarding incapacity benefits for the injury of August 2, 2014,

¹ Mercy Hospital had different workers' compensation insurance companies at the time of Ms. Samuel's two injuries. ESIS, Inc., is the company responsible for Ms. Samuel's injury date of October 4, 2012, and it has advised the Appellate Division that it takes no position on the present appeal. Cross Insurance TPA, Inc., is the third-party administrator responsible for Ms. Samuel's injury date of August 2, 2014, and pursued this appeal.

on the basis that the later injury did not result in any increase in her work restrictions; and in awarding 100% partial incapacity benefits because Ms. Samuel submitted insufficient work search evidence. We disagree with the arguments regarding apportionment and work restrictions but agree with the argument regarding the award of 100% partial incapacity benefits. We therefore affirm in part, vacate in part, and remand the decision.

I. BACKGROUND

[¶2] Suzan Samuel worked as a housekeeper at Mercy Hospital and experienced a work-related right shoulder injury on October 4, 2012. Ms. Samuel continued to work and reported a period of improving symptoms until 2014, when her right shoulder symptoms worsened. When she sought care for these symptoms on July 31, 2014, Ms. Samuel's medical providers restricted her from any use of her right arm. On August 2, 2014, Ms. Samuel slipped at work and injured her right shoulder for the second time. An MRI scan six days later demonstrated a rotator cuff tear and Ms. Samuel underwent surgery on October 3, 2014. Following the surgery, Ms. Samuel was able to return to work for Mercy Hospital. While the ALJ's decision is silent on the matter, the medical records submitted by the parties demonstrate that when Ms. Samuel returned to work following her right shoulder surgery, she worked with restrictions against heavy, repetitive, or overhead lifting with her right arm.

[¶3] Mercy Hospital disputed Ms. Samuel’s claim for benefits. During litigation, Ms. Samuel saw an independent medical examiner pursuant to 39-A M.R.S.A. § 312 (Pamph. 2020). In the examiner’s report, he opined that Ms. Samuel’s two work injuries were each 50% responsible for right shoulder condition, surgery, and rehabilitation.

[¶4] On September 22, 2016, Mercy Hospital terminated Ms. Samuel’s employment. At the November 8, 2016, hearing before the ALJ, Ms. Samuel testified that she was looking for work and had applied for unemployment benefits. The ALJ then awarded 100% partial incapacity benefits from September 22, 2016, to the present and continuing. The ALJ apportioned responsibility for these benefits 50% between the two work injury dates.

[¶5] Mercy Hospital filed a Motion for Additional Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Pamph. 2020). The ALJ granted the motion, making additional findings and conclusions without altering the substantive outcome. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶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). Because Mercy Hospital requested findings of fact and conclusions of law following the decision, the Appellate Division may “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.

B. Partial Incapacity and Work Restrictions

[¶7] In general, an injured employee whose earning capacity is diminished by a work injury is entitled to receive partial incapacity benefits under the Workers’ Compensation Act reflecting that diminished earning capacity. 39-A M.R.S.A. § 213 (Pamph. 2020). In this case, Mercy Hospital argues that as a matter of law no incapacity benefits should have been awarded for the injury of August 2, 2014, because Ms. Samuel’s restrictions following that injury and recovery period after surgery were less than her restrictions immediately before the injury date.

[¶8] We reject Mercy Hospital’s argument. The ALJ who heard the case relied upon competent evidence—a written opinion from the independent medical examiner—to find that the injury of August 2, 2014, was 50% responsible for Ms. Samuel’s right shoulder condition, including her need for surgery. In order to meet her burden on a claim for partial incapacity benefits, Ms. Samuel was not required

to demonstrate that her second injury resulted in greater restrictions than she was under pre-surgery. Therefore, on this issue we affirm the ALJ's decision.

C. 100% Partial Incapacity Benefits

[¶9] Generally, in order for an injured employee to receive 100% partial incapacity benefits, the injured employee must demonstrate through a work search or other suitable evidence that the employee has made “a reasonable exploration of the labor market in [the] community for the kind of work [the employee] has regained some ability to perform[.]” *Monaghan v. Jordan's Meats*, 2007 ME 100, ¶ 17, 928 A.2d 786 (quotation marks omitted). The Law Court in *Monaghan* provided guidance with a non-exhaustive factor test to help weigh an injured employee's entitlement to 100% partial incapacity benefits. *Id.* at ¶ 21.

[¶10] Mercy Hospital argues that the ALJ committed legal error by awarding 100% partial incapacity benefits based solely on Ms. Samuel's testimony that she was laid off shortly before the hearing in her case and had applied for unemployment benefits. Ms. Samuel argues that her testimony is competent evidence to support the ALJ's award of benefits.

[¶11] The Law Court has offered guidance on the issue of the evidence required to support an award of 100% partial benefits in the event of a recent termination from employment. In *Swan v. Andrew Crowe & Sons, Inc.*, 434 A.2d 1008 (Me. 1981), the employee's physician released him to attempt limited duty

work three weeks before the evidence closed in his workers' compensation case. *Id.* at 1011. The commissioner faulted the worker for failing to conduct an adequate work search during this time and awarded only 50% partial incapacity benefits. *Id.* On appeal, the Law Court reversed, holding:

[B]ecause of the short span of time between Swan's recovery of partial capacity to work and the date of the hearing, we believe that in fairness to Swan this case should be remanded, and Swan should be given the opportunity to submit evidence solely of his work search efforts subsequent to April 1, 1980.

Id.

[¶12] The *Swan* holding applies in this case. We therefore remand to the ALJ so that Ms. Samuel may present evidence of her work search subsequent to November 8, 2016, the date of the hearing in her case.

III. CONCLUSION

[¶13] The ALJ's finding of partial incapacity attributable to the injury of August 2, 2014, is supported by competent evidence and otherwise free of reversible error. We vacate the ALJ's award of 100% partial incapacity benefits from September 22, 2016, onward, and remand for Ms. Samuel to present evidence of her work search efforts since November 8, 2016, and for the ALJ to conduct a *Monaghan* analysis to determine if those efforts are adequate to support an award of 100% partial incapacity benefits.

The entry is:

The administrative law judge's decision is affirmed in part and vacated in part, and remanded for further proceedings.

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 (Pamph. 2020).

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:
Thomas E. Getchell, Esq.
TROUBH HEISLER
P.O. Box 9711
Portland, ME 04104-5011

Attorneys for Appellee:
Shawn P. Walsh, Esq.
Workers' Compensation Board
Advocate Division
1037 Forest Avenue, Suite 11
Portland, ME 04103-3382

Allan M. Muir, Esq.
PIERCE ATWOOD
1 Monument Square
Portland, ME 04101