JOHN D. BARRY
(Appellant)

v.

STATE OF MAINE DEPARTMENT OF TRANSPORTATION
(Appellee)

Argued: March 16, 2017
Decided: February 14, 2018

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

[¶1] John D. Barry appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) partially granting his Petition for Award related to a February 9, 2015, mental stress injury. Mr. Barry argues that the ALJ erred by finding that he was partially, rather than totally, incapacitated during a closed-end period from February 10, 2015, to October 1, 2015. He also contends the ALJ erred by calculating his partial incapacity benefits using imputed earnings from a job that he formerly held even though that job was not available during the period of incapacity. Because the ALJ declined to make sufficient findings on the issue of the extent of partial incapacity, we remand for further findings on this issue.

## I. BACKGROUND

[¶2] John Barry was a transportation crew leader for the Department of Transportation (DOT) until early December, 2014, when he assumed the position

of acting transportation crew supervisor on an interim basis. As a crew supervisor, Mr. Barry supervised three crew leaders and had substantially more responsibility. After one of his three crew leaders went out of work, Mr. Barry fulfilled that crew leader's duties in addition to his duties as a supervisor.

[¶3] Mr. Barry's increased workload caused a mental stress injury that manifested itself on February 9, 2015.[1] Mr. Barry's family doctor took him out of work the next day. According to Mr. Barry, before going out of work, he asked his supervisor, Joe Lacerda, to reassign him to his former job as a crew leader, but Mr. Lacerda told him it was unlikely that he could make such a move until a permanent crew supervisor was hired. Mr. Lacerda, on the other hand, did not recall any such request and testified that a crew leader position was open to Mr. Barry at the time he went out of work.

[¶4] On September 30, 2015, DOT sent Mr. Barry to a medical examination pursuant to 39-A M.R.S.A. § 207 (Supp. 2017). The section 207 examiner diagnosed Mr. Barry with "acute adjustment disorder with anxiety, minimal depression," but opined that at all times he had the ability to work as a crew leader. Mr. Barry returned to work as a crew leader on October 1, 2015.

[¶5] The ALJ awarded Mr. Barry partial incapacity benefits based on the difference between his average weekly wage as a crew supervisor ($1,198.92) and

[1] The DOT does not appeal the ALJ's determination that Mr. Barry suffered a compensable mental injury caused by mental stress at work pursuant to 39-A M.R.S.A. § 201(3) (Supp. 2017).

the wages he had earned as a crew leader ($965.73). Mr. Barry requested further findings of fact and conclusions of law, contending that the section 207 examiner's opinion was not competent evidence of his work capacity. In addition, Mr. Barry reasserted that before going out of work, his supervisor had rejected his request to return to work as a crew leader. The ALJ denied the motion for further findings of fact and conclusions of law. This appeal followed.

## II. DISCUSSION

### A. Standard of Review

[¶6] The Appellate Division's role on appeal is "limited to assuring that the [ALJ's] factual 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." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). Because Mr. Barry requested additional findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2017), and submitted proposed additional findings, we do not assume that the ALJ made all the necessary findings to support his conclusions. *See Spear v. Town of Wells*, 2007 ME 54, ¶ 10, 922 A.2d 474. "Instead, we review the original findings and any additional findings made in response to a motion for findings to determine if they are sufficient, as a matter of

law, to support the result and if they are supported by evidence in the record." *Id.* (quotation marks omitted).

B. Level of Incapacity

[¶7] Mr. Barry contends that the ALJ's factual finding—that he was partially, but not totally, incapacitated—is not supported by competent evidence. It is the province of an ALJ, as fact-finder, to accept or reject expert medical opinions, in whole or in part. *See Leo v. Am. Hoist & Derrick Co.*, 438 A.2d 917, 920–21 (Me. 1981); *Rowe v. Bath Iron Works*, 428 A.2d 71, 74 (Me. 1981). The mere presence of contradictory evidence does not render an expert's medical opinion incompetent. *See Rowe*, 428 A.2d at 73 ("It is immaterial that there was also evidence which would have supported a different conclusion."). "The extent of a worker's incapacity is a question of fact. In carrying out his responsibility as fact finder, the [ALJ] must weigh competing evidence and is not required to accept or reject the whole testimony of particular medical experts." *Leo*, 438 A.2d at 920–21.

[¶8] In making findings on Mr. Barry's work capacity, the ALJ relied on the opinion expressed by DOT's section 207 examiner, who opined that Mr. Barry was, at all relevant times, capable of working as a crew leader. Although there were other opinions in the record, the ALJ found the section 207 examiner's opinion on this point most persuasive. His opinion thus constitutes competent

evidence to support the ALJ's finding that Mr. Barry was partially, but not totally, incapacitated.

C. Imputed Earning Capacity

[¶9] When an employee is partially incapacitated, his or her incapacity benefits are calculated based on the difference between the employee's pre-injury average weekly wage and the "earnings or salary that the employee is able to earn after the injury." *See* 39-A M.R.S.A. § 213(1)(B) (Supp. 2017). Post-injury earning capacity is based on both the employee's physical capacity to earn wages, and "the availability of work within the employee's physical limitations." *Monaghan v. Jordan Meats*, 2007 ME 100, ¶ 9, 928 A.2d 786 (quoting *Morse v. Fleet Fin. Group*, 2001 ME 142, ¶ 5, 782 A.2d 769, 771 (emphasis added)). When there has been no specific job offer or when the employee has failed to conduct a work search, the ALJ must determine what the employee is "able to earn." *Hogan v. Great N. Paper*, 2001 ME 162, ¶ 9, 784 A.2d 1083.

[¶10] In this case, the ALJ calculated Mr. Barry's partial incapacity benefits based on the difference between his pre-injury wage as a crew supervisor and what he would have earned had he returned to his job as a crew leader during his period of incapacity. Even though the ALJ found that Mr. Barry retained the ability to work as a crew leader, it is not clear from his findings whether that job was actually available during the period of incapacity. Indeed, there was conflicting

evidence on this point. Mr. Barry testified that his supervisor told him that it was unlikely that he could return to his crew leader job. On the other hand, Mr. Barry's supervisor testified that he did not recall discussing returning to the crew leader position with Mr. Barry but that it was always open to him. This conflicting evidence can only be resolved by the fact finder.

[¶11] Because of the conflict regarding the availability of crew leader wages, and because the ALJ did not make specific findings on this issue, we must remand for further findings of fact with regard to the issue of the extent of Mr. Barry's incapacity. *Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982) (stating that, when requested, an ALJ has affirmative duty to make additional findings of fact and conclusions of law in order to create an adequate basis for appellate review).

## III. CONCLUSION

[¶12] The decision to accept or reject medical evidence belongs solely to ALJ as factfinder; therefore we do not disturb the ALJ's determination that Mr. Barry was partially incapacitated. However, the ALJ erred by imputing earnings from the crew leader job to Mr. Barry without adequate findings supporting the extent of incapacity found.

The entry is:

> The ALJ's determination that the claimant was partially, but not totally, incapacitated during the relevant period is affirmed. However, the decision is vacated in part and remanded to the ALJ for additional findings of fact and conclusions of law with respect to the issue of imputed earnings during the period of partial incapacity.

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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.

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