PAULA GOWEN
(Appellant)

v.

L.L. BEAN, INC.
(Appellee)

and

MAINE EMPLOYERS' MUTUAL INSURANCE CO.
(Insurer)

Argument held: April 6, 2016
Decided: February 3, 2017

PANEL MEMBERS: Administrative Law Judges Elwin, Goodnough, and Jerome
BY: Administrative Law Judge Jerome

[¶1] Paula Gowen appeals from a decision of a Workers' Compensation Board administrative law judge (*Collier, ALJ*) granting Ms. Gowen's Petition for Review, awarding ongoing partial incapacity benefits pursuant to 39-A M.R.S.A § 213 (Supp. 2016), and granting L.L. Bean, Inc.'s, Petition to Determine Extent of Permanent Impairment, concluding that Ms. Gowen's whole-body permanent impairment is 11%. Ms. Gowen appeals. She contends that the ALJ erred (1) by concluding that she did not meet her burden of proof on the issue of entitlement to total incapacity benefits pursuant to 39-A M.R.S.A § 212 (Supp. 2016) and *Adams v. Mt. Blue Health Center*, 1999 ME 105, 735 A.2d 478; and (2) by granting L.L. Bean's Petition to Determine Extent of Permanent Impairment.

I. BACKGROUND

[¶2] Paula Gowen sustained a gradual injury in 2004 while working for L.L. Bean. In a 2006 consent decree, L.L. Bean agreed to pay 100% partial incapacity benefits and to pay for all reasonable and necessary medical treatment, with the parties reserving the right to litigate in the future the extent of incapacity and issues regarding medical treatment. The scope of Ms. Gowen's injury, according to the consent decree, includes her "right hand, right arm, and right shoulder and related body parts."

[¶3] After her injury, Ms. Gowen was initially restricted to 20 hours of work per week. Ms. Gowen was out of work from July of 2006 until September of 2006 due to surgery to correct a work-related right rotator cuff injury. In June of 2007 Ms. Gowen had a mass surgically removed from her right humerus bone, and subsequently was out of work for a period of time before returning to work four hours per week, with restrictions, in November of 2007. Ms. Gowen was laid off from L.L. Bean in January of 2008 because it no longer had work available within her restrictions.

[¶4] Ms. Gowen began working as a counter associate at a Mr. Bagel store in mid-March of 2008. She worked four hours per shift and no more than 20 hours per week. Ms. Gowen was able to do the work until she was asked to exceed her restrictions, which caused her symptoms to increase. Ms. Gowen was taken out of

work for four weeks on June 30, 2008, and has not worked since. At the time of the hearing in 2013 Ms. Gowen's work restrictions included working four hours per shift and 20 hours per week; only occasional lifting and no lifting greater than 10 pounds; sitting and standing as needed; no pushing, pulling or overhead work; no mousing, typing, or repetitive writing; and no repetitive reaching with her right hand.

[¶5] In 2012, L.L. Bean filed a Petition to Determine Extent of Permanent Impairment and a Certificate of Discontinuance or Reduction of Compensation, seeking to reduce Ms. Gowen's benefits because it contends Ms. Gowen is capable of performing full-time modified work. Ms. Gowen filed a Petition for Review of Incapacity, seeking total incapacity benefits pursuant to *Adams v. Mt. Blue Health Center*, 1999 ME 105, 735 A.2d 478.

[¶6] The ALJ granted Ms. Gowen's Petition for Review, and determined that although she was not entitled to payment of total incapacity benefits under section 212, or 100% partial incapacity benefits, she was entitled to payment of ongoing partial incapacity benefits pursuant to section 213 based upon her average weekly wage and an imputed weekly earning capacity of $150.00. The ALJ also granted L.L. Bean's Petition to Determine Extent of Permanent Impairment, and adopted the opinions of both Dr. Esponnette and Dr. Pier that Ms. Gowen's whole-body permanent impairment resulting from the work injury is 11%. This would

entitle L.L. Bean to cease making benefit payments after 520 weeks. Me. W.C.B. Rule, Ch. 2, §§1(3), (2) (establishing benefit threshold for duration of disability at 13.4% permanent impairment for 2004 injuries, and setting maximum number of partial benefit payments at 520 weeks for those with permanent impairment below that threshold). Ms. Gowen filed a motion for additional findings of fact and conclusions of law, which the ALJ denied. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶7] The role of the Appellate Division 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 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). *See also Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995). In addition, because Ms. Gowen requested further findings of fact and conclusions of law following the decision, the Appellate Division will "review only the factual findings actually made and the legal standards actually applied by the hearing officer." *Daley v. Spinaker*, 2002 ME 134, ¶ 17, 803 A.2d 446.

B. Entitlement to "Total" or 100% Partial Incapacity Benefits

[¶8] Ms. Gowen maintains that the ALJ erred by concluding that she did not meet her burden to show that suitable work is unavailable to her in her community as a result of her work injury, and by awarding only a fixed rate of partial incapacity benefits. Specifically, Ms. Gowen argues that the ALJ misapplied the law by focusing on just one element of her work search, and held her work search efforts to a higher standard than the law requires by determining that she was required to submit written work search documents or labor market surveys.

[¶9] [A]n employee suffering only partial incapacity to earn may be entitled to "total" benefits pursuant to 39-A M.R.S.A § 212 (Supp. 2016) if the employee can establish both (1) the unavailability of work within the employee's local community, and (2) the physical inability to perform full-time work in the statewide labor market, regardless of availability. *Morse v. Fleet Fin. Group*, 2001 ME 142, ¶ 8, 782 A.2d 769. The first requirement, that work is unavailable within the employee's local community as a result of the work injury, must be established pursuant to the work search rule. *Id*. The work search rule is a judicially created doctrine designed to allocate the order and presentation of proof related to the availability of work. *Tripp v. Phillips Elmet Corp.*, 676 A.2d 927, 929 (Me. 1996).

[¶10] When the employee is the petitioning party, the employee has the ultimate burden of proof to show that work is unavailable within the employee's

local community as a result of the work injury. *Morse*, 2001 ME 142, ¶ 7; *see also Monaghan v. Jordan's Meats*, 2007 ME 100, ¶14, 928 A.2d 786. The work search rule is thus a prerequisite to the receipt of "total" incapacity benefits pursuant to section 212 and 100% partial incapacity benefits pursuant to section 213, and it is the process by which an employee must demonstrate on a more likely than not basis that there is no work available to them because of the ongoing effects of their work injury. Further, the rule establishes that the existence or fact of doing a work search is not enough to satisfy an employee's burden of proof; there are both quantitative and qualitative components that must be evaluated to determine whether an employee has made a reasonable exploration of the local community for suitable work. *See Monaghan*, 2007 ME 100, ¶ 21 (identifying numerous factors that an ALJ should consider when evaluating the adequacy of a work search, including the number of inquiries, method of searching, whether work search targeted to available positions, etc.).

[¶11] The ALJ did not misapply the law or hold Ms. Gowen's work search efforts to a higher standard than the law requires. The ALJ specifically made findings regarding the qualitative and quantitative components of Ms. Gowen's work search, fully analyzing each factor identified as part of the evaluation in *Monaghan*. The ALJ found that Ms. Gowen had spoken with only six or seven employers; had worked with a vocational rehabilitation counselor from the Maine

Department of Labor; and had attended a job fair, meetings, and workshops at the Career Center.

[¶12] The ALJ also found that Ms. Gowen did not submit any written work search or labor market testimony of any kind.[1] After weighing the evidence, the ALJ determined that Ms. Gowen did not meet her burden. The ALJ concluded that six or seven employer contacts, only one of which Ms. Gowen found through her own efforts, did not demonstrate an adequate exploration of the labor market. Given the limited number of contacts, the ALJ concluded "[i]t is difficult to determine, based upon the information provided, whether Ms. Gowen's search was appropriate or too restrictive, whether it was targeted to work that she was capable of performing, or whether she over-emphasized her work restrictions." In addition to specifically discussing these *Monaghan* factors, the ALJ noted Ms. Gowen's 20 year work history at L.L. Bean; the fact that she was articulate and presented well; and her experience in phone, computer, and billing work.

[1] At hearing, Ms. Gowen attempted to submit into evidence an affidavit from the vocational counselor she worked with at the Department of Labor that may or may not have been focused on the *Monaghan* criteria. The objection to that evidence was sustained given the fact that the witness had not been identified in the joint scheduling memorandum, the witness was not present for cross-examination at hearing, and the document was exchanged only two days before the hearing. *See* 39-A M.R.S.A § 309(3) (Supp. 2016); Me. W.C.B. Rule, ch. 12, § 14. The ALJ also ruled that Ms. Gowen could testify, generally, to her employer contacts but not to the specifics of those encounters given the fact that no work search evidence identifying specific employer contacts had been provided to L.L. Bean prior to hearing. These rulings were within the discretion of the ALJ and are consistent with the general board policy of exchanging information in advance of hearing in order to promote an efficient and fair process. 39-A M.R.S.A. §151-A (2001).

[¶13] It was incumbent upon Ms. Gowen to present work search evidence that was sufficient in quantity and quality to demonstrate that work was unavailable to her as a result of the work injury, such that she was unable to replicate her earning capacity. That burden is difficult to carry when evidence of exploration of the labor market is limited by few employer contacts. We find that the ALJ considered the *Monaghan* factors and properly analyzed the evidence presented. In sum, there was competent evidence supporting the ALJ's conclusion that Ms. Gowen failed to carry her burden of proof with respect to entitlement to either "total" or 100% partial incapacity benefits.

C. Whole-Body Permanent Impairment Rating

[¶14] Ms. Gowen also argues that the ALJ erred in granting L.L. Bean's Petition to Determine Extent of Permanent Impairment and in concluding that her whole-body permanent impairment is 11%.

[¶15] When testifying regarding the January 6, 2004, injury, Ms. Gowen stated, "[i]t became a little later that I started having troubles with my upper neck and my back towards the left side," and "I have mild pain in my neck that goes to both sides in my shoulder, more to my right than my left." In addition to Ms. Gowen's testimony regarding her pain, the medical evidence in the record included three opinions on the extent of Ms. Gowen's whole-body permanent impairment. Dr. Esponnette and Dr. Pier both performed written permanent impairment

assessments after reviewing all available medical history and an examination of Ms. Gowen, each concluding that Ms. Gowen's whole-body permanent impairment is 11%. Neither of those opinions specifically addressed the issue of whether Ms. Gowen's neck and upper back problems were related to the work injury nor did those opinions indicate whether the 11% impairment included Ms. Gowen's neck and upper back symptoms. Dr. Manahan did not provide a written assessment but testified that Ms. Gowen's whole-body permanent impairment is 19%, including specific assessment of impairment for her neck and upper back symptoms.[2]

[¶16] When an employer petitions for a finding that an injured worker's whole-body permanent impairment is below the applicable threshold, the employee must meet a burden of production sufficient to raise a genuine issue whether the permanent impairment level exceeds the statutory threshold. "[T]he employee must produce competent evidence to suggest that the employee's whole body permanent impairment may be above the threshold[.]" *Farris v. Georgia-Pacific Corp.*, 2004 ME 14, ¶¶ 16-17, 844 A.2d. 1143. The employer bears the ultimate burden to prove that the employee's permanent impairment does not exceed the threshold.

[2] The ALJ did not find Dr. Manahan's opinion persuasive. Dr. Manahan testified that he has never read the AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed., 1993), he had never before looked at the *Guides* to determine permanent impairment, he has not had any training on how to do a permanent impairment assessment, and he would want to read the *Guides* thoroughly in order to understand exactly how to do such assessments before giving a final opinion on Ms. Gowen's permanent impairment in this case. Dr. Manahan also acknowledged that he did not know whether his calculation of Ms. Gowen's permanent impairment was accurate, and would defer to the opinion of a physician who had done many previous assessments of permanent impairment.

Farris, 2004 ME 14, ¶ 17; *see also Bisco v. S.D. Warren Co.*, 2006 ME 117, ¶¶ 12-14, 908 A.2d 625 (holding that the employee bears burden of production regarding whether permanent impairment ratings should be combined pursuant to 39-A M.R.S.A. § 213(1-A)(A) for purposes of imposing statutory cap on partial benefits, even when the employer bears the burden of proof).

[¶17] Ms. Gowen met her burden to "produc[e] some evidence to persuade a reasonable fact-finder of the existence of a genuine issue concerning the percentage of permanent impairment." *Farris,* 2004 ME 14, ¶ 16. "The burden of production does not require that the employee convince the [ALJ] on the ultimate issue[.]" *Id.* Dr. Manahan's inclusion of permanent impairment for neck symptoms was "some evidence" tending to satisfy Ms. Gowen's burden of production. While the ALJ did not find Dr. Manahan's opinion persuasive on the issue of whole-body permanent impairment, it is, combined with Ms. Gowen's testimony, sufficient to persuade an ALJ of the existence of a genuine issue with respect to whether Ms. Gowen's neck and upper back symptoms are within the scope of the injury, and if they are, whether she suffers additional permanent impairment as a result. *Bisco,* 2006 ME 117, ¶ 14.

[¶18] Because Ms. Gowen met her burden of production, it was incumbent on L.L. Bean to meet its "ultimate" burden to prove that Ms. Gowen's whole-body permanent impairment does not exceed the threshold. Because neither of the

permanent impairment opinions proffered by L.L. Bean specifically addressed the scope of Ms. Gowen's work injury, i.e., whether it includes symptoms she experiences in her neck and upper back, L.L. Bean did not meet this burden.

III. CONCLUSION

[¶19] The ALJ did not err by concluding that Ms. Gowen did not meet her burden of proof on the issue of entitlement to "total" or 100% partial incapacity benefits, and the portion of the decision regarding this conclusion is affirmed. For the reasons stated above, however, we conclude that the ALJ erred by granting L.L. Bean's Petition to Determine Extent of Permanent Impairment.

The entry is:

> The administrative law judge's decision is affirmed to the extent that it entitles Ms. Gowen to payment of ongoing partial incapacity benefits, and vacated to the extent that it grants L.L. Bean's Petition to Determine Extent of Permanent Impairment.

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. 2016).

Attorneys for 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