STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
App. Div. Case Nos. 15-0067
15-0068
15-0069
Decision No.18-25

STEVEN A. LENFEST, JACOB R. HALLETT,
and STEPHEN HALLETT[1]
(Appellees)

v.

SULLIVAN & MERRITT
(Appellant)

and

MAINE EMPLOYERS' MUTUAL INSURANCE COMPANY
(Insurer)

Argued: March 16, 2017
Decided: September 25, 2018

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

[¶1] Sullivan & Merritt appeals from a decision of a Workers' Compensation Board administrative law judge (*Greene, ALJ*)[2] granting the Petitions for Award of three employees: Stephen Hallett, Jacob Hallett, and Steven Lenfest. Sullivan & Merritt contends that the ALJ erred by (1) not adopting the findings of the board's independent medical examiner, (2) not sequestering the employees after they had testified, (3) making factual findings that were unsupported by competent evidence, and (4) awarding total incapacity benefits for

[1] These cases were consolidated both at the formal hearing level and for purposes of appeal.

[2] Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers licensed to practice law are now designated administrative law judges. The change in the law occurred after the initial decision was issued in this case, but before the decision on the Motion for Findings was issued.

a period during which they received unemployment benefits. We disagree, and affirm the decision.

I. BACKGROUND

[¶2] The employees, Stephen Hallett, Jacob Hallett, and Steven Lenfest, worked for the employer, Sullivan & Merritt, in late 2010. (For ease of reference, Stephen Hallett will be referred to in this decision as "Stephen," Jacob Hallett as "Jacob," and Steven Lenfest as "Mr. Lenfest.") Sullivan & Merritt hired them as ironworkers on a project at the Red Shield paper mill in Old Town. Jacob was a foreman on the job and Stephen and Mr. Lenfest were members of his crew. The project had two phases. The first, which lasted about three and one-half weeks, was construction work on a boiler house that surrounded the mill's "recovery boiler." The crew's job entailed metalwork and the removal of paint. They used acetylene torches to cut the house's steel structure in order to reconfigure it. While they were working, the recovery boiler was in operation burning "black liquor," a byproduct from pulp production. Smoke from nearby welders also drifted into their work area. Mr. Lenfest testified that toward the end of this project he began having flu-like symptoms including headaches, cramps, diarrhea, and some chest pressure. Jacob also reported that he felt ill "on a daily basis" during this first phase of the job.

[¶3] After a four-day break, the crew returned to the mill on December 31, 2010, to work on the second phase of the project. This phase involved metalwork on the interior of a boiler that had previously burned construction debris but by 2010 was burning only wood. A fourth worker assisted them, and they attempted to replace a metal grate that had become welded in place from the heat of the boiler. Jacob and the other man worked beneath the grate, using acetylene torches to cut the bolts that had fused. The space inside the boiler was full of ash, dust, and soot that drifted into the air as the crew worked, along with the fumes from the torch. Stephen recalled that he could smell and taste fumes from the torch Jacob was using just below him. The crewmembers wore masks to filter particles from the air, but they fit poorly, clogged quickly, tended to fog their safety goggles, and were not suitable for protecting the workers from exposure to carbon monoxide or other toxins. According to Sullivan & Merritt's "confined space entry logs," air level tests taken at various times near the boiler entries were negative for carbon monoxide.

[¶4] All three employees testified that by the end of their work on December 31, they felt sick. They continued to feel sick the next day, January 1, 2011, when they resumed their work in the boiler. On this day they also used a jackhammer to try to loosen the grate, which stirred up even more dust and ash. Mr. Lenfest recounted that at times he could not see his co-workers three or four

feet from him. He also said that an air quality alarm went off most of that second day but they were told to ignore it because it was broken. That afternoon, work in the boiler stopped when a piece of grate fell on the finger of the fourth crewmember, injuring him and prompting them all to come out of the boiler. A heated conversation then took place between Stephen and Garry Perry, the employer's project manager, during which Mr. Perry fired Stephen. Stephen then told Mr. Perry that he was sick and had been for some time. Jacob and Mr. Lenfest informed Mr. Perry that they were leaving the project as well because of the intolerable air conditions. All three employees were terminated, and all three applied for and received unemployment benefits following their terminations.

[¶5] On January 3, 2011, Jacob, Stephen, and Mr. Lenfest visited Sullivan & Merritt's preferred health care provider, Concentra, where they complained of feeling ill. Jacob reported a variety of symptoms over the previous month, including nausea, diarrhea, chills, shakes, aching joints, loss of appetite, weakness, and difficulty breathing, with a recent persistent headache. Stephen also reported symptoms "from the first day of work there," including nausea, diarrhea, chest pain, weakness, hoarseness, and difficulty breathing. He said he had lost 20 pounds over the previous five weeks from poor appetite. Blood tests did not show elevated levels of carbon monoxide.

[¶6] All three employees sought further treatment with their own chosen providers. They each reported suffering from a similar set of both physical and psychological maladies that included headaches, respiratory problems, tremors, anxiety, insomnia, and depression.

[¶7] In August 2011, Calvin Fuhrmann, M.D., an independent medical examiner appointed by the board pursuant to 39-A M.R.S.A. § 312 (Supp. 2017), separately examined each of the three employees. He concluded that the three men suffered an acute respiratory irritation due to their exposure to dust and fumes, the effects of which had ended. He stated that each was "fit for duty," although he phrased this with respect to Mr. Lenfest that he was "fit for duty from a pulmonary and respiratory point of view." Dr. Fuhrmann, a pulmonologist, only briefly addressed the issue of toxic exposure in his report for Stephen, writing:

> The medical records at the present time clearly demonstrate that there was no evidence of arsenic, lead, or carbon monoxide in the environment. The contention on the part of the claimant that this exposure was so serious that he could no longer work is not substantiated by the records I have reviewed.

He specifically declined to offer an opinion on the psychological component of the employees' conditions.

[¶8] Because the section 312 examiner rendered his opinion relatively early in the process of litigation, however, a large volume of medical records and

opinions developed after his report. The parties did not inform the examiner of those developments or ask him to revise his opinion in light of them.

[¶9] The employees continued to seek evaluation and treatment after the independent medical examiner issued his report, including treatment with Susan Korrick, M.D., a specialist in internal medicine and occupational environmental medicine. Dr. Korrick evaluated Stephen and explained his condition as chronic neurologic sequelae from toxic exposures at the paper mill. Dr. Korrick examined Jacob and Mr. Lenfest and explained their condition with similar diagnoses. Stephen saw Dr. Korrick in March of 2012, before the first hearing. Jacob and Mr. Lenfest saw her in 2013, after they testified. The three were also separately diagnosed with incapacitating psychological conditions stemming from their work at the mill.

[¶10] Due to the similarity of the claims, Sullivan & Merritt agreed to their consolidation for hearing. The board took evidence from the parties over four separate hearings from November 8, 2012, to April 2, 2014. The evidence included testimony from each of the three employees. Jacob and Stephen testified at the first hearing; Stephen and Mr. Lenfest testified at the second hearing. Each employee was sequestered until he had completed his testimony, at which point the board allowed each of them, over Sullivan & Merritt's objection, to observe the remaining proceedings.

[¶11] On August 18, 2015, the board issued a decree granting the employees' petitions. The board, relying heavily on the opinion of Dr. Korrick, found that the employees suffered upper respiratory injuries from the inhalation of dust and ash on December 31, 2010, and January 1, 2011, and chronic psychological and neurological complications resulting from toxic exposure to carbon monoxide. The decree did not address how, if at all, the board's findings deviated from the medical conclusions of the section 312 examiner or to what extent clear and convincing evidence compelled a finding contrary to the examiner's report.

[¶12] Sullivan & Merritt requested further findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2017), but did not ask the ALJ to explain his reasons for not adopting the section 312 examiner's medical findings. The ALJ issued supplemental findings, but did not alter the outcome. Sullivan & Merritt filed this appeal.

II. DISCUSSION

A. Standard of Review

[¶13] 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 findings of fact and conclusions of law, 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 (quotation marks omitted).

B. Adoption of the Independent Medical Examiner's Opinion

[¶14] Sullivan & Merritt argues that 39-A M.R.S.A. § 312 (Supp. 2017) required the ALJ to adopt the medical opinion of the independent medical examiner appointed pursuant to that section. Section 312(7) provides:

> **Weight.** The board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings. Contrary evidence does not include medical evidence not considered by the independent medical examiner. The board shall state in writing the reasons for not accepting the medical findings of the independent medical examiner.

Section 312 also requires that independent medical examiners be notified of hearings and that all medical evidence subsequent to their examinations "be forwarded to the independent medical examiner no later than 14 days prior to the hearing." 39-A M.R.S.A. § 312(6). If the subsequent medical evidence affects his or her previous findings, section 312(6) requires the examiner to issue a supplemental report.

[¶15] Sullivan & Merritt argues on appeal that the ALJ improperly rejected the section 312 examiner's opinion based on subsequent medical evidence that was not provided to the examiner as required by section 312(6). However, Sullivan & Merritt waived this argument by not properly raising it at the hearing level. With few exceptions, parties may not raise issues for the first time before an appellate body. *Fitch v. Doe*, 2005 ME 39, ¶ 27, 869 A.2d 722; *Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46, ¶¶ 9-10 (App. Div. 2017). A party that objects to the consideration of medical evidence used to rebut a section 312 examiner's opinion on the basis that it was not provided to the section 312 examiner must do so at the hearing level. *See Dubois v. Madison Paper Co.*, 2002 ME 1, ¶ 15 n.3, 795 A.2d 696 ("Although [the doctor] provided his opinion after the IME report, and therefore his opinion could not have been considered by the IME, [the employer] failed to raise this issue before the ALJ or on appeal, and, therefore, it has not been preserved.").

[¶16] Had Sullivan & Merritt raised this issue at the hearing stage, the ALJ could have expressly reconciled his findings with those of Dr. Fuhrmann, the section 312 examiner. In fact, the ALJ noted that the examiner "was focused on respiratory symptoms following the reported exposure." The ALJ also observed that the "initial focus of evaluation and treatment by providers was on the employee's respiratory symptoms, thus likely delaying distinguishing and

investigating neurological symptoms eventually developing, likely as a result of CO poisoning." Dr. Fuhrmann is an internist specializing in pulmonary conditions. He was not asked any questions about possible neurological injuries. The ALJ apparently did not interpret the examiner's opinion as ruling out the chronic neurological disorders that the ALJ ultimately identified as the cause of the employees' injuries.

[¶17] Sullivan & Merritt did not object to the admission of medical evidence developed after the independent medical examination or ask that the evidence be forwarded to the section 312 examiner to review and issue a supplemental report. It did not raise this issue in its position paper nor in its request for findings of fact and conclusions of law. In short, Sullivan & Merritt waived the issue by failing to give the ALJ a reasonable opportunity to address it. *See Henderson*, Me. W.C.B. No. 17-46, ¶¶ 9-10; *Waters v. S.D. Warren Co.*, Me. W.C.B. No. 14-26, ¶¶ 17-18 (App. Div. 2014).

C. Sequestration of Witnesses

[¶18] Sullivan & Merritt argues that the ALJ erred by denying its request for an order that would have excluded the employees from the hearing even after they testified. We review the ALJ's decision on this issue for an abuse of discretion. *See State v. Pickering*, 491 A.2d 560, 563 (Me. 1985) ("In Maine, the sequestration of witnesses is wholly discretionary."). "The primary function of

sequestration is to prevent one witness from hearing the testimony of another so as to be able to conform his own testimony to that given by the other, especially that given in response to cross-examination." *State v. Cloutier*, 302 A.2d 84, 90 (Me. 1973). A sequestration order "is not a general prohibition against witnesses talking about the case." *State v. Bennett*, 416 A.2d 720, 727 (Me. 1980). Although it is common practice to sequester witnesses before they testify, denying a party the right to observe and assist legal counsel during proceedings is unusual. *See* M.R. Evid. 615 (authorizing sequestration of witnesses but not parties).

[¶19] The ALJ's procedure, having sequestered the party-witnesses until after they testified, accomplished the purpose of sequestration. Once each employee provided sworn testimony, there was no further reason to exclude them from the proceedings. And, to the extent that there may have been any value, it was outweighed by the employees' interest as parties in participating in the proceedings. We cannot conclude that the ALJ abused his discretion by allowing the employees to join the proceedings after they each concluded their testimony.

D. Factual Findings

[¶20] Sullivan & Merritt attacks various factual findings made by the ALJ as being unsupported by competent evidence. In the absence of fraud, a ALJ's decision is final with respect to all findings of fact. *See* 39-A M.R.S.A. § 318. "We look only to see if the decision rests on some legally competent and probative

evidence and is not merely the result of speculation, conjecture or guesswork." *See Bradbury v. Gen. Foods Corp.*, 218 A.2d 673, 674 (Me. 1966).

[¶21] Sullivan & Merritt argues that the ALJ premised many of his conclusions on an unsupported finding: that the employees suffered a toxic exposure to carbon monoxide. The ALJ inferred that such an exposure occurred based in part on the employees' accounts of their symptoms, and in part on medical evidence indicating that that those symptoms are consistent with carbon monoxide exposure. Sullivan & Merritt argues that this inference is unsustainable because objective evidence did not show that the employees were exposed to toxic levels of carbon monoxide.

[¶22] We disagree. In considering whether the ALJ's findings are supported by competent evidence, "[i]t is immaterial that there was also evidence which would have supported a different conclusion." *See Rowe v. Bath Iron Works Corp.*, 428 A.2d 71, 73 (Me. 1981). The record contains evidence that the employees used acetylene torches in confined spaces without adequate respiratory protection. It also contains opinions from medical experts who stated that the employees' symptoms indicate that they suffered a toxic exposure to carbon monoxide. In his deposition, Dr. Kolkin, who examined the employees pursuant to 39-A M.R.S.A. § 207 (Supp. 2017), conceded that the symptoms these employees reported are consistent with carbon monoxide poisoning. Dr. Korrick specifically stated that

this exposure was likely. The ALJ expressly explained why he found Dr. Korrick's opinion persuasive, and observed that "other treating and evaluating neurologists . . . had postulated a toxic exposure of some kind to account for some of [the employees'] symptoms." The fact that these experts based their opinions, in part, on the subjective complaints of the employees does not render their opinions incompetent.

[¶23] The ALJ identified and explained, in some detail, which evidence he found persuasive. He specifically found "the employees' early reports to providers . . . essentially truthful," though not without certain flaws. The employees' testimony, in conjunction with the medical evidence, is sufficient to support the finding that the employees were exposed to carbon monoxide in their work environment.

E. Total Incapacity and Unemployment

[¶24] Finally, Sullivan & Merritt argues that the ALJ erred by awarding the employees total incapacity benefits for a period during which the employees had received unemployment benefits.[3] Because a worker can only qualify for unemployment benefits if they are able to work, it argues, a worker that receives

[3] The ALJ explicitly made the employees' total incapacity benefits "subject to all offsets permitted by law" and the parties do not dispute that they are subject to coordination as provided by 39-A M.R.S.A. § 220 (2001).

unemployment benefits cannot be totally incapacitated. *See* 26 M.R.S.A. § 1192 (Supp. 2017).

[¶25] The Law Court has considered and rejected this identical argument. *See Page v. Gen. Elec. Co.*, 391 A.2d 303, 305 (Me. 1978) ("[I]n order to qualify for unemployment benefits it is necessary for an unemployed person to be 'able to work'; therefore, the appellants argue, [the employee] could not have been totally incapacitated. This argument has no merit."). An award of unemployment benefits from the Department of Labor does not have a preclusive effect on the Workers' Compensation Board.[4] *See* 26 M.R.S.A. § 1194(12) (2007). Moreover, although an employer may impeach an employee who makes inconsistent representations about their physical capacity, making alternative claims for workers' compensation and unemployment benefits is not in itself an act of dishonesty. As the Law Court remarked:

> A claimant may honestly represent to the unemployment compensation agency that he is able to do some work if a job is made available to him. At the same time, with equal honesty, he might properly represent to the workmen's compensation agency that he was totally disabled during the same period because no one would give him a job in his then physical condition.

[4] Regarding unemployment decisions, title 26 M.R.S.A § 1194(12) provides: "Except for proceedings under this chapter, no finding of fact or conclusion of law contained in a decision of a deputy, an administrative hearing officer, the commission, the commissioner or a court, obtained under this chapter, has preclusive effect in any other action or proceeding."

Page, 391 A.2d at 306 (superseded by statute on other grounds, *see Johnson v. S.D. Warren Co.*, 2001 ME 26, ¶ 16, 843 A.2d 1) (quoting *Edwards v. Metro Tile Co.*, 133 So.2d 411, 412 (Fla. 1961)). Thus, the employees' receipt of unemployment benefits did not preclude, as a matter of law, an award of total incapacity benefits.

III. CONCLUSION

[¶26] Because Sullivan & Merritt did not raise the issue of whether subsequent medical evidence should have been provided to the section 312 examiner pursuant to 39-A M.R.S.A. § 312(6) before that evidence could constitute "clear and convincing evidence" to rebut the examiner's findings, that issue has been waived. The ALJ did not abuse his discretion by refusing Sullivan & Merritt's request to sequester the claimants throughout the hearing, and there is competent evidence in the record to support his factual findings. Finally, the employees' receipt of unemployment insurance benefits did not render them ineligible for an award of total incapacity benefits subject to the statutory offset.

The entry is:

The ALJ'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 (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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