ERIC BERUBE
(Appellee)

v.

NEW ENGLAND TRUCK TIRE CENTERS, INC.
(Appellant)

and

MAINE EMPLOYERS' MUTUAL INSURANCE CO.
(Insurer)

Argument held: September 20, 2023
Decided: November 30, 2023

PANEL MEMBERS: Administrative Law Judges Sands, Hirtle, and Smith
BY: Administrative Law Judge Sands

[¶1] New England Truck Tire Centers ("NETTC") appeals from a decision of a Workers' Compensation Board administrative law judge (*Stovall, ALJ*) granting Eric Berube's Petitions for Award and for Payment of Medical and Related Services. NETTC contends that the ALJ erred in finding that Mr. Berube sustained a work injury on February 9, 2021; that timely notice of this injury was provided; and in awarding ongoing lost time benefits given the absence of any medical evidence substantiating the award. We affirm in part and remand in part.

I. BACKGROUND

[¶2] Mr. Berube sustained a work-related injury to his right ankle and knee on August 18, 2020, while employed by NETTC. He was taken out of work for four

weeks then returned to work in a light duty capacity before ultimately returning to his regular job.

[¶3] On February 9, 2021, Mr. Berube testified that he experienced a severe worsening of a preexisting hemorrhoid condition while having to perform heavy lifting at work, including severe bleeding and increased pain. He subsequently underwent surgery with Dr. Robert Doiron to repair his hemorrhoids on April 9, 2021. The surgery was unsuccessful, and Mr. Berube ultimately required multiple nerve blocks due to nerve damage. He has been out of work since this surgery.

[¶4] Mr. Berube filed Petitions for Award with respect to both the August 18, 2020, right ankle and knee injury and an alleged February 9, 2021, work injury, which he contended included his lower extremity, upper back, and gastrointestinal tract. Mr. Berube sought total incapacity benefits from February 9, 2021, through the present and continuing. He also filed Petitions for Payment of Medical Expenses on both dates of injury seeking payment of related medical bills.

[¶5] The medical evidence submitted in this case included records from various emergency room visits, operative notes from Dr. Doiron, and records from Mr. Berube's treating providers at Southern Maine Healthcare, Dr. Leonid Temkin and Nancy Marshall, FNP. Ms. Marshall is the only medical provider who has addressed the issue of medical causation. Her first response to the question of causation was faxed to Mr. Berube's former attorney and it reads: "I do not believe

the work he had been doing was the cause of his exacerbation." A few months later, on November 10, 2021, Ms. Marshall authored a second opinion which reads: "Mr. Berube had been working in a position that required continual heavy lifting. Which on further review aggravated his hemorrhoids. This subsequently required surgery." Lastly, Ms. Marshall issued an opinion dated March 4, 2022, which reads:

> Over a year ago Eric developed severe painful bleeding hemorrhoids. He had been repetitively lifting heavy tires for eight hours a day five days a week. It significantly aggravated his internal hemorrhoids which were stable up until then. He subsequently needed surgery. He continues to struggle with pain.

[¶6] The medical records do not contain any express opinions relative to Mr. Berube's ability to work. Mr. Berube, however, testified that he feels that he has been unable to work since the surgery. When asked about this belief and his present symptomology, he testified that his ripped tendons from his right ankle to his knees "never healed" and that he experienced "ripping and tearing" in the top of his knee. He specifically testified that his right leg "will feel like a rip and tear and it gives out" causing falls. He also described being unable to lift without feeling his back "rip." He testified to experiencing nerve pain at various instances including sensitivity to cold. He testified that he uses a wheelchair or walker and is unable to walk up stairs without hopping or crawling. He testified that he has difficulty cleaning himself after using the toilet, and that he requires assistance in cooking, cleaning, and dressing himself.

[¶7] The ALJ granted Mr. Berube's petitions, in part. He found that Mr. Berube had sustained a right ankle and knee strain which resolved by November 17, 2020. He further found that Mr. Berube had established a work injury of February 9, 2021, consisting of an aggravation of his preexisting hemorrhoid condition. The ALJ awarded Mr. Berube total incapacity benefits from February 9, 2021, to October 19, 2021, and partial benefits based on an imputed earning capacity of $560 per week from October 20, 2021, to the present and continuing. The ALJ also ordered payment of related medical bills.

[¶8] Both parties filed Motions for Further Findings of Fact and Conclusions of Law. The ALJ denied these motions, and this appeal followed.

II. DISCUSSION

A. Standard of Review

[¶9] 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 was done 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). In addition, the Appellate Division will not disturb a factual finding made by the ALJ absent a showing that it lacks competent evidence to support it. *Dunkin Donuts of Am., Inc. v. Watson*, 366 A.2d 1121, 1125 (Me. 1976).

B. Injury Analysis

[¶10] NETTC first contends that the ALJ erred in failing to address whether the work injury occurred before analyzing whether Mr. Berube met the criteria outlined in 39-A M.R.S.A. § 201(4). We find no reversible error.

[¶11] "When a case appears to come within section 201(4), the [ALJ] must first determine whether the employee has suffered a work-related injury … then [section] 201(4) is applied if the employee has a condition that preceded the injury." *Celentano v. Dep't of Corr.*, 2005 ME 125, ¶ 9, 887 A.2d 512. In a combined effects case, the first prong is satisfied by a showing of both medical and legal causation. *Id*. at ¶ 12 (citing *Bryant v. Masters Machine Co.*, 444 A.2d 329, 336 (Me. 1982)). Medical causation can be shown when the work activity or incident does in fact produce the onset of symptoms. *See Celentano*, 2005 ME 125, ¶ 13, 887 A.2d 512; *see also Bryant*, 444 A.2d at 338-39. It can also be demonstrated where the work increases the disabling effects of an already symptomatic preexisting condition. *See id*. at 339-341 & n.11. '"[T]o meet the test of legal cause where the employee bears with him some 'personal' element of risk because of a pre-existing condition, the

employment must be shown to contribute some substantial element to increase the risk, thus offsetting the personal risk which the employee brings to the employment environment."' *Celentano*, 2005 ME 125, ¶ 12 (quoting *Bryant*, 444 A.2d at 337).

[¶12] There is no dispute that Mr. Berube had a preexisting hemorrhoid condition. The ALJ noted that Mr. Berube testified that he experienced a severe worsening of that condition on February 9, 2021, including severe bleeding and increased pain, and that Mr. Berube went to the emergency room for treatment and stayed home from work for a few days. Nurse Practitioner Marshall provided an opinion that Mr. Berube's work duties requiring heavy lifting brought about the increase in the disabling effects of his preexisting condition on February 9, 2021. As discussed below, this may be adequate to establish medical causation.

[¶13] With regard to legal causation, the ALJ referenced the "employee's credible testimony regarding the aggravation of his preexisting condition due to the heavy lifting at work." The ALJ also noted that NETTC acknowledged that Mr. Berube had to lift tires around the time of the February 2021 injury. The ALJ also pointed to Nurse Practitioner Marshall's causation opinion that the job duty of heavy lifting aggravated the hemorrhoid condition. Thus, the ALJ relied on competent evidence that establishes that the employment contributed some substantial element to increase the risk of injury, adequately establishing legal causation.

[¶14] Although the ALJ may not have expressly analyzed whether a work injury occurred before applying the heightened requirements of compensability under section 201(4), the ALJ's findings regarding both the increase in symptoms and the increased risks of injury brought on by the employment reflect that the ALJ analyzed and found both medical and legal causation as required under *Celentano*. Accordingly, we see no reversible error in the ALJ's analysis. *See Celentano,* 2005 ME 125, ¶ 15 n.1 (finding no error where it was apparent from the decision that the hearing officer applied section 201(4) despite the absence of a specific citation to the statute).

C. Medical Causation

[¶15] NETTC further argues that the ALJ erred in adopting the causation opinion authored by Ms. Marshall given her status as a nurse practitioner. Specifically, they argue that, given her lack of a medical degree, her opinion does not constitute "the opinion of a qualified medical expert" as required for an employee to meet his or her burden of proof on the issue of medical causation "in all but the simple and routine cases." *Smith v. Maine Coast Healthcare*, Me. W.C.B. No. 20-02, ¶ 10 (App. Div. 2019) (quoting *Brawn v. Bangor Tire Co*., Me. W.C.C. 97, 101 (App. Div. 1983)). This case is distinguishable, however, from *Smith* in that Mr. Berube presented a written causation opinion from his treating medical provider. The qualifications of any medical provider may factor into an ALJ's weighing of

competing medical opinions, but ultimately it is the province of an ALJ, as the factfinder, to accept or reject expert medical opinions, in whole or in part. *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). Moreover, the Act plainly contemplates that the board may consider medical evidence provided by nurse practitioners. *See* 39-A M.R.S.A. § 309.

[¶16] NETTC also contends the ALJ erred in relying upon the causation opinion authored by Ms. Marshall given that her causation opinion was premised on her belief that Mr. Berube "had been repetitively lifting heavy tires for eight hours a day five days a week."[1] Mr. Berube testified that he was engaged in lifting "[a]t least half my day if not more because that's pretty much all it is. It's all heavy lifting." In contrast, the plant manager at NETTC testified that Mr. Berube was assigned to initial inspection of tires, which is a position requiring limited lifting. The only factual finding contained in the decree relative to the frequency of lifting performed by Mr. Berube consists of the ALJ's statement that "at times the employee had to lift tires during the time of this injury."

[¶17] The presence of factual errors in a medical report does not necessarily render the report unreliable. In *Higgins v. H.P. Hood, Inc.*, 2007 ME 94, ¶ 19, 926

[1] This description is taken from Ms. Marshall's causation report of 03/04/2022. In her causation opinion of 11/10/2021, Ms. Marshall describes Mr. Berube's lifting duties at work as "continual."

A.2d 117, the Law Court found that an IME report with "minor" errors which had "no substantive impact on the report's conclusion" can constitute competent evidence. *Id.* at ¶ 15. Additionally, in *Thomas v. United Ambulance Service*, Me. W.C.B. No. 21-10, ¶ 18 n.3 (App. Div. 2021), an appellate division panel found no error in an ALJ's reliance on a medical report that incorrectly stated the number of years and hours per day that an employee had worked. In that case, the ALJ had specifically noted that "the discrepancy… is not so off the mark that it causes me to reject" the IME's causation findings. *Id.* In contrast, we recognize that the reliance on a medical report that is premised on incorrect facts that likely impact the medical expert's ultimate conclusion cannot constitute competent evidence.

[¶18] Because of the conflicting testimony and because the ALJ did not make specific findings as to the frequency of lifting, we are unable to determine the extent of any discrepancy between the factual findings and Ms. Marshall's assumptions about Mr. Berube's physical duties at work. Accordingly, we remand for further findings about the extent and frequency of lifting involved in Mr. Berube's pre-injury job. *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 to create an adequate basis for appellate review). If the factual findings differ from the assumptions made by Ms. Marshall relative to the nature of

Mr. Berube's job demands, then the ALJ should address any discrepancies and whether he thinks that the discrepancies impact Ms. Marshall's conclusions.

D. Notice

[¶19] NETTC argues that the ALJ erred as a matter of law in finding that Mr. Berube gave timely notice of the February 9, 2021, date of injury. Specifically, NETTC argues that Mr. Berube's testimony is inconsistent with the text exchanges put into evidence and the testimony of his manager, Edward Corrigan. We disagree. The ALJ, as the fact finder and sole judge of the credibility of witnesses, was well within his authority to weigh competing factual evidence. *See Boober v. Great N. Paper Co.*, 398 A.2d 371, 375 (Me. 1979) (stating that when conflicting evidence and credibility are at issue, it is for the ALJ, who "had the opportunity to hear the witnesses and judge their credibility ... to resolve the evidentiary conflicts in the case.") (quoting *Lovejoy v. Beech Hill Dry Wall Co., Inc*., 361 A.2d 252, 254 (Me. 1976)). Because there is competent evidence in the record that supports the ALJ's factual findings, we discern no error.

E. Award of Ongoing Incapacity

[¶20] Lastly, NETTC argues that the ALJ's finding that Mr. Berube is entitled to ongoing benefits is unsupported by competent evidence. Specifically, NETTC argues that the absence of any work capacity opinion authored by a qualified medical expert precludes the ALJ from awarding ongoing lost wage benefits.

[¶21] With respect to the issue of work capacity, the ALJ concluded first that Mr. Berube was unable to perform the type of lifting required at NETTC due to his ongoing condition. In reaching this conclusion, the ALJ specifically relied on Ms. Marshall's opinion that the lifting Mr. Berube had performed aggravated his preexisting condition. The ALJ further noted his reliance on Mr. Berube's "credible testimony indicating that the type of lifting required at New England Truck and Tire Center is beyond his physical capacity because of his ongoing condition."

[¶22] In the subsequent paragraph, the decree reads:

> I find that the employee is entitled to total lost wage benefits from February 9, 2021 to October 19, 2021. The medical evidence from Dr. Temkin on October 19, 2021 persuades me that the employee's rectal pain had subsided to the point that he had some work capacity by that time. I find that as of October 20, 2021, the employee has had work capacity with restrictions.

[¶23] The Law Court has concluded that testimony may be sufficient to support an award of incapacity benefits even in the absence of medical evidence. Specifically, in *Michaud's Case*, 122 Me. 276, 279, 119 A. 627 (1923), the Law Court described testimony from an injured worker as "evidence of the highest quality from which the Commission could determine the extent of impairment." The Law Court noted that the injured worker had "fully explained the effect which the operation had upon the use of the foot in walking and while at work." *Id.* His testimony was also supported with medical findings submitted into evidence. *Id.* at

280, 119 A. 627. Noting that the "extent of impairment rests for determination in the sound judgment of the Commission," the Law Court affirmed a finding of 40% impairment even though no medical provider reached this specific conclusion. *Id.*

[¶24] In the instant case, the ALJ expressly found Mr. Berube's testimony regarding his inability to perform the lifting requirements associated with his pre-injury employment to be credible. Although the record does not contain any opinion from a medical expert on this precise issue, Mr. Berube's testimony is bolstered by the fact that he underwent surgery on April 9, 2021, and has since required multiple nerve blocks and injections due to nerve damage from the surgery. The ALJ further notes reliance on the Dr. Temkin's office note of October 19, 2021, in finding "some work capacity at that time." While Dr. Temkin makes no mention of restrictions, this office note reflects that he addressed Mr. Berube's rectal pain and that although he saw "significant improvement" following steroid injections, Mr. Berube continued to experience "some recurrent symptoms."

[¶25] Mr. Berube's testimony, considered in conjunction with the medical records, constitutes competent evidence to support the ALJ's conclusions relative to the extent of Mr. Berube's incapacity. As such, we will not disturb it on appeal.

The entry is:

> The administrative law judge's decision is affirmed in part and remanded in part consistent with this decision.

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.

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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