DANNY PELLETIER
(Appellant)

v.

GERALD PELLETIER, INC.
(Appellee)

and

ACADIA INSURANCE CO.
(Insurer)

Conference held: November 30, 2016
Decided: October 30, 2017

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

[¶1] Danny Pelletier appeals the decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) denying his Petition for Review by which he sought an increase in his partial incapacity benefits. Mr. Pelletier argues that the ALJ erred when he held that work search evidence alone cannot, as a matter of law, prove a change of economic circumstances necessary to overcome the res judicata effect of a prior decision. We agree, and remand for further findings.

I. BACKGROUND

[¶2] Mr. Pelletier sustained a work injury to his left shoulder on January 16, 2012, when his truck rolled over at work. The employer, Gerald Pelletier, Inc.,

voluntarily paid incapacity benefits until May 8, 2013, when it filed a Petition for Review of Incapacity seeking to decrease Mr. Pelletier's weekly benefits.

[¶3] The board (*Greene, HO*) heard the employer's petition in April of 2014. At that hearing, Mr. Pelletier offered no documentary evidence of a work search, although he testified that he had called many employers, unsuccessfully seeking part-time, light-duty work. He argued that he remained totally physically incapacitated and was entitled to ongoing total incapacity benefits. He did not seek partial incapacity benefits. In a decree dated August 14, 2014, the board rejected Mr. Pelletier's argument, concluded that he had regained a partial physical work capacity, and imputed a weekly earning capacity. Finding that Mr. Pelletier had the ability to earn $360 per week, the board granted the employer's petition and ordered ongoing partial incapacity benefits based on that imputed earning capacity.

[¶4] In May of 2015, Mr. Pelletier filed a Petition for Review seeking 100% partial incapacity benefits. At a hearing in December of 2015, Mr. Pelletier offered testimony and documentary work search evidence "of a large number of contacts with prospective employers documenting his efforts to find work within his restrictions." The board (*Hirtle, ALJ*) concluded that Mr. Pelletier's evidence was insufficient to overcome the res judicata effect of the prior decision, and denied the Petition for Review.

[¶5] Mr. Pelletier filed a request for further findings of fact and conclusions of law. The ALJ issued additional findings, but did not alter the outcome, citing *McIntyre v. Great Northern Paper, Inc.*, 2000 ME 6, 743 A.2d 744, for the proposition that a work search alone is not sufficient to demonstrate the change of economic circumstances necessary to increase an employee's incapacity benefits. Mr. Pelletier appeals.

II. DISCUSSION

[¶6] An employee whose level of incapacity benefits has been established by decree may overcome the res judicata effect of that prior decision with evidence that demonstrates a change of economic circumstances. *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 7, 837 A.2d 117. In this case, the ALJ did not evaluate the strength of Mr. Pelletier's work search evidence based on the criteria set forth in *Monaghan v. Jordan's Meats*, 2007 ME 100, 928 A.2d 786. Instead, the ALJ interpreted *McIntyre*, 2000 ME 6, 743 A.2d 744, as holding that work search evidence, without more, is insufficient, as a matter of law, to prove a change of economic circumstances. We must decide whether the ALJ misconceived the applicable law in that respect. *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted).

[¶7] We do not read *McIntyre* as foreclosing review of the level of partial incapacity when work search evidence is the only proof of changed economic

circumstances. The Law Court held in *McIntyre* that an employee's work search, coupled with vocational training and obtaining employment, was sufficient to demonstrate an economic change in circumstances. 2000 ME 6, ¶ 7. The Court did not hold that work search evidence alone was insufficient, and we are not inclined to create such a rule. Prohibiting an injured employee who is receiving partial incapacity benefits, such as Mr. Pelletier, from seeking an increase in benefits after engaging in an extensive work search would thwart "the purpose of the Act to encourage employees to look for post-injury employment." *Id.*

[¶8] Moreover, in determining whether changed circumstances exist, the Court in *McIntyre* emphasized the necessity of identifying the basis on which the previous award was made. *Id.* at ¶ 6. In the litigation leading to the prior decree in this case, Mr. Pelletier did not argue for a level of partial incapacity. The board based its 2014 award of partial incapacity benefits primarily on its rejection of Mr. Pelletier's argument that he was totally incapacitated from a medical standpoint. In this situation, it would be particularly inappropriate to bar him from attempting to establish a higher level of partial incapacity based on a work search exploring the availability of work within his restrictions because, before the prior decree, it was not yet clear that Mr. Pelletier had any work capacity and would, therefore, be expected to seek work.

[¶9] Finally, although the ALJ did consider whether Mr. Pelletier was entitled to 100% partial incapacity benefits in 2014, the work search evidence presented at the 2015 hearing includes documentary and testimonial evidence of numerous employment inquiries made after the date of the 2014 decree, for purposes of comparing the relative state of the labor markets and availability of work. The Law Court has emphasized that earning capacity can, and frequently does, change over time: "it is actually a dynamic and changing measure. . . . In each case, review of work capacity should be based on comparative evidence of change in the actual factors affecting work capacity." *Folsom v. New England Tel. & Tel. Co.*, 606 A.2d 1035, 1037–38 (Me. 1992).

III. CONCLUSION

[¶10] In denying the petition on the basis that work search evidence alone cannot establish changed economic circumstances as a matter of law, the ALJ misconceived the holding of *McIntyre.* Accordingly, we vacate the decision and remand for additional findings on that issue. On remand, the ALJ should assess whether Mr. Pelletier's work search evidence "constitutes a significant change in circumstances relating to the extent of his incapacity." *See id.* at ¶ 7.

The entry is:

> The ALJ's decision vacated and the case remanded for further findings of fact and conclusions of law.

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).

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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