RONALD NORBERG
(Appellant)

v.

S.D. WARREN
(Appellee)

and

CCMSI
(Insurer)

Argued: December 7, 2017
Decided: June 8, 2018
(corrected June 12, 2018)

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

[¶1] Ronald Norberg appeals from a decision of a Workers' Compensation Board administrative law judge (*Collier, ALJ*),[1] denying his Petition for Review. Mr. Norberg contends that the ALJ used the wrong prior decision as a benchmark when concluding that he had not proven a change of circumstances sufficient to overcome the res judicata effect of that decision. We disagree with that contention and affirm the ALJ's decision.

I. BACKGROUND

[¶2] Mr. Norberg was a pipefitter and welder for S.D. Warren for 30 years. He sustained a work-related injury to his right shoulder, upper back, chest, and

[1] Effective October 15, 2015, Workers' Compensation Board hearing officers licensed to practice law are now designated administrative law judges. P.L. 2015, ch. 297.

neck on March 21, 1984, when he was knocked into a steel frame. Mr. Norberg continued to work after the injury, but with restrictions that hindered his ability to earn his pre-injury wages. On March 31, 1992, the Maine Workers' Compensation Commission awarded Mr. Norberg fixed partial benefits on an ongoing basis. After both parties filed petitions for review, the Workers' Compensation Board (*Johnson, HO*) issued a decree on September 29, 2000, in which it maintained the ongoing partial incapacity payment scheme (as adjusted for inflation) that had been in effect since 1992.[2]

[¶3] Soon after the 2000 decree, Mr. Norberg's doctor imposed an additional work restriction, and S.D. Warren terminated his employment on the basis that it could no longer accommodate his restrictions. S.D. Warren voluntarily increased Mr. Norberg's benefit level to 100% partial by executing a Modification of Compensation and filing it with the board on October 30, 2000.

[¶4] On August 2, 2009, S.D. Warren filed a Petition for Review of Incapacity seeking to terminate or reduce Mr. Norberg's weekly benefits. Mr. Norberg argued that S.D. Warren was paying him 100% partial incapacity benefits with prejudice—rather than voluntarily—and that it could not decrease those payments without first proving a change of circumstances since the October 30, 2000, Modification of Compensation. In a decree issued August 20, 2010, the

[2] Although the hearing officer granted Mr. Norberg's petition as it related to two close-ended periods, she did not alter his level of partial incapacity benefits on an ongoing basis. The hearing officer dismissed S.D. Warren's petition for review.

board (*Collier, HO*) rejected Mr. Norberg's argument that the Modification was entitled to res judicata effect and assessed his condition relative to the 2000 decree. Finding that Mr. Norberg's condition had not changed since that time, the hearing officer declined to alter the existing payment scheme. The hearing officer thus permitted S.D. Warren to reduce benefits to the partial rate established in the 2000 decree.

[¶5] Mr. Norberg filed the current Petition for Review in 2011, requesting an increase to 100% partial or total incapacity benefits. Mr. Norberg argued that the ALJ should order an increase in benefits because there had been a change of circumstances since the 2000 decree, the last time the board adjudicated a request from him for an increase. Specifically, Mr. Norberg argued that the deterioration of his medical condition and the loss of his job after the 2000 decree constituted a sufficient change of circumstances to warrant an increase in benefits. S.D. Warren, on the other hand, argued that Mr. Norberg's burden was to prove a change since the board's last decree in 2010, and that the medical and economic changes since that time were insufficient to justify an increase.

[¶6] The ALJ rejected Mr. Norberg's contention that the 2000 decree was the appropriate benchmark against which it should measure Mr. Norberg's condition. The ALJ reasoned that once the level of incapacity "is before the Board, it is the Board's obligation to set the appropriate level of compensation, no matter

whose petition raised the issue." The ALJ concluded that because the parties raised and litigated the issue in the context of the August 30, 2010, decree, and that decree fixed Mr. Norberg's incapacity level, Mr. Norberg could not overcome the res judicata effect of that decree without showing a change of circumstances since that round of litigation. Reasoning that the medical evidence did not show such a change, the ALJ denied Mr. Norberg's petition and declined to increase his weekly benefits.

[¶7] Mr. Norberg filed a Motion for Further Findings of Fact and Conclusions of Law, which the ALJ summarily denied. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶8] The Appellate Division's role on appeal 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*, 669 A.2d 156, 158 (Me. 1995). Because Mr. Norberg requested further findings of fact and conclusions of law, the Appellate Division will "review only the factual findings actually made and the legal standards actually applied" by the hearing officer. *Daly v. Spinnaker Indus., Inc.*, 803 A.2d 446, 451–52 (Me. 2002); *see also Gallant v. Boise Cascade Paper Group*, 427 A.2d 976, 977 (Me. 1981).

B. Change of Circumstances

[¶9] Mr. Norberg contends that the ALJ erred when determining that the doctrine of res judicata required him to prove a change in medical or economic circumstances since the 2010 decree, rather than the 2000 decree.

[¶10] Valid and final decisions of the Workers' Compensation Board, like court decisions, are subject to the general rules of res judicata and issue preclusion. *Bailey v. City of Lewisto*n, 2017 ME 160, ¶ 10, 168 A.3d 762; *Grubb v. S.D. Warren Co*., 2003 ME 139, ¶ 9, 837 A.2d 117. Res judicata is grounded in concerns for judicial economy and efficiency, the stability of final judgments, and fairness to litigants. *See Lewis v. Me. Coast Artists*, 2001 ME 75, ¶ 9, 770 A.2d 644. The doctrine can bar an award when there has been a prior adjudication regarding the same work injury. *Day v. S.D. Warren*, Me. W.C.B. No. 16-19, ¶ 7 (App. Div. 2016). "A party is precluded from re-litigating an issue that has been (1) actually litigated, (2) determined by a final judgment, and (3) the determination was essential to the judgment." *Traussi v. B & G Foods, Inc.*, Me. W.C.B. No. 15-10, ¶ 10 (App. Div. 2015).

[¶11] Although an employee may obtain an increase of incapacity benefits by filing a petition for review, he or she must overcome the preclusive effect of a prior decree by proving a change in medical or economic circumstances that would

justify such an increase. *Bernier v. Data Gen.*, 2002 ME 2, ¶ 7, 787 A.2d 144 (Me. 2002).

[¶12] Mr. Norberg contends the issue of whether his condition had deteriorated since 2000 was not in contention during the 2010 litigation; he contends the issue that was actually litigated in 2010, pursuant to S.D. Warren's Petition for Review, was whether there had been an *improvement* in his medical or economic circumstances since 2000. Thus, he argues in the current round of litigation, that he was entitled to prove changed circumstances reflecting a deteriorating condition since 2000. Moreover, because he was receiving 100% partial incapacity benefits at the time of the 2010 litigation, he contends he had no incentive to prove a worsening of his condition at that time and should not be precluded from doing so now.

[¶13] We disagree. Mr. Norberg's 100% partial incapacity benefits were at stake during the prior litigation and he had ample incentive to prevent a decrease in benefits by proving the full extent of his incapacity. Indeed, Mr. Norberg availed himself of the opportunity to do so by testifying that his condition had worsened and arguing in his position paper that the extent of his incapacity had deepened since the 2000 decree.[3]

[3] As the hearing officer acknowledged in the 2010 decree, Mr. Norberg testified "that his physical condition has only gotten worse since [the prior decision], both from his work injuries and from other non-occupational medical conditions and problems." *Norberg v. S.D. Warren*, W.C.B. 84-011291 (Me. 2010). Mr. Norberg's attorney argued that "[Mr. Norberg's] pain is so bad that he becomes nauseous and

[¶14] Mr. Norberg further argues that the 2010 decree did not actually establish his level of incapacity, but merely determined that S.D. Warren had not proven a change of circumstances sufficient to trigger a reexamination of that issue. In essence, Mr. Norberg asks us to treat the 2010 decree as a determination that the evidence was inadequate to establish a decrease in incapacity, rather than a final adjudication on that issue.

[¶15] We see no reason to interpret the 2010 decree so narrowly. The hearing officer could not have reached his ultimate determination—that Mr. Norberg's level of incapacity had not changed since 2000—without resolving the dispute about Mr. Norberg's level of incapacity as it existed in 2010. The 2010 decree was therefore a conclusive determination of Mr. Norberg's incapacity as it existed at that time. To now allow Mr. Norberg to use pre-2010 evidence—evidence that he had a fair opportunity and incentive to present during the prior round of litigation—to prove a pre-2010 change in earning capacity would be unfair to S.D. Warren and undermine the finality of the 2010 decree.

[¶16] The extent of Mr. Norberg's incapacity was squarely before the hearing officer at the time of the 2010 decree. The hearing officer heard competing

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dizzy and almost passes out. . . . His condition has gotten worse since 2000 and he feels that that is in part because he is not active. . . . He said his depression is worse and he also stays around the house most of the time. . . . He could not report to work and be reliable." Employee's Position Letter, June 18, 2010 (Record on Appeal at 777-78). Mr. Norberg's attorney concluded by arguing that "Mr. Norberg remains entitled to receive 100% partial incapacity benefits because there is no evidence that his medical conditions have improved since the October 30, 2000 award. Rather, [the employer's medical expert] concluded that Mr. Norberg's conditions have only worsened since then." *Id.* (Record on Appeal at 778.)

evidence of Mr. Norberg's medical condition at that time and concluded, based upon that evidence, that Mr. Norberg's condition warranted ongoing partial incapacity benefits at the level set in the 2000 decree, rather than the 100% partial rate that Mr. Norberg sought. Because the issue was actually litigated and decided in 2010, the ALJ's decision to use the 2010 decree as the benchmark against which to measure a change of circumstance in litigation commenced just one year after the issuance of that decree was consistent with longstanding principles of res judicata.[4]

III. CONCLUSION

[¶17] The ALJ correctly applied principles of res judicata by evaluating Mr. Norberg's level of incapacity relative to the 2010 decree, the last time that the parties litigated and the board resolved that issue. Mr. Norberg had a fair opportunity and incentive to litigate the extent of his incapacity in 2010 and, in fact, did so. The ALJ's determination that Mr. Norberg failed to prove a change in circumstances relative to the time of the 2010 decree is supported by competent evidence in the record.

The entry is:

The ALJ's decision is affirmed.

[4] Mr. Norberg also argues that the evidence compelled a finding that there has been a change of circumstances since the 2000 decree. Because we conclude that the ALJ did not err by comparing Mr. Norberg's current circumstances to those in 2010, we do not reach this issue.

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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