PETER PERRY
(Appellee)

v.

MAINE TURNPIKE AUTHORITY
(Appellant)

and

CANNON COCHRAN MANAGEMENT SERVICES, INC.
(Insurer)

Argued: September 21, 2017
Decided: May 31, 2019

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

[¶1] The Maine Turnpike Authority (the MTA) appeals from a decision of a Workers' Compensation Board administrative law judge (*Goodnough, ALJ*) denying its Petitions for Review of Incapacity and granting its Petitions to Determine the Extent of Permanent Impairment relative to established 2004, 2005, and 2006 work injuries. The MTA does not dispute the 13% permanent impairment (PI) rating set by the ALJ, but argues that testimony from the independent medical examiner (IME) compels a finding that Mr. Perry no longer suffers any effects from the 2006 work injury and therefore, it was error to conclude that the 12% PI threshold for duration of disability benefits applicable to the 2006 date of injury applies instead of the higher threshold applicable to the earlier dates of injury. We affirm the decision.

I. BACKGROUND

[¶2] As established in a 2009 board decree (*Jerome, HO*), Peter Perry sustained three work-related injuries while employed by the MTA. In 2004 he fell down a hill, landing on his left shoulder and neck. He lost no time from work due to that injury. In 2005, he fractured ribs, injured his left arm and neck, and aggravated his left shoulder in a motor vehicle accident, after which he was out of work for about fifteen weeks. In 2006, he exacerbated his left shoulder and neck condition while lifting boards over his head. Mr. Perry has been out of work since the 2006 injury except for a brief period.

[¶3] In the 2009 decree, based in part on an independent medical examination and report from Dr. Donovan, *see* 39-A M.R.S.A. § 312 (Supp. 2018), and in part on reports from two other doctors, including Dr. Esponnette, the hearing officer concluded that all three work injuries continued to play a role in Mr. Perry's incapacity, and he was awarded ongoing partial benefits.

[¶4] In 2015, the MTA brought three Petitions for Review of Incapacity and three Petitions to Determine the Extent of Permanent Impairment, relating to the three dates of injury. The parties agreed that Dr. Esponnette could perform an updated independent medical examination. Dr. Esponnette provided a written report and testified at a deposition.

[¶5] In the 2016 decree now under appeal, the administrative law judge granted the Petitions to Determine Extent of Permanent Impairment, concluding that Mr. Perry's PI rating from his work injuries is 13%. The PI threshold required for partial incapacity benefits to be paid for the duration of the disability is 13.4% for the 2004 and 2005 injuries, and 12% for the 2006 injury. 39-A M.R.S.A. § 213(3-A); Me. W.C.B. Rule, ch. 2, § 1(3).

[¶6] The ALJ denied the Petitions for Review, concluding that neither party demonstrated a change in Mr. Perry's medical circumstances since the 2009 decree. *See Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 7, 837 A.2d 117 (holding that a petition to increase or decrease compensation from a previous decree imposes a burden to show a change in medical or economic circumstances). Thus, the 2009 decree remained the law of the case and Mr. Perry remained incapacitated due to all three work injuries, including the 2006 injury. And because Mr. Perry's PI rating of 13% is above the 12% threshold for the 2006 date of injury, the ALJ concluded that he is entitled to continue receiving partial incapacity benefits.

[¶7] The MTA moved for additional findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2018), which the ALJ denied. The MTA appeals.

II. DISCUSSION

[¶8] "A finding of fact by an administrative law judge is not subject to appeal [before the Appellate Division]." 39-A M.R.S.A. § 321-B (Supp. 2018). Instead, appellate review is "limited to assuring that [the ALJ's] factual findings are supported by competent evidence." *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982). On issues of law, we assure "that [the ALJ's] decision involves no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Id.*

[¶9] The MTA contends that Dr. Esponnette's deposition testimony establishes that Mr. Perry's medical circumstances have changed since the 2009 decree; compels the conclusion that Mr. Perry no longer suffers the effects of the 2006 work injury; and requires that the 13.4% PI threshold applicable to the 2005 injury be applied. We disagree.

[¶10] In his 2016 written report, Dr. Esponnette states that Mr. Perry's restrictions resulted from all three dates of injury, as they had in 2009. The ALJ noted that the report specifically recounts that Mr. Perry had sustained the three work-related injuries and that he "has thirteen (13) percent impairment of the whole person as a combined result of the three injuries noted above, but almost entirely due to the events of 9/23/2005."

[¶11] In his deposition Dr. Esponnette testified that he did not have a "firm opinion either way" on whether the effects of the 2006 injury continued. However, he stated on cross-examination that the significant effects of that injury had likely resolved.

[¶12] Later in the deposition, Mr. Perry's counsel questioned Dr. Esponnette on the same issue, prompting an exchange in which Dr. Esponnette agreed that any opinion that the effects of the 2006 injury ended at some specific point after the 2009 decision "would be speculative."

[¶13] The ALJ resolved the apparent conflict between the report and deposition testimony as follows: "[b]ecause decisions of the Board cannot be grounded in speculation, I conclude that the 2009 Decree relative to the ongoing effects of the 2006 injury remains the law of the case."

[¶14] The MTA argues that Dr. Esponnette's testimony that his opinion was speculative, when read in context, was pertinent to the date or time frame at which the effects of the 2006 injury ended, rather than whether the effects had ended at all. Thus, the MTA argues, the ALJ erred when not adopting the medical finding that the effects of the 2006 injury had ended, pursuant to section 312. *See* 39-A M.R.S.A. § 312(7) (providing that the ALJ must accept an IME's medical findings absent clear and convincing contrary evidence).

[¶15] While we agree that the deposition testimony can be read as the MTA suggests, we disagree that the ALJ was compelled to adopt that interpretation. The IME's deposition testimony is susceptible of more than one interpretation, and thus is ambiguous on the issue of whether the effects of the 2006 work injury continue. *See Blanchard v. Sawyer*, 2001 ME 18, ¶ 4, 769 A.2d 841. "When confronted with potentially ambiguous language in a report from an IME, or when there is ambiguity between an IME's report and deposition testimony, 'it is incumbent on the [ALJ] to consider the larger context in which those statements are offered to construe the intent of the examining physician.'" *Tardiff v. AAA Northern New England, Inc.*, Me. W.C.B. No. 18-11, ¶ 13 (App. Div. 2018) (quoting *Oriol v. Portland Housing Auth.*, Me. W.C.B. No. 14-35, ¶ 12 (App. Div. 2014)).

[¶16] The ALJ's interpretation of the IME's deposition testimony regarding the effects of the 2006 work injury was preceded by a thorough analysis of the larger context of that testimony, the IME's report, and the 2009 decree. The finding that the effects of the 2006 injury persist is supported by competent evidence and will therefore not be disturbed on appeal. *Tardiff*, No. 18-11, ¶¶ 13-14. The ultimate determination that the MTA did not establish changed medical circumstances and thus the 2009 decree remains in effect neither misconceives nor misapplies the law. *See Grubb*, 2003 ME 139, ¶ 7, 837 A.2d 117.

[¶17] Finally, because the ALJ did not err when concluding that the effects of the 2006 injury continue, he did not err when determining that the 12% PI threshold applicable to that date of injury applies.

III. CONCLUSION

[¶18] The ALJ's factual findings are supported by competent evidence, and the decision involves no misconception of applicable law. The application of the law to the facts was neither arbitrary nor without rational foundation. *See Hall*, 441 A.2d at 1021.

The entry is:

The administrative law judge'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. 2018).

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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