NINA SAPRANOVA
(Appellant)

v.

MARRIOTT HOTELS
(Appellee)

and

CHARTER OAK FIRE INSURANCE
(Insurer)

Argued: June 13, 2019
Decided: August 30, 2019

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

[¶1] Nina Sapranova appeals from a decision of a Workers' Compensation Board administrative law judge (*Stovall, ALJ*) granting Marriott Hotels' Petitions for Review and to Determine Extent of Permanent Impairment, and authorizing Marriott to cease paying partial incapacity benefits. Ms. Sapranova contends that the ALJ erred when determining that she did not meet her burden of production regarding her level of permanent impairment. We agree with this contention. Accordingly, we vacate the ALJ's decision and remand for further proceedings.

I. BACKGROUND

[¶2] Nina Sapranova sustained a work-related respiratory injury on May 18, 2006, while working with various cleaning chemicals in her capacity as

a housekeeper for Marriott Hotels. The initial injury was established by a board decision dated June 1, 2007 (*Collier, HO*). In subsequent litigation, the hearing officer adopted the medical opinion of Ms. Sapranova's treating pulmonologist, Dr. Andrew Carey, who had restricted her from any housekeeping or other positions in which she would be exposed to dust or cleaning chemicals. The hearing officer awarded her 100% partial incapacity benefits from October 13, 2007, and ongoing, due to the continuing effects of the 2006 injury.

[¶3] In the current round of litigation, Marriott presented evidence that Ms. Sapranova had been paid more than 520 weeks of benefits pursuant to 39-A M.R.S.A. § 213 (Supp. 2018), as well as a permanent impairment opinion from Dr. William Boucher, who stated that Ms. Sapranova did not suffer from any permanent impairment from the work injury. The ALJ rejected Dr. Boucher's opinion.

[¶4] Ms. Sapranova once again presented a medical opinion from Dr. Carey. The ALJ adopted his opinion regarding diagnosis and ongoing causation, but rejected Dr. Carey's opinion that Ms. Sapranova suffers 17.5% whole-body permanent impairment, expressed only in his deposition, because Dr. Carey also testified at the deposition (during cross examination), in response to a hypothetical question, that he could not give an opinion on permanent impairment. The ALJ therefore found that Ms. Sapranova did not meet her burden of production because

she had "failed to produce competent evidence to suggest that her whole-body permanent impairment may be above the applicable 12% threshold."

[¶5] The ALJ granted Marriott's petitions and terminated her wage loss benefits. Ms. Sapranova filed a Motion for Further Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶6] The Appellate Division's role on appeal is "limited to assuring that the [ALJ's] factual 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." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (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.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. The Employer's Petitions for Review and to Determine Permanent Impairment

[¶7] Partial incapacity benefits are subject to a durational cap of 520 weeks. *See* 39-A M.R.S.A. § 213(1)(A) (setting a 260-week limit subject to extension); Me. W.C.B. Rule, ch. 2, § 2(5) (extending the 260-week limitation to 520 weeks).

Employees, however, are exempt from this cap if their injuries result in whole-body permanent impairment rated above a certain threshold percentage. 39-A M.R.S.A. § 213(1)(A) (setting a 15% threshold subject to modification). Ms. Sapranova, who was injured in 2006, is subject to the 520-week cap unless her permanent impairment rating exceeds a 12.0% threshold. Me. W.C.B. Rule, ch. 2, § 1(3).

[¶8] The employer bears an ultimate burden to prove that an employee's permanent impairment is below the statutory threshold when the relief sought is termination of benefits based on the durational limit. *Farris v. Georgia-Pacific Corp.*, 2004 ME 14, ¶ 17, 844 A.2d 1143. The employee, however, is "responsible for raising the issue of whole-body permanent impairment, and of presenting sufficient evidence to demonstrate that a genuine issue exists" with respect to whether the impairment exceeds the cap. *Id.* ¶ 1. In *Farris*, the Law Court summarized the respective burdens as follows:

> [W]hen the employee seeks to make the percentage of impairment an issue at the hearing, the employee must bear a burden of raising the issue of percentage of whole-body impairment, and of producing some evidence to persuade a reasonable fact-finder of the existence of a genuine issue concerning the percentage of impairment. The burden of production does not require that the employee *convince* the hearing officer on the ultimate issue of whole-body permanent impairment, but merely that the employee must produce competent evidence to suggest that the employee's whole body permanent impairment may be above the threshold for purposes of obviating the durational cap pursuant to section 213(1).

Id. ¶ 16. Once an employee meets that burden, the employer must persuade the board that the employee's permanent impairment rating is, in fact, below the applicable threshold. *Id.* ¶ 17.

[¶9] The Appellate Division recently addressed the quantity and quality of proof necessary for an employee to meet this burden of production. In *Jensen v. S.D. Warren Co.*, Me. W.C.B. No. 17-26 (App. Div. 2017), the employer had filed a petition for review, seeking to terminate the employee's partial incapacity benefits because it had made the statutory maximum number of payments and the employee's permanent impairment did not exceed the statutory threshold. *Id*. ¶ 3.

[¶10] It was undisputed that Mr. Jensen suffered 5% permanent impairment due to his work-related low back injury. *Id*. ¶ 4. He contended that he also suffered from depression resulting from the back injury, and that his depression contributed additional permanent impairment that could potentially raise his percentage over the threshold. *Id*. ¶ 3. He sought to meet his burden of production with evidence including: his own testimony that he felt depressed due to the work injury; his treating physician's note that he was getting a little depressed due to his lack of function; and an independent medical examiner's deposition testimony in which the examiner addressed Mr. Jensen's depression, but declined to opine on whether it resulted in permanent impairment. *Id.* ¶ 5.

[¶11] The ALJ concluded that this evidence met the employee's burden of production pursuant to *Farris,* shifted the burden of proof to the employer, and determined that the employer failed to prove by a preponderance of the evidence that depression did not increase the employee's level of permanent impairment above the statutory threshold. *Id.* ¶ 6. The ALJ therefore denied the petition for review. *Id.*

[¶12] The Appellate Division vacated the decision, determining that the evidence submitted by the employee in *Jensen* did not meet his burden of production. *Id.* ¶ 16. The panel reasoned:

> Although the evidence necessary to meet the production burden need not convince the ALJ that the employee's permanent impairment is above the threshold, the evidence must be more than mere speculation. It must be evidence concerning a level of permanent impairment which, if believed, would be sufficient to "defeat the employer's attempt to impose the [durational] cap." [*Farris* at ¶ 17]
> . . . .
>
> [A]n employee cannot create a genuine issue regarding permanent impairment by producing evidence that merely raises the *possibility* that his or her impairment rating exceeds the statutory threshold, or that would rely on conjecture or speculation to reach such a finding. Rather, *an employee must produce evidence that, if believed, could provide a factual basis for a finding in the employee's favor.* Under the circumstances of this case, this would require Mr. Jensen to present medical evidence of a rating for his depression sufficient to yield a whole-body permanent impairment that exceeds the applicable threshold—here, 13.4%. The ALJ need not accept the opinion or believe it to be correct, but the opinion must competently demonstrate that the employee's permanent impairment, if accepted, exceed[s] the statutory threshold.

Id. ¶¶ 14, 16 (emphasis added). The panel further noted that "the ALJ did not find that there was evidence showing that Mr. Jensen's permanent impairment rating exceeded the threshold." *Id.* ¶ 18. The panel therefore vacated the ALJ's decision, allowing the employer to cease paying partial benefits. *Id.* ¶ 22.

[¶13] In contrast to *Jensen*, the evidence in this case included testimony from Dr. Carey that Ms. Sapranova had a 17.5% permanent impairment because of her asthma and dust allergy, a condition that the board previously found to be work-related. Dr. Carey testified in response to questioning from employee counsel that Ms. Sapranova's rating was between 10% and 25% and that setting a rate at the mid-point, 17.5%, was reasonable. Dr. Carey's testimony "competently demonstrate[s] that the employee's permanent impairment, if accepted, exceed[s] the statutory threshold." *Id.* ¶ 16.

[¶14] Further, Dr. Carey's testimony was neither conjecture nor speculation; rather, his opinion, "if believed, could provide a factual basis for a finding in the employee's favor." *Id.*

[¶15] The ALJ found that Dr. Carey's opinion did not carry the burden of production because, under cross-examination and in response to a hypothetical question, Dr. Carey suggested that he could not offer any opinion regarding the employee's permanent impairment, despite his earlier testimony. The hypothetical question posed by employer's counsel, however, was based on the unsupported

premise that Ms. Sapranova's permanent impairment was to some degree due to unidentified causes other than the work injury.[1] Dr. Carey's testimony that he did not have an opinion as to the contribution of work-related permanent impairment to total impairment based upon the hypothetical presented does not negate his previously expressed opinion on the existence and amount of work-related permanent impairment.

[1] Dr. Carey testified as follows:

> [Employer Counsel]: Okay. To the extent that she suffered occupational asthma due to exposures there, would you expect to see it worsening years out from the last exposure?
> [Dr. Carey]: Not from that. I think that's what you're asking.
> Q: Okay and that would be –
> A: . . . It could be the natural course of things. I mean we see people sometimes that just don't do as well over time.
> Q: So if the worsening is perhaps a non-work related component of her pulmonary function, do you have an opinion as to what her impairment would be at this point based on the work-related component of her pulmonary function?
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> . . . .
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> A: I would say no. The answer would be no. I don't have an opinion on that.
> Q: Okay. Do you –
> A: I mean it's hard to know what – you know.
> Q: Okay. Fair to say that it would be something less?
> A. It may be different.
> Q. Okay, that's all I have.
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> . . . .
>
> [Employee counsel]: In terms of her symptoms, she's been complaining of the same kinds of symptoms since you started seeing her again in 2010, correct?
> A. I believe so, yes.
> Q. Is there any way to separate out at this point in terms of her asthma the percentage that's caused by work – the exposures she had at work compared to potential other causative factors?
> A. I can't do that.

[¶16] Dr. Carey did not retract his opinion that Ms. Sapranova sustained 17.5% whole-body permanent impairment. His opinion constitutes competent medical evidence of a whole-body permanent impairment that exceeds the applicable threshold of 12%. The ALJ need not accept this opinion or believe it to be correct; but if accepted, it would demonstrate that Ms. Sapranova's permanent impairment exceeds the statutory threshold. Thus, Dr. Carey's opinion is sufficient as a matter of law to meet the employee's burden of production. *See Farris*, 2004 ME 14, ¶ 16, 844 A.2d 1143 (stating that the burden of production is a minimal burden requiring only some evidence that the employee's percentage of permanent impairment exceeds the threshold).

The entry is:

> The administrative law judge's decision is vacated, and the case remanded for a determination of whether the employer has met its burden of persuasion regarding the level of permanent impairment.

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, ch. 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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