DOROTHY CURRIER
(Appellant)

v.

GOUDREAU'S RETIREMENT INN
(Appellee)

and

MEMIC
(Insurer)

Conference held: September 11, 2019
Decided: March 9, 2021

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

[¶1] Dorothy Currier appeals from a decision of a Workers' Compensation Board administrative law judge (*Elwin, ALJ*) granting in part her Petition for Award regarding a May 9, 2010, work injury. Ms. Currier contends that the ALJ erred in finding that her work injury was temporary in nature and not responsible for a period of alleged earning incapacity. Because the independent medical examiner made findings that Ms. Currier sustained restrictions as a result of her work injury, we vacate the decision in part and remand for consideration of whether the rejection of those findings is supported by clear and convincing contrary evidence, pursuant to 39-A M.R.S.A. § 312(7) (Pamph. 2020).

I. BACKGROUND

[¶2] Dorothy Currier worked for Goudreau's Retirement Inn as a cook and housekeeper for fifteen years. Ms. Currier has a history of low back injuries beginning in 1983, and she had undergone two lumbar discectomy surgeries before May 9, 2010, when she slipped and fell at work and reported the onset of low back symptoms. Her claim for benefits under the Workers' Compensation Act followed. An orthopedic surgeon was appointed as an independent medical examiner (IME) pursuant to 39-A M.R.S.A. § 312 (Pamph. 2020). The IME issued a report dated June 9, 2017.

[¶3] The IME did not address the issue of work capacity in that initial report. The IME did provide an in-depth analysis of whether the alleged work injury aggravated or accelerated Ms. Currier's low back condition, which the ALJ summarized as follows: "Ms. Currier's May 9, 2010 work injury constituted an exacerbation of her chronic low back pain, resulting in an increase in intermittent lumbar radiculopathy." The IME also noted non-anatomical findings, "unimpressive" limits to her range of motion, and a likely role of symptom magnification and psychological factors in her ongoing complaints.

[¶4] In a follow up email, the IME was asked if Ms. Currier sustained work restrictions and if those restrictions were caused by the alleged work injury. The IME responded by listing restrictions and stating: "[t]hese restrictions apply largely to

5/9/10, but to a small degree also to her pre-existing conditions." The ALJ found that this statement was contrary to the IME's earlier report and rejected it, instead relying "on the balance of his § 312 IME report in finding that Ms. Currier's May 9, 2010 work injury temporarily contributed to her disability in a significant manner, but no longer does so." The ALJ also found that prior to the restrictions imposed by the IME, "no doctor had imposed restrictions with regard to Ms. Currier's back condition." The ALJ then granted protection of the Act for an injury but denied any ongoing benefits.

[¶5] Ms. Currier filed a Motion for Additional Findings of Fact and Conclusions of Law, but the ALJ declined to make any changes to the decision. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶6] 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). Because Ms. Currier requested findings of fact and conclusions of law following the decision, the Appellate Division will "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. The failure to issue adequate findings in support of a decision when requested constitutes legal error and may require a remand from the Appellate Division. *See Coty v. Town of Millinocket*, 444 A.2d 355, 359 & n.5 (Me. 1982).

B. Competent Evidence

[¶7] Ms. Currier contends that the ALJ erred in her characterization of the IME's opinion and was obligated to conduct a review for "clear and convincing evidence to the contrary" before she rejected the IME's opinion that Ms. Currier's work injury is a compensable cause of her ongoing restrictions. We find this argument persuasive, in part.[1]

[¶8] There is no dispute among the parties that Ms. Currier experienced a compensable back injury at work on May 9, 2010. In the IME's initial report, he was not asked to discuss work restrictions or whether those work restrictions were due to the work injury. We agree with Ms. Currier's argument that this initial report does not provide competent evidence for the ALJ's finding that no work restrictions resulted from the work injury; the issue of restrictions was simply not addressed. In

[1] Ms. Currier also argues that the ALJ's finding (that prior to the IME no doctor had imposed restrictions on Ms. Currier) is a material error and cites to an osteopath's M-1 practitioner's report issued approximately ten months prior to the IME's examination. The report lists Ms. Currier with no work capacity. As set out below, the case is vacated in part and remanded for further findings so that the ALJ may weigh the evidence as a whole, including this report, using the "clear and convincing evidence" standard set forth in section 312(7).

the IME's subsequent email, he opined that Ms. Currier should be under activity restrictions and attributed those restrictions "largely to 5/9/10, but to a small degree also to her pre-existing conditions." The IME's opinion on the issue of ongoing restrictions thus supported Ms. Currier's claim. The ALJ was obligated under 39-A M.R.S.A. § 312(7)[2] to review the evidence submitted and determine if there exists "clear and convincing evidence to the contrary" of the IME's opinion regarding restrictions. *See Dube v. Paradis Pulp & Logging Co., Inc.*, 489 A.2d 10, 11 (Me. 1985) (finding error in a failure to issue findings of fact adequate to permit meaningful appellate review).

[¶9] The ALJ in this case has identified evidence contrary to the IME's opinion, namely, surveillance evidence submitted by the employer and Ms. Currier's demeanor during the hearing. We remand the case to the ALJ for findings about whether this, or other pertinent evidence, meets the "clear and convincing" standard of section 312(7) required before the IME's opinion on ongoing restrictions may be rejected.

[2] Title 39-A M.R.S.A. § 312(7) provides:

> **Weight.** The board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings. Contrary evidence does not include medical evidence not considered by the independent medical examiner. The board shall state in writing the reasons for not accepting the medical findings of the independent medical examiner.

III. CONCLUSION

[¶10] The ALJ's characterization of the IME's report is not supported by competent evidence. We remand the case for the ALJ's analysis of whether there exists "clear and convincing" evidence to the contrary of the IME's opinion regarding ongoing restrictions.

The entry is:

> The administrative law judge's decision is vacated in part and remanded for further findings.

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 (Pamph. 2020).

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.

Attorney for Appellant:
Charles E. Trainor, Esq.
DESMOND & RAND, P.A.
55 Stroudwater Street
Westbrook, ME 04092

Attorney for Appellee:
Elizabeth Eddy Griffin, Esq.
MEMIC
P.O. Box 3606
261 Commercial Street
Portland, ME 04101