JONATHAN E. DUBOIS
(Appellee)

v.

SAPPI FINE PAPER
(Appellant)

and

CANNON COCHRAN MANAGEMENT SERVICES, INC.
(Administrator)

Argument held: February 8, 2023
Decided: March 1, 2023

PANEL MEMBERS: Administrative Law Judges Sands, Chabot, and Knopf
BY: Administrative Law Judge Sands

[¶1] Sappi Fine Paper appeals from a decision of a Workers' Compensation Board administrative law judge (*Elwin, ALJ*) determining that Jonathan Dubois sustained a 15% whole person permanent impairment as a result of an August 22, 2010, work injury. Sappi contends that the ALJ erred in rejecting the independent medical examiner's (IME's) opinion that the permanent impairment associated with Mr. Dubois's low back was not due to his work injury but rather to his underlying degenerative disc disease. Sappi's arguments are two-fold: (1) that the ALJ erred in her assessment that the IME's opinion was contradictory and confusing; and (2) that the ALJ erred in finding that another provider's opinion constitutes clear and

convincing contrary evidence under 39-A M.R.S.A. §312(7). We disagree with these contentions and affirm the decision.

I. BACKGROUND

[¶2] Jonathan Dubois worked for Sappi Fine Paper Company from 1999 to 2010 as a heavy equipment operator. On August 22, 2010, Mr. Dubois was descending the steps to a crane when he fell eight to ten feet, resulting in multiple injuries. He never returned to work and was subsequently terminated for reasons unrelated to the injury. In a 2014 decree, the board awarded Mr. Dubois 100% partial incapacity benefits due to a combination of physical limitations caused by his work-related injuries and his good faith work search.

[¶3] Sappi subsequently filed a Petition for Review and Petition to Determine Permanent Impairment. In a 2018 decree, the board denied the Petition for Review finding that the Sappi had not established any change in Mr. Dubois's medical or economic circumstances since the 2014 decree. *See, e.g., Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 7, 837 A.2d 117. The board dismissed the Petition to Determine Permanent Impairment on the basis that the issue was not ripe for adjudication.

[¶4] In June of 2019, Sappi again filed Petitions for Review and to Determine Permanent Impairment, along with a Petition to Terminate Benefit Entitlement. Through these Petitions, Sappi sought to discontinue Mr. Dubois's ongoing 100% partial benefits based on the durational cap provided in 39-A M.R.S.A. § 213 and

Me. W.C.B. Rule, ch. 2, § 2.[1] In response, Mr. Dubois filed a Petition for Review seeking a finding that his condition had worsened, rendering him totally disabled pursuant to 39-A M.R.S.A. § 212.

[¶5] The parties mainly disputed the percentage of permanent impairment Mr. Dubois sustained as a result of his low back injury.[2] Dr. Bamberger, who performed an independent medical examination pursuant to 39-A M.R.S.A. § 312 in March of 2017, produced a written report assessing 5% whole person impairment "for the back strain he sustained in the fall" and specifically excluding any impairment associated with "ongoing problems due to age related degenerative changes." Dr. Bamberger was subsequently deposed in July of 2017. During his deposition, Dr. Bamberger initially testified that Mr. Dubois "experience[d] some permanent harm from that fall, albeit . . . minor." Thereafter, Dr. Bamberger appeared to change his mind from his written report, testifying that the 5% permanent impairment was not due to the work injury but instead was due to the underlying degenerative disc disease. He testified that the effects of the low back injury had ended. Later in the same

[1] For Mr. Dubois's date of injury, partial incapacity benefits are subject to a durational limit 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 are exempt from this cap, however, if their injuries result in a whole-body permanent impairment rating above a certain threshold percentage. *See* 39-A M.R.S.A. § 213(1)(A) (setting a 15% threshold subject to modification). Mr. Dubois, who was injured in 2010, is subject to the 520-week cap unless his permanent impairment rating exceeds a 12.0% threshold. *See* Me. W.C.B. Rule, ch. 2, § 1(4).

[2] The work injury also included a left shoulder injury which both Dr. Bamberger and Dr. Pavlak agreed resulted in 11% whole person impairment. This finding has not been appealed.

deposition, Dr. Bamberger suggested that although the work injury did not play a "major" or "significant" contributing factor with respect to ongoing back symptomology, "it may play some small role."

[¶6] Dr. Pavlak, who issued an opinion at Mr. Dubois's request on July 30, 2020, assessed a 5% whole person permanent impairment causally related to the work injury. He opined that Mr. Dubois's fall from the crane was a significant aggravation of his previously asymptomatic lumbar degenerative disc disease.

[¶7] Lastly, Dr. Curtis, who examined Mr. Dubois both in 2014 and in 2016, opined that the low back injury had resolved, and he did not attribute any permanent impairment associated with the low back to the work injury. Notably, the ALJ deemed this opinion "not persuasive" as it "minimized the mechanism of [Mr. Dubois's] work injury and did not address the fact that Mr. Dubois was asymptomatic and able to perform his work for Employer before the injury."

[¶8] After considering the opinions of all three physicians, the ALJ ultimately concluded:

> Dr. Bamberger's opinion as expressed in his report is consistent with that of Dr. Pavlak. To the extent that Dr. Bamberger expressed the opposite opinion in his deposition testimony, the Board finds that Dr. Pavlak's unequivocal opinion constitutes clear and convincing contrary evidence. The Board therefore finds that the 5% permanent impairment of [Mr. Dubois's] back is caused by his August 22, 2010 work injury.

[¶9] After adding the 5% to the 11% associated with the shoulder injury, the ALJ concluded that Mr. Dubois's permanent impairment related to his work injuries totals 15%, thereby exceeding the 12% threshold for receipt of partial incapacity benefits beyond 520 weeks. Accordingly, the ALJ granted the Petition to Determine Permanent Impairment and denied the Petition to Terminate Benefit Entitlement. She further concluded that Mr. Dubois's work capacity had not changed since the issuance of the 2018 decree, and therefore denied the Petitions for Review.

[¶10] Sappi 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

[¶11] 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). 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., Inc*., 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted). In addition, the Appellate

Division will not disturb a factual finding made by the ALJ absent a showing that it lacks competent evidence to support it. *Dunkin Donuts of Am., Inc. v. Watson*, 366 A.2d 1121, 1125 (Me. 1976).

B. Application of Title 39-A M.R.S.A. § 312

[¶12] Sappi argues that the ALJ erred when she rejected the IME's opinion on the basis that it is "contradictory and confusing" as to whether the 5% permanent impairment rating associated with the low back is attributable to the work injury. Sappi contends the ALJ was required to adopt Dr. Bamberger's opinion because he ultimately clarified any potential ambiguity in his deposition testimony. We disagree.

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

> 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.

[¶13] Dr. Bamberger's testimony that the injury no longer contributes to Mr. Dubois's low back symptomology is inconsistent with testimony provided in the same deposition as to the "minor" permanent harm caused by the injury and his opinion that the injury "might play some small role." Dr. Bamberger's deposition testimony not only contradicted his written report but was also internally

inconsistent. The inconsistent statements arguably lead to ambiguity with respect to Dr. Bamberger's overall conclusions.

[¶14] As noted in *Thurlow v. Rite Aid of Maine, Inc.*, section 312 does not compel the adoption of the IME's medical findings when those findings are ambiguous. Me. W.C.B. No. 16-23, ¶¶ 13-14 (App. Div. 2016). Specifically, the panel in *Thurlow* held that an ALJ's interpretation of ambiguous statements rendered by an IME need not be supported by clear and convincing contrary evidence. *Id.*; *see also Oriol v. Portland Housing Auth.*, Me. W.C.B. No. 14-35, ¶ 12 (App. Div. 2014).

[¶15] In any event, we need not determine whether sufficient ambiguity was present to allow for the rejection of any opinion that Dr. Bamberger may have rendered because the ALJ expressly found that "Dr. Pavlak's unequivocal opinion constitutes clear and convincing contrary evidence." Sappi contends that this was error. It asserts that Dr. Pavlak's opinion cannot be considered clear and convincing contrary evidence because: Dr. Pavlak failed to sufficiently account for pre-injury low back symptomology and discrepancies in prior physical examinations; Dr. Pavlak relied on inaccurate accounts provided by Mr. Dubois; and Dr. Pavlak did not review surveillance evidence from 2011 previously introduced in this case. We disagree.

[¶16] When determining whether there is clear and convincing evidence sufficient to contradict the IME's medical findings, the Appellate Division panel

looks to whether the ALJ "could reasonably have been persuaded that the required factual finding was or was not proved to be highly probable." *Dubois v. Madison Paper Co*., 2002 ME 1, ¶ 14, 795 A.2d 696 (quotation marks omitted).[3]

[¶17] The ALJ here fully explained her reasons for rejecting the IME's findings as required by section 312(7) and why she found Dr. Pavlak's opinion to be sufficiently persuasive. She viewed Dr. Pavlak's opinion as "unequivocal" in its assessment of 5% permanent impairment related to the low back condition; she noted that it was not based primarily on Mr. Dubois's subjective complaints but on contemporaneous medical records; and it took into consideration that "the fall from the crane had significant potential for mechanical damage to Mr. Dubois's back" and that it had significantly aggravated his previously asymptomatic degenerative condition.

[¶18] The inconsistent statements rendered by Dr. Bamberger, considered in conjunction with Dr. Pavlak's medical opinion, could reasonably have persuaded the ALJ that it was highly probable that the record did not support the IME's conclusion that the back injury no longer contributed to ongoing low back symptomology and Mr. Dubois's related permanent impairment. We find no error in this determination.

[3] At oral argument, the parties conceded that Dr. Pavlak's opinion was not considered by Dr. Bamberger as required under section 312(7). However, this issue was not raised at the hearing level and therefore we conclude that it has been waived. *See Lenfest v. Sullivan & Merritt*, Me. W.C.B. No. 18-25, ¶ 15 (App. Div. 2018).

III. CONCLUSION

[¶19] The ALJ did not err in finding clear and convincing evidence contrary to the IME's findings.

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.

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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