LESLIE BROWN-SMITH
(Appellee)

v.

ROSS MANOR ASSOCIATES
(Appellant)

and

CROSS INSURANCE TPA, INC.
(Insurer for Ross Manor Assoc.)

and

MERT ENTERPRISES, INC.
(Cross-Appellant)

and

GUARANTY FUND MANAGEMENT SERVICES
(Insurer for MERT Enterprises, Inc.)

Argued: September 12, 2019
Decided: June 29, 2020

PANEL MEMBERS: Administrative Law Judges Knopf, Elwin, and Jerome
BY: Administrative Law Judge Elwin

[¶1] Ross Manor Associates appeals, and MERT Enterprises cross-appeals, from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) denying their Petitions for Review regarding Leslie Brown-Smith's established work-related lower back injuries sustained while working for Ross Manor on June

21, 1999, and later at MERT Enterprises on June 6, 2000.[1] Appellant and cross-appellant contend that the ALJ erred by finding that they failed to demonstrate a change in Ms. Brown-Smith's medical circumstances, thereby permitting no alteration in her ongoing level of total incapacity benefits. We affirm the decision.

I. BACKGROUND

[¶2] Ms. Brown-Smith injured her lower back while working as a direct care healthcare worker for Ross Manor on June 21, 1999, and later injured her back and left leg while performing a similar job for MERT Associates on June 6, 2000. Both injuries involved acute incidents that happened while assisting patients. Ms. Brown-Smith received treatment for her injuries without issue until 2012, when she began experiencing additional symptoms. Ms. Brown-Smith was examined in August 2013 by Dr. Philip Kimball pursuant to 39-A M.R.S.A. § 207 (Pamph. 2020), who concluded that she had a restricted full-time work capacity because of her low back condition.

[¶3] Ms. Brown-Smith was later examined by her primary care provider, Dr. Thomas Hayward. On January 9, 2014, Dr. Hayward opined that Ms. Brown-Smith

[1] MERT Enterprises was insured by Reliance Insurance Company, which became insolvent, triggering Maine Insurance Guaranty Association (MIGA) coverage under 24-A M.R.S.A. §§ 4431-52. Because MIGA is a guarantor of last resort, benefits payable to Ms. Brown-Smith must be paid by Ross Manor/Cross, and MIGA is excluded from apportionment liability until Ms. Brown-Smith's claims against Ross Manor/Cross are exhausted. *See id.* § 4443(3); *Me. Ins. Guaranty Ass'n v. Folsom*, 2001 ME 63, ¶ 8, 769 A.2d 185.

had ongoing left-leg weakness—diagnosed as "foot drop"—and that she therefore had no work capacity.

[¶4] By decision dated March 11, 2016, the board (*Hirtle, ALJ*) found that these injuries resulted in two surgeries to treat bilateral nerve root compression, and concluded that Ms. Brown-Smith was entitled to ongoing total incapacity benefits under 39-A M.R.S.A. § 212 (Pamph. 2020). The ALJ relied on the left foot drop diagnosed by Dr. Hayward in rejecting Dr. Kimball's assessment of full-time, light duty work capacity.

[¶5] In August 2017, Ross Manor and MERT Enterprises filed separate Petitions for Review, each seeking to establish that Ms. Brown-Smith's medical condition had improved, and she was no longer entitled to total incapacity benefits. They relied on a second exam and report pursuant to section 207 by Dr. Craig Curtis, dated July 20, 2017, in which he did not document symptoms of a left foot drop and described Ms. Brown-Smith's gait as normal. They also relied on surveillance evidence gathered in a seven-day period, during which investigators reported no apparent abnormalities in Ms. Brown-Smith's gait as she performed a variety of chores and errands.

[¶6] Concluding that the employers failed to demonstrate a change in medical circumstances by comparative medical evidence, the ALJ declined to alter the prior award of total incapacity benefits. Both employers filed Motions for Further

Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Pamph. 2020), which the ALJ denied. This appeal followed.

II. DISCUSSION

[¶7] "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 (Pamph. 2020). 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.*

[¶8] The board's 2016 decision established that Ms. Brown-Smith was totally incapacitated due to her two work injuries. "[V]alid and final decisions of the Workers' Compensation Board are subject to the general rules of *res judicata* and issue preclusion, not merely with respect to the decision's ultimate result, but with respect to all factual findings and legal conclusions that form the basis of that decision." *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 9, 837 A.2d 117 (quotation marks omitted). In order to overcome the *res judicata* effect of the previous decision, the employers were required to provide comparative medical evidence establishing a change of medical circumstances sufficient to revisit the prior decree. *Van Horn v. Hillcrest Foods, Inc.*, 392 A.2d 52, 54 (Me. 1978). "The purpose of the

[comparative evidence] rule is 'to prevent the use of one set of facts to reach different conclusions.'" *McIntyre v. Great N. Paper, Inc*., 2000 ME 6, ¶ 5, 743 A.2d 744 (quoting *Folsom v. New England Tel. & Tel. Co*., 606 A.2d 1035, 1038 (Me. 1992)).

[¶9] The ALJ applied this standard and found that the evidence offered by Ross Manor and MERT Enterprises failed to compare Ms. Brown-Smith's condition at the time of the board's prior finding of total incapacity with her current condition. In considering both Dr. Curtis's findings and the surveillance materials, the ALJ concluded:

> It is not self-evident that Dr. Curtis's medical findings during examination and the activities documented by surveillance are evidence of a change in circumstances affecting Ms. Brown-Smith's physical restrictions and therefore the extent of her incapacity. *Gilbert v. S.D. Warren*, AD 16-12, ¶¶13-14 (April 20, 2016) (finding that raw data of lost grip strength and atrophy were legally insufficient to demonstrate a change in circumstances in the absence of evidence discussing the relevance of such findings), *see also Van Horn v. Hillcrest Foods, Inc.*, 392 A.2d 52, 54 (Me.1978) ("A claim of changed condition can be established only by adducing expert medical testimony which [bears] directly upon the comparison between his former and his present disability."). While the evidence relied upon by the Employer may fuel an expert medical opinion that Ms. Brown-Smith's work capacity has improved by comparative medical evidence, no such expert opinion was offered in this case.

[¶10] Ross Manor and MERT argue that comparative medical evidence was not required in this case for two reasons. First, citing *Curtis v. Bridge Construction Corp.*, they assert that comparative medical evidence is not required where the injured worker no longer has any physical disability resulting from the work injury.

428 A.2d 62, 64 (1981). Second, they argue that the absence of Ms. Brown-Smith's left foot drop represents a difference "in kind rather than degree," which the Law Court recognized in *Cote v. Osteopathic Hospital of Maine, Inc.*, as sufficient grounds to reconsider the compensation payment scheme. 447 A.2d 75, 77 (Me. 1982). Neither of these cases relieves the employers of the burden of providing comparative medical evidence in this case.

[¶11] In *Curtis*, the Law Court held that an employer could meet its burden without comparative evidence by showing not merely some improvement in an employee's condition, but by showing that the worker had no remaining disability resulting from the injury. *Curtis*, 428 A.2d at 64. Here, Ms. Brown-Smith continued to experience disabling symptoms from her two back injuries (although the parties disagreed as to the exact nature of the symptoms and the extent of disability). Furthermore, the ALJ did not find that Ms. Brown-Smith's foot drop had ended. The ALJ cited numerous references in the medical records to continued left leg symptoms and occasional tripping through March 2017. While neither Dr. Curtis nor the private investigators observed this symptom, there is nevertheless no medical opinion that this symptom had entirely resolved.

[¶12] The *Cote* case is also distinguishable from Ms. Brown-Smith's situation. The employee in *Cote* suffered a physical work injury, but later developed psychological issues due to the work injury, which increased her overall level of

incapacity. *Cote*, 447 A.2d at 77. The Law Court determined that although the employee failed to establish a worsening of the physical condition with comparative medical evidence, proof that she had developed the psychological condition, "new in kind rather than degree" was sufficient to revisit the prior decree. *Id.*

[¶13] In this case, neither Dr. Curtis's medical findings nor the surveillance evidence documents symptoms of foot drop. However, that lack of documented examples does not establish that Ms. Brown-Smith had a complete resolution of foot-drop symptoms, or that she had developed a condition "new in kind rather than degree."

[¶14] Because the record lacked a medical opinion comparing Ms. Brown-Smith's condition as it existed at the time of the 2016 decree to her present condition, the ALJ did not err when determining that the evidence was insufficient to establish a change in Ms. Brown-Smith's medical circumstances. Thus, Ross Manor and MERT failed to overcome the res judicata effect of the prior decree.

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 (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.

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