CHERYL JACKSON
(Appellant)

v.

PRATT-ABBOTT CLEANERS
(Appellee)

Argued: November 20, 2013
Decided: May 8, 2014

PANEL MEMBERS: Hearing Officers Knopf, Stovall, and Jerome
BY: Hearing Officer Knopf

[¶1] Cheryl Jackson appeals from a decision of a Worker's Compensation Board hearing officer (*Collier, HO*) granting Pratt-Abbott Cleaners' Petition for Review, filed with respect to a March 20, 2009, work injury. The hearing officer determined that Ms. Jackson was no longer incapacitated as a result of that work injury and authorized Pratt-Abbott to discontinue benefits. We affirm the hearing officer's decision in part. However, because Pratt-Abbott filed a petition regarding only one work injury when it was established in a prior decree that three separate work injuries contributed to her incapacity for work, we remand for consideration of whether Pratt-Abbott is entitled to discontinue benefits in conjunction with pending petitions for review related to the two other work injuries.

I. BACKGROUND

[¶2] In a decree dated August 3, 2010, the hearing officer found that Ms. Jackson had sustained three work injuries in 2009[1] while employed by Pratt-Abbott: an injury to her left shoulder, neck, and upper back on January 9, 2009; a carpal tunnel injury on January 30, 2009; and an aggravation of pre-existing lumbar degenerative disk disease on March 20, 2009. Based on her restrictions, evidence of her work search, and her personal characteristics, the hearing officer awarded Ms. Jackson ongoing 100% partial incapacity benefits. The hearing officer's findings regarding the March 20, 2009, low back injury were based largely on the opinion of Dr. Phillips that Ms. Jackson's symptoms resulted from the work-related aggravation of her pre-existing degenerative disc disease.

[¶3] In 2012, Pratt-Abbott filed its Petition for Review regarding the March 20, 2009, date of injury, contending that Ms. Jackson's medical circumstances had improved, and that it was entitled to reduce or discontinue her 100% partial benefits. At the hearing, Ms. Jackson testified that she no longer experiences symptoms from the January 9, 2009, left shoulder or the January 30, 2009, carpal tunnel injuries, but still has low back and left leg problems connected with the March 20, 2009, aggravation injury. She continues to treat with Dr. Phillips, who monitors her medication and performs acupuncture. Ms. Jackson, who does not

[1] The Board also awarded protection of the Act for a 2006 back injury, but found the effects of that injury had ended.

have a driver's license, testified that her low back pain increased because she had to walk in order to search for work. Due to the increase in pain, Dr. Phillips took her out of work, and he has not released her to return to work.

[¶4] Dr. Pier examined Ms. Jackson on December 2, 2011, pursuant to 39-A M.R.S.A. § 207 (Supp. 2013). He concluded that Ms. Jackson's upper extremity problems had resolved and that her ongoing back problems were unrelated to the 2009 injury. Dr. Pier's view is that in March of 2009, Ms. Jackson likely aggravated an underlying, pre-existing low-back condition (which he diagnosed as lumbar arthritis), but the aggravation has resolved and her ongoing back symptoms are more likely than not attributable to the underlying, nonwork-related condition. He disagreed with Dr. Phillips's opinion that Ms. Jackson's ongoing symptoms result from the 2009 aggravation of degenerative disc disease.

[¶5] The hearing officer weighed the respective medical opinions of Dr. Phillips and Dr. Pier, and found Dr. Pier's opinion to be more persuasive. Thus, the hearing officer concluded that Ms. Jackson's ongoing incapacity is no longer caused by her March 20, 2009, work injury. Accordingly, the hearing officer granted the petition for review, and ordered that Ms. Jackson's benefits be discontinued. Ms. Jackson appeals.

II. DISCUSSION

A. Standard of Review

[¶6] Appeals from hearing officer decisions are governed by 39-A M.R.S.A. §§ 321-B, 322 (Supp. 2013). Section 321-B(2) provides that "[a] finding of fact by a hearing officer is not subject to appeal under this section." The role of the Appellate Division, therefore, "is limited to assuring that the [hearing officer'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 and Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995).

B. Effect of Prior Medical Findings

[¶7] Ms. Jackson argues that the hearing officer was bound by the finding in the 2010 decree, based on Dr. Phillips's opinion, that her back pain was caused by an aggravation of degenerative disc disease, and because Dr. Pier's opinion differed as to the nature of the underlying condition—he believes it to be lumbar arthritis—it was error to adopt Dr. Pier's opinion regarding the cause of the ongoing symptoms. We find no error.

[¶8] "Valid 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."[2] *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 9, 837 A.2d 117. Therefore, "in order to prevail on a petition to increase or decrease compensation in a workers' compensation case when a benefit level has been established by a previous decision, the petitioning party must first meet its burden to show a 'change of circumstances' since the prior determination, which may be met by either providing 'comparative medical evidence,' or by showing changed economic circumstances." *Id.* ¶ 7 (citations omitted).

[¶9] In this case, Dr. Pier acknowledged that this was a "difficult causation opinion to correlate with the [prior] Board decree," because he did "not necessarily agree with the diagnosis and causation now as established by Dr. Phillips." He determined, however, that the aggravation of Ms. Jackson's symptoms attributable to the March 20, 2009, work injury had ended, and the ongoing symptoms were caused by the underlying condition—not the work injury.

[¶10] Comparative medical evidence may come from different physicians as long as the more recent examiner becomes acquainted with the employee's previous condition and has read the other physician's medical reports. *Van Horn v. Hillcrest Foods, Inc.*, 392 A.2d 52, 54-55 (Me. 1978). "[It] is not necessary that the second physician personally agree with findings or evaluations of the first

[2] Ms. Jackson characterizes the issue alternatively as involving the "law of the case" or res judicata. Because the issue involves the binding effect of a prior factual finding, as opposed to a legal principle or an appellate mandate, the doctrine of res judicata applies here. *Compare Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 9, 837 A.2d 117 *with Blance v. Alley*, 404 A.2d 587, 589 (Me. 1979).

physician. If the second physician is asked to assume, hypothetically, the validity of the findings of the prior examining physician, he may then give his opinion as to whether or not a change in condition has occurred, based on that assumption." *Id.*

[¶11] Dr. Pier familiarized himself with Dr. Phillips's earlier findings and opinions, and while he did not agree with them, he entertained their validity in determining whether Ms. Jackson's ongoing symptoms continued to result from the work injury. He concluded that the work-related aggravation had resolved. The hearing officer did not misconceive or misapply the law when adopting Dr. Pier's medical findings.[3]

C. Adequacy of the Pending Petition for Review

[¶12] The August 3, 2010, decree decided petitions on four dates of injury: March 22, 2006, January 9, 2009, January 30, 2009, and March 20, 2009. The hearing officer found that the 2006 injury had largely resolved within a month of its occurrence and did not contribute to Ms. Jackson's incapacity. However, the hearing officer concluded that all three work injuries that Ms. Jackson suffered in 2009 contributed to her ongoing incapacity at the time.

[3] Ms. Jackson also argues that the hearing officer erred when failing to consider that her low-back symptoms have intensified, which she attributes to having to walk in order to search for work. Because the hearing officer found that Ms. Jackson's ongoing symptoms are unrelated to the work injury, it was not necessary for the hearing officer to determine whether an increase in those symptoms was related to the work injury.

[¶13] In the current round of litigation, Pratt-Abbott filed only one petition for review related to the March 30, 2009, date of injury—it did not file petitions regarding the January 9, 2009, neck injury or the January 30, 2009, carpal tunnel injury. Ms. Jackson argues that it was error for the hearing officer to discontinue benefits for all three injuries when only one petition relating to the last date of injury was before the Board. Pratt-Abbott reports that it brought petitions for review on the remaining two 2009 dates of injury.

[¶14] We agree with Ms. Jackson that the hearing officer could not properly address the level of incapacity attributable to the January 9, and January 30, 2009, dates of injury without having petitions related to those injuries before him. Because there were no petitions pending on the January 2009 work injuries, Ms. Jackson was not put on notice that her incapacity relating to those injuries was at issue.

[¶15] While it may seem formalistic to require Pratt-Abbott to file petitions on all dates of injury that are potentially at issue, it is the only way to afford Ms. Jackson with notice and an opportunity to present a defense to the employer's claim. For example, Ms. Jackson might have testified about her medical care and unpaid bills, but it would not be fair to order payment of those bills absent the filing of a petition that would put Pratt-Abbott on notice of that claim. A party is not compelled to present evidence on an issue absent formal notice of a claim.

[¶16] Accordingly, we vacate that portion of the hearing officer's decision discontinuing benefits, and remand the case for consideration with the petitions for review for the remaining dates of injury. Until such time that all dates of injury are addressed, benefits are reinstated to their former level reflecting 100% partial incapacity.

The entry is:

> The hearing officer's decision granting the petition for review is: (1) affirmed insofar as it determines that Ms. Jackson's ongoing back symptoms are not causally connected to the March 20, 2009, date of injury; (2) vacated insofar as it authorizes the employer to discontinue incapacity benefits; and (3) remanded for a determination with the pending petitions for review pertaining to the January 9, 2009, and January 30, 2009, dates of injury.

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. 2013).

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