

RAYMOND HENDERSON
(Appellee)

v.

JOHN LUCAS TREE EXPERTS
(Appellant)

and

CCMSI

Argument held: February 4, 2016
Decided: October 4, 2016

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

[¶1] John Lucas Tree Experts appeals from a decision of a Workers' Compensation Board administrative law judge, (*Jerome, ALJ*) granting Raymond Henderson's Petitions for Award and for Payment of Medical and Related Services regarding a December 8, 2011, work injury. The ALJ awarded total incapacity benefits from December 8, 2011, through March 15, 2012. Lucas Tree argues that the ALJ erred because the factual findings were not supported by competent evidence and based on testimony identified as lacking credibility in part; and that Mr. Henderson unreasonably refused a return to work offer and thus forfeited the right to any incapacity benefits pursuant to 39-A M.R.S.A § 214(1)(A) (Supp. 2015). We disagree, and affirm the ALJ's decision in all respects.

I. BACKGROUND

[¶2] Raymond Henderson began working for Lucas Tree in the summer of 2011. His job duties involved using a chainsaw, picking up tree limbs, and placing the tree limbs into a wood chipper. While working at Lucas Tree, Mr. Henderson also had his own small engine repair business and had worked in that capacity for several years. Previously, Mr. Henderson had suffered from carpal tunnel syndrome and a cervical spine injury while working for Glidden Paving on July 19, 1999.

[¶3] On December 8, 2011, Mr. Henderson awoke with sore and swollen arms. He testified that he was “completely tired” from his work the day before. Mr. Henderson was taken out of work temporarily due to his symptoms. Kathy Buxton, the human resources manager for Lucas Tree, offered Mr. Henderson light duty work as a flagger. On December 12, 2011, Mr. Henderson indicated to his provider at Concentra that he did not think he could flag because he could not get in and out of the truck. Mr. Henderson also treated with Dr. Barr. Dr. Barr took Mr. Henderson out of work on December 15, 2011, based on the understanding that Mr. Henderson would have had to perform his regular duties.

[¶4] Mr. Henderson filed Petitions for Award and for Medical and Related Services. There were a number of issues before the ALJ, including whether the record contained competent evidence that Mr. Henderson sustained a work-related

injury, the role of his preexisting condition, the nature and extent of his incapacity, and his refusal of work as a flagger. A decree was issued on February 27, 2015, granting Mr. Henderson's petitions. The ALJ found that Mr. Henderson suffered from a bilateral upper extremity condition that preexisted the work-related injury at Lucas Tree.

[¶5] The ALJ further found that on December 8, 2011, Mr. Henderson suffered bilateral gradual work-related injuries to his upper extremities, epicondylitis and mild carpal tunnel syndrome that aggravated his preexisting condition, and that his work contributed to his disability in a significant manner. 39-A M.R.S.A § 201(4) (2001). The ALJ awarded Mr. Henderson total incapacity benefits from December 8, 2011, to March 15, 2012. Additionally, the ALJ found that Mr. Henderson had been offered and refused light duty flagging work from December 8, 2011, to December 15, 2011, but that his refusal was not unreasonable given that he did not feel he could get in and out of the truck and Dr. Barr thought it advisable for him to remain out of work as of December 15, 2011.

[¶6] The ALJ found some of Mr. Henderson's testimony to be credible, but did not credit his testimony about his general ability to return to work post-injury after the period of total disability. Lucas Tree 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

[¶7] 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 Lucas Tree requested further 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 [administrative law judge].” *Daley v. Spinnaker Inds., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446. The ALJ’s findings of fact are not subject to appeal. 39-A M.R.S.A § 321-B(2) (Supp. 2015).

B. Competent Evidence to Support the ALJ’s Findings

[¶8] Lucas Tree contends that Mr. Henderson did not carry his burden of proving a work injury or that he was incapacitated to earn from December 8, 2011, to March 15, 2012, due to credibility issues and a lack of competent evidence. In determining that Mr. Henderson’s injury was work-related, the ALJ relied on the opinions of both Dr. Barr and Dr. Herzog. Dr. Barr, at his deposition, indicated that repetitive activity and use of vibratory tools caused or contributed to Mr. Henderson’s increased symptoms. Dr. Herzog opined that Mr. Henderson suffered

from work-related overuse tendonitis. Both of these opinions constitute competent evidence to support the ALJ's determination that Mr. Henderson suffered a work-related overuse injury.

[¶9] Lucas Tree also argues that there is no competent evidence in the record to support the ALJ's determination under 39-A M.R.S.A § 201(4) that Mr. Henderson's employment at Lucas Tree aggravated, accelerated, or combined with his condition and contributed to his disability in a significant manner. The ALJ, relying on the medical record that contained EMG test results pre-dating Mr. Henderson's employment at Lucas Tree and after the work-related injury at Glidden, found that Mr. Henderson likely had ongoing problems with his neck and left arm, including numbness and trouble with grip in his left hand. Mr. Henderson testified regarding the extensive hand use required by his job, and the ALJ found this testimony to be credible. The ALJ concluded that "Mr. Henderson's inability to work from December 8, 2011, to March 18, 2012, is evidence that his work at Lucas Tree contributed to his disability in a significant manner." The ALJ also relied upon Dr. Barr's deposition testimony, including his recommendation that Mr. Henderson stay out of work and rest his arms, to support the finding that the symptoms Mr. Henderson experienced as result of his work at Lucas Tree increased his disability. Thus, there was competent evidence to support the ALJ's determination that Mr. Henderson's employment at Lucas Tree aggravated,

accelerated, or combined with his condition and contributed to his disability in a significant manner.

[¶10] Lucas Tree also contends that the ALJ erred because she based her decision in part on Mr. Henderson's testimony, which she expressly found to lack credibility in some respects. When the party who bears the burden of proof introduces evidence that is undisputed, the Law Court has held that the "fact-finder has the prerogative selectively to accept or reject it, in terms of the credibility of the witnesses or the internal cogency of the content." *Dionne v. LeClerc*, 2006 ME 34, ¶ 15, 896 A.2d 923; *see also In RE Andrea W.*, 537 A.2d 596, 598 (Me. 1988) ("We have long recognized the principle that the [fact-finder] has the responsibility to assess the credibility of the witnesses and to find facts[.]"). In the decision, the ALJ grappled with the issue of Mr. Henderson's credibility. The ALJ clearly found parts of Mr. Henderson's testimony credible and other parts not credible. The ALJ rejected some of Mr. Henderson's testimony, but she was not obligated to reject all of his testimony, particularly when there are supporting medical opinions. Thus, we find no error.

C. Reasonable Refusal of Work

[¶11] Lucas Tree argues that Mr. Henderson unreasonably refused its offer of flagging work from December 8, 2011, through December 15, 2011, and

therefore forfeited the right to incapacity benefits pursuant to section 214(1)(A).

Section 214(1)(A) provides:

If an employee receives a bona fide offer of reasonable employment from the previous employer or another employer or through the Bureau of Employment Services and the employee refuses that employment without good and reasonable cause, the employee is considered to have voluntarily withdrawn from the work force and is no longer entitled to any wage loss benefits under this Act during the period of the refusal.

There is no dispute that the flagging job that Lucas Tree offered Mr. Henderson was a bona fide offer of employment. Accordingly, once Lucas Tree offered this employment, Mr. Henderson was obligated to accept that offer, absent good and reasonable cause for refusal. *Thompson v. Earle W. Noyes & Sons, Inc.*, 2007 ME 143, ¶ 7, 935 A.2d 663.

[¶12] The ALJ did not err in finding that Mr. Henderson's refusal of flagging work was reasonable. Mr. Henderson testified that he did not feel he could do the work because arm pain would prevent him from getting in and out of the truck, and he was restricted from lifting or pulling more than five pounds. While Dr. Barr did not take Mr. Henderson out of work until December 15, 2011, the ALJ determined that because Mr. Henderson was incapable of working as of December 15, 2011, it was unlikely he was capable of working the week before. Dr. Barr testified that he took Mr. Henderson out of work because he understood that Mr. Henderson would be required to do his regular duties at Lucas Tree, but that he

could have worked with restrictions. However, this distinction was not known to the parties until Dr. Barr's deposition and the testimony did not negate the fact that he had taken Mr. Henderson out of work as of December 15, 2011. It was reasonable for Mr. Henderson to rely on his treating doctor's assessment of work capacity even if that assessment evolved over time. Dr. Barr did not release Mr. Henderson to return to work until March 15, 2012. Although Dr. Barr later determined that Mr. Henderson could have worked in a light-duty capacity throughout that period, Mr. Henderson correctly understood that Dr. Barr had taken him out of work for the entire period, and did not unreasonably refuse the offer of flagging work.

III. CONCLUSION

[¶13] Despite the credibility issues in this case, the ALJ found that Mr. Henderson sustained a work-related injury; that the injury aggravated or combined with his preexisting condition in a manner sufficient to satisfy 39-A M.R.S.A § 201(4); that Mr. Henderson was incapacitated from December 15, 2011, until March 15, 2012; and that Mr. Henderson did not unreasonably refuse a bona fide offer of reasonable employment under 39-A M.R.S.A § 214(1)(A). The decision reached by the ALJ was supported by competent evidence, did not involve the misconception of applicable law, and was neither arbitrary nor without rational foundation. We will not disturb it on appeal.

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 (Supp. 2015).

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