ROBERT DANIELS
(Appellant)

v.

S.D. WARREN CO.
(Appellee)

and

ESIS
(Insurer)

Conference held: December 1, 2016
Decided: December 7, 2017

PANEL MEMBERS: Administrative Law Judges Stovall, Goodnough, and Knopf
BY: Administrative Law Judge Stovall

[¶1] Robert Daniels appeals from a decision of a Workers' Compensation Board administrative law judge (*Collier, ALJ*) granting S.D. Warren's Petition for Review and authorizing S.D. Warren to terminate wage loss benefits due to the durational limit for partial benefits. *See* 39-A M.R.S.A § 213 (Supp. 2016). The ALJ concluded that Mr. Daniels did not establish a change of economic or medical circumstances since the prior decree of January 18, 2011, at which time he was found to have a partial work capacity. Mr. Daniels contends that the ALJ was required to adopt the independent medical examiner's (IME's) findings that he had no work capacity, and that those findings establish a change in medical

circumstances. *See* 39-A M.R.S.A. § 312(7) (Supp. 2016). We disagree with this contention and affirm the ALJ's decision.

## I. BACKGROUND

[¶2] Robert Daniels began working for S.D. Warren as a millwright and rigger in 1968 after graduating from high school. On April 2, 2003, he sustained a bilateral shoulder injury while strenuously pulling on a large wrench. Mr. Daniels was diagnosed with bilateral rotator cuff tears and had surgery in June of 2003 and July of 2004. He worked until he was sent home by S.D. Warren on January 9, 2005. In 2008, Dr. Esponnette tested Mr. Daniels' range of motion. In a January 18, 2011, board decree, Mr. Daniels was found to have a $300.00 per week earning capacity and was awarded partial wage loss benefits reflecting the difference between his imputed earning capacity and his pre-injury average weekly wage.

[¶3] S.D. Warren filed a Petition for Review on September 14, 2012, and a Petition to Determine Extent of Permanent Impairment on November 1, 2012. Mr. Daniels filed a Petition for Review and a Petition to Determine Permanent Impairment on November 15, 2012. In this round of litigation, Dr. Graf performed an independent medical examination pursuant to 39-A M.R.S.A § 312 and measured Mr. Daniels' range of motion. Dr. Graf's assessment indicated, according to Mr. Daniels, that Mr. Daniels' range of motion is less than it was when Dr. Esponnette had tested him in 2008. Further, in 2013, Dr. Graf wrote "Mr.

Daniels has no work capacity by reason of his chronic shoulder pain and shoulder pathology." Mr. Daniels asserts that that this is evidence of a change in medical circumstances because he had a partial work capacity in 2011.

[¶4] The ALJ issued a decree on January 8, 2016, concluding that Mr. Daniels had been paid 520 weeks of wage loss benefits under section 213 and that his permanent impairment was below the applicable threshold of 13.2%. *See* Me. W.C.B. Rule ch. 2, § 1(2). The ALJ also concluded that Mr. Daniels had not demonstrated either an economic or medical change of circumstances and therefore, granted S.D. Warren's Petition for Review and Petition to Determine Permanent Impairment, and denied Mr. Daniels' Petition for Review. The ALJ also dismissed Mr. Daniels' Petition to Determine Permanent Impairment without prejudice at Mr. Daniels' request.

[¶5] Mr. Daniels filed a motion for additional findings of fact and conclusions of law, which the ALJ denied. This appeal followed. Mr. Daniels maintains that the ALJ erred by failing to find that his bilateral shoulder condition has worsened since the last decree of January 18, 2011, thus establishing a change in medical circumstances; and by not accepting Dr. Graf's opinion that he has no work capacity.

## II. DISCUSSION

### A. Standard of Review

[¶6] Appeals from decisions of administrative law judges are governed by 39-A M.R.S.A. §§ 321-B, 322 (Supp. 2016). 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 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).

### B. Comparative Medical Evidence

[¶7] In support of his contention that comparative medical evidence is not always required, Mr. Daniels cites *Curtis v. Bridge Constr. Corp*., 428 A.2d 62 (Me. 1981). *Curtis* holds that comparative medical evidence is not necessary when total benefits are awarded pursuant to an agreement that does not specify how much of the worker's incapacity is attributable to the disability, and how much, if any, is attributable to the unavailability of work; and, when the employer is

alleging that the employee is no longer suffering any disability as a result of the work injury. *Id.* at 64 – 65. Because the agreement establishes some disability, "[h]ence the proving of no present physical disability at the time of the petition for review necessarily establishes [a] change in the worker's condition" after the agreement was executed. *Id.* at 65.

[¶8] Here, S.D. Warren is not alleging that Mr. Daniels no longer suffers any disability as a result of the work injury, nor was the previous award of benefits based on an ambiguous agreement. In *Grubb v. S.D. Warren Co.*, 2003 ME 139, 837 A.2d 117, the Law Court stated:

> It is well-established that 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. *See, e.g., McIntyre v. Great N. Paper, Inc.*, 2000 ME 6, ¶¶ 5–6, 743 A.2d 744, 746–47; *Folsom v. New England Tel. & Tel. Co.*, 606 A.2d 1035, 1038 (Me. 1992).

*Id.* at ¶ 7.

[¶9] The difficulty for Mr. Daniels is that Dr. Graf gave no indication that he made a comparison between Mr. Daniels' physical condition from the last decree in January of 2011, and when he examined Mr. Daniels in March of 2013. The ALJ declined, in light of *Van Horn v. Hillcrest Foods, Inc.*, 392 A.2d 52 (Me. 1978), to assume that Dr. Graf's opinion as to work capacity was done by way of

a comparison between Mr. Daniels' work capacity in 2011 and 2013. Further, because Dr. Graf provided no evidence that he compared Mr. Daniels' range of motion between the 2008 testing and his testing in 2013, the ALJ declined to make his own medical comparison between the 2008 and 2013 range of motion results. The Law Court stated in *Van Horn*:

> The [ALJs] are not themselves medical experts. To require a[n ALJ] to compare [the ALJ's] findings, based on [the ALJ's] own understanding of the medical testimony given in a prior proceeding, with the current testimony of different doctors, requires that the [ALJ] act as a fulcrum point, attempting to interpret and integrate the testimony of two different medical experts. It is a sounder practice to have that comparison made by a physician, who is better able to compare another physician's earlier observations with his own. The later physician's opinion as to the intervening change can be tested through cross-examination in a way that the conclusion of a[n ALJ] making the comparison himself obviously could not be. The physician's opinion as to change can also be met on rebuttal by evidence of the same type and, where available, by the testimony of the same doctor who made the earlier examination.

*Id.* at 56 n.4.

[¶10] Mr. Daniels contends that no medical comparison was needed because he went from being partially disabled to totally disabled and this clearly shows a medical change in circumstances. Although in certain cases in which the change is apparent (such as in *Curtis*), comparative medical evidence may not be necessary to establish a change in circumstances, this is not such a case. The ALJ did not err when declining to make an independent comparison between Mr. Daniels' medical condition in 2011 versus 2013. Dr. Graf's finding that Mr.

Daniels is totally incapacitated may rest on his opinion that Mr. Daniels' condition has worsened, or it may rest on an understanding that Mr. Daniels has been totally incapacitated all along. Because Dr. Graf made no comparison between 2011 and 2013, there is no way of knowing whether he thought that Mr. Daniels has had a change in his incapacity. The only evidence that Dr. Graf provided on this issue is that, in his opinion, Mr. Daniels is disabled. This alone does not prove a change in medical condition. Moreover, the ALJ was not persuaded by Mr. Daniels' testimony that his condition had worsened since 2011.

[¶11] Because he concluded that Mr. Daniels did not establish a change in medical or economic circumstances, the ALJ was not obligated to revisit the prior decree, and thus, was not required to adopt the IME's current medical findings regarding level of incapacity pursuant to section 312(7).

## III. CONCLUSION

[¶12] Because the ALJ's findings are supported by competent evidence, the decision involved no misconception of applicable law, and the application of the law to the facts was neither arbitrary nor without rational foundation, we affirm the ALJ's decision.

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. 2016).

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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