

WILLIAM PARKER
(Appellant)

v.

CITY OF LEWISTON
(Appellee)

and

CCMSI
(Insurer)

Argued: September 26, 2024
Decided: June 4, 2025

PANEL MEMBERS: Administrative Law Judges Stovall, Hirtle, and Smith
BY: Administrative Law Judge Smith

[¶1] William Parker appeals from a decision of a Workers' Compensation Board administrative law judge (*Rooks, ALJ*) granting his Petition for Review of Incapacity regarding a January 22, 2015, date of injury, and Petitions for Award and for Payment of Medical and Related Services regarding a February 16, 2022, date of injury. Mr. Parker was awarded closed-end periods of partial and total incapacity benefits, and ongoing partial benefits, with an imputed full-time, minimum-wage earning capacity. Mr. Parker contends the ALJ erred as a matter of law by basing her decision regarding his earning capacity for the period after he recovered from hip replacement surgery on a speculative medical opinion proffered by the independent medical examiner (IME), *see* 39-A M.R.S.A. § 312. He further contends the

evidence, mainly the City of Lewiston's labor market survey, compels the finding that work is unavailable to Mr. Parker within his local community due to his work injuries, and therefore he is entitled to ongoing 100% partial incapacity benefits. We affirm the decision

I. BACKGROUND

[¶2] Mr. Parker began working for the City in 2004. His duties included construction, operating heavy equipment, landscaping, plowing, and mowing. On January 22, 2015, Mr. Parker was removing tree stumps on a steep incline using a bulldozer, when the machine went out of his control. Mr. Parker jumped from the bulldozer, trying to avoid injury. He nevertheless sustained a broken right tibia. Mr. Parker underwent surgery that same day, and a second surgery approximately one year later, performed by Dr. Michael Newman. Mr. Parker was out of work from the initial date of injury until June 2016.¹ When he returned, the City was able to accommodate his restrictions with light duty work.

[¶3] Mr. Parker continued to experience right knee pain. He underwent physical therapy and received steroid injections to help alleviate his symptoms. He continued to perform light duty work for the City until February 16, 2022, when he sustained a second work injury. Mr. Parker was performing trash removal on a particularly cold day, when many of the trash barrels were iced to the ground. At the

¹ During that time, the City voluntarily paid Mr. Parker total benefits, without prejudice.

end of the day, he experienced severe right leg pain that inhibited his ability to walk. He was diagnosed with right hip avascular necrosis and was removed from work by Dr. Newman. Mr. Parker has not worked since February 16, 2022. Dr. Newman performed a total right hip replacement on March 22, 2023.

[¶4] Mr. Parker filed his petitions in April of 2022, and the ALJ conducted an evidentiary hearing on January 10, 2023. The ALJ credited Mr. Parker's testimony that his right leg is constantly painful; he walks with a limp; he requires the use of crutches; his condition worsened over recent months making it difficult to put weight on his right leg; and that his condition has affected his ability to sleep.

[¶5] Dr. Gregory Taggart performed an independent medical examination on September 21, 2022, pursuant to 39-A M.R.S.A § 312. He stated in his report that Mr. Parker suffers from right knee posttraumatic arthritis due to the January 22, 2015, right tibia fracture. Dr. Taggart further opined that Mr. Parker's work activities leading up to February 16, 2022, caused an acetabular stress fracture and that condition caused his previously asymptomatic avascular necrosis to become symptomatic. He assessed Mr. Parker with a sedentary work capacity related to the February 2022 work injury.

[¶6] Dr. Taggart was deposed in February 2023—before Mr. Parker underwent his right hip replacement. He testified that Mr. Parker would likely

require three months to recover after the surgery and would regain light duty work capacity thereafter.

[¶7] The ALJ admitted into evidence a report from Dr. Newman dated May 2, 2023. Dr. Newman opined that Mr. Parker should apply for Social Security disability and that he would not be able to perform any manual labor.

[¶8] The City presented evidence from labor market expert, Christopher Temple. Mr. Temple performed a labor market survey and opined that a stable labor market existed for Mr. Parker, and that Mr. Parker had an earning capacity of \$745.60 per week (\$18.64 per hour). Mr. Parker testified that he had reviewed the labor market survey and did not believe he could perform any of the jobs listed.

[¶9] The ALJ granted Mr. Parker's petitions and awarded partial incapacity benefits up to the date of the total right hip replacement surgery, total incapacity benefits for a three-month recovery period following the surgery, and partial incapacity benefits thereafter. For the periods of partial incapacity, the ALJ imputed a full-time, minimum wage-earning capacity (\$552.00 per week).

[¶10] Mr. Parker filed a Motion for Additional Findings of Fact and Conclusions of Law, after which the ALJ issued additional findings but did not alter the outcome of the initial decision. Mr. Parker filed this appeal.

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). Because Mr. Parker requested 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 [ALJ].” *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446.

[¶12] As the petitioner, Mr. Parker bore the burden of proof. *Fernald v. Dexter Shoe Co.*, 670 A.2d 1382, 1385 (Me. 1996). “When an [ALJ] concludes that the party with the burden of proof failed to meet that burden, we will reverse that determination only if the record compels a contrary conclusion to the exclusion of any other inference.” *Kelley v. Me. Pub. Employees Ret. Sys.*, 2009 ME 27, ¶ 16, 967 A.2d 676 (quotation marks omitted).

B. The IME’s Opinion on Post-Recovery, Ongoing Work Capacity

[¶13] Mr. Parker contends the ALJ erred as a matter of law when finding, based on Dr. Taggart’s opinion, that Mr. Parker would recover a light duty work

capacity after recovering from hip replacement surgery.² He contends that opinion, stated before Mr. Parker underwent the surgery, is too speculative to form the basis of a decision on Mr. Parker's ongoing work capacity, citing *Grant v. Georgia-Pacific Corp.*, 394 A.2d 289 (Me. 1978). We disagree with this contention.

[¶14] We note that the ALJ was required to accept the IME's medical findings absent "clear and convincing evidence to the contrary." *Id.* § 312(7). When the ALJ adopts the IME's findings, as in this case, we reverse only if those findings are not supported by competent evidence, or the record discloses no reasonable basis to support the decision. *Dillingham v. Great N. Paper*, Me. W.C.B. No. 15-7, ¶ 3 (App. Div. 2015); *May v. Saddleback, Inc.*, Me. W.C.B. No. 16-2, ¶ 5 (App. Div. 2016). "[A]lthough slender evidence may be sufficient [to meet a burden of proof], it must be evidence, not speculation, surmise or conjecture." *Grant*, 394 A.2d at 290.

[¶15] Dr. Taggart's written report of September 2022 states that "a right hip replacement [may be] indicated." The report further states that if that surgery becomes necessary, it would be "the direct result of the work-related injury on February 16, 2022." At his deposition, conducted before Mr. Parker underwent hip replacement surgery, Dr. Taggart opined that following a three-month recovery period after the hip replacement surgery, Mr. Parker "would probably be able to

² Neither party has appealed the award of total incapacity benefits for the three-month, immediate post-surgical period.

improve to . . . at least light duty.” Dr. Taggart further opined that after the three-month period, Mr. Parker would have no restrictions on driving, nor would he need crutches.

[¶16] Mr. Parker did not provide evidence of his post-operative condition until after the evidence was closed and the parties had submitted final written arguments to the ALJ. Mr. Parker’s counsel submitted a post-surgical treatment record from Dr. Newman, which was admitted over objection. Contrary to Mr. Parker’s characterization, Dr. Newman did not opine that Mr. Parker remained totally incapacitated from work following his recovery from hip replacement surgery. However, Dr. Newman did opine that Mr. Parker would no longer “be very useful for the [sic] any type of manual labor.” Thus, Dr. Newman’s post-surgical opinion that Mr. Parker could not return to manual labor provides support for Dr. Taggart’s opinion that Mr. Parker would regain light duty work capacity.

[¶17] Additionally, even if we were to determine that Dr. Taggart’s opinion regarding the ongoing post-recovery period were too speculative, it was incumbent on the ALJ to base her decision on the remaining competent evidence before her, namely Dr. Taggart’s medical findings and other evidence credited by the ALJ (including Mr. Parker’s testimony) regarding Mr. Parker’s condition after the

February 2022 injury.³ Accordingly, we conclude that the ALJ relied upon legally competent evidence to reach her conclusion and thereby committed no reversible error when relying in part on Dr. Taggart’s opinion. The evidentiary record supports a determination that Mr. Parker is entitled to partial incapacity benefits from the date he went out of work, February 16, 2022, to the present and continuing (excluding the three-month immediate period of total incapacity benefits immediately following the hip replacement surgery), with an imputed minimum-wage earning capacity of \$552.00 per week.⁴

C. Level of Incapacity Benefits

[¶18] Mr. Parker contends the evidence, particularly the labor market survey submitted by the City, compels a finding that he is entitled to ongoing 100% partial incapacity benefits. This contention lacks merit.

[¶19] A partially incapacitated employee may be entitled to “100% partial” incapacity benefits pursuant to 39-A M.R.S.A § 213 based on the combination of a partially incapacitating work injury and the loss of employment opportunities that are attributable to that injury. *Morse v. Fleet Fin. Grp.*, 2001 ME 142, ¶ 6, 782 A.2d

³ To the extent either party would construe Dr. Newman’s opinion as contrary to the IME’s opinion, such construction is barred because Dr. Newman’s opinion was never provided to the IME, nor was a request made to update the IME’s opinion with post-surgical records. 39-A M.R.S.A. § 312(7) (“Contrary evidence does not include medical evidence not considered by the independent medical examiner.”).

⁴ We reiterate that neither party has appealed the award of total incapacity benefits for the three-month period following the hip replacement surgery.

769. To establish entitlement to 100% partial incapacity benefits when the employee is the petitioning party, as in this case, the employee has the burden to show that work is unavailable within the employee's local community, due to the work injury. *Monaghan v. Jordan's Meats*, 2007 ME 100, ¶ 14, 928 A.2d 786. Although an employee may prove that work is unavailable with evidence of an unsuccessful work search, "any competent and persuasive evidence to show the unavailability of work in his or her local community is acceptable, including labor market surveys, or other credible evidence regarding availability of work for a particular employee in the local community." *Id.* ¶ 16.

[¶20] Mr. Parker did not submit evidence of a work search, but relies on the City's labor market survey to meet his burden to prove the unavailability of work. However, the ALJ accepted Dr. Taggart's opinion that Mr. Parker had a sedentary work capacity. There are positions identified in Mr. Temple's labor market survey for sedentary work, and Dr. Taggart opined that Mr. Parker could perform some of the jobs identified in the survey. Accordingly, we reject the contention that the labor market survey compels the conclusion that work is unavailable to Mr. Parker in his local community.

III. CONCLUSION

[¶21] Competent evidence supports and provides a rational basis for the ALJ's finding that Mr. Parker regained partial capacity for work after recovering from hip

replacement surgery. Further, the City's labor market survey does not compel the conclusion that no work was available to Mr. Parker in his local community; thus, the ALJ did not err when declining to award 100% partial incapacity benefits.

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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