GREGORY TRAUSSI
(Appellant)

v.

B & G FOODS, INC.
(Appellee)

and

MAINE EMPLOYERS' MUTUAL INSURANCE CO.
(Insurer)

Argued: November 19, 2014
Decided: March 26, 2015

PANEL MEMBERS: Hearing Officers Greene, Collier, and Stovall

Majority: Hearing Officers Collier and Stovall
Dissent: Hearing Officer Greene

BY: Hearing Officer Collier

[¶1] Gregory Traussi appeals from a decision of a Workers' Compensation Board hearing officer (*Elwin, HO*) granting his Petition for Restoration regarding a November 23, 2006, work injury, denying his Petition for Restoration regarding an April 5, 2010, injury, and granting in part his Petition for Award regarding a March 31, 2011, work injury. Mr. Traussi contends that the hearing officer erred in three respects, by: (1) not awarding incapacity benefits for the 2010 work injury, based on the res judicata effect of an earlier decision; (2) rejecting his testimony about his work duties; and (3) adopting the conclusions of the independent medical

examiner's written report rather than certain portions of his deposition testimony, without citing clear and convincing evidence to support her choice, *see* 39-A M.R.S.A. § 312(7) (Supp. 2014).[1] We agree with Mr. Traussi's first contention of error, and remand the case for further proceedings.

I. BACKGROUND

[¶2] Gregory Traussi began working in a B & G Foods factory in May of 2000. In November of 2006, Mr. Traussi injured his low back when manipulating a large bag of beans that was suspended from the ceiling. He underwent surgery and was awarded a closed-end period of total incapacity benefits for that injury.

[¶3] Mr. Traussi returned to work, but sustained a second low back injury in April 2010 while shoveling meat scraps into a tote. He was out of work from April 9, 2010, until November 8, 2010, when he returned to work with restrictions. He filed a Petition for Restoration regarding the 2006 work injury, and a Petition for Award related to the 2010 work injury. In a 2011 decree, the hearing officer described Mr. Traussi's condition as consisting of "underlying multi-level degenerative disc disease [that] has been aggravated by several work-related injuries, including the April 5, 2010 meat-shoveling incident." She further found

[1] Title 39-A M.R.S.A. § 312(7) provides:

> The board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings. Contrary evidence does not include medical evidence not considered by the independent medical examiner. The board shall state in writing the reasons for not accepting the medical findings of the independent medical examiner.

"that Mr. Traussi's disability due to his ongoing lower back and radicular symptoms is contributed to in a significant manner by his employment, including his November 23, 2006 and April 5, 2010 work injuries." The hearing officer awarded a period of total incapacity benefits consistent with the time that Mr. Traussi was out of work. She denied his claim for ongoing partial incapacity benefits for those injuries.[2]

[¶4] Mr. Traussi suffered a third low back injury on March 31, 2011, after taking a misstep off a platform at work. Mr. Traussi then brought the petitions at issue in this appeal: Petitions for Restoration on his two established low back injuries, and a Petition for Award seeking to establish both an acute and a gradual work injury as of March 31, 2011. He sought an award of total or 100% partial incapacity benefits from that date forward.

[¶5] The hearing officer found that Mr. Traussi's disability due to his ongoing lower back symptoms is causally related to the 2006 work injury, and granted the Petition for Restoration on that injury. She further found, based on the opinion of the independent medical examiner, that the 2010 work injury was a temporary aggravation of the 2006 work injury and does not play any ongoing

[2] The hearing officer stated in the 2011 decision that Mr. Traussi sought total incapacity benefits through November 7, 2010 "and partial incapacity benefits from November 8, 2010 to the present and continuing."

role in Mr. Traussi's disability. She therefore denied the Petition for Restoration for the 2010 injury.

[¶6] With respect to the March 31, 2011, incident, the hearing officer concluded that Mr. Traussi established that he suffered an acute—but not a gradual—work injury on that date, and that the acute injury did not contribute to his ongoing disability in a significant manner. *See* 39-A M.R.S.A. § 201(4) (Supp. 2014). She therefore granted only the protection of the Act for the 2011 injury.

[¶7] Finally, the hearing officer imputed a $400.00 weekly earning capacity and awarded ongoing partial incapacity benefits for the 2006 injury only, based on the difference between Mr. Traussi's 2006 average weekly wage of $564.69 and his $400.00 weekly earning capacity.

[¶8] Mr. Traussi filed a motion for additional findings of fact and conclusions of law. The hearing officer issued additional findings but did not alter the outcome. Mr. Traussi now appeals.

II. DISCUSSION

A. Standard of Review

[¶9] The Appellate Division is "limited to assuring that the [hearing officer's] factual 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." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983).

B. Res Judicata

[¶10] Mr. Traussi contends that the hearing officer was bound by the res judicata effect of the 2011 decision to find that the 2010 work injury continued to contribute to his disability, because she did not determine that there had been a change in circumstances. *See, e.g., Folsom v. New England Tel. & Tel. Co*., 606 A.2d 1035, 1038 (Me. 1992). "[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 (citations omitted). A party is precluded from relitigating an issue that has been (1) actually litigated, (2) determined by a final and valid judgment, and (3) the determination was essential to the judgment. *Cline v. Me. Coast Nordic*, 1999 ME 72, ¶ 9, 728 A.2d 686.

[¶11] The hearing officer specifically found in the 2011 decision that "Mr. Traussi suffered an injury to his lower back arising out of and in the course of his work for [the] Employer on April 5, 2010," based on Mr. Traussi's testimony as supported by Dr. Carrier's contemporaneous medical records. She also found that

his "disability due to his ongoing lower back and radicular symptoms is contributed to in a significant manner by his employment, including his November 23, 2006 and April 5, 2010 work injuries."[3] This was a determination that the 2010 injury was compensable under 39-A M.R.S.A. § 201(4).[4] The hearing officer was bound by these findings when deciding the most recent petitions, absent a showing of changed circumstances. *See Moore v. City of Portland*, 2004 ME 49, ¶ 10, 845 A.2d 1163; *see also Ervey v. Ne. Log Homes Inc.*, 638 A.2d 709, 710-11 (Me. 1994). Changed circumstances sufficient to overcome the res judicata effect of these findings must be established with "comparative medical evidence." *Grubb*, 2003 ME 139, ¶¶ 7-9, 837 A.2d 117. "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).

[3] These findings were essential to the claim, and necessary to the decision, because without them there would have been no benefits awarded for the 2010 injury. Therefore, the parties had every incentive and opportunity to litigate that issue. The issues *were* litigated, Mr. Traussi prevailed, and benefits were awarded (in part) for the 2010 injury. The fact that incapacity benefits were awarded only up to the time that Mr. Traussi returned to work on light duty does not negate these findings, or render them unnecessary to the decision. Incapacity benefits were not awarded beyond that point based on separate findings that his earning incapacity ended then—not that his injury had resolved. In fact, the hearing officer found that he "returned to work for Employer, with permanent physical restrictions due to his back condition." Moreover, the 2011 decision involved the identical parties, and both are equally bound by its findings. In this situation, the res judicata effects of the decision do not depend on which party files a subsequent petition.

[4] The hearing officer expressly recognized in her 2013 decision that the 2011 decision established the compensability of the 2010 injury.

[¶12] In her 2013 decision the hearing officer found that the "April 5, 2010 and March 31, 2011 injuries do not contribute in a significant manner to Mr. Traussi's ongoing disability," and in her 2014 Further Findings of Fact and Conclusions of Law she found that neither of these injuries "remains a cause of his ongoing disability." However, she did not evaluate whether there had been any change of circumstances since the 2011 decision. She cited the report of Dr. Bradford, who performed an independent medical evaluation of Mr. Traussi in 2012 pursuant to 39-A M.R.S.A. § 312. But Dr. Bradford did not say that Mr. Traussi's condition had changed since 2011. He explained in his report that he "re-referred" to the notes of Dr. Carrier and others from April of 2010 and concluded that the incident in April of 2010 was not particularly noteworthy from an orthopedic standpoint. This is an interpretation of the evidence as of April of 2010, not an analysis of whether Mr. Traussi's condition had changed since the decision in November of 2011.

[¶13] The hearing officer interpreted Dr. Bradford's statement as a conclusion that the incident in April of 2010 was only a temporary aggravation that no longer played a role in his condition. She stated in her additional Findings of Fact and Conclusions of Law that "there is no contradiction between the Board's earlier finding that the April 5, 2010 incident contributed to Mr. Traussi's disability in a significant manner as of the time of the November 9, 2011 Decision,

and the Board's current finding (based on Dr. Bradford's medical opinion) that it no longer does." But given the findings from the 2011 decree, Dr. Bradford's report does not provide the comparative analysis on which to base the conclusion that the 2010 injury had resolved.[5] *See Klein v. State of Me. Dep't of Labor*, Me. W.C.B. No. 15-5, ¶¶ 10-12 (App. Div. 2015); *cf. Jackson v. Pratt-Abbott Cleaners*, Me. W.C.B. No. 14-13, ¶¶ 10-11 (App. Div. 2014). Instead, Dr. Bradford's report uses the same set of facts relied on in 2011 to reach a different conclusion. *See McIntyre*, 2000 ME 6, ¶¶ 7-8, 743 A.2d 744.

[¶14] We conclude that the hearing officer committed error by failing to conduct an analysis to determine whether there was any change in circumstances sufficient to warrant revisiting the findings from the 2011 decision. Therefore, we remand this matter for such a determination.

C. Treatment of Mr. Traussi's Testimony

[¶15] Mr. Traussi also argues that the hearing officer erred by rejecting his testimony concerning his work duties, asserting that there was no competent evidence in the record to justify such a conclusion. He points to the hearing officer's statement that it "would be virtually impossible for Mr. Traussi accurately

[5] The causative effects of an injury are certainly capable of ending at some point, as the dissent points out. In our view, however, once they have been established in a board decision, as they were here, they must be affirmatively shown to have ended. There was no such finding in either the 2011 or 2013 decision.

to recall which symptoms he experienced and what work activities he was performing at specific points in time over the past eight years."

[¶16] We disagree. The hearing officer's comment was simply an explanation of her assessment of the relative reliability of information recorded in the contemporaneous medical records as opposed to Mr. Traussi's memory of the correlation between work activities and his symptoms at specific points in time.[6] As triers of fact, the board's hearing officers are uniquely situated to assess the credibility of witness testimony, and the Appellate Division grants deference to those determinations. *See, e.g., Dubois v. Madison Paper Co.*, 2002 ME 1, ¶ 16, 795 A.2d 696; *Saltz v. M.W. Sewall & Co.*, Me. W.C.B. No. 14-34, ¶ 15 (App. Div. 2014).

D. Adoption of 312 Examiner's Written Report's Conclusions

[¶17] Finally, Mr. Traussi argues that the hearing officer erred by adopting the conclusions from the independent medical examiner's written report over some potentially conflicting testimony during his deposition. He claims that she was required to find "clear and convincing evidence to the contrary" pursuant to section 312(7) before rejecting the examiner's deposition testimony. However, the hearing officer did not reject the medical findings of the independent medical examiner in this case. After considering both the written report and his deposition testimony,

[6] Specifically, Dr. Carrier's records from November 18, 2010 through March 23, 2011.

she adopted the findings that he expressed in his written report, concluding that his deposition testimony did not fundamentally alter those conclusions. She was not required by section 312(7) to find clear and convincing evidence in order to find the examiner's written conclusions more persuasive than selected portions of his deposition testimony.

III. CONCLUSION

The entry is:

> The hearing officer's decision with respect to the Petition for Restoration for the April 5, 2010, work injury is vacated, and the case is remanded for further proceedings with respect to that Petition. In all other respects, the hearing officer's decision is affirmed.

Hearing Officer Greene, dissenting

[¶18] I disagree with the majority's conclusion that the prior 2011 decision awarding a closed-end period of incapacity benefits for a disability found by the hearing officer to be "contributed to in a significant manner by his employment, including his November 23, 2006 and April 5, 2010 work injuries," each of which had aggravated Mr. Traussi's "underlying multi-level degenerative disc disease," was entitled to res judicata effect on the issue of the continuing contribution of those injuries in the subsequent proceeding addressing his claim for a restoration of benefits based on those injuries. Therefore, I respectfully dissent.

[¶19] Generally, "valid and final decisions of the Workers' Compensation Board are subject to 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 (citations omitted). Most commonly, res judicata is applied in workers' compensation cases to require a showing of a change in circumstances where the petitioning party seeks to establish a different level of earning incapacity from that previously adjudicated for purposes of an award of ongoing incapacity benefits. *See, e.g,. McIntyre v. Great N. Paper, Inc.*, 2000 ME 6, ¶ 6, 743 A.2d 744 (employee's petition for review); *Folsom v. New England Tel. & Tel. Co.*, 606 A.2d 1035, 1036 (Me. 1992) (employer's petition for review). An employer may also obtain relief from an existing compensation payment scheme by showing that the employee's disability is no longer causally related to the work injury. *See Soucy v. Fraser Paper, Ltd.*, 267 A.2d 919, 921-22 (Me. 1970).

[¶20] In the present case there was no compensation payment scheme in effect when Mr. Traussi filed his present petition for restoration. Thus, he bore the burden of proof on his claim for additional benefits. However, the majority concludes that, rather than having to prove the existence of an ongoing causal connection between his disability and his work injuries or a continuing significant

contribution to his disability from those injuries, *see* 39-A M.R.S.A. § 201(4), the prior decree established the existence of such a causal connection and significant contribution (absent a medical change negating such), not only for the period for which benefits were previously awarded, but for purposes of any future claim for benefits. In so doing it approves what is akin to the offensive use of collateral estoppel by Mr. Traussi.[7]

[¶21] Initially, the *offensive* use of collateral estoppel is permitted only "'on a case-by-case basis if it serves the interests of justice' and we 'require that the identical issue was determined by a prior final judgment, and that the party estopped had a fair opportunity and incentive to litigate the issue in the prior proceeding.'" *Van Houten v. Harco Constr., Inc*., 655 A.2d 331, 333 (Me. 1995) (quoting *Mut. Fire Ins. v. Richardson*, 640 A.2d 205, 208 (Me. 1994)).

[¶22] Collateral estoppel, or issue preclusion, applies "where a question of fact essential to a judgment is actually litigated and determined by a valid final judgment." *Cianchette v. Verrier*, 155 Me. 74, 89, 151 A.2d 502, 510 (1959); *see also Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 9, 940 A.2d 1097. Maine case law is in accord with the RESTATEMENT (SECOND) OF JUDGMENTS: ISSUE PRECLUSION § 27 (1982), which provides as follows: "When an issue of fact

[7] Where a "plaintiff[] seek[s] to use issue preclusion to tie the defendant['s] hands with an adversely decided issue from a previous case, the use of collateral estoppel is deemed 'offensive.'" *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 573 (1st Cir. 2003). "Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 (1979).

or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *See, e.g., Curtis v. Allstate Ins. Co.*, 2002 ME 9, ¶ 23 n.6, 787 A.2d 760.

[¶23] In the 2011 decision the hearing officer made a specific finding that "Mr. Traussi's disability due to his ongoing lower back and radicular symptoms is contributed to in a significant manner by his employment, including his November 23, 2006 and April 5, 2010 work injuries." However, she only awarded incapacity benefits for a closed end period—the period "Mr. Traussi was out of work due to low back pain or depression/anxiety from April 9, 2010 through November 7, 2010." Mr. Traussi made no claim for ongoing benefits; and the hearing officer denied Mr. Traussi's claim for partial incapacity benefits to March 31, 2011, following his return to work, because, despite "permanent physical restrictions due to his back condition" following his return to work, she was "not persuaded by Mr. Traussi's argument that he has had reduced earnings from November 7, 2010 until March 31, 2011 due to his inability to work overtime," a finding of no earning incapacity which made any determination of causation for that period unnecessary, i.e. nonessential, even for this additional period ending prior to the decision.[8]

[8] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i ("*Alternative determinations by court of first instance.* If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone."); *Stanton v. Schultz*, 222 P.3d 303, 308-310 (Colo. 2010)

[¶24] The findings *essential* to the decision awarding incapacity benefits for a closed-end period were as follows: Mr. Traussi's 2006 and 2010 work-related, aggravation injuries to his low back and their psychological sequela contributed in a significant manner to his disability during the period that he was out of work and totally incapacitated from April 9, 2010, through November 7, 2010. Because (1) the hearing officer determined that there was no loss of earning capacity due to Mr. Traussi's low back condition following his return to work; and (2) there was no award of ongoing incapacity benefits, a finding as to the continuing effects or contribution from the 2006 and 2010 work injuries *after November 7, 2010*, was not essential to the decision. Therefore, collateral estoppel did not apply to (1) obviate proof by Mr. Traussi in the present case of the continuing effects of both injuries or (2) require B & G Foods to demonstrate a medical change in defending against the claim for additional benefits.

[¶25] Unlike the occurrence and nature of a work injury, which are static determinations lending themselves to decisions granting the protection of the Act for purposes of a subsequent claims for benefits, *see e.g. Van Houten*, 655 A.2d at 334 (prior decision finding that employee injured his leg and back and that "his back is now the primary problem," and awarding partial incapacity benefits

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(declining to enter the "debate" about whether comment i, a change from the first Restatement, applies because the appeal of the prior judgment called for the application of comment o, present in both Restatements and itself precluding collateral estoppel); *Beaver v. John Q. Hammons Hotels, L.P.*, 138 S.W. 3d 664, 667- 69 (Ark. 2003).

offensively collaterally estopped the employer from asserting in a subsequent proceeding that the back injury was not work-related), the causative effects of an injury are capable of ending at some point, particularly where, as here, the injury aggravates a preexisting condition. Indeed, the statute expressly governing injuries, which aggravate, accelerate or combine with preexisting conditions, section 201(4), requires for the compensability of any resulting disability the existence of a significant employment contribution to the disability, which is subject to change over time. *See Hall v. State ex rel. Wyoming Workers' Compensation Div.*, 2001 WY 136, ¶ 14, 37 P.3d 373; *Martinez v. State ex rel. Wyoming Workers' Compensation Div.*, 917 P.2d 619, 622 (Wyo. 1996) (employer was estopped from contesting compensability of the initial injury, but not from requiring the employee to prove that he was entitled to receive additional benefits despite previous awards for the same injury); *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 49 (Colo. 2001) (noting that "courts . . . in other jurisdictions have similarly refused to treat the causation of permanent injuries as having been resolved by determinations of causation relative to temporary injuries") (citing cases); *Appeal of Hooker*, 142 N.H. 40, 44, 694 A.2d 984, 987 (1997) ("We . . . find a mechanical application of collateral estoppel inappropriate in the instant case, which involves the effects of a discrete industrial accident superimposed upon a history of pulmonary disease.").

[¶26] The majority points to no case where a prior determination of causation for purposes of an award of either incapacity or medical benefits for a given period not extending beyond the date of that decision establishes causation, even to the extent of requiring the employer to show a change in the effects of a work injury on a persisting condition, for a later claim for benefits by the employee. Cases where there has been a prior determination that a condition is *not* causally related to a work injury, *see Klein v. State of Me. Dep't of Labor*, Me. W.C.B. No. 15-5 (App. Div. 2015), or that the effects of an injury on a persisting condition have ended, *see Dillingham v. Andover Wood Prods. Inc.*, 483 A.2d 1232, 1235 (Me. 1984), are distinguishable because those essential findings, affirmatively establishing the non-compensability of a condition after a certain point, bear directly on the entitlement to any benefits in the future. *See Bath Iron Works Corp. v. Director, Office of Workers' Comp. Programs*, 125 F.3d 18, 20, 23-24 (1st Cir. 1997) (prior Maine state workers' compensation agency finding that work injury "had no lasting effect on [the employee's] condition," was a "finding of historical fact" which collaterally estopped later claim for additional benefits under the federal Longshore Act despite state's "willingness to modify an award based on later *changes* in medical condition[,which] is not the same as giving a party two chances to litigate the same historical fact. . . .") (emphasis in original). The defensive use of collateral estoppel by the employers in those cases also is

consistent with the employees, as the petitioners, having the burden of proof on their claims for additional benefits. *See Bushey v. S.D. Warren Co.*, 642 A.2d 1352, 1353-54 (Me. 1994) ("*Dillingham* . . . holds that the petitioning party may not relitigate the issue of causation during the same time period litigated in a prior decree.").

[¶27] When, as with the prior decision here, benefits are awarded for a closed-end period, nothing has been determined**,** a matter of historical fact, about the continuing effects of the injuries beyond that period. Stated otherwise, a finding as to causation at a given point in time in the past is not equivalent, as a matter of logic or law, to an affirmative finding of no continuing causation or significant contribution for purposes of issue preclusion or relieving the employee of his or her burden of proof in future proceedings for additional benefits for the same condition.

[¶28] I would affirm the hearing officer's decision in all respects and, therefore, respectfully dissent from the majority's decision remanding the case for "an analysis to determine whether there was any change in circumstances sufficient to warrant revisiting the findings from the 2011 decision."

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. 2014).

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