STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 14-0050
Decision No. 16-11

MICHAEL BAILEY
(Appellant)

v.

CITY OF LEWISTON
(Appellee)

and

CCMSI
(Insurer)

Conference held: May 20, 2015
Decided: April 15, 2016

PANEL MEMBERS: Administrative Law Judges[1] Pelletier, Jerome, and Stovall
BY: Administrative Law Judge Jerome

[¶1] Michael Bailey appeals from a decision of a Workers' Compensation Board administrative law judge (*Goodnough*, *ALJ*) denying his Petition for Payment of Medical and Related Services and granting the City of Lewiston's (City) Petitions for Review and to Determine Extent of Permanent Impairment. The ALJ determined that Mr. Bailey's whole person permanent impairment related to an October 21, 2001, date of injury was no longer 32% as established by a previous Board decision, based upon evidence of an improvement in his condition. The ALJ found that Mr. Bailey's permanent impairment had been

[1] Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers licensed to practice law are now designated administrative law judges.

reduced to 0% as of August of 2014, and allowed the City to discontinue workers' compensation benefits. Mr. Bailey contends that the ALJ erred as a matter of law in finding that a 32% whole person permanent impairment set by a prior decree could be reduced to 0% because it violated the doctrine of *res judicata*. We agree, and vacate the ALJ's decision in part.

I. BACKGROUND

[¶2] Michael Bailey began working for the City of Lewiston as a firefighter in 1975. In connection with an October 21, 2001, respiratory work injury, he was awarded partial incapacity benefits in a decision on June 4, 2004. In February of 2007 the ALJ reaffirmed that decision and denied the City's Petition for Review. In the February 2007 decision the ALJ also granted Mr. Bailey's Petition to Determine Extent of Permanent Impairment, finding that he had reached maximum medical improvement (MMI) and had sustained a whole person permanent impairment (PI) relative to the October 21, 2001, injury of 32%. The 2007 decision regarding MMI and PI were based upon a 39-A M.R.S.A § 312 (Supp. 2015) independent medical examiner's report by Dr. Fuhrman. In 2013, the City sought to terminate Mr. Bailey's benefits based upon a new independent medical examiner's report from Dr. Fuhrman and Dr. Fuhrman's deposition testimony, and brought Petitions for Review and to Determine Extent of Permanent

Impairment. Mr. Bailey brought a Petition for Payment of Medical and Related Services.[2]

[¶3] The ALJ, in denying Mr. Bailey's petition and granting the City's petitions, adopted Dr. Fuhrman's opinion that Mr. Bailey reached MMI in 2013 and that his PI was 0%. The ALJ concluded that Dr. Fuhrman's opinion was comparative evidence of a change in circumstances sufficient overcome the *res judicata* effect of the 2007 decision. Mr. Bailey filed a motion for additional findings of fact and conclusions of law, which was denied. This appeal followed.

II. DISCUSSION

[¶4] The Appellate Division's role on appeal 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). The ALJ's findings of fact are not subject to appeal. 39-A M.R.S.A § 321-B(2) (Supp. 2015).

[¶5] Under the relevant law, entitlement to partial incapacity benefits such as those received by Mr. Bailey are subject to a durational limit unless the employee's permanent impairment exceeds a threshold set by statute.[3] The Board's

[2] No arguments were raised on appeal regarding the ALJ's determination that certain medical procedures were not reasonable and necessary. Thus, we do not disturb the ALJ's ruling on the issue.

[3] 39-A M.R.S.A § 213(1)(A) (Supp. 2015) provides:

2007 decision established a level of permanent impairment (32%) that was well over the statutory threshold and thus removed any durational limit on Mr. Bailey's entitlement to partial incapacity benefits. In this case, the City sought to impose the durational limit and terminate benefits based upon a change in the level of Mr. Bailey's permanent impairment.

[¶6] A decision on the issue of permanent impairment is entitled to *res judicata* effect. *Dillingham v. Andover Wood Prod.*, 483 A.2d 1232, 1235 (Me. 1984). The doctrine of *res judicata* does not bar an employer or an employee from bringing a Petition to Determine Extent of Permanent Impairment after the issue has already been adjudicated if there has been a change in circumstance sufficient to justify revisiting that issue. *Folsom v. New England Tel. and Tel*., 606 A.2d 1035, 1038 (Me. 1982). It is well settled that an employee may seek an

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1. Benefit and duration. While the incapacity for work is partial, the employer shall pay the injured employee a weekly compensation as follows.

> A. If the injured employee's date of injury is prior to January 1, 2013, the weekly compensation is equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage that the injured employee is able to earn after the injury, but not more than the maximum benefit under section 211. Compensation must be paid for the duration of the disability if the employee's permanent impairment, determined according to subsection 1-A and the impairment guidelines adopted by the board pursuant to section 153, subsection 8, resulting from the personal injury is in excess of 15% to the body. In all other cases an employee is not eligible to receive compensation under this paragraph after the employee has received a total of 260 weeks of compensation under section 212, subsection 1, this paragraph or both. The board may in the exercise of its discretion extend the duration of benefit entitlement beyond 260 weeks in cases involving extreme financial hardship due to inability to return to gainful employment. This authority may be delegated by the board, on a case-by-case basis, to an administrative law judge or a panel of 3 administrative law judges. Decisions made under this paragraph must be made expeditiously. A decision under this paragraph made by an administrative law judge or a panel of 3 administrative law judges may not be appealed to the board under section 320, but may be appealed pursuant to section 322.

increase in their permanent impairment (PI) rating, provided that they are able to first establish a change in circumstances sufficient to overcome the doctrine of *res judicata. See Lariviere v. Hampshire Manufacturing Co.*, Me. W.C.C. 1651 (Me. App. Div. 1986). The issue of whether a party may demonstrate a decrease in permanent impairment is a novel issue, however, and requires a close examination of the underlying statutory definitions and consideration of the principles underlying the finality of judgments.

[¶7] The Workers' Compensation Act defines 'maximum medical improvement' as the date after which further recovery and further restoration of function can no longer be reasonably anticipated, based upon reasonable medical probability. 39-A M.R.S.A § 102(15) (Supp. 2015). Permanent impairment is defined as "any anatomic or functional abnormality or loss existing after the date of maximum medical improvement which results from the injury." 39-A M.R.S.A § 102(16) (Supp. 2015). The Law Court has previously examined the concept of maximum medical improvement in the context of durational limits on benefits. In *Williams v. E.S. Boulos,* 2000 ME 40, 747 A.2d 181, the employee sought additional permanent impairment benefits based upon a worsening of his condition and to change his date of MMI. *Id.* at ¶ 3. Under the law in effect at that time, benefits were limited to a maximum of 400 weeks after the date that maximum

medical improvement had been reached. *Id.* at ¶1. A change in the date of MMI would have extended the employee's right to continue to receive benefits.

[¶8] The Law Court held that "[t]he employee's condition in this case has not *improved*, and, therefore, there is no requirement in law or in logic to fix a new date of maximum medical improvement." *Id.* at ¶9. (emphasis added). The Court also relied upon the legislative history of the statute in determining that the Legislature intended MMI to be a one-time determination and that demonstrating a change in MMI would too easily reset the 400 week clock on the duration of benefits. The ALJ, in applying *Williams* to this case, concluded that the Law Court dealt with MMI in the context of a pre-1993 statutory scheme regarding a "400-week" partial benefit limitation, and that there are no current similar conceptual restraints prohibiting a change of circumstance analysis under the current statute.[4] Further, the ALJ determined that "although a shifting date of MMI over time could promote uncertainty and instability for both employers and employees (as it has plainly done for Mr. Bailey), absent statutory changes, these concerns do not compel a contrary result, or a result like that ordered by the Court in *Williams*."

[¶9] We agree that a different law applies to Mr. Bailey's entitlement to partial incapacity benefits than the law at issue in *Williams*, but we conclude that both laws impose durational limits on the receipt of benefits and that both laws are

[4] Pursuant to the law in effect in 1989, employees were entitled to 400 weeks of partial benefits from the date of maximum medical improvement. 39 M.R.S.A. § 55-B (1989), amended by P.L. 1991, ch. 615, § D-7, repealed by P.L. 1991, ch. 885, § A-7.

based upon the concept of MMI to establish the threshold by which those limits are measured. While the holding in *Williams* may not be directly relevant to the issue set forth in this case, we find significant similarity between them. In addition, we note that the statutory definitions of MMI and PI are identical in the two laws.

[¶10] In order to overcome the *res judicata* effect of a previous determination, the moving party must generally show that there has been a change in circumstance sufficient to justify revisiting that issue. *Folsom v. New England Tel. and Tel*., 606 A.2d at 1037. Thus, for instance, the issue of the extent of incapacity suffered by an employee may well change over time based upon the improvement or degradation of his or her medical condition. The issue of maximum medical improvement is different, however. By definition, MMI is an estimate of the date on which someone's medical condition is not expected to improve, by reasonable medical probability. The Legislature has decreed that the extent of permanent impairment must not be measured until this date has been reached based on medical probability.

[¶11] *Williams* established that the extent of an employee's permanent impairment may increase based on a worsening of that employee's medical condition without violating the concept that maximum medical improvement had been reached. *Williams v. E.S. Boulos*, 2000 ME 40 at ¶ 10.We find, however, that the same reasoning does not apply when an employee's condition improves. It is

not possible to make a finding that an employee's condition has improved since the date that MMI was established by decree without finding, essentially, that the first determination was in fact, incorrect. A valid and final decision of the Board is binding on the parties, even if erroneous. *Ervey v. Northeastern Log Homes, 638 A.2d 709, 709-11 (Me. 1994).*

[¶12] When the Board found in the 2007 decree that Mr. Bailey had reached a date of maximum medical improvement, it stood for the proposition that it was not likely that Mr. Bailey would improve after that date, based on reasonable medical probability. The ALJ's finding in the more recent decision that the date of MMI could shift essentially acknowledges that the 2007 decree was incorrect on this point. The principle of *res judicata* is meant to protect the finality of that first decision.

[¶13] We find that when the Board establishes a date of MMI, it is a one-time determination regardless of an increase or decrease in an employee's level of permanent impairment. MMI, being by its nature an estimate based on reasonable medical probability, is thus not something that can be re-adjudicated. Moreover, there has been no change in circumstance sufficient to justify revisiting that issue; rather, there was a change of opinion regarding the date of MMI. Further, we agree with the ALJ that shifting the date of MMI over time could promote uncertainty and instability for both employers and employees. For these reasons, we conclude

that the prior decision establishing a date of MMI was a final determination on that issue, and entitled to preclusive effect.

III. CONCLUSION

[¶14] In this case, the date of MMI was set in 2007. Because that finding is entitled to preclusive effect, it was error for the ALJ to grant the City's Petitions for Review and to Determine Extent of Permanent Impairment and to authorize the termination of benefits.

The entry is:

> The administrative law judge's decision is vacated, in part, and the employer's petitions for review and to determine extent of permanent impairment are denied.

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).

Attorney for Appellant:
Benjamin DeTroy, Esq.
LEARY & DETROY, LLC
P.O. Box 3130
Auburn, ME 04212-3130

Attorney for Appellee:
John H. King, Jr., Esq
NORMAN, HANSON & DETROY, LLC
P.O. Box 4600
Portland, ME 04112-4600