LARRY JENSEN
(Appellee)

v.

S.D. WARREN CO.
(Appellant)

and

ESIS, INC.
(Insurer)

Argued: December 1, 2016
Decided: August 11, 2017

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

[¶1] S.D. Warren appeals from a decision of a Workers' Compensation Board administrative law judge (*Stovall, ALJ*) denying its Petition for Review of Incapacity and Petition to Determine Permanent Impairment, and denying Larry Jensen's Petition to Determine Permanent Impairment in connection with a January 27, 2004, work-related injury. S.D. Warren contends that the ALJ erroneously lowered the level of proof necessary for Mr. Jensen to meet his burden of production and shift the ultimate burden of proof onto S.D. Warren in this durational limits case. S.D. Warren also contends that the ALJ should have granted

both Petitions to Determine Extent of Permanent Impairment because the record supported a finding of permanent impairment of 5% attributable to Mr. Jensen's compensable back condition.

[¶2] We vacate the ALJ's decision in part and modify it to grant both parties' Petitions to Determine Permanent Impairment and S.D. Warren's Petition for Review, thereby allowing S.D. Warren to cease payment of incapacity benefits pursuant to the statutory durational limit.

I. BACKGROUND

[¶3] Larry Jensen suffered a work-related injury to his low back while working for S.D. Warren on January 27, 2004. On July 30, 2010, the board awarded Mr. Jensen ongoing 100% partial incapacity benefits for that injury. S.D. Warren thereafter filed the current Petition for Review and Petition to Determine Extent of Permanent Impairment, seeking to terminate Mr. Jensen's benefits based upon the 520-week durational cap set forth in 39-A M.R.S.A. § 213(1)(A) (Supp. 2016). Mr. Jensen then filed his own Petition for Review of Incapacity and Petition to Determine Extent of Permanent Impairment, alleging that his overall medical condition had worsened, rendering him totally incapacitated and therefore not subject to the statutory cap.[1] In the alternative, Mr. Jensen argued that his whole-body permanent impairment exceeds the 13.4% statutory threshold due, at

[1] The ALJ denied Mr. Jensen's Petition for Review of Incapacity on the ground that Mr. Jensen had not proved changed circumstances. Neither party appeals that determination.

least in part, to a mental sequela in the form of depression. Mr. Jensen also argued that S.D. Warren failed to prove that his permanent impairment falls below the statutory threshold and that it did not meet its burden of proof pursuant to *Farris v. Georgia-Pacific Corp*., 2004 ME 14, 844 A.2d 1143.

[¶4] The parties do not dispute that Mr. Jensen's low back condition yields a whole-body permanent impairment of 5%. The primary issue is whether Mr. Jensen also suffers from an alleged sequela to that condition—depression—and what, if any, bearing that condition has on his level of impairment.

[¶5] The medical evidence in the record concerning Mr. Jensen's depression is fairly limited. Mr. Jensen's treating physician noted in 2011 that Mr. Jensen "was getting a little depressed because of his lack of function." The independent medical examiner, a physiatrist, addressed Mr. Jensen's depression at deposition but declined to definitively state whether there was a causal relationship between that condition and Mr. Jensen's low back injury. *See* 39-A M.R.S.A. § 312 (Supp. 2016). The examiner also declined to opine on the effect Mr. Jensen's depression might have on his impairment rating. The examiner explained that "I think you really want to take an extensive psychiatric history in order to render permanent impairment."

[¶6] The ALJ initially concluded that Mr. Jensen "has depression related to his work related injury" and that Mr. Jensen raised a "genuine issue" as to whether

that depression was both a sequela of the underlying back injury and resulted in additional impairment. Thus, according to the ALJ, Mr. Jensen satisfied his burden of producing "competent evidence to suggest that the employee's whole body permanent impairment may be above the threshold for purposes of obviating the durational cap pursuant to section 213(1)." *Farris*, 2004 ME 14, ¶ 16, 844 A.2d 1143. Because he concluded that Mr. Jensen met his burden of production, the ALJ shifted the burden of proof to S.D. Warren to establish that Mr. Jensen's impairment fell below the applicable threshold. The ALJ found that S.D. Warren did not meet its burden of proof because it "offered no evidence that demonstrates by a preponderance of the evidence that the employee's depression has not caused or added to the employee's level of permanent impairment." Accordingly, the ALJ denied S.D. Warren's Petition to Determine Extent of Permanent Impairment and Petition for Review, permitting Mr. Jensen to receive benefits for the duration of his disability pursuant to section 213(1)(A).

[¶7] The ALJ also denied Mr. Jensen's Petition to Determine Extent of Permanent Impairment because Mr. Jensen had not established that his depression was at maximum medical improvement.[2]

[2] Mr. Jensen also argued that permanent impairment associated with a bilateral carpal tunnel syndrome injury that had developed after the established low back injury should have been subject to "stacking," thereby resulting in an impairment rating exceeding the threshold. The ALJ determined, without making any specific findings regarding the work-relatedness of the carpal tunnel syndrome injury, that there was no causal connection between the two injuries and that they cannot be stacked for that reason. The parties do not appeal that issue.

[¶8] The ALJ issued further findings of fact and conclusions of law in response to S.D. Warren's motion. The ALJ responded by deleting the finding that Mr. Jensen "also has depression related to his work related injury" and substituting a finding that Mr. Jensen "may have depression related to his work related injury." The ALJ further explained that "whether the employee has depression as a result of his work related injury and whether that depression causes permanent impairment is a genuine issue in this matter." However, the ALJ did not alter the manner in which he disposed of the petitions. S.D. Warren appeals.

II. DISCUSSION

A. Standard of Review

[¶9] The Appellate Division's role on appeal is "limited to assuring that the [ALJ'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) (quotation marks omitted).

[¶10] When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, "we review only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnaker Indus.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted). In addition, the Appellate Division should not disturb a factual finding made by the

ALJ absent a showing that it lacks competent evidence to support it. *Dunkin Donuts of Am., Inc. v. Watson*, 366 A.2d 1121, 1125 (Me. 1976). Although slender evidence may be sufficient, it must be evidence and not speculation, surmise, or conjecture. *See Grant v. Georgia-Pacific Corp.*, 394 A.2d 289, 290 (Me. 1978); *Overlock v. E. Fine Paper, Inc.*, 314 A.2d 56, 60 (Me. 1974).

B. The Employer's Petitions for Review and to Determine Extent of Permanent Impairment

[¶11] Partial incapacity benefits are generally subject to a durational cap of 520 weeks. *See* 39-A M.R.S.A. § 213(1)(A) (setting a 260-week limit subject to extension); Me. W.C.B. Rule, ch. 2, § 2 (extending the 260-week limitation to 520 weeks). Employees are exempt from this cap if their injuries result in whole-body permanent impairment rated above a certain threshold percentage. 39-A M.R.S.A. § 213(1)(A) (setting a 15% threshold subject to modification). Mr. Jensen, who was injured on January 27, 2004, is subject to the 520-week cap unless his permanent impairment rating exceeds a 13.4% threshold. Rule, ch. 2, § 1(3). If a work injury results in further medical complications or "sequelae"—such as depression—an employee's impairment rating may include additional impairment from those secondary conditions. *See Harvey v. H.C. Price Co.*, 2008 ME 161, ¶ 8, 957 A.2d 960.

[¶12] Regardless of which party brings a petition to establish permanent impairment, the order of proof is assigned in the same manner. *See Farris*

v. Georgia-Pacific Corp., 2004 ME 14, ¶ 15, 844 A.2d 1143. The employer ultimately bears the burden of proving that an employee's permanent impairment is below the statutory threshold. *See id.* at ¶ 17. The employee, however, is "responsible for raising the issue of whole body permanent impairment, and of presenting sufficient evidence to demonstrate that a genuine issue exists" with respect to whether the impairment exceeds the cap. *See id.* at ¶ 1. In *Farris*, the Law Court summarized the respective burdens as follows:

> [W]hen the employee seeks to make the percentage of impairment an issue at the hearing, the employee must bear a burden of raising the issue of percentage of whole body impairment, and of producing some evidence to persuade a reasonable fact-finder of the existence of a genuine issue concerning the percentage of impairment. The burden of production does not require that the employee *convince* the hearing officer on the ultimate issue of whole body permanent impairment, but merely that the employee must produce competent evidence to suggest that the employee's whole body permanent impairment may be above the threshold for purposes of obviating the durational cap pursuant to section 213(1).

Id. at ¶ 16 . Once an employee meets that burden, the employer must persuade the board that the employee's permanent impairment rating is, in fact, below the applicable threshold. *Id.* at ¶ 17.

[¶13] S.D. Warren does not contest the manner in which the ALJ allocated the burdens of production and proof. Rather, it contends that the evidence relied upon by the ALJ was insufficient to support his finding that Mr. Jensen met his burden of production. We agree.

[¶14] Although the evidence necessary to meet the production burden need not convince the ALJ that the employee's permanent impairment is above the threshold, the evidence must be more than mere speculation. It must be evidence concerning a level of permanent impairment which, if believed, would be sufficient to "defeat the employer's attempt to impose the [durational] cap." *Id.*

[¶15] As the Law Court recognized in *Farris*, this burden of production resembles in concept the employee's burden of production under the so-called "work search" rule. *See id.* at ¶ 16 n.6. Under that rule, an employee must produce evidence of a work search pattern that is thorough enough to allow a rational inference that the employee's inability to find work is due to the effects of his or her injury. *Monaghan v. Jordan's Meats*, 2007 ME 100, ¶ 22, 928 A.2d 786. Although work search evidence need not be unassailable to shift the burden back to the employer, it is not adequate as a matter of law unless it can withstand a multifactorial test to determine whether, standing alone, it would give a rational person reasonable cause to believe that work is not available to the injured worker. *See id.* at ¶ 17. In other words, an employee's work search evidence must be at least minimally sufficient to affirmatively demonstrate the unavailability of work.

[¶16] Likewise, an employee cannot create a genuine issue regarding permanent impairment by producing evidence that merely raises the *possibility* that his or her impairment rating exceeds the statutory threshold, or that would rely on

conjecture or speculation to reach such a finding. Rather, an employee must produce evidence that, if believed, could provide a factual basis for a finding in the employee's favor. Under the circumstances of this case, this would require Mr. Jensen to present medical evidence of a rating for his depression sufficient to yield a whole body permanent impairment that exceeds the applicable threshold—here, 13.4%. The ALJ need not accept the opinion or believe it to be correct, but the opinion must competently demonstrate that the employee's permanent impairment, if accepted, exceed the statutory threshold. *See Grant*, 394 A.2d at 290.

[¶17] There is no such competent evidence in the record. Mr. Jensen's testimony that he feels depressed due to the work injury does not provide an evidentiary basis for a finding that his permanent impairment level could be above the threshold. The evidence from Mr. Jensen's treating physician, noting that Mr. Jensen may have depression linked to the injury, could be viewed as sufficient to raise an issue regarding whether a work-related sequela has been established, but does nothing to advance the issue of Mr. Jensen's permanent impairment rating. Finally, the independent medical examiner declined to opine on the issue, essentially acknowledging that he, as a physiatrist, is not qualified to address it. His testimony that Mr. Jensen's depression (assuming he had depression) could raise his permanent impairment rating above the threshold also does not advance the inquiry beyond speculation.

[¶18] Indeed, the ALJ did not find that there was evidence showing that Mr. Jensen's permanent impairment rating exceeded the threshold; he found only that Mr. Jensen produced enough evidence "to make the element of depression and whether it causes any additional permanent impairment a genuine issue in this case." Such a finding does not justify shifting the burden of persuasion back to the employer.

[¶19] Mr. Jensen cites *Bisco v. S.D. Warren Co.*, 2006 ME 117, 908 A.2d 625, for the proposition that his credible testimony on the issue of permanent impairment is sufficient, as a matter of law, to meet his burden of production on that issue. Such a reading of *Bisco* is overly-broad. The hearing officer in *Bisco* found that the employee had permanent impairments associated with two established dates of injury: a 21% permanent impairment from a 1995 carpal tunnel injury and a 5% permanent impairment from a 1999 neck, shoulder, and back injury. *See id.* at ¶ 4. The employee argued that the ratings should be "stacked" so that the combined impairment level would place him over the permanent impairment threshold for both dates of injury. *Id.* at ¶ 12. He testified that, when driving, he compensated for the pain from his 1999 injury by pushing himself up with his hands and that doing so caused pain in the area affected by the 1995 injury. *Id.* at ¶ 4. Additionally, a doctor testified that "an injury to the neck, shoulder and back could adversely affect the upper extremities." *Id.* The hearing

officer, applying section 213(1-A)[3], declined to stack the two ratings, finding that the employee did not "demonstrate *on a more probable than not basis* that one work injury aggravates or accelerates the other." *See id.* at ¶ 13 (emphasis added).

[¶20] The Law Court concluded that the hearing officer held the employee to an impermissibly high standard by requiring him to prove his level of impairment "on a more probable than not basis." *See id.* at ¶ 14. The employee need not convince the hearing officer on the ultimate issue, the Court reasoned, and his testimony that one injury had an effect on the other was sufficient as a matter of law to meet his burden of production on the issue of whether one injury aggravated

[3] Section 213(1-A) provides:

> **1-A. Determination of permanent impairment.** For purposes of this section, "permanent impairment" includes only permanent impairment resulting from:
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> **A.** The work injury at issue in the determination and any preexisting physical condition or injury that is aggravated or accelerated by the work injury at issue in the determination; or
>
> **B.** For dates of injury on or after January 1, 2002, the work injury at issue in the determination and:
>
> > (1) Any prior injury that arose out of and in the course of employment for which a report of injury was completed pursuant to section 303 and the employee received a benefit or compensation under this Title, which has not been denied by the board, and that combines with the work injury at issue in the determination to contribute to the employee's incapacity, except that a prior injury that was the subject of a lump-sum settlement approved pursuant to section 352 that had a finding of permanent impairment equal to or in excess of the then applicable permanent impairment threshold may not be included; or
> >
> > (2) Any preexisting physical condition or injury that is aggravated or accelerated by the work injury at issue in the determination.
>
> Except as set forth in this subsection, "permanent impairment" does not include a condition that is not caused, aggravated or accelerated by the work injury.

or accelerated the other under section 213(1-A)(A), and shift the ultimate burden of proof to the employer. *See id.* at ¶ 14. The Court remanded the case to the hearing officer to determine whether the employer could meet its burden of persuasion. *See id.* at ¶ 14.

[¶21] The present case is distinguishable from *Bisco*. In *Bisc*o, there was no dispute that the employee had permanent impairment ratings associated with both his 1995 and 1999 injuries. The sole issue was whether there was a sufficient nexus between the two injuries to justify stacking their respective impairment ratings. Nothing in the Court's holding implies that the employee's testimony was a suitable substitute for the assessments of competent medical professionals or that such competent evidence was unnecessary. Although an employee's testimony may be adequate to establish a nexus between two established injuries for stacking purposes, the Court's holding in *Bisco* does not require the Board to accept such evidence as competent when the issue is more fundamental: the actual level of permanent impairment associated with a given medical condition.[4]

[4] There appears to be an even more fundamental issue in this case. The ALJ's initial decree found that "the employee also has depression related to his work related injury," but in his Further Findings of Fact and Conclusions of Law, the ALJ deleted that finding and found instead that "the employee *may have depression* related to his work related injury." (Emphasis added). The latter finding is insufficient to put the psychological sequela in play for purposes of Mr. Jensen's permanent impairment rating. *See Nelson v. E. Millinocket*, 402 A.2d 466, 469 (Me. 1979) ("The only question in such a case, *assuming the employee can prove that a psychological condition has developed as a result of the work-related injury*, is whether and to what degree the new condition has *further* impaired the employee's working capacity.") (first emphasis added). The burden-shifting design of *Farris* does not obviate the ALJ's need to find as fact that a psychological condition has developed and that a causal connection between the work injury

[¶22] Thus, the ALJ erred in finding that Mr. Jensen met his burden of production under *Farris*. He did not cite, and Mr. Jensen did not produce, any medical evidence that would, if believed, put his impairment rating over the applicable threshold. Without such evidence, Mr. Jensen cannot meet his burden of production. Therefore, it was error to deny S.D. Warren's Petitions for Review and to Determine Extent of Permanent Impairment.

C. Mr. Jensen's Petition to Determine Extent of Permanent Impairment

[¶23] S.D. Warren next argues that the ALJ should have granted Mr. Jensen's Petition to Determine Extent of Permanent Impairment and fixed Mr. Jensen's whole-body permanent impairment at 5%. The parties do not dispute that the permanent impairment attributable to Mr. Jensen's low back is 5% but, as noted above, Mr. Jensen argued, and the ALJ found, that he may also suffer from depression, an alleged sequela to the low back injury. The ALJ concluded that without evidence that Mr. Jensen's depression reached maximum medical improvement, he could not fix Mr. Jensen's whole-body permanent impairment rating.

[¶24] Because we conclude that Mr. Jensen did not meet his initial burden of production on the mental sequela issue, it is not necessary to reach the argument concerning maximum medical improvement. On the basis stated above, Mr.

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and the alleged psychological sequela exists before considering whether the employee has raised a genuine issue concerning the percentage of permanent impairment attributable to the alleged sequela.

Jensen's Petition to Determine Extent of Permanent Impairment should have been granted, and permanent impairment established at 5% for impairment associated solely with the physical effects of his low back injury.

I. CONCLUSION

[¶25] We conclude that Mr. Jensen did not meet his burden of production on the issue of whether his whole body permanent impairment may be above the threshold for purposes of applying the durational limit on partial incapacity benefits. Accordingly, the ALJ erred when denying both Petitions to Determine Permanent Impairment and S.D. Warren's Petition for Review. S.D. Warren, having established that it paid the maximum number of weekly benefits, may terminate the employee's benefits consistent with 39-A §§ 205(9)(B)(2) and 213(1)(A).

The entry is:

> We vacate the ALJ's decision in part, and modify that decision to grant Mr. Jensen's and S.D. Warren's Petitions to Determine Permanent Impairment as specified above, and to grant S.D. Warren's Petition for Review. That portion of the ALJ's decision denying Mr. Jensen's Petition for Review 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).

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