DAVID PELLETIER
(Appellee)

v.

IRVING FOREST PRODUCTS, INC.
(Appellant)

and

HANOVER INSURANCE COMPANY
(Insurer)

and

GREAT NORTHERN PAPER
(Appellee/Cross-Appellant)

and

SEDGWICK CLAIMS MANAGEMENT SERVICE, INC.
(Insurer)

Conference held: May 17, 2017
Decided: November 14, 2017

PANEL MEMBERS: Administrative Law Judges Elwin, Hirtle, and Jerome
BY: Administrative Law Judge Hirtle

[¶1] Irving Forest Products, Inc., and Great Northern Paper appeal from a decision of an administrative law judge of the Workers' Compensation Board (*Pelletier*, *ALJ*) denying their Petitions for Review of Incapacity filed with respect to two dates of injury: June 19, 1996, and December 1, 1999. The ALJ rejected the opinion of the employers' medical examiner and adopted the opinion of the

employee's treating physician to conclude that Mr. Pelletier remains entitled to total incapacity benefits. Irving Forest Products and Great Northern Paper contend that the ALJ erred when concluding that the employers did not meet their burden of proof on the issues of changed medical and economic circumstances. We disagree and affirm the decision.

I. BACKGROUND

[¶2] Mr. Pelletier suffered work-related low back injuries on June 19, 1996, while working for Great Northern Paper, and December 1, 1999, while working for Irving Forest Products. On January 14, 2010, the board (*Pelletier, HO*) awarded Mr. Pelletier total incapacity benefits on an ongoing basis. The board concluded that Mr. Pelletier was entitled to total incapacity benefits notwithstanding his ability to perform part-time, sedentary work because, given his restrictions, there was no suitable work available to him in his local community and he was physically unable to perform full-time work in the statewide labor market. *See Morse v. Fleet Fin. Group*, 2001 ME 142, ¶ 8, 782 A.2d 769. In reaching this conclusion, the board was presented with the opinion of a vocational expert who identified some available jobs that were reported to be within Mr. Pelletier's restrictions.

[¶3] Both employers filed Petitions for Review of Incapacity, arguing that Mr. Pelletier's incapacity had decreased since the 2010 decree. They relied upon

the medical opinions of a physician selected by the employers pursuant to 39-A M.R.S.A. § 207 (Supp. 2016), who reported that Mr. Pelletier's medical condition had improved to the point that he could perform full time work with restrictions, and a vocational expert who concluded that, given the medical examiner's opinion, Mr. Pelletier could earn substantial wages. The vocational expert also concluded that the economic conditions around Mr. Pelletier's home in northern Maine had shown "an improving trend which follows the State and National trend towards lower unemployment rates." When deposed ten months later, the vocational expert testified that, in the intervening months, "[t]he labor market has improved slightly in the geographic area I surveyed."

[¶4] In response, Mr. Pelletier relied upon the written medical opinion of his treating physician, who opined that he had no work capacity because of his low back injuries. The parties deposed the treating physician and, during cross-examination, she testified that: "If [the medical examiner] feels the patient is able to work, he has greater experience with this problem. I would rely since he's an expert. But my opinion is a different one."

[¶5] The employers urged the ALJ to interpret that testimony as being in harmony with the section 207 examiner's assessment of Mr. Pelletier's work capacity. Accordingly, the employers argued that the board should find (1) that Mr. Pelletier had recovered a full-time work capacity with restrictions, and (2) that Mr.

Pelletier possessed an earning capacity as set forth in the labor market survey of their vocational expert. In their position papers, the employers compared the labor market evidence submitted in the context of the 2010 decree with that submitted in the current proceedings. They did not, however, specifically argue that the vocational expert's opinion regarding improvements to the labor market was sufficient to demonstrate an economic change of circumstances that would independently justify a new examination of Mr. Pelletier's earning capacity.

[¶6] The board (*Pelletier, ALJ*) found that the treating physician's initial written opinion—that Mr. Pelletier had no work capacity—was more persuasive than either her comments about the section 207 examiner's written opinion or the examiner's written opinion itself. Accordingly, the ALJ concluded that Mr. Pelletier remained entitled to total incapacity benefits ordered in the 2010 decision. The employers filed Motions for Additional Findings of Fact and Conclusions of Law, in which they proposed findings related only to the medical opinions. They did not raise any issues or submit any proposed findings regarding an economic change of circumstances. The ALJ granted the motions but did not alter the substance of the initial decision. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶7] In general, 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 "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).

B. The ALJ's Reliance on the Written Opinion of the Treating Physician

[¶8] Generally, parties may not revisit a board decision awarding ongoing benefits without first either providing comparative medical evidence, or by showing changed economic circumstances. *Folsom v. New England Tel. & Tel., Co.*, 606 A.2d 1035, 1038 (Me. 1992). The moving party on a petition for review bears the burden of demonstrating changed circumstances. *Hoglund v. Aaskov Plumbing & Heating*, 2006 ME 42, ¶ 10, 895 A.2d 323.

[¶9] The employers argue that after Mr. Pelletier's treating physician acknowledged the section 207 medical examiner's superior level of expertise, there

was no longer competent evidence to support the ALJ's finding that Mr. Pelletier remained totally incapacitated; the ALJ, therefore, was compelled to find changed medical circumstances. Mr. Pelletier, on the other hand, argues that it remained within the ALJ's discretion as the fact-finder to adopt the treating physician's written opinion, especially when the ALJ specifically noted that she "immediately added [at her deposition] that 'my opinion is a different one[]'" after discussing her willingness to defer to the employers' expert.

[¶10] The employers' argument is unpersuasive. It is the province of an ALJ, as the fact-finder, to accept or reject expert medical opinions, in whole or in part. *Leo v. Am. Hoist & Derrick Co.*, 438 A.2d 917, 920-21 (Me. 1981); *Rowe v. Bath Iron Works*, 428 A.2d 71, 74 (Me. 1981). Consistent with the Law Court's reasoning in these decisions, we conclude that the ALJ did not err when interpreting and adopting those portions of the treating physician's opinion that he found persuasive. *Leo*, 438 A.2d at 920-21 ("The extent of a worker's incapacity is a question of fact. In carrying out his responsibility as fact finder, the Commissioner must weigh competing evidence and is not required to accept or reject the whole testimony of particular medical experts."); *Rowe*, 428 A.2d at 74 ("The Commissioner was not required to accept [the doctor's] medical evaluation in whole, when other evidence in the record supported a different conclusion."). The treating physician's opinion is competent evidence to support the ALJ's

findings and the decision did not otherwise contain a misapplication of the law to the facts on this issue. *See Oriol v. Portland Hous. Auth.*, Me. W.C.B. No. 14-35, ¶ 12 (App. Div. 2014).

C. Economic Change of Circumstances

[¶11] The employers make two further arguments: (1) that the ALJ erred by not conducting an analysis of whether Mr. Temple's labor market survey demonstrated changed economic circumstances through a general improvement in the local labor market; and (2) that the ALJ erred by failing to address whether sedentary, part-time jobs that the vocational expert found were now available in the local labor market demonstrated a change of economic circumstances. However, they did not adequately raise either theory in their written submissions to the board or their request for further findings of fact and conclusions of law. Accordingly, the issues are waived. *See Teel v. Colson*, 396 A.2d 529, 534 (Me. 1979) ("a case will not be reviewed by an appellate court on a theory different from that on which it was tried."); *see also Waters v. S.D. Warren*, Me. W.C.B. No. 14-26, ¶¶ 17-18 (App. Div. 2014) (determining that an issue raised only perfunctorily in a position paper was waived).

[¶12] Even if the employers had preserved these issues, it would not compel us to alter the ALJ's decision. Because the employers did not request further findings of fact on either issue, we treat the ALJ "as having made whatever factual

determination could, in accordance with correct legal concepts, support its ultimate decision, and we inquire whether on the evidence such factual determinations must be held clearly erroneous." *See Daley*, 2002 ME 134, ¶ 17.

[¶13] The ALJ's ultimate decision would have been supported with a finding that the job market faced by Mr. Pelletier had not significantly changed since the 2010 decree and, given the evidence presented, such a finding would not have been clearly erroneous. Specifically, although the employers' vocational expert made passing mention of declining unemployment rates in northern Maine, such broad commentary is of limited use as proof that there has been a change in the relevant economic circumstances since the board's decision of January 4, 2010. Similarly, the evidence presented by the employers of some positions that may be within Mr. Pelletier's physical abilities does not compel a finding of changed circumstances when similar evidence of available jobs was presented in 2010.

III. CONCLUSION

[¶14] The ALJ did not err by adopting the written opinion of Mr. Pelletier's treating physician, and his conclusion that Mr. Pelletier remains entitled to ongoing total incapacity benefits contains no reversible error. Further, by failing to preserve their argument that changed economic circumstances justified a change in Mr. Pelletier's incapacity benefits, the employers have forfeited consideration of that argument on appeal.

The entry is:

The ALJ'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.

Attorney for Appellant:
Travis Rackliffe, Esq.
TUCKER LAW GROUP
P.O. Box 696
Bangor, ME 04402-0696

Attorney for Appellee:
William Smith, Esq.
SMITH LAW OFFICE, LLC
P.O. Box 7
Van Buren, ME 04785

Attorneys for Appellee/
Cross-appellant:
Anne Marie Storey, Esq.
John Hamer, Esq.
RUDMAN WINCHELL
P.O. Box 1401
Bangor, ME 04402