MICHAEL BOULANGER
(Appellee)

v.

S.D. WARREN CO./ESIS
(Appellant)

and

S.D. WARREN CO./HELMSMAN
(Appellee/Cross-Appellant)

and

S.D. WARREN CO./CCMSI
(Appellee/Cross-Appellant)

Argument held: May 18, 2017
Decided: January 25, 2019

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

[¶1] S.D. Warren/ESIS appeals the decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) on its Petitions for Apportionment, to Determine Extent of Permanent Impairment, and for Review, related to Michael Boulanger's 2002 work injury. S.D. Warren/Helmsman and S.D. Warren/CCMSI cross appeal from the decision on their respective Petitions to Determine Extent of Permanent Impairment for a 1998 work injury, and to Determine Date of Maximum Medical Improvement for a 1989 work injury. The ALJ denied S.D. Warren/ESIS's Petitions for Apportionment pursuant to 39-A M.R.S.A. § 354

(Supp. 2018), but awarded Michael Boulanger an increased partial incapacity benefit with a reduction because he had been paid the maximum number of partial incapacity benefits attributable to the 1989 date of injury.

[¶2] The main issues raised on appeal are (1) whether the ALJ erred when determining that S.D. Warren/ESIS was not entitled to apportionment against S.D. Warren/CCMSI and S.D. Warren/Helmsman pursuant to section 354; (2) whether the ALJ erred when determining that S.D. Warren/ESIS was not entitled to reduce the partial incapacity benefit payable to Mr. Boulanger by the amount related to the 1998 date of injury; and (3) whether the ALJ erred when increasing the partial incapacity benefit when Mr. Boulanger did not file a separate petition for review; that is, whether the issue of his incapacity level was properly before the board. We vacate the ALJ's decision on the issue of apportionment. In all other respects, we affirm the decision.

I. BACKGROUND

[¶3] Michael Boulanger suffered three work-related injuries while employed by S.D. Warren: a 1989 injury to the left shoulder and thoracic area, a 1998 injury to the right shoulder, and a 2002 carpal tunnel injury. At all relevant times, S.D. Warren was self-insured, with different corporate entities acting as third-party administrators (TPAs) and potentially as excess insurers under different

contractual arrangements: CCMSI for the 1989 date of injury, Helmsman for the 1998 date of injury, and ESIS for the 2002 date of injury.

[¶4] In a 2005 board decision, the hearing officer determined that S.D. Warren/ESIS was responsible for paying a 71% partial incapacity benefit due solely to the 2002 work injury. The hearing officer further determined that Mr. Boulanger was able to earn $400.00 per week. At that time, the parties agreed that a pending petition related to the 1998 right shoulder injury could be dismissed. The 2005 decree also referenced the 1989 left shoulder and upper back injury, but no petitions were pending at that time on that injury.[1] Pursuant to the 2005 decree, S.D. Warren/ESIS began paying partial incapacity benefits based only on the 2002 injury.

[¶5] In the current litigation, S.D. Warren/ESIS filed a Petition to Determine Extent of Permanent Impairment and a Petition for Review based on the durational limit contained in 39-A M.R.S.A. § 213 (Supp. 2018) for the 2002 date of injury, as well as Petitions for Apportionment related to the 1989 and 1998 injuries. In turn, S.D. Warren/CCMSI filed a Petition to Determine Maximum Medical Improvement on the 1989 injury and S.D. Warren/Helmsman filed a Petition to Determine the Extent of Permanent Impairment on the 1998 injury.

[1] The 2005 decree also referenced a 1986 knee injury, on which no petitions were pending. That injury is not part of this litigation.

[¶6] To prevail on its Petition for Review, S.D. Warren/ESIS had the burden of demonstrating that Mr. Boulanger has been paid the statutory maximum number of partial incapacity benefit payments, that he is not totally incapacitated, and that his permanent impairment level is below the threshold established in 39-A MRSA § 213. *Farris v. Georgia-Pacific Corp.*, 2004 ME 14, ¶ 17, 844 A.2d 1143; *Legassie v. Securitas, Inc.*, 2008 ME 43, ¶ 30, 944 A.2d 495 (superseded in part by P.L. 2009, ch. 301, § 1 (amendment providing that there may be no reduction for amounts based on a prior injury that was the subject of a lump sum settlement)). Pursuant to section 213, the board has established a 520-week limit on receipt of wage loss benefits for partially incapacitating injuries that do not exceed the applicable permanent impairment threshold. Me. W.C.B. Rule, ch. 2, § 2(5). That threshold for the 2002 injury is 13.2%. *Id.* § 1(2).

[¶7] By its petitions, S.D. Warren/ESIS sought to terminate payment of Mr. Boulanger's partial incapacity benefits. It argued that the 520-week period expired, based on its having paid benefits pursuant to the 2005 board decision. In addition, it argued that Mr. Boulanger's permanent impairment level fell below the threshold based on Dr. Esponnette's assessment of a 6% whole person impairment due to the 2002 injury.

[¶8] Pursuant to S.D. Warren/ESIS's Petition for Review, Mr. Boulanger sought an increase in the previously established payment scheme. As such, he bore a burden to establish a medical or economic change in circumstances. *See Grubb v. S.D. Warren Co*., 2003 ME 139, ¶ 7, 837 A.2d 117. He contended that he is now either totally incapacitated or that his partial incapacity level has increased. The ALJ compared Mr. Boulanger's level of incapacity before and after the 2005 decision and determined that he established that his medical circumstances had changed for the worse. In response to the parties' motions for further findings of fact and conclusions of law, the ALJ also concluded that his economic circumstances had changed because he was no longer employed at S.D. Warren.

[¶9] Having determined that Mr. Boulanger established the foundation for reviewing the existing payment scheme, the ALJ then found that although Mr. Boulanger failed to establish that he is totally incapacitated, he did establish that his disability had worsened since the 2005 decision, and that he is now able to earn only $80.00 per week. The ALJ ordered an increase in partial incapacity benefits from the date Mr. Boulanger underwent a functional capacity evaluation (FCE) on August 24, 2006, forward. The ALJ found that all three injuries contributed to Mr. Boulanger's incapacity as of that date.

[¶10] On the issues of maximum medical improvement and permanent impairment for all three dates of injury, the ALJ adopted Dr. Esponnette's findings. Dr. Esponnette determined that Mr. Boulanger reached maximum medical improvement on the 1989 date of injury on May 31, 2003, and that the whole person permanent impairment level associated with that injury was 3%.[2] He assigned 9% whole person permanent impairment to the 1998 right shoulder injury, and 6% to the 2002 carpal tunnel injury.[3] The ALJ also adopted Dr. Esponnette's finding in which he assigned one-third proportionate responsibility for Mr. Boulanger's incapacity to each date of injury.

[¶11] The ALJ concluded that the percentages from each injury could be stacked onto the 2002 injury, and that Mr. Boulanger's combined permanent impairment of "at least 17%" put his permanent impairment rating over the 13.2% threshold. As such, the ALJ determined that S.D. Warren/ESIS had failed to establish that Mr. Boulanger's permanent impairment level fell below the threshold for duration of disability benefits, and ordered that partial benefit payments continue, at the higher rate, from the date of the 2006 FCE forward.

[2] Title 39 M.R.S.A. § 55-B (1989) applies to the 1989 date of injury. That provision allows for a cessation of partial benefits after payments have been made for 400 weeks after the date of maximum medical improvement.

[3] The ALJ also noted that Dr. Voss assessed permanent impairment for mental health of 5%, without assigning that percentage to any particular injury. No party has raised an issue regarding the permanent impairment assigned to the mental condition.

[¶12] In addressing the petitions for apportionment, the ALJ found that the Act's apportionment provision, 39-A M.R.S.A. § 354, does not apply to this case. She reasoned that the plain language of section 354 addresses apportionment between multiple workers' compensation insurers, not between a single, self-insured employer and its TPAs.

[¶13] Nonetheless, the ALJ allowed S.D. Warren/ESIS to reduce its ongoing obligation by the portion of incapacity attributable to the 1989 S.D. Warren/CCMSI injury. The ALJ relied on 39-A M.R.S.A. § 201(6) (Supp. 2018), which, she reasoned, provided separate statutory authority for apportioning injuries occurring prior to 1993. For the 1989 injury, former section 55-B allowed for payment of benefits for 400 weeks after the date of maximum medical improvement. The ALJ determined that the 400-week period expired on January 31, 2011, and authorized S.D. Warren/ESIS to reduce its weekly benefit payment by the one-third attributable to the 1989 injury.

[¶14] The ALJ further concluded that because section 354 does not apply and section 201(6) applies only to injuries incurred before 1993, the Act provides no authority to reduce the benefit by the portion attributable to the 1998 injury.

[¶15] S.D. Warren/ESIS filed this appeal, and S.D. Warren/Helmsman and S.D. Warren/CCMSI filed separate cross-appeals.

II. DISCUSSION

A. Standard of Review

[¶16] The role of the Appellate Division 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). "When construing provisions of the Workers' Compensation Act, our purpose is to give effect to the Legislature's intent." *Hanson v. S.D. Warren Co*., 2010 ME 51, ¶ 12, 997 A.2d 730. "In so doing, we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results." *Id*. We also consider "the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Davis v. Scott Paper Co*., 507 A.2d 581, 583 (Me. 1986). "If the statutory language is ambiguous, we then look beyond the plain meaning and consider other indicia of legislative intent, including legislative history." *Damon v. S.D. Warren Co*., 2010 ME 24, ¶ 10, 990 A.2d 1028.

B. Apportionment

[¶17] S.D. Warren/ESIS contends that the ALJ erred when determining that it is not entitled to apportionment pursuant to 39-A M.R.S.A. § 354. Section 354 provides, in pertinent part:

> **1. Applicability.** When 2 or more occupational injuries occur, during either a single employment or successive employments, that combine to produce a single incapacitating condition and more than one insurer is responsible for that condition, liability is governed by this section.
>
> **2. Liability to employee.** If an employee has sustained more than one injury while employed by different employers, or if an employee has sustained more than one injury while employed by the same employer and that employer was insured by one insurer when the first injury occurred and insured by another insurer when the subsequent injury or injuries occurred, the insurer providing coverage at the time of the last injury shall initially be responsible to the employee for all benefits payable under this Act.
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> **3. Subrogation.** Any insurer determined to be liable for benefits under subsection 2 must be subrogated to the employee's rights under this Act for all benefits the insurer has paid and for which another insurer may be liable. Apportionment decisions made under this subsection may not affect an employee's rights and benefits under this Act. There may be no reduction of an employee's entitlement to any benefits under this Act payable by an insurer based on a prior work-related injury that was the subject of a lump sum settlement approved by the board prior to the date of the injury for which the insurer is responsible. The board has jurisdiction over proceedings to determine the apportionment of liability among responsible insurers.

[¶18] As the Law Court has stated numerous times, our apportionment statute is based on the principle of subrogation. *See, e.g.*, *Trottier v. Thomas*

Messer Builders, 2007 ME 64, ¶ 18, 921 A.2d 163. The most recent insurer or employer has the initial responsibility to pay the employee and then is subrogated to the employee's rights as against other insurers. *Id.* The most recent insurer has no right of reimbursement from other employers or insurers unless the employee has that right. *Id*. "This statutory scheme was designed to encourage prompt payment of benefits, while still providing the most recent payor with the *potential ability* to recover a portion of those payments from other responsible employers and insurers." *Arsenault v. J.A. Thurston Co.*, 2004 ME 83, ¶ 9, 853 A.2d 217 (emphasis added).

[¶19] The apportionment statute thus allows the most recent insurer to step into the shoes of the employee and assert the employee's workers' compensation rights against other insurers responsible for some portion of the employee's incapacity. It does not affect the most recent insurer's obligation to pay the full benefit, and it does not guarantee that the most recent employer or insurer will receive reimbursement. *See* 39-A M.R.S.A. § 354(3) ("Apportionment decisions made under this subsection may not affect an employee's rights and benefits under this Act."); *see, e.g.*, *Juliano v. Ameri-cana Transport*, 2007 ME 9, ¶¶ 15-16, 912 A.2d 1244 (holding that most recent insurer cannot apportion against MIGA); *Trottier*, 2007 ME 64, ¶ 20 (holding that most recent insurer cannot recover against

previous employer or insurer when the employee's current earnings exceed his average weekly wage at the time of the earlier injury).

[¶20] The ALJ interpreted the term "insurer" in section 354 with reference to 39-A M.R.S.A. § 102(14) (Supp. 2018), which defines "insurance company" in pertinent part as:

> any casualty insurance company or association authorized to do business in this State that may issue policies conforming to subsection 19 and includes the Maine Employers' Mutual Insurance Company. Whenever in this Act relating to procedure the words "insurance company" or "insurer" are used they apply only to cases in which the employer has secured the payment of compensation and other benefits by insuring such payment under a workers' compensation insurance policy, instead of furnishing satisfactory proof of the employer's ability to pay compensation and benefits directly to the employer's employees.

[¶21] The ALJ determined that "insurer" was being used in a procedural context in section 354,[4] and thus construed "insurer" consistently with section 102(14), as referring only to a workers' compensation insurer. The ALJ determined that the TPAs or excess insurers in this case were not included in that definition of insurer.

[4] S.D. Warren/ESIS contends that the ALJ erred when determining that the term "insurer" is used in a procedural context in section 354, and that the definition in section 102(14) therefore does not apply. It asserts that section 354 creates substantive rights in successive injury cases by making the last employer or insurer responsible for all benefits owed to the injured employee, and giving subrogation rights to the last employer/insurer on the risk against other responsible parties. Because we conclude that the ALJ erred when declining to apportion the respective risk responsibility between dates of injury, we do not reach this issue.

[¶22] The ALJ was not persuaded by the evidence submitted by S.D. Warren/ESIS to establish that more than one insurer was on the risk. Even if the TPAs could be considered workers' compensation insurers, she determined that S.D. Warren/ESIS did not establish on a more probable than not basis that the excess insurance was ever in play, or that an excess insurer would meet the statutory definition. Instead, she found as fact that there was a single, self-insured employer on the risk for all three dates of injury, each represented by a different TPA, and thus there was no separate entity to apportion against.

[¶23] The ALJ determined that S.D. Warren/ESIS did not meet its burden to establish the statutory prerequisite that "more than one insurer" was responsible for Mr. Boulanger's incapacity; therefore, she concluded that section 354 does not apply.

[¶24] S.D. Warren/ESIS argues that apportionment nevertheless comes within the board's jurisdiction and is required because the single self-insured employer had three different entities retained as TPAs for the different dates of injury, each with a different legal and financial interest in the outcome. S.D. Warren/ESIS asserts that the right to apportion by or against self-insured employers represented by TPAs has consistently been upheld by the Law Court, citing *Buckley v. S.D. Warren*, 2012 ME 112, ¶ 4, 54 A.3d 1274 (ALJ allowing

apportionment as between four dates of injury when S.D. Warren was self-insured; apportionment issue was not before the Law Court); *Miller v. Spinnaker Coating*, 2011 ME 79, ¶¶ 6, 18, 25 A.3d 954 (affirming the decision to allow the most recent insurer to reduce its benefit by the amount attributable to the first injury for which self-insured employer had paid the maximum number of partial incapacity benefits); *Johnson v. S.D. Warren, Div. of Scott Paper Co.*, 432 A.2d 431, 435-36 (Me. 1981) (allowing apportionment as between self-insured employer and insurer); *Robbins v. Bates Fabrics, Inc.*, 412 A.2d 374, 376-77 (Me. 1980) (authorizing apportionment as between an insurer and self-insured employer); *see also Nichols v. Cantera & Sons*, 659 A.2d 258, 262 (Me. 1995) (holding the board had the authority to apportion liability between two dates of injury incurred at different employers when the same insurer insured both employers). We agree with S.D. Warren/ESIS that these cases amply illustrate how self-insured employers may be subject to the board's underlying apportionment jurisdiction. That a self-insured employer may employ one or more TPAs to sort-out its overall payment responsibilities under the Act through the use of various payment mechanisms such as excess insurance policies, does not serve to diminish or foreclose the board's authority in this area.

[¶25] The Legislature enacted section 104-B in 1977. P.L. 1977, ch. 368 (effective October 24, 1977), codified at 39 M.R.S.A. § 104-B, *repealed and replaced by* P.L. 1981, ch. 474, § 4 (effective September 18, 1981). In relevant part, section 104-B is substantially similar to section 354.[5]

[¶26] The Law Court recognized the board's authority to apportion liability in successive injury cases before the enactment of section 104-B. *See Kidder v. Coastal Constr., Co., Inc.,* 342 A.2d 729, 734 (Me. 1975); *Dunkin' Donuts of America, Inc. v. Watson*, 366 A.2d 1121, 1125 (Me. 1976). The Court has likewise recognized that the enactment of the original apportionment statute or subsequent amendments did not displace apportionment principles that pre-dated the statute. *Robbins,* 412 A.2d at 378*; Nichols*, 659 A.2d at 261-62. The Court reasoned that apportionment according to responsibility for the employee's disability between different employers and their respective insurers or between different insurers of the same employer "is not only logical and equitable, but consistent with the general purpose of our compensation Act." *Robbins*, 412 A.2d at 376 (quotation

[5] The 1977 version of 39 M.R.S.A. § 104-B provided:

> If an employee has sustained more than one injury while employed by the same employer and if the employer was insured under this Act by one carrier when the first injury took place and insured under this Act by a 2nd carrier when the last injury took place and if there is a dispute between the 2 carriers as to their financial responsibility concerning each injury, the carrier providing coverage at the time of the last injury shall be responsible to the employee for payment of weekly compensation benefits for the last injury and shall have the right of subrogation against the first insurance carrier for the amount of the first carrier's financial responsibility for the employee's first injury.

marks omitted). The Court viewed the power to apportion as "undoubtedly necessary and appropriate for the full exercise of the authority directly conferred upon the Commission in the administration of the compensation statute." 412 A.2d at 378 (citing *Churchill v. M.S.A.D. 49 Teachers Ass'n,* 380 A.2d 186, 192 (Me. 1977); *State v. Finn and Feather Club,* 316 A.2d 351, 355 (Me. 1974)); *see also Kidder,* 342 A.2d at 734.

[¶27] The Court stated in *Robbins:*

> Section 104-B itself gives no indication that it was intended to restrict the powers of the Commission in relation to its normal subject-matter jurisdiction to adjudicate the respective rights and duties of employees, employers and insurance carriers inter se in the industrial accident compensation area, nor in connection with its supervisory powers in the enforcement of the Act.
>
> Furthermore, where the Legislature did not wish to invest the Commission with adjudicatory power in fringe areas such as in the recovery of damages from third party tortfeasors, it used clear language to manifest its intention. *See* 39 M.R.S.A. § 68. There is no reason to believe that, if it intended to divest the Commission of its normal power to apportion responsibility between insurance carriers in successive injury cases, the Legislature would have chosen explicit language to do so.
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> . . . .
>
> We should not infer from the mere reference to the right of subrogation, in the absence of clear legislative expression, any intent to deprive the Commission of a portion of its conventional powers to apportion the respective risk responsibility between several insurers in successive injury cases, when all the *proper parties* are before the Commission. A contrary construction would frustrate a major purpose built into the Act looking toward simplification of procedures in administration.

412 A.2d at 378, 379 (emphasis added).

[¶28] The Court has subsequently noted that "the legislative purpose of section 104-B was not to displace the right of apportionment, but to ensure that, in successive injury cases involving two employers and their insurers, the second employer's insurer becomes primarily liable for the injury without the necessity of including other insurers in the proceeding." *Nichols*, 659 A.2d at 261-62, citing *Robbins*, 412 A.2d at 378; *see also Johnson*, 432 A.2d at 434-35.

[¶29] We find the Court's reasoning equally applicable to cases involving a single self-insured employer whose claims are administered by multiple third-party administrators. The same considerations of logic, economy, and fairness apply. In successive injury cases, we view establishing an entity's responsibility for benefits as concomitant with establishing the entity's level of responsibility for incapacity allocated to each date of injury. As such, the Law Court's instruction in *Buckley*, a case involving multiple post-1992 injuries with this same self-insured employer, is relevant here. The Court stated: "the hearing officer must assign a separate percentage of permanent impairment to each injury because, in multiple injury cases involving partial incapacity, an employer may reduce the partial incapacity benefit payment by the amount attributable to each respective injury

after the employer has paid the statutory maximum number of benefit payments for that injury." *Buckley*, 2012 ME 112, ¶ 13.

[¶30] Accordingly, we conclude that enactment of the apportionment statute did not restrict the inherent power of the board to adjudicate the respective rights of employers and insurers in connection with its supervisory powers in the enforcement of the Act. Here, all parties with potential rights and liabilities under the Act were before the board, including the TPAs. Therefore, the ALJ erred when declining to apportion the respective risk responsibility between those entities in this successive injury case.

C. Reduction of the Partial Incapacity Benefit

[¶31] S.D. Warren/ESIS next contends that the ALJ erred when determining that it was not permitted to reduce Mr. Boulanger's partial benefit payment by the percentage of incapacity attributable to the 1998 work injury.[6]

[¶32] An employer or insurer may seek to reduce benefits commensurate with the amount attributable to an injury for which the employee has received all

[6] S.D. Warren/Helmsman contends that this issue was not properly before the board and that it is not properly before us on appeal, because, as the employer/TPA on the risk of the 1998 date of injury, it did not raise the issue at the hearing or appellate level. The ALJ concluded that S.D. Warren/Helmsman did raise the issue in its position paper. Regardless, the issue was squarely raised by S.D. Warren/ESIS. As the party responsible in the first instance for paying the portion of the benefit attributable to the 1998 work injury, S.D. Warren/ESIS has a sufficient stake in the in the controversy, and the issue is appropriately addressed by the relief sought on appeal. Thus, the issue was properly before the ALJ and is properly before the appellate division. *See Storer v. Dep't of Envtl. Prot.,* 656 A.2d 1191, 1192 (Me. 1995).

the benefits to which he is entitled. *Miller*, 2011 ME 79, ¶¶ 11, 18, 25 A.3d 954; *see also Legassie*, 2008 ME 43, ¶ 13. The Court in *Legassie* enumerated instances in workers' compensation law allowing a reduction or adjustment in benefits outside of the apportionment provision in section 354.[7] Such a reduction in benefits may be appropriate to prevent the employee from receiving more benefits than he is entitled to receive under the Act. *Miller*, 2011 ME 79, ¶¶ 11, 13. When a reduction is appropriate based on the expiration of durational limits on partial incapacity payments, upon an employer's motion the ALJ must assign a percentage of responsibility to each injury in order to apply the durational limit and reduce benefits proportionately. *See Buckley*, 2012 ME 112, ¶ 13.

[¶33] Based on Dr. Esponnette's findings, the ALJ determined that one-third of Mr. Boulanger's disability is attributable to each date of injury. Notwithstanding the ALJ's determination that section 354 does not apply to the

[7] The Court noted, in addition to the offset provision in 39-A M.R.S.A. § 221 (Supp. 2018), these include:

> (1) a reduction of the portion of incapacity attributable to subsequent nonwork injuries pursuant to 39-A M.R.S. § 201(5) (2007); (2) an apportionment to apply the law in effect at the time of an injury occurring prior to 1993 pursuant to 39-A M.R.S. § 201(6) (2007); and (3) a lien against third-party recoveries in the amount of benefits due pursuant to 39-A M.R.S. § 107 (2007). The Act also allows an employer to take a credit for a duplicate recovery in another state. *Lapointe v. United Eng'rs & Constructors*, 680 A.2d 458, 461 (Me. 1996).

Legassie, 2008 ME 43, ¶ 14.

single, self-insured employer, the ALJ concluded that 39-A M.R.S.A. § 201(6)[8] required a reduction commensurate with the portion of the partial incapacity benefit attributable to the 1989 work injury, because Mr. Boulanger had been paid all benefits to which he was entitled for that injury under the law in effect at the time, former section 55-B. *See Cust v. Univ. of Me.*, 2001 ME 29, ¶ 15, 766 A.2d 566. Section 201(6) applies only to injuries occurring before January 1, 1993. The ALJ, finding no authority for apportionment for injuries occurring after that date other than section 354 (which she determined did not apply), declined to allow a reduction for the 1998 injury. S.D. Warren/ESIS contends this was error.

[¶34] The ALJ interpreted section 201(6) as conveying authority to apportion in cases involving pre-1993 injuries that does not otherwise exist outside of section 354. Section 201(6), however, does not establish authority for apportionment itself; it merely instructs the board to apply the law in effect at the time of a pre-1993 injury, rather than the law as it exists after 1993. Section 201(6) does not convey license to apportion; it mandates which version of the law to use

[8] Title 39-A M.R.S.A. § 201(6) provides:

> **6. Prior work-related injuries.** If an employee suffers a work-related injury that aggravates, accelerates or combines with the effects of a work-related injury that occurred prior to January 1, 1993 for which compensation is still payable under the law in effect on the date of that prior injury, the employee's rights and benefits for the portion of the resulting disability that is attributable to the prior injury must be determined by the law in effect at the time of the prior injury.

to do so. In other words, in the case of the 1989 injury, the board must determine the parties' rights by applying 39 M.R.S.A. § 55-B, not 39-A M.R.S.A. § 213.

[¶35] In this respect, it is noteworthy that there is nothing in the former Act that gave the board any more or less authority to apportion between injuries than the current Act. If the responsible party has paid all partial benefits to which Mr. Boulanger is entitled for the 1998 injury, S.D. Warren/ESIS is entitled to reduce the benefit by the amount attributable to that injury, calculated pursuant to the law in effect at the time of the injury. *See Miller*, 2011 ME 79, ¶ 17.

[¶36] Based on competent evidence, the ALJ found that the right to benefits associated with the 1989 injury expired 400 weeks after the date of maximum medical improvement. Similarly, pursuant to section 213—the law in effect at the time—the right to benefits associated with the 1998 injury would expire after the receipt of 520 weeks of benefits because Mr. Boulanger is partially incapacitated and has a permanent impairment percentage associated with that injury of less than the applicable threshold of 11.8%. Me. W.C.B. Rule, ch. 2, § 1. In contrast, the benefit associated with the 2002 injury continues beyond the durational limit because, by operation of 39-A M.R.S.A. § 213(1-A)(B), the permanent impairment attributable to all three injuries is stacked and the resulting 17% permanent impairment associated with that injury exceeds the threshold.

[¶37] Although the ALJ was able to extrapolate from the record with regard to the 1989 injury in order to allow S.D. Warren/ESIS to reduce its weekly benefit obligation to Mr. Boulanger by an amount associated with the one-third responsibility attributable to that injury, she determined that she could not do so with respect to the 1998 injury. The ALJ found that the 1989 and 1998 injuries became incapacitating and that all three injuries contribute to Mr. Boulanger's incapacity as of the August 24, 2006, FCE. Based on this finding, she awarded benefits at an increased rate from that date forward. This finding of fact establishes that the benefits for the 1998 injury began at the latest as of August 24, 2006. However, because the evidence closed before the expiration of 520 weeks from that date, the ALJ properly concluded that S.D. Warren/ESIS did not meet its burden to establish that it made 520 weeks of benefit payments related to the 1998 date of injury since August 24, 2006.

D. Incapacity Level

[¶38] S.D. Warren/CCMSI raises an additional issue on appeal. It contends that the ALJ erred when increasing Mr. Boulanger's partial incapacity benefit because (1) there was insufficient evidence of a change in circumstances that would justify revisiting the prior benefit scheme; and (2) there was no employee petition for review before the board.

1. Did Mr. Boulanger Establish a Change in Medical or Economic Circumstances?

[¶39] To increase or decrease the benefit level set by a previous decision, a party must first show a change in medical or economic circumstances. *Grubb*, 2003 ME 139, ¶ 7. "The purpose of the [changed circumstances] 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)).

[¶40] The ALJ initially determined that Mr. Boulanger successfully demonstrated a change in medical circumstances by weighing the medical evidence generated both before and after the 2005 decree. In further findings of fact and conclusions of law, she also determined that Mr. Boulanger had established a change in economic circumstances based on the fact that he "was separated from employment at S.D. Warren sometime after the January 2005 board decree."

[¶41] S.D. Warren/CCMSI argues that the evidence does not demonstrate a change in medical or economic circumstances. First, S.D. Warren/CCMSI argues that the record contained no comparative medical evidence and it was error for the ALJ to perform a comparative medical analysis on her own. CCMSI next argues that Mr. Boulanger's separation from employment was not an economic change in

circumstances because at the time of the 2005 decree, although he was still employed by S.D. Warren, he was not working.

[¶42] Although Mr. Boulanger was not working at the time, the 2005 decree establishes that he had an employment relationship with S.D. Warren and an expectation that the relationship would continue. Thus, his separation from employment since that time constitutes a sufficient change in circumstances to warrant review of the compensation payment scheme. *See Strout v. Blue Rock Indus.*, Me. W.C.B. No. 16-37, ¶ 22 (App. Div. 2016). Because a change in economic circumstances alone is sufficient to overcome the res judicata effect of the 2005 decree, we do not reach the issue regarding changed medical circumstances.

2. Was the Issue of Incapacity Level Properly Before the ALJ?

[¶43] S.D. Warren/CCMSI asserts that pursuant to the S.D. Warren/ESIS Petition for Review, which sought to terminate benefits under 39-A M.R.S.A. § 205(9)(B)(2) (Supp. 2018), as well as the Petition to Determine Extent of Permanent Impairment and the Petition to Determine Date of Maximum Medical Improvement, the ALJ was limited to deciding whether benefits should be terminated—not whether benefits should be increased.

[¶44] The issue whether benefits should be terminated requires a determination regarding whether Mr. Boulanger is totally or partially incapacitated or has a whole person permanent impairment that exceeds the threshold. S.D. Warren/CCMSI argues that because the ALJ determined that Mr. Boulanger's permanent impairment exceeded the threshold, it was not necessary to decide the level of incapacity, much less whether the level of partial incapacity had changed. The ALJ rejected this argument and determined Mr. Boulanger's incapacity level had increased, reasoning that because she was required to address whether Mr. Boulanger is totally or partially incapacitated, his level of incapacity was squarely before her.

[¶45] Although resolution of the incapacity issue is different from resolution of the permanent impairment issue, we conclude that the issue was raised by the employer petitions. *See Doughty v. Fiber Materials, Inc.*, No. 92-132 (Me. W.C.C. App. Div. July 1, 1992) ("[T]he fact that the employer was the petitioner did not prevent the Commission, in reviewing the existing payment scheme, from concluding that the employee's incapacity had actually increased."); *Blais v. Boise Cascade Corp.*, No. 92-42 (Me. W.C.C. App. Div. April 13, 1992) (holding that employee's compensation could be increased or decreased even when the only pleading presented was the employee's petition for review).

[¶46] There appears to be no dispute that if the ALJ had found Mr. Boulanger to be totally incapacitated, it would have been appropriate to adjust his benefit level accordingly. On its petition, S.D. Warren/ESIS presented competent evidence that Mr. Boulanger's level of incapacity has been partial since the 2005 board decree, and did not exceed the threshold for the 2002 date of injury. To avoid the durational limit, the burden then passed to Mr. Boulanger to produce evidence that he was totally incapacitated or that his permanent impairment level exceeded the threshold. *See Farris*, 2004 ME 14, ¶ 16. Towards this end, he produced a number of medical records from which the ALJ deduced that although Mr. Boulanger was not totally incapacitated, his level of incapacity had increased since the 2005 decree. Further, while the focus of this litigation largely concerned durational limits, Mr. Boulanger indicated in his position paper that he was seeking a determination that his permanent impairment was over the threshold, and that he was totally incapacitated. Requiring additional litigation to determine Mr. Boulanger's level of incapacity would be needlessly inefficient.

[¶47] Although it was possible for the ALJ to determine the durational limit issue without addressing Mr. Boulanger's level of incapacity, the employer petitions raised the issue of the level of incapacity, and it was not error for the ALJ to address this issue.

III. CONCLUSION

[¶48] We conclude that the ALJ erred when determining that she did not have authority to reduce the benefit by the portion attributable to the 1998 date of injury. However, she did not err when determining that S.D. Warren/ESIS did not meet its burden to prove that 520 weeks of benefits had been paid on that date of injury.

[¶49] We further conclude that an ALJ has inherent power to apportion liability between dates of injury based on the board's authority to adjudicate the respective rights of employers and insurers in connection with its supervisory powers in the enforcement of the Act. Accordingly, the decision is vacated to the extent that the ALJ denied the Petitions for Apportionment. Responsibility for incapacity is hereby allocated one-third to each date of injury. S.D. Warren/ESIS remains responsible for payment of ongoing benefits, with S.D. Warren/CCMSI responsible for benefits attributable to the 1989 date of injury from the date of the August 24, 2006, FCE until the expiration of 400 weeks, which, as the ALJ found, expired on January 31, 2011. S.D. Warren/Helmsman is responsible for benefits attributable to the 1998 date of injury from the August 24, 2006, FCE and ongoing. Benefits attributable to each entity should be based on the respective average weekly wage and the law in effect at the time of each injury.

[¶50] Finally, the ALJ did not err when determining that changed economic circumstances overcame the effect of the 2005 decree, nor by increasing the partial incapacity benefit.

The entry is:

> The ALJ's decision is vacated in part and S.D. Warren/ESIS's Petitions for Apportionment are granted. In all other respects, the 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. 2018).

Pursuant to board Rule, ch. 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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