ROBERT SAWYER
(Appellee)

v.

S.D. WARREN
(Appellant)

and

ESIS
(Insurer)

Argued: June 14, 2018
Decided: August 23, 2019

PANEL MEMBERS: Administrative Law Judges Goodnough, Elwin, and Pelletier
BY: Administrative Law Judge Elwin

[¶1] S.D. Warren/ESIS appeals from a decision of a Workers' Compensation Board administrative law judge (*Knopf, ALJ*) granting Mr. Sawyer's Petition for Award alleging a 2004 gradual bilateral knee injury; rejecting S.D. Warren's notice, statute of limitations, and res judicata defenses; and declining to find that benefits for this injury ran concurrently with those paid for Mr. Sawyer's October 23, 2004, acute left knee injury. The ALJ also dismissed S.D. Warren's Petition to Determine Extent of Permanent Impairment as unripe. S.D. Warren argues that (1) the ALJ erred in rejecting its notice and statute of limitations defenses for mistake of fact; (2) the ALJ erred in concluding that the claim was not barred by the res judicata effect of a 2007 consent decree; (3) the ALJ misapplied the law when ordering benefits to

be paid for the gradual, bilateral knee injury after the maximum number of benefit payments had been made for the acute left knee injury; and (4) the ALJ erred when dismissing the Petition to Determine Extent of Permanent Impairment on ripeness grounds. We disagree with S.D. Warren's contentions and affirm the decision.

I. BACKGROUND

[¶2] Mr. Sawyer suffered an acute left knee injury when he stepped into a gap in the floor while working for S.D. Warren on October 23, 2004. He had worked for S.D. Warren (or its predecessor) for almost twenty years prior to that date. Mr. Sawyer testified that during those early years he would regularly work eight to twelve hours on cement floors, and his work involved climbing, lifting, pushing, and pulling. A consent decree approved March 2, 2007, established the compensability of the left knee injury, but did not specify whether it was acute or gradual. That consent decree awarded ongoing benefits for partial incapacity.

[¶3] In October 2013, near the end of the period for paying partial incapacity benefits on the 2004 left knee injury, S.D. Warren filed a Petition for Review and a Petition to Determine Extent of Permanent Impairment. As part of that litigation, Dr. Bradford examined Mr. Sawyer and issued a report pursuant to 39-A M.R.S.A. § 312 (Supp. 2018). That report included a medical finding that Mr. Sawyer's work for S.D. Warren since 1986 had contributed to a gradual bilateral knee injury as of 2004.

[¶4] In an August 28, 2015, decree, the hearing officer (*Greene, HO*) concluded that the 2007 consent decree addressed only the compensability of the acute injury to Mr. Sawyer's left knee. Although he concluded that the compensability of a gradual bilateral knee injury was beyond the scope of the petitions pending at that time, the hearing officer invited Mr. Sawyer to file a new petition alleging a gradual bilateral knee injury subject to defenses of notice, statute of limitations, and res judicata. The hearing officer disposed of S.D. Warren's 2013 petitions by authorizing discontinuance of benefits for the 2004 acute left knee injury because the effects of the injury had ended, or alternatively because the durational limit for that injury had passed.

[¶5] Mr. Sawyer subsequently filed a Petition for Award, and S.D. Warren filed Petitions for Award and to Determine Extent of Permanent Impairment, all alleging a gradual bilateral knee injury on the same date as the acute left knee injury. The ALJ determined, in the 2017 decree, that res judicata did not bar Mr. Sawyer's petition, giving alternative reasons:

> In his decision of 2015 . . . the hearing officer specifically determined that the 2007 consent decree addressed only a traumatic left knee injury. The 2015 decree settles this issue: only the traumatic left knee injury was "adjudicated" in the earlier litigation. Moreover, even if it did not, the board finds that the description of injury in the 2006 petition did not include a gradual bilateral knee injury. Although there is some support (the affidavit attached to the petition) that in 2006 Mr. Sawyer was alleging a gradual left knee injury, there was no claim involving his *right* knee until 2015. The reference to "related bodily parts" does not include a separate injury affecting his right knee, which the board finds

> to be a wholly separate bodily part, unrelated to Mr. Sawyer's left knee and, based on Dr. Bradford's assessment, the injury thereto.

The ALJ further determined that neither the statute of limitations nor the notice provision barred his claim because Mr. Sawyer was under a mistake of fact regarding the cause and nature of the gradual injury until he received Dr. Bradford's section 312 report.

[¶6] Despite finding that Mr. Sawyer's gradual bilateral knee injury had contributed to his incapacity since 2004, the ALJ determined that payments of incapacity benefits for this injury did not retrospectively run concurrently with payments S.D. Warren previously had made for the acute left knee injury, citing *Oleson v. International Paper*, Me. W.C.B. No. 14-29 (App. Div. 2014). Because partial incapacity payments for the gradual bilateral injury had commenced only in 2015 (upon expiration of the 520-week cap for the acute left knee injury), the ALJ dismissed S.D. Warren's permanent impairment petition as unripe.

[¶7] S.D. Warren filed a Motion for Further Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Supp. 2018), which the ALJ granted, issuing a revised decision that did not change the result. S.D. Warren appeals.

II. DISCUSSION

[¶8] 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) (quotation marks omitted). When a party requests and proposes additional findings of fact and conclusions of law, as 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).

A. Res Judicata

[¶9] S.D. Warren contends that the ALJ erred in determining that res judicata did not bar Mr. Sawyer's claim of a gradual bilateral knee condition because the prior proceedings related only to the acute left knee injury.

[¶10] Regarding the application of res judicata to workers' compensation proceedings, the Law Court has stated:

> [V]alid and final decisions of the Workers' Compensation Board are subject to the general rules of res judicata and issue preclusion, *see Ervey v. Northeastern Log Homes, Inc.*, 638 A.2d 709, 710 (Me. 1994) (res judicata); *Crawford v. Allied Container Corp.*, 561A.2d 1027, 1028 (Me. 1989) (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, *see* [*McIntyre v. Great No. Paper, Inc.*], 2000 ME 6, ¶¶ 7-8, 743 A.2d at 747. Res judicata and issue preclusion in the workers' compensation setting is intended to promote "judicial economy and efficiency, the stability of final judgments, and fairness to litigants." *Crawford*, 561 A.2d at 1028.

Grubb v. S.D. Warren Co., 2003 ME 139, ¶ 9, 837 A.2d 117.

[¶11] In certain cases, the doctrine of res judicata may bar "the relitigation of issues that were tried, or that may have been tried, between the same parties or their privies in an earlier suit on the same cause of action." *Blance v. Alley*, 1997 ME 125, ¶ 4, 697 A.2d 828 (citations and quotation marks omitted). Res judicata precludes an award when there was a prior adjudication regarding the same injury: "[a] party is precluded from relitigating an issue that has been (1) actually litigated, (2) determined by a final judgment, and (3) the determination was essential to the judgment." *Traussi v. B & G Foods, Inc.*, Me. W.C.B. No. 15-10, ¶ 10 (App. Div. 2015).

[¶12] However, res judicata does not preclude an award of workers' compensation benefits for one injury when there has been a prior adjudication regarding a different injury. In *Oleson v. International Paper*, Me. W.C.B. No. 14-29 (App. Div. 2014), an Appellate Division panel held that res judicata did not bar a claim where entitlement to incapacity benefits resulting from a shoulder injury was neither litigated by the parties nor decided in a prior decision regarding the claimant's back injury. *Id.* ¶¶ 21-22; *see also Wacome v. Paul Mushero Const. Co.*, 498 A.2d 593, 594 (Me. 1985) (holding claimant who entered agreement for foot injury is not barred by res judicata from later seeking compensation for back injury arising from same accident).

[¶13] In *Day v. S.D. Warren*, Me. W.C.B. No. 16-19 (App. Div. 2016), the employee had asserted in previous litigation that his work activities during his many years at the mill caused a gradual injury to his neck that manifested on October 29, 2010. *Id.* ¶ 2. In subsequent litigation, the employee alleged that these same activities caused a gradual injury to his neck that manifested six weeks later. *Id.* ¶ 3. The Appellate Division found no error in the ALJ's determination that the gradual injury claimed by Mr. Day was the same gradual injury asserted in the previous litigation: in each round he argued that his hard work over his long career at the mill resulted in a gradual injury to his neck, requiring hospitalization and cervical surgery. *Id.* ¶ 8. There were no new facts present and the same claim of incapacity was at issue—the only difference was the claimed date of injury. *Id.*

[¶14] Like the employee in *Oleson*, and unlike the employee in *Day*, Mr. Sawyer is claiming a different injury than the one previously adjudicated. In the earlier litigation, Mr. Sawyer claimed an acute injury to his left knee when he stepped into a gap in the floor and rolled his left foot. In the current litigation, Mr. Sawyer claims a gradual bilateral knee injury based on his years of work at the mill.

[¶15] The gradual bilateral knee injury claim was not adjudicated in the prior round of litigation. This was conclusively determined by the prior hearing officer, who found that the parties' 2007 Consent Decree "determined only the compensability [of] an acute injury to the left knee on October 23, 2004." Because

that conclusion in 2015 was not appealed, the doctrine of law of the case prevents revisiting it. *See Allarie v. Jolly Gardener Products, Inc.*, Me. W.C.B. No. 16-39, ¶¶ 8-9 (App. Div. 2016) (stating that the law of the case doctrine precludes reconsideration of legal decisions in successive rounds of workers' compensation litigation).

[¶16] The August 28, 2015, decision conclusively establishes that Mr. Sawyer's gradual bilateral knee injury claim was not previously adjudicated, and therefore res judicata does not bar Mr. Sawyer's current petition.[1]

B. Mistake of Fact

[¶17] Because the injury in this case occurred in 2004 and petitions were not filed until 2015, S.D. Warren argued that Mr. Sawyer failed to give timely notice and that the statute of limitations barred his claim. While these arguments were specifically reserved, as noted by the prior hearing officer's August 28, 2015, decision, the ALJ rejected them based on a finding that Mr. Sawyer was under a mistake of fact. S.D. Warren contends that this was error.

[1] S.D. Warren also argues that the hearing officer "expressly reserved" the question of whether that injury was already determined because he wrote in the 2015 decree that "[a new gradual injury claim] will be subject to any defenses, including . . . the res judicata effect of the March 2, 2007 Consent Decree." To the extent that this statement represents internal inconsistency in the hearing officer's decree, we conclude that the ALJ's interpretation was a reasonable exercise of her discretion to clarify an ambiguity. *See Thompson v. Rothman*, 2002 ME 39, ¶ 7, 791 A.2d 921 (a lower court's clarification of an ambiguity in a judgment is reviewed for abuse of discretion).

[¶18] Because Mr. Sawyer's date of injury is prior to January 1, 2013, he was required to notify S.D. Warren of his injury within 90 days. *See* 39-A M.R.S.A. § 301 (Supp. 2018). Petitions under the Act are barred by the statute of limitations unless brought within two years after the date of injury or the date of first report of injury. *Id.* § 306(1). "Any time during which the employee . . . fails to [give notice] on account of mistake of fact[] may not be included in the computation of proper notice." *Id.* § 302.[2] If an employee fails to file a petition within the limitations period because of a mistake of fact as to the cause or nature of the injury, they may file a petition within a reasonable time. *Id.* § 306(5).

[¶19] "A failure to connect medical problems to a work-related cause constitutes a mistake of fact sufficient to extend the notice and limitations periods." *Jensen v. S.D. Warren Co.*, 2009 ME 35, ¶ 17, 968 A.2d 528 (citing *Dunton v. E. Fine Paper Co.*, 423 A.2d 512, 518 (Me. 1980)). The mistake of fact exception applies when "the injury is latent or its relation to the accident unperceived [and

[2] Title 39-A M.R.S.A. § 302 provides:

> **§302. Sufficiency of notice; knowledge of employer; extension of time for notice**
>
> A notice given under section 301 may not be held invalid or insufficient by reason of any inaccuracy in stating any of the facts required for proper notice, unless it is shown that it was the intention to mislead and that the employer was in fact misled by the notice. Want of notice is not a bar to proceedings under this Act if it is shown that the employer or the employer's agent had knowledge of the injury. Any time during which the employee is unable by reason of physical or mental incapacity to give the notice, or fails to do so on account of mistake of fact, may not be included in the computation of proper notice. In case of the death of the employee within that period, there is allowed for giving the notice 3 months after the death.

does] not include instances where . . . the employee knows of the injury and its cause." *Pino v. Maplewood Packing Co.*, 375 A.2d 534, 537 (Me. 1977). Likewise, "[a] mistake of fact takes place either when some fact which really exists is unknown or some fact is supposed to exist which really does not exist." *Brackett's Case,* 126 Me. 365, 368, 138 A. 557, 558 (1927) (quotation marks omitted).

[¶20] The ALJ found as a fact that Mr. Sawyer did not become aware of the cause and nature of his gradual injury until he received Dr. Bradford's report, which was issued on August 8, 2014. Dr. Bradford's report concluded that Mr. Sawyer suffered a gradual injury to both knees and that "the nature of his work did contribute to arthritic changes in both knees." The ALJ based the finding that Mr. Sawyer was under a mistake of fact on Mr. Sawyer's testimony, noting that before receiving the IME's report, Mr. Sawyer mistakenly believed "that his right knee symptoms stemmed from his acute left knee injury," and specifically that "he was bearing more weight on his right knee in compensation for the problem he was having with his left knee."

[¶21] Mr. Sawyer's testimony is competent evidence to support the ALJ's finding that he was unaware of the cause or nature of his injury until he received Dr. Bradford's report.[3] The ALJ neither misconstrued nor misapplied the law when

[3] The ALJ also found that S.D. Warren's receipt of Dr. Bradford's report provided S.D. Warren with actual knowledge of the injury sufficient to satisfy the notice requirement of section 301. *See* 39-A M.R.S.A. § 302.

determining that the statute of limitations and notice periods did not begin to run until Mr. Sawyer was no longer operating under this mistake of fact.

C. Concurrent Running of Benefits

[¶22] The ALJ found, based on Dr. Bradford's opinion, that Mr. Sawyer's bilateral knee condition has contributed to his incapacity since 2004. Nevertheless, citing *Oleson,* the ALJ ordered that S.D. Warren begin paying partial benefits for that injury on August 30, 2015—one day after its payment obligation for the 2004 acute left knee injury expired.[4] S.D. Warren contends it was error to separate the payment period from the date of injury, and that the payment periods for both injuries should have run concurrently. We disagree.

1. Application of the Law

[¶23] In *Oleson,* the hearing officer determined that the durational limit for the later-litigated 2001 shoulder injury had been reached because the employee had received 520 weeks of payments for an earlier-litigated 2000 low back injury. *Oleson,* Me. W.C.B. No. 14-29, ¶ 10. The hearing officer had reasoned that "because [the employee's 2001 shoulder injury had contributed to his loss of earning capacity during the time that he received benefits for the 2000 low back injury, the benefits were in fact paid for both injuries . . . ." *Id.* An Appellate Division panel reversed,

[4] Because Mr. Sawyer's date of injury is before January 1, 2013, the durational limit for his partially incapacitating injury is 520 weeks. 39-A M.R.S.A. § 213(1)(A) (Supp. 2018); Me. W.C.B. Rule, ch. 2, § 2.

reasoning that because the shoulder injury was a separate injury that continued to cause incapacity and that had not previously been litigated, *id.* ¶ 12, the benefit payments for the back injury did not preclude payment of benefits for the shoulder injury, *id.* ¶ 16.

[¶24] Similarly, in *Spencer's Case*, 123 Me. 46, 121 A. 236 (1923), the employee's thumb and two fingers were injured on the same date. *Id.* On his initial petition, the employee was awarded 55 weeks of compensation for the injury to his two fingers. *Id.* On a petition relating separately to the thumb injury filed almost two years later, the employee was awarded "the further period of twenty-five weeks to begin at the expiration of the period of fifty-five weeks specified in the previous agreement." *Id.* The Law Court affirmed that award. *Id.*

[¶25] Based on these authorities, we conclude that the ALJ did not misconstrue or misapply the law when awarding benefits beginning August 30, 2015, for a separate injury that was not previously litigated and that continues to cause incapacity.

2. Sufficiency of Findings and Conclusions

[¶26] S.D. Warren further argues that the ALJ erred by failing to make sufficient findings of fact and conclusions of law following its motion pursuant to section 318. Specifically, it argues that the ALJ was required to make findings to support her determination that the benefits period should begin in August 2015.

[¶27] When a party requests additional findings, an ALJ is under an affirmative duty pursuant to section 318 to make additional findings that would create an adequate basis for appellate review. *See Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982); *Malpass v. Philip J. Gibbons*, Me. W.C.B. No. 14-19, ¶ 18 (App. Div. 2014). Here, the ALJ made an explicit finding that August 30, 2015, "coincides with the employer's August 29, 2015, discontinuance of incapacity benefits." Thus, it is clear that the ALJ intended for the new benefits period to begin for the bilateral gradual knee injury when the benefits period for the acute left knee injury ended, consistent with *Oleson.* The ALJ's findings and conclusions on this matter are sufficient for appellate review.

D. Dismissal of Petition to Determine Extent of Permanent Impairment

[¶28] S.D. Warren contends that the ALJ erred when dismissing its Petition to Determine Extent of Permanent Impairment as unripe. We review a dismissal on this ground for abuse of discretion. *See Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 (Me. 1985) (applying abuse of discretion standard of review for administrative body's dismissal of an action).

[¶29] Compensation must be paid for the duration of an employee's disability if their permanent impairment resulting from a work-related injury is in excess of a threshold determined by Board Rule. 39-A M.R.S.A. § 213(1), (1-A), (2) (Supp. 2018). If the employee's permanent impairment level is below the applicable

threshold, then their benefit payments are subject to the durational limit. *Id.* § 213(1). In *Young v. Central Maine Power Company*, 2003 ME 10, 814 A.2d 998, the Law Court held that permanent impairment level may be established before the expiration of the durational limit to avoid the potential for overpayment of benefits by the employer. *Id.* ¶ 15. A number of board decisions subsequent to *Young* have held, however, that permanent impairment petitions filed long before expiration of the durational limit may be dismissed as unripe. *See, e.g.*, *Hosie v. Matrix Power*, W.C.B. 11-006091D (Me. 2017) (dismissing as unripe three years prior); *Peters v. VIP, Inc.*, W.C.B. 04-0030141 (Me. 2012) (dismissing three years prior). This serves the interest of administrative economy, because even if permanent impairment below the applicable threshold is established, future litigation may still be required before an employer will be permitted to discontinue benefits. *Hosie*, W.C.B. 11-006091D at 7; *Peters v. VIP, Inc.*, W.C.B. 04-0030141 at 3; *see* 39-A M.R.S.A. § 205(9)(B) (Supp. 2018).

[¶30] Additionally, the Law Court held in *Bailey v. City of Lewiston*, that res judicata bars relitigation of permanent impairment level after an initial determination. 2017 ME 160, ¶¶ 11-17, 168 A.3d 762. It is therefore important that permanent impairment not be determined prematurely, precluding the possibility of a change in an employee's medical circumstances—whether improvement or degradation—before the end of the durational limit.

[¶31] At the time of the decree, the durational limit for Mr. Sawyer's gradual bilateral knee injury was at least seven years away. The ALJ acted within the reasonable bounds of her discretion when dismissing S.D. Warren's petition as unripe.

III. CONCLUSION

[¶32] The ALJ did not err when determining that the current petition was not barred by the res judicata effect of the parties' 2007 consent decree. The ALJ's finding that Mr. Sawyer was under a mistake of fact regarding his bilateral gradual knee injury is supported by competent evidence in the record, and the conclusion that the notice and statute of limitations period was tolled was a proper application of the law. The ALJ did not err when concluding that the benefits period for the later-litigated gradual bilateral knee injury did not run concurrently with the earlier benefits period for the acute left knee injury. Finally, the ALJ acted within the bounds of her discretion when dismissing S.D. Warren's Petition to Determine Extent of Permanent Impairment as unripe.

The entry is:

The administrative law judge'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. 2018).

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.

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