STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 24-0002
Decision No. 24-14

KENNETH E. HUGHES
(Appellee)

v.

FIRST FLEET, INC.
(Appellant)

and

COTTINGHAM BUTLER CLAIM SERVICE
(Insurer)

Conference held: September 26, 2024
Decided: November 27, 2024

PANEL MEMBERS: Administrative Law Judges Rooks, Stovall, and Chabot
BY: Administrative Law Judge Stovall

[¶1] First Fleet, Inc., appeals from a decision of a Workers' Compensation Board administrative law judge (*Sands, ALJ*) granting Kenneth Hughes's Petition for Award related to a motor vehicle accident that occurred on November 27, 2021, while he was working. First Fleet contends (1) the ALJ's finding that Mr. Hughes has a fifteen-hour per week work capacity is unsupported by any competent medical evidence; and (2) the ALJ erred when crediting Mr. Hughes's treating chiropractor's records and rejecting the opinion of the neurosurgeon who examined Mr. Hughes pursuant to 39-A M.R.S.A § 207 on the issue of work capacity. We affirm the decision.

## I. BACKGROUND

[¶2] On November 27, 2021, Kenneth Hughes was involved in a motor vehicle accident while driving a tractor-trailer that was rear-ended by a box truck. Both trucks sustained damage from the impact. Mr. Hughes immediately felt pain in his head and neck, and experienced vision problems. The next day, he experienced lower back spasms. Mr. Hughes has preexisting spondylosis in his cervical spine and a past problem with headaches occurring as long as twenty-five years before the work injury. He also has a preexisting condition of hypothyroidism, which is treated with medication but when left untreated, causes clouding of consciousness or brain fog.

[¶3] In the week following the accident, Mr. Hughes complained of dizziness, brain fog, headaches, and neck and low back pain. He began treating with Joshua Hughes, NP, and Dr. Matthew Turnquist at Western Maine Primary Care. Dr. Turnquist recommended a leave of absence from work and referred Mr. Hughes to Dr. Bram L. Newman at Maine Medical Partners Neurosurgery and Spine. On March 29, 2022, Dr. Newman reviewed Mr. Hughes's MRI and found degenerative changes but nothing conforming with Mr. Hughes's pain complaints. He opined that Mr. Hughes had more of a myofascial/muscular pain than any neurosurgical injury. Dr. Newman issued an M-1 practitioner's report that Mr. Hughes had no work capacity at that time and recommended physical therapy.

[¶4] On April 20, 2022, Mr. Hughes was examined by Dr. Eric Omsberg, a neurosurgeon, pursuant to 39-A M.R.S.A. § 207. Dr. Omsberg found Mr. Hughes to have post-concussive syndrome; neck, mid-back, and lower back pain; a lumbar strain; and right hip discomfort. He opined that Mr. Hughes's subjective complaints did not correlate with the objective findings indicated in diagnostic testing. Dr. Omsberg found that Mr. Hughes has a full-time, light-duty work capacity with limitations of avoiding bright or flashing lights, and loud noises. Furthermore, Dr. Omsberg wrote that Mr. Hughes should not drive for more than one hour and fifteen minutes continuously.

[¶5] Mr. Hughes began treating with a chiropractor, Barry Knopp, D.C., in June of 2022. Dr. Knopp found that Mr. Hughes has a chronic unstable subluxation complex in his cervical, thoracic, and lumbar spine. He also opined that Mr. Hughes has no functional work capacity.

[¶6] On May 3, 2022, First Fleet offered Mr. Hughes a 30-hour per week light-duty job, consistent with Dr. Omsberg's listed restrictions. Mr. Hughes testified that he refused that offer because he believed he was not physically capable of performing the job offered. The ALJ found that Mr. Hughes had good and reasonable cause to reject the job offer, pursuant to 39-A M.R.S.A § 214(1)(A).[1]

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[1] Title 39-A M.R.S.A. §214 (1)(A) provides:

[¶7] Mr. Hughes has not worked since the accident, although he did volunteer at a community garden for a few hours per week for about six weeks. Mr. Hughes testified that when gardening, he noticed increased neck and back symptoms, and dizziness. Dr. Knopp recommended that he stop that activity. He nevertheless tried doing the gardening activities again but had to stop after one hour due to increased symptoms. Mr. Hughes has followed Dr. Knopp's recommendations since that time.

[¶8] Because Mr. Hughes had a preexisting cervical condition, the ALJ correctly applied 39-A M.R.S.A. § 201(4) in determining whether incapacity related to his neck injury is compensable. Relying on the medical opinions of Dr. Knopp and Dr. Omsberg, she found that the work injury meets the standard for compensability under section 201(4), in that it aggravated Mr. Hughes's preexisting cervical condition resulting in disability, and the employment contributed to the disability in a significant manner.[2]

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> **A.** If an employee receives a bona fide offer of reasonable employment from the previous employer or another employer or through the Bureau of Employment Services and the employee refuses that employment without good and reasonable cause, the Employee is considered to have voluntarily withdrawn from the workforce and is no longer entitled to any wage loss benefits under this Act during the period of the refusal.

[2] Title 39-A M.R.S.A § 201(4) provides:

> **Preexisting condition.** If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner.

[¶9] Although there was no dispute that Mr. Hughes could not perform his pre-injury truck driving job, his level of incapacity was in dispute. Drs. Turnquist, and Newman opined that Mr. Hughes was totally incapacitated at times, but anticipated that his condition would improve. Dr. Omsberg opined that Mr. Hughes has a full-time, light-duty work capacity. The ALJ credited Dr. Omsberg's medical findings in part, particularly with respect to appropriate restrictions, but found Dr. Knopp's records indicating that Mr. Hughes's symptoms were easily aggravated, along with Mr. Hughes's testimony regarding his functionality, to be more persuasive on the issue of work capacity.

[¶10] Considering the medical evidence, along with Mr. Hughes's age, work history, education, presentation, and physical limitations, the ALJ concluded that he was able to earn $13.80 per hour working fifteen hours per week. This renders an imputed weekly earning capacity of $270.00.[3] First Fleet filed a Motion for Findings of Fact and Conclusions of Law, which was denied. This appeal followed.

## II. DISCUSSION

### A. Standard of Review

[¶11] "A finding of fact by an administrative law judge is not subject to appeal [before the Appellate Division]." 39-A M.R.S.A. § 321-B(2). The role of

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[3] Mr. Huges did not provide work search evidence.

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, 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.*, *Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted). In addition, the Appellate Division will 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).

B. Work Capacity

[¶12] First Fleet contends the ALJ erred in finding that Mr. Hughes has a fifteen-hour per week work capacity because no medical provider offered an opinion that his work capacity was limited to fifteen hours per week. We disagree.

[¶13] The ALJ's finding on work capacity is based on more than mere conjecture. Although no medical provider specifically opined that Mr. Hughes was able to work fifteen hours per week, the ALJ arrived at a work capacity finding that is between the opinions of Dr. Omsberg and Dr. Knopp, but closer to Dr.

Knopp's. The ALJ found Omsberg's report describing a full-time, light duty work capacity to be objective and reasonably based on diagnostic criteria, but she also noted that Dr. Omsberg did not discredit Mr. Hughes's subjective complaints. The ALJ found most persuasive the statement in Dr. Knopp's reports that Mr. Hughes's condition is "frequently and easily aggravated," noting that Dr. Knopp was intimately familiar with Mr. Hughes's injury due to the time he has been involved with his treatment. The ALJ considered Mr. Hughes's testimony that he engaged in post-injury activities such as snow shoveling, gardening, and lawn mowing, but she also she credited his testimony that physical activity often results in increased symptoms, and that he was concerned that he would be unable to keep a consistent work schedule due to those frequent flare-ups

[¶14] Dr. Knopp and Dr. Omsberg offered conflicting opinions regarding Mr. Hughes's work capacity. It was within the province of the ALJ to determine the weight and credibility to assign to that evidence. *See Sloan* v. *Christianson*, 2012 ME 72, ¶ 33, 43 A.3d 978 (stating that the trial court is not bound to accept any testimony or evidence as fact and must determine the weight and credibility to assign to that evidence). The choice between competing expert medical opinions is a matter soundly within the purview of the ALJ who hears the case. *Dolliver v. Pratt & Whitney,* Me. W.C.B. No. 23-14, ¶ 17 (App. Div. 2023). The ALJ was not required to adopt either Dr. Omsberg's or Dr. Knopp's opinion in their entirety;

an ALJ has authority to accept or reject expert medical opinions, in whole or in part. *Leo v. American Hoist & Derrick Co.*, 438 A.2d 917, 920-921 (Me. 1981).

[¶15] The ALJ also appropriately relied on Mr. Hughes's testimony regarding his post-injury ability to work. In *Michaud's Case*, 122 Me. 276, 279, 119 A. 627 (1923), the Law Court described testimony from an injured worker as "evidence of the highest quality from which the Commission could determine the extent of impairment." In light of Dr. Knopp's opinion and Mr. Hughes's testimony, the ALJ did not err in finding that Mr. Hughes had a fifteen-hour per week work capacity.

[¶16] First Fleet further argues that by crediting Dr. Knopp's opinion and landing on factual ground somewhere between Dr. Knopp's opinion and Dr. Omsberg's opinion, the ALJ erroneously altered the neurosurgeon's medical opinion on work capacity. However, arriving at a finding closer to Dr. Knopp's opinion that Mr. Hughes has no functional work capacity than Dr. Omsberg's opinion that he has full-time work capacity is not "altering" the section 207 examiner's medical findings.

[¶17] We further reject First Fleet's assertion that no reasonable person would accept a chiropractor's opinion over that of a neurosurgeon. The Act contemplates that a chiropractor's opinion would be admissible in workers' compensation hearings. *See* 39-A M.R.S.A § 309(3) (making a medical

professional's written statements on medical questions admissible to the same extent that their oral testimony would be, including chiropractors' testimony on chiropractic issues); *see also Masselli v. Yellow Transp., Inc.,* Me. W.C.B. No. 22-35, ¶ 11 (remanding for additional findings regarding independent medical examiner's qualifications to provide an opinion on chiropractic care). First Fleet's position that chiropractic evidence is incompetent in the face of evidence from a neurosurgeon lacks merit.

[¶18] An ALJ's determination regarding an employee's level of work capacity is a finding of fact. *Aldrich v. Cianbro Corp.*, 378 A.2d 744, 745 (Me. 1978); *Leo*, 438 A.2d at 920. The Law Court has stated:

> On review of findings of fact, we do not reexamine the record from the trial court and reach our own decision about the facts; instead, we conduct a deferential review for clear error, meaning that we will defer to the fact-finder's decision as to (1) which witnesses to believe and not believe; (2) what significance to attach to particular evidence, and (3) what inferences may or may not be drawn from the evidence. *See Cates* v. *Donahue*, 2007 ME 38, ¶ 9, 916 A.2d 941; *Stickney* v. *City of Saco*, 2001 ME 69, ¶ 13, 770 A.2d 592; *Sturtevant* v. *Town of Winthrop*, 1999 ME 84, ¶ 9, 732 A.2d 264.

*Zablotny* v. *State Bd. of Nursing*, 2017 ME 29, ¶ 18, 156 A.3d 126. Because there is competent evidence in the record, we defer to the ALJ's findings regarding Mr. Hughes's work capacity.[4]

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[4] The ALJ also concluded that Mr. Hughes had good and reasonable cause to refuse First Fleet's offer of a 30-hour per week light-duty job on the basis that Mr. Hughes had only a fifteen-hour per week work capacity. First Fleet contends this is erroneous because the fifteen-hour work capacity finding is

## III. CONCLUSION

[¶19] Mr. Hughes' testimony, considered in conjunction with the medical records, specifically Dr. Knopp's records, constitutes competent evidence to support the ALJ's conclusions relative to Mr. Hughes' work capacity. As such, we will not disturb it on appeal.

The entry is:

The administrative law judge's decision is affirmed.

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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.

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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unsupported in the record. 39-A M.R.S.A § 214(1). Because we uphold the finding that Mr. Hughes has a fifteen-hour per week work capacity, First Fleet's contention lacks merit.