DARLENE L. THURLOW
(Appellant)

v.

RITE AID OF MAINE, INC.
(Appellee)

and

TRAVELERS INSURANCE CO.
(Insurer)

Conferenced: September 17, 2014
Decided: August 17, 2016

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

[¶1] Darlene Thurlow appeals from a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) granting in part her Petition for Award regarding a September 8, 2005, gradual work injury to her bilateral upper extremities and denying an award of ongoing partial incapacity benefits. Ms. Thurlow contends that the administrative law judge erred in three respects, by: (1) rejecting the conclusions of the Independent Medical Examiner's (IME) written report without citing clear and convincing evidence to the contrary, *see* 39-A M.R.S.A. § 312(7) (Supp. 2015); (2) improperly placing a burden on Ms. Thurlow to establish unavailability of work after she had established prima facie evidence of her post-injury earning incapacity; and (3) denying incapacity benefits for the 2005

work injury based on an allegedly unsupported finding that there was other suitable work available to Ms. Thurlow.

[¶2] Although we find no error in the ALJ's reading of the independent medical examiner's findings, we conclude that the ALJ misallocated the burdens of proof and production. Therefore, we vacate the ALJ's decision and remand for further proceedings.

I. BACKGROUND

[¶3] Darlene Thurlow began working at Rite Aid in 1998, performing cashiering and stocking duties. On September 8, 2005, she injured her wrists, forearms, and elbows while lifting a 30-pack of beer to chest level in order to scan the barcode on the bottom of the box. Ms. Thurlow was taken out of work for a few months while she underwent physical therapy treatments and received two cortisone injections. Her symptoms persisted despite the treatment. Ms. Thurlow returned to Rite Aid in late 2005 on a reduced, eighteen-hour per week schedule, with restricted duties. She worked as a cashier but did not do stocking. Rite Aid also furnished Ms. Thurlow with a hand-held scanning device so she no longer had to lift heavy items to scan them.

[¶4] Before her injury, Ms. Thurlow worked 30 hours per week with an average weekly wage of $199.84. In her current reduced-work schedule she earns

a higher hourly wage but earns less than her average weekly wage due to the reduction in her hours.

[¶5] Rite Aid had been voluntarily paying Ms. Thurlow partial incapacity benefits related to her 2005 injury until it suspended those benefits in May 2006 after she was cleared by her doctor to resume working 30 hours per week with restrictions. In 2012, she filed her Petition for Award alleging a September 8, 2005, gradual injury to her bilateral upper extremities. She sought ongoing partial incapacity benefits on a varying rate basis from May 27, 2006, forward. In order to carry her burden of proof and establish that she is entitled to partial wage-loss benefits, Ms. Thurlow relied on the opinion of Dr. Graf, the Independent Medical Examiner appointed pursuant to 39-A M.R.S.A. § 312 (Supp. 2015), and evidence of her post-injury earnings working eighteen hours per week at Rite Aid.

[¶6] Based on Dr. Graf's medical findings, the ALJ found that Ms. Thurlow suffered from "medial and lateral epicondylitis and tendonitis of a chronic nature" and that she has work restrictions for both upper extremities including "limitations in strength of power grip and key pinch, as well as pushing, pulling and lifting" as a result of the 2005 work injury. She found no clear and convincing evidence to the contrary "with respect to the issue of the nature of the injury suffered by Ms. Thurlow" and therefore granted the protection of the Act for a gradual injury to Ms. Thurlow's bilateral upper extremities as of September 8, 2005.

[¶7] However, the ALJ found Dr. Graf's statement that Ms. Thurlow "has been restricted in hours worked to 18 hours from a prior full work week" to be ambiguous, and that it did not support Ms. Thurlow's proposition that she is restricted to working 18 hours per week on an ongoing basis. The ALJ further found that Ms. Thurlow's proof of reduced, post-injury wages was not adequate to carry her burden that any continued earning incapacity was casually related to her 2005 work injury. Thus, she denied the claim for ongoing partial incapacity benefits.

[¶8] Ms. Thurlow filed a motion for Findings of Fact and Conclusions of Law, which the ALJ denied. Ms. Thurlow now appeals.

II. DISCUSSION

A. Standard of Review

[¶9] Our role on appeal is limited to assuring that the ALJ's 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). Because Ms. Thurlow requested findings of fact and conclusions of law, "we review the original findings and any additional findings made in response to a motion for findings to determine if they are sufficient, as a matter of law, to support the result and if they are supported by evidence in the record." *Maietta*

v. Town of Scarborough, 2004 ME 97, ¶ 17, 854 A.2d 223. Finally, an ALJ's ruling "that any party has or has not sustained the party's burden of proof . . . is considered a conclusion of law and is reviewable[.]" 39-A M.R.S.A. § 318 (Supp. 2015); *see also Savage v. Georgia Pacific Corp.*, Me. W.C.B. No. 13-5, ¶ 7 & n.1 (App. Div. 2013).

B. Application of Title 39-A M.R.S.A. § 312

[¶10] Ms. Thurlow first contends that the ALJ erred when she rejected the IME's opinion regarding restrictions on the hours she can work without citing to contrary clear and convincing medical evidence in the record. We find no error.

Title 39-A M.R.S.A. § 312(7) provides:

> The board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings. Contrary evidence does not include medical evidence not considered by the independent medical examiner. The board shall state in writing the reasons for not accepting the medical findings of the independent medical examiner.

[¶11] When determining whether there is clear and convincing evidence contrary to the IME's findings, the Appellate Division looks to whether the ALJ "could reasonably have been persuaded that the required factual finding was or was not proved to be highly probable." *Dubois v. Madison Paper Co*., 2002 ME 1, ¶ 14, 795 A.2d 696 (quotation marks omitted).

[¶12] In order to support her claim that she cannot work more than eighteen hours per week due to the ongoing effects of her work injury, Ms. Thurlow relied on the opinion of Dr. Graf, who stated:

> [Ms. Thurlow has] permanent work restrictions for both upper extremities. She has limitations in strength of power grip and key pinch, as well as pushing, pulling and lifting. These restrictions are causally related to the 09/08/05 work-related injury. She has been restricted in hours worked to 18 hours from a prior full workweek and she no longer stocks shelves. There ha[ve] been improvements in the scanning devices to allow her to continue as a cashier in spite of her problems.

[¶13] Based on this report, the ALJ unequivocally concluded that Ms. Thurlow suffers ongoing effects and has work restrictions as a result of the injury. The issue, however, is whether she has any earning incapacity due to those restrictions. The ALJ found the IME's report regarding how many hours per week Ms. Thurlow can work to be ambiguous. Specifically, because Dr. Graf used the words "she *has been restricted* to 18 hours," the ALJ observed "that it is not clear whether Dr. Graf is describing an historical fact or whether he is advising what should occur in the future." (Emphasis added).

[¶14] We agree that the statement in Dr. Graf's report is susceptible of more than one meaning. Accordingly, we conclude that the ALJ did not fail to adopt a medical finding by the IME. Instead, she interpreted Dr. Graf's statement to be insufficient to establish an ongoing restriction to eighteen hours per week.

Therefore, section 312 did not require the ALJ to support her reading of Dr. Graf's report with clear and convincing contrary evidence.

C. Post Injury Earning Capacity and Allocation of Burdens

[¶15] Ms. Thurlow argues that the ALJ erred when allocating evidentiary burdens of proof in this case. She asserts that the ALJ placed a heightened and unwarranted burden on her to establish, with work search or labor market evidence, that employment paying as much or more than her pre-injury wage was reasonably unavailable to her in the local competitive labor market. She contends, instead, that proof of her substantial post-injury earnings constitutes prima facie evidence of her post-injury earning capacity, and once she submitted proof of those earnings, it was incumbent on Rite Aid to come forward with evidence that higher-paying work within her restrictions was reasonably available to her, *citing Fecteau v. Rich Vale Constr., Inc.*, 349 A.2d 162, 165 (Me. 1975); *Flanagin v. Ames Dep't Store*, 652 A.2d 83, 85 (Me. 1995).

[¶16] In *Fecteau* and *Flanigan*, the Law Court "held that when an employee has obtained post-injury employment and is *earning substantial wages*, those post-injury wages constitute prima facie evidence of earning capacity and the employee is not required to produce additional evidence of work-search." *Flanigan*, 652 A.2d at 84 (emphasis added); *see also Fecteau*, 349 A.2d at 166. The Court allocated the burdens of proof and production as follows:

> We decide that since the ultimate burden of proof to establish the extent of partial incapacity is upon the employer who has petitioned for a review of incapacity, in the situation now before us the job at which the injured employee is in fact working and the income it produces provide a legally sufficient basis to support a Commission determination as to the extent of partial incapacity in terms of weekly compensation. If the employer who is petitioning for review would have it otherwise, it is for such petitioning employer, as incident of the discharge of his ultimate burden to prove the extent of partial incapacity in terms of weekly compensation, to come forward with evidence that regular employment paying wages higher than those being earned by the employee, and compatible with the employee's limited physical ability to work, was reasonably available to the employee.

Fecteau, 349 A.2d at 166; *see also Flanigan*, 652 A.2d at 84.

[¶17] Rite Aid would distinguish the *Flanigan* and *Fecteau* cases on the basis that they involved employer-filed petitions for review, in which the employer bore the never-shifting burdens of proof and persuasion regarding the partially incapacitated employee's post-injury ability to earn. Here, Rite Aid contends, Ms. Thurlow bore the never-shifting burdens of proof and persuasion. *See Morse v. Fleet Fin. Co.*, 2001 ME 142, ¶ 7 & n.2, 782 A.2d 769 (comparing the differing burdens of proof and production when an employer and employee are the petitioning party and the employee seeks 100% partial incapacity benefits).

[¶18] The Law Court, however, in *McIntyre v. Great Northern Paper*, considered the employee's post-injury earnings as prima facie evidence of post-injury earning capacity, despite that it was the employee's petition for review and the employee bore the burdens of proof and persuasion. 2000 ME 6, ¶ 8, 743 A.2d

744 (2000) ("McIntyre's post-injury earnings constitute prima facie evidence of his earning capacity. *See Fecteau v. Rich Vale Constr., Inc.*, 349 A.2d 162, 166 (Me1975)."). It is therefore not correct to say that the *Fecteau/Flanigan* holding, directing that evidence of substantial post-injury earnings be considered prima facie evidence of the employee's earning capacity, applies only to employer-initiated petitions.

[¶19] In this case, the ALJ stated:

> It is Ms. Thurlow's burden to prove that she continues to suffer a work-related earning incapacity. While her current wages are some evidence of her earning capacity, it is not self-evident that she cannot work in some other job that is consistent with her limitations nor is it evident that such work is unavailable to her. This issue is made relevant by her relatively low average weekly wage.

[¶20] Thus, it is apparent that the ALJ placed a burden on Ms. Thurlow to go beyond establishing prima facie evidence of earning capacity, and to establish that regular employment paying higher wages was unavailable to her. Moreover, the ALJ made unsupported findings that higher-paying work was available to Ms. Thurlow in the absence of such evidence. This was error.

[¶21] Ms. Thurlow met her initial burden of proof by submitting evidence of substantial post-injury earnings. Those earnings constitute prima facie evidence of her post-injury ability to earn. Once she submitted that evidence, the burden shifted to Rite Aid to come forward with evidence that regular employment paying

wages higher than those being earned by Ms. Thurlow, and compatible with her limited physical ability to work, was reasonably available to her.

[¶22] Had the employer come forward with this evidence, Ms. Thurlow's ultimate burden of persuasion would require the ALJ, at that point, to evaluate credibility and reliability of all of the evidence submitted,[1] and to ultimately decide what the employee is able to earn considering "(1) the employee's physical capacity to earn wages and (2) the availability of work within the employee's physical limitations." *Dumond v. Aroostook Van Lines*, 670 A.2d 939, 941 (Me. 1996). However, because there is no indication in the record that the employer came forward with evidence to meet its burden, and the ALJ made certain findings that higher-paying work was available in the absence of such evidence, we must vacate the decision.

[1] The Law Court recently described the prima facie evidence standard, in the context of a motion to dismiss, as:

> the preliminary burden of production of evidence; it requires proof only of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor. Prima facie evidence requires only some evidence on every element of proof necessary to obtain the desired remedy. Thus, prima facie proof is a low standard that does not depend on the reliability or credibility of the evidence, all of which may be considered at some later time in the process. *Cookson v. State*, 2011 ME 53, ¶ 8, 17 A.3d 1208 (internal citations omitted).

Nader v. Me. Democratic Party, 2012 ME 57, ¶ 34, 41 A.3d 551.

III. CONCLUSION

[¶23] The ALJ was not required to cite clear and convincing evidence contrary to an ambiguous medical finding of the independent medical examiner. However, because the ALJ erred in allocating the burdens of proof and production, we vacate the decision and remand for further proceedings.

The entry is:

> The ALJ's decision is affirmed in part and vacated in part and remanded for proceedings consistent with this decision.

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. 2015).

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