REBECCA BELANGER
(Appellee)

v.

MILES MEMORIAL HOSPITAL
(Appellant)

and

SYNERNET

Argument held: June 9, 2016
Decided: May 25, 2017

PANEL MEMBERS: Administrative Law Judges Stovall, Jerome, and Pelletier

Majority: Administrative Law Judges Jerome and Pelletier
Dissent: Administrative Law Judge Stovall

By: Administrative Law Judge Jerome

[¶1] Miles Memorial Hospital appeals from a decision of a Workers' Compensation Board administrative law judge (*Knopf, ALJ*) granting Rebecca Belanger's Petitions for Review and for Payment of Medical and Related Expenses in part. The ALJ awarded total incapacity benefits from March 13, 2013, through September 13, 2013; ongoing partial benefits based on a $400 per week imputed earning capacity; and payment of certain medical expenses. The Hospital contends first, that the ALJ erred in finding changed economic circumstances to overcome the res judicata effect of a previous decree; and second, by failing to apply 39-A M.R.S.A. § 206(11) (Supp. 2016) to deny payment for brand-named drugs. We

affirm the ALJ's decision on the res judicata issue, and vacate in part and modify the decision to the extent that it requires payment for brand-named drugs.

I. BACKGROUND

[¶2] Rebecca Belanger was working as a nurse at Miles Memorial Hospital on November 10, 1999, when a chair she was sitting on collapsed and caused her to sustain an injury. In a 2003 decree, the ALJ found that Ms. Belanger injured her hands and thumbs as a result of this work-related incident; she suffered partial incapacity; there were job opportunities in the health profession available to her within her work restrictions; and she was capable of earning $800.00 per week.

[¶3] Ms. Belanger subsequently filed a Petition for Review of Incapacity. The ALJ denied the Petition in a 2012 decree, concluding that Ms. Belanger failed to establish a change in medical or economic circumstances that would warrant revisiting the 2003 award. *See Grubb v. S.D. Warren Co*., 2003 ME 139, ¶ 7, 837 A.2d 117. The ALJ found that while Ms. Belanger had developed anxiety and depression, there was no evidence that those conditions caused any increase in her incapacity.

[¶4] In the current round of litigation, Ms. Belanger filed another Petition for Review and a Petition for Payment of Medical and Related Services, which was resolved in a 2015 decree. Although the ALJ concluded that once again Ms. Belanger did not demonstrate a change in her medical circumstances, the ALJ did

find that Ms. Belanger proved a change in her economic circumstances. Thus, the ALJ proceeded to re-examine the prior decree.

[¶5] The ALJ determined that Ms. Belanger is entitled to ongoing partial incapacity benefits reflecting a decrease in earning capacity from $800.00 to $400.00 per week. The ALJ further ordered the Hospital to pay the disputed medical bills, except for the bill from one date of treatment.[1]

[¶6] The Hospital filed a motion for additional findings of fact and conclusions of law, which the ALJ granted. The ALJ issued additional findings, reiterating her conclusions as to changed circumstances and incapacity, but altering her decision with respect to the decision to award payment for brand-name (as opposed to generic) medications, with respect to future payments. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶7] Appeals from decisions of administrative law judges are governed by 39-A M.R.S.A. §§ 321-B, 322 (Supp. 2016). Section 321-B (2) provides that "[a] finding of fact by an administrative law judge is not subject to appeal under this section." The role of the Appellate Division "is limited to assuring that the [ALJ's] findings are supported by competent evidence, that [the] decision involved no

[1] The ALJ also awarded Ms. Belanger total incapacity benefits from March 13, 2013, through September 13, 2013, the period during which she underwent and recovered from surgery on her thumbs. The Hospital does not dispute this award.

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 hearing officer." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Change in Economic Circumstances

[¶8] The Hospital contends that the ALJ erred when finding a change in economic circumstances sufficient to overcome the res judicata effect of the previous decision. We disagree.

[¶9] "[V]alid and final decisions of the Workers' Compensation Board are subject to the general rules of res judicata and 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." *Grubb*, 2003 ME 139, ¶ 9, 837 A.2d 117 (citations omitted). Therefore, "in order to prevail on a petition to increase or decrease compensation in a workers' compensation case when a benefit level has been established by a previous decision, the petitioning party must first meet its burden to show a 'change of circumstances' since the prior determination, which may be met by either providing 'comparative

medical evidence,' or by showing changed economic circumstances." *Id.* ¶ 7 (citations omitted).

[¶10] The ALJ concluded that Ms. Belanger established a change in her economic circumstances, based on the following:

> [S]ince the decree of April 24, 2012, Ms. Belanger has performed a work search (albeit one that was insufficient to warrant an award of 100% partial incapacity benefits); she engaged in vocational rehabilitation; she underwent surgery; she was totally incapacitated while recovering from surgery and later found to be totally incapacitated from a psychological perspective by Dr. Pulver; she lost her job with the Sagadahoc County Probate Court; she has not worked within her field of expertise in over 10 years; and at the time of the decree, Ms. Belanger had reached 65 years of age. While any one of these changes in circumstances may not be sufficient to warrant review of the compensation payment scheme, taken together, the Board . . . find[s] that review was warranted in this round of litigation.

[¶11] The Hospital asserts that because the ALJ did not find Ms. Belanger's work search and labor market evidence sufficient to establish entitlement to 100% partial incapacity benefits, it was error to consider this evidence on the issue of changed circumstances. The Hospital, however, cites no authority to support its contention. Evidence regarding the current labor market or evidence that an employee has undertaken a work search may be relevant to an inquiry regarding economic circumstances, particularly when considered in conjunction with other factors, even though that evidence does not persuade the ALJ that the employee is entitled to 100% partial incapacity benefits.

[¶12] The remaining factors considered by the ALJ are that Ms. Belanger had not worked in her profession for ten years, had applied for vocational rehabilitation services, undertook an unsuccessful search for work, lost a part-time job, underwent surgery and was totally incapacitated for a period thereafter, suffers from psychiatric problems,[2] and is now 65 years old. These types of factors are relevant to an employee's ability to earn, and thus to her economic circumstances. *See, e.g., Tucker v. Assoc. Grocers of Me.*, 2008 ME 167, ¶ 9, 959 A.2d 75 (holding, despite that job loss occurred before the consent decree was entered, the employee's unanticipated unemployment for a prolonged period after the consent decree constituted a change in economic circumstances); *see also Strout v. Blue Rock Indus.*, Me. W.C.B. No. 16-37, ¶ 22 (App. Div. 2016) (affirming determination that loss of part-time, post-injury employment constituted a change in economic circumstances).

[¶13] The ALJ's assessment of Ms. Belanger's circumstances is supported by the record, is not irrational, and does not misconceive or misapply the law. Accordingly, we find no error.

[2] The Hospital specifically contends that it was error to consider Dr. Pulver's opinion on Ms. Belanger's psychiatric condition because it conflicts with the independent medical examiner's opinion. The independent medical examiner, Dr. Bamberger, answered multiple questions regarding Ms. Belanger's upper extremities and her work capacity pertaining to her physical condition. Dr. Bamberger did not address any issue regarding Ms. Belanger's mental conditions. Therefore, the fact that the ALJ considered Dr. Pulver's opinion regarding Ms. Belanger's mental condition does not contradict Dr. Bamberger's evaluation which was, as he stated, to answer questions regarding her left wrist injury. Dr. Bamberger wrote in his January 23, 2014 report: "I will not reiterate her history today since the purpose of today's evaluation was specifically to answer certain questions regarding her recent left wrist surgery and an ostensible injury that occurred at home in December of 2012." The ALJ did not commit the alleged error.

C. Application of Section 206(11)

[¶14] The Hospital contends that Ms. Belanger's Petition for Payment of Medical and Related Services should be denied to the extent she requests reimbursement for certain brand-name medications provided by her pharmacy, because 39-A M.R.S.A. § 206(11) requires payment for generic drugs when available. We agree with this contention.

[¶15] Section 206(11) provides:

> **Generic drugs.** Providers shall prescribe generic drugs whenever medically acceptable for the treatment of an injury or disease for which compensation is claimed. An employee shall purchase generic drugs for the treatment of an injury or disease for which compensation is claimed if the prescribing provider indicates that generic drugs may be used and if generic drugs are available at the time and place of purchase under subsection 11-A. If an employee purchases a nongeneric drug when the prescribing provider has indicated that a generic drug may be used and a generic drug is available at the time and place of purchase, the insurer or self-insurer is required to reimburse the employee for the cost of the generic drug only. For purposes of this subsection, "generic drug" has the same meaning found in Title 32, section 13702-A, subsection 14.

Title 32 M.R.S.A. § 13702-A(14) provides:

> **Generic and therapeutically equivalent drug.** "Generic" and "therapeutically equivalent drug" means any drug that has identical amounts of the same active ingredients in the same dosage form and in the same concentration that, when administered in the same amounts, will produce or can be expected to have the same therapeutic effect as the drug prescribed.

[¶16] The ALJ concluded:

> There is no evidence in the record as to whether generic drugs were available at the time and place of purchase, however. As such, the

> Board declines to order reduced reimbursement. Nonetheless, to the extent the provisions of this are met going forward, Ms. Belanger should purchase generic drugs when possible.

[¶17] The Hospital argues that because generic drugs were available on some occasions they must have been available at the time and place Ms. Belanger was given the brand name medication. The Hospital alternatively asserts that the burden of proof on the issue of whether generic drugs were available rests with Ms. Belanger, and thus, the lack of evidence on this issue should have resulted in a denial of her claim for reimbursement of the cost of brand name drugs.

[¶18] "When construing provisions of the Workers' Compensation Act . . . we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results." *Hanson v. S.D. Warren Co.*, 2010 ME 51, ¶ 12, 997 A.2d 730. We read section 206(11) to place an affirmative obligation on providers to prescribe generic drugs, and on employees to use the generic version if two conditions are met: (1) the provider has indicated that the generic version is appropriate and (2) the generic version is available at the time and place of purchase.

[¶19] In this case, the ALJ found that the first condition had been met. This is a finding of fact that we will not disturb on appeal. *See* 39-A M.R.S.A. § 321-B(2).

[¶20] The ALJ thereafter determined there was no evidence with respect to the second condition, but nonetheless concluded that the Hospital was liable to pay for the brand name version of the drugs that were sought. This put the burden of proving the availability of the generic version of a drug (at the time and place of purchase) on the Hospital.

[¶20] Except in unusual circumstances, the party filing a claim bears the burden of proof on all elements of that claim. *Fernald v. Dexter Shoe Co.*, 670 A.2d 1382, 1385 (Me. 1996). We perceive no reason to alter that burden in this circumstance. It is the employee who is present at the time and place of purchase of any medication. Placing the obligation on the employee to show unavailability of the generic version of a drug is consistent with the affirmative burden placed upon employees by section 206(11), and is not an onerous burden.

[¶21] Because Ms. Belanger did not meet her burden of proof, it was error to order the Hospital to pay for the brand name cost of the drugs at issue.

III. CONCLUSION

[¶22] We affirm the decision insofar as the ALJ determined that Ms. Belanger's economic circumstances have changed (thus overcoming the res judicata bar to revisiting the prior payment scheme) and that Ms. Belanger's earning capacity has decreased. With respect to this portion of the ALJ's decision,

the factual findings are supported by competent evidence, the decision involved no misconception of the applicable law, and the application of the law to the facts was neither arbitrary nor without rational foundation. *Moore*, 669 A.2d at 158. Because Ms. Belanger did not meet her burden to prove the unavailability of generic drugs, however, we vacate the decision insofar as it ordered payment for brand-named drugs, and modify the decision to require the Hospital to reimburse Ms. Belanger to the extent of the cost of the generic versions only.

The entry is:

> The administrative law judge's decision is affirmed in part, vacated in part, and modified.

Administrative Law Judge Stovall, dissenting

[¶23] I respectfully dissent from section C of this decision. Tile 39-A M.R.S.A. § §206(11) reads in part: "If an employee purchases a nongeneric drug when the prescribing provider has indicated that a generic drug may be used *and* a generic drug is available at the time and place of purchase, the insurer or self-insurer is required to reimburse the employee for the cost of the generic drug only." (Emphasis added).

[¶24] Section 206 (11) has two prerequisites that need to be established before the insurer can avoid payment of the actual cost incurred and instead pay

the generic price. First, proof is necessary that the employee was prescribed generic medication. That has been established in this case. Second, it must be proven that the generic drug was available at the time and place of purchase. I read this prerequisite as an insurer's defense against paying for the name-brand cost.

[¶25] By the plain language of the Act there is no requirement to establish the unavailability of the generic drug. To the contrary, by the plain language there is a requirement to establish the availability of the generic drug *before* the reduction in payment can be made. To give the employee such a burden would require the statute to be interpreted as follows:

> "If an employee purchases a nongeneric drug when the prescribing provider has indicated that a generic drug may be used ~~and a generic drug is available at the time and place of purchase~~, the insurer or self-insurer is required to reimburse the employee for the cost of the generic drug ~~only~~ *unless the employee proves the unavailability of the generic drug at the time and place of purchase*."

[¶26] The ALJ determined that "There is no evidence in the record as to whether generic drugs were available at the time and place of purchase." Because of the language in section 206(11), I cannot agree that an insurer can reduce its payments to the generic drug cost without proof that the generic drug was available at the time and place of purchase. Accordingly, I would affirm the ALJ's decision as consistent with section 206.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2016).

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