PAMELA PUIIA
(Appellee)

v.

NEWPAGE CORP.
(Appellant)

and

MAINE SELF-INSURANCE GUARANTEE ASSOC.
(Insurer)

Argued: March 16, 2017
Decided: November 3, 2017

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

[¶1] NewPage Corporation appeals from a decision of a Workers' Compensation Board administrative law judge (*Elwin, ALJ*) denying its Petitions to Determine Extent of Permanent Impairment for respiratory injuries that occurred on May 31, 2001, and January 29, 2004. The ALJ determined that the res judicata effect of a 2010 consent decree—which established a combined permanent impairment for three injuries, including the 2001 and 2004 injuries at issue—barred NewPage's petitions. NewPage contends that because the 2010 decree decided only the cumulative permanent impairment level from three separate injuries, it does not preclude the board from determining the permanent impairment ratings assigned to each individual injury. We disagree, and affirm the decision.

I. BACKGROUND

[¶2] Ms. Puiia worked at the Rumford paper mill currently owned and operated by NewPage.[1] She sustained two respiratory injuries due to chemical exposures that occurred on May 31, 2001, and January 29, 2004. Ms. Puiia also sustained a gradual injury to her neck, left arm, and low back that manifested itself on May 5, 2005, her last day of work at the mill. Ms. Puiia began receiving partial incapacity benefits for her respiratory injuries retroactively to March 29, 2006, as ordered by the board (*Goodnough, HO*) in a 2008 decree.

[¶3] Later in 2008 and 2009, NewPage filed petitions asking the board to determine the extent of permanent impairment associated with Ms. Puiia's 2001, 2004, and 2005 injuries. On December 20, 2010, the board (*Goodnough, HO*) granted those petitions in a consent decree, approving an agreement of the parties that Ms. Puiia's impairment rating "relative to the combined effects of all three dates of injury is 19%."[2] The consent decree did not specifically apportion the cumulative impairment rating between the three dates of injury.

[1] The ALJ found: "NewPage was self-insured at the time of the claimed injuries and when the 2010 Decree was issued. Sometime after the 2010 Decree, MSIGA began handling the claim. While MSIGA is represented by different counsel, it stands in the shoes of Employer and is not a new party from the standpoint of *res judicata.*"

[2] The board issued its 2010 decision after the Law Court vacated and remanded a previous decision for reconsideration of a previously-awarded offset. The previous decision had also determined Ms. Puiia's permanent impairment rating to be 19%. In a decision dated December 20, 2010, the board dismissed NewPage's offset petitions, but, with the agreement of the parties, reaffirmed the finding with respect to permanent impairment.

[¶4] NewPage commenced the current round of litigation by again filing Petitions to Determine Extent of Permanent Impairment, this time for Ms. Puiia's 2001 and 2004 respiratory injuries but not her 2005 orthopedic injury. NewPage asked the board to assign an impairment rating to each individual respiratory injury rather than a single aggregated rating. The board (*Elwin, ALJ*) denied those petitions, finding that the res judicata effect of the 2010 consent decree foreclosed her from making separate awards of permanent impairment for the 2001 and 2004 injuries. Alternatively, the ALJ concluded that there was insufficient evidence to separate out the permanent impairment related to the two distinct respiratory injuries because no medical opinion in evidence assigned an impairment rating to the 2001 injury. The board rejected NewPage's request for further findings of fact and conclusions of law, and this appeal followed.

II. DISCUSSION

[¶5] Under the current Workers' Compensation Act, permanent impairment is relevant only to the issue of whether an employee's partial incapacity benefits are subject to the durational limit set forth in 39-A M.R.S.A. § 213 (Supp. 2016).[3] Thus, the import of the board's 2010 findings on permanent impairment is that

[3] Partial incapacity benefits are generally subject to a durational cap of 520 weeks. *See* 39-A M.R.S.A. § 213(1)(A) (setting a 260-week limit subject to extension); Me. W.C.B. Rule, ch. 2, § 2 (extending the 260-week limitation to 520 weeks). Employees are exempt from this cap if their injuries result in whole-body permanent impairment rated above a certain threshold percentage. 39-A M.R.S.A. § 213(1)(A) (setting a 15% threshold subject to modification). Ms. Puiia's benefits are subject to the 520-week cap

(1) Ms. Puiia suffers from the combined effects of all three dates of injury, and (2) her combined permanent impairment is high enough to avoid the durational limit on partial incapacity benefits.

[¶6] A valid and final decision of a Workers' Compensation Board hearing officer or administrative law judge is subject to the general rules of res judicata and is not subject to later collateral attack. *See Bailey v. City of Lewiston*, 2017 ME 160, ¶ 10, __ A.3d __; *Moore v. City of Portland*, 2004 ME 49, ¶ 10, 845 A.2d 1163. Principles of res judicata bar a party from bringing a cause of action that has already been subject to a valid, final decision. *See Beegan v. Schmidt*, 451 A.2d 642, 644 (Me. 1982). The scope of the bar extends to all claims and all issues that were tried in the prior action, but does not necessarily extend to all claims that *might have been* tried. *See Oleson v. Int'l Paper*, Me. W.C.B. No. 14-29, ¶ 19 (App. Div. 2014).

[¶7] With respect to a permanent impairment determination, "[e]xcept for the very limited circumstances referenced in 39-A M.R.S.A. §§ 319 and 321, the workers' compensation statute provides no opportunity for a redetermination of a hearing officer's or ALJ's findings regarding permanent impairment or MMI." *Bailey*, 2017 ME 160, ¶ 13.

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unless her permanent impairment rating exceeds thresholds of 11.8% for her 2001 injury, and 13.4% for her 2004 injury. Rule, ch. 2, § 1(3).

[¶8] NewPage filed Petitions to Determine Extent of Permanent Impairment on Ms. Puiia's 2001 and 2004 respiratory injuries in 2008, and for the 2005 orthopedic injury in 2009. Those were addressed and resolved by agreement in the 2010 decree—a valid and final adjudication. In the current proceedings, in 2014, NewPage filed a second round of Petitions to Determine Extent of Permanent Impairment for the 2001 and 2004 respiratory injuries. It would appear that under the Law Court's recent decision in *Bailey*, NewPage is barred from bringing the second round of permanent impairment petitions for the same dates of injury.

[¶9] Finally, we conclude that even if *Bailey* did not control the result in this case, the ALJ did not err in determining that res judicata precludes NewPage's request to establish separate permanent impairment ratings for the 2001 and 2004 work injuries. NewPage, citing *Oleson*, contends that res judicata does not preclude consideration of issues that the board could have, but did not, decide during a previous round of litigation.[4] *See* Me. W.C.B. 14-29, ¶ 19 (contrasting Maine case law with Michigan's more broad use of res judicata). In *Oleson*,

[4] NewPage also argues that Ms. Puiia waived her res judicata defense by not listing it on the Joint Scheduling Memorandum. Me. W.C.B. Rule, Ch. 12, § 13.3 ("Any affirmative defenses must be raised in the Joint Scheduling Memo or will be deemed waived."). The issue, however, was fully and fairly addressed by both parties in position papers submitted to the ALJ, and in the Motion for Additional Findings of Fact and Conclusions of Law. Because res judicata is essential to avoid duplicative litigation and inconsistent judgments, the ALJ did not abuse her discretion in addressing an issue of which both parties had full and fair notice well in advance of the decision. *See Clodfelter v. Republic of Sudan*, 720 F.3d 199, 208 (4th Cir. 2013) ("[C]ourts have consistently described a district court's sua sponte consideration of a res judicata defense as permissible but not required."); *Scherer v. Equitable Life Assurance Soc'y*, 347 F.3d 394, 398 n.4 (2d Cir. 2003) ("[A] court is free to raise that defense [of res judicata] sua sponte, even if the parties have seemingly waived it.").

a hearing officer barred an employee from seeking benefits for a 2001 shoulder injury because, he reasoned, the employee could have asserted that claim during prior litigation involving a separate low back injury. *Id.* at ¶ 17. An Appellate Division panel vacated that decision, concluding that the hearing officer had applied the principle of res judicata too broadly. *Id.* Citing *Wacome v. Paul Mushero Const. Co.*, 498 A.2d 593 (Me. 1985), and applying the Restatement (Second) of Judgments, § 83 (1982), the panel determined that a claim that could have been raised in prior litigation is not barred provided that claim was "neither litigated by the parties nor decided in the [prior] decision." *Id*. at ¶ 21.

[¶10] NewPage urges us to apply *Oleson* because its current petitions sought not to resolve a claim previously decided, but a *factual issue* not addressed in the 2010 consent decree. However, it cannot be said that the issue of permanent impairment level for each injury was not before the board in 2010. During that phase of the litigation, independent medical examiner opinions were submitted for both the respiratory and orthopedic injuries. Moreover, the parties agreed to the 19% figure, which they submitted to the hearing officer for approval without a breakdown. Contrary to NewPage's arguments, its petitions are precisely what the rules of res judicata are intended to avoid. *See Beegan*, 451 A.2d at 644.

III. CONCLUSION

[¶11] The Law Court recently interpreted the Workers' Compensation Act to preclude re-litigation of permanent impairment determinations. Moreover, the board's 2010 decree included a valid and final adjudication of NewPage's Petitions to Determine Extent of Permanent Impairment for Ms. Puiia's 2001 and 2004 respiratory injuries. The ALJ correctly determined that principles of res judicata bar re-adjudication of those petitions.

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. 2016).

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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