STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 24-0008
Decision No. 25-02

APRIL M. MOON
(Appellee)

v.

NORTHERN LIGHT
EASTERN MAINE MEDICAL CENTER
(Appellant)

and

EASTERN MAINE GROUP WORKERS
COMPENSATION TRUST
(Insurer)

Argued: December 11, 2024
Decided: January 31, 2025

PANEL MEMBERS: Administrative Law Judges Chabot, Sands, and Smith
BY: Administrative Law Judge Chabot

[¶1] Northern Light Eastern Maine Medical Center (NLEMMC) appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*), granting its Petitions for Review in part and awarding April Moon total incapacity benefits pursuant to 39-A M.R.S.A § 212. NLEMMC contends that the ALJ erred in failing to reduce the award to account for a subsequent nonwork-related injury pursuant to 39-A M.R.S.A. § 201(5). NLEMMC further contends that the evidence is inconsistent with total incapacity and compels a finding of partial incapacity. We disagree and affirm the decision.

I. BACKGROUND

[¶2] Ms. Moon sustained work-related injuries on July 24, 2017, August 23, 2017, and August 24, 2018. These injuries are established by a Consent Decree dated April 4, 2019. The Consent Decree adopted the medical findings of the independent medical examiner (IME), Dr. John Bradford, appointed pursuant to 39-A M.R.S.A § 312. Dr. Bradford opined that the July 24, 2017, injury resulted in a low back strain that was no longer affecting Ms. Moon, but that the August 23, 2017, injury resulted in lumbar radiculopathy for which she underwent surgery at the L4-5 level. Dr. Bradford also stated that Ms. Moon sustained an aggravation of the August 23, 2017, injury on August 24, 2018.

[¶3] Ms. Moon continued to work part-time for NLEMMC after her injuries until June 2021. Thereafter, she began to experience significant pain. She underwent surgery in August 2021 for a new herniated disc at L5-S1. She has not returned to work.

[¶4] Pursuant to the Consent Decree, NLEMMC was paying Ms. Moon partial incapacity benefits at varying rates. NLEMMC filed Petitions for Review seeking to reduce Ms. Moon's weekly benefit to a fixed rate reflecting an imputed earning capacity identified in its labor market survey.[1] Ms. Moon contended that she should receive total incapacity benefits.

[1] NLEMMC brought Petitions for Review on the July 24, 2017, and August 23, 2017, dates of injury.

[¶5] Ms. Moon underwent a second independent medical examination with Dr. Bradford in 2023, after which he opined that Ms. Moon continued to experience the effects of her work injuries and that she continued to be under work restrictions. In his report, he concluded that her 2021 surgery was related to her work injuries, but when questioned at a later deposition, he reversed this opinion and stated that it was not work-related. Regarding work capacity, Dr. Bradford stated, "I would recommend a trial of three hours per day for two days per week. If tolerated, after several weeks she could attempt three hours per day for four days per week." He opined that her work hours could be further increased over time as tolerated. At his deposition, Dr. Bradford testified that it would not surprise him if Ms. Moon could not tolerate a return to work.

[¶6] Ms. Moon submitted work search evidence showing that she had made inquiries about seven positions, but she did not submit any applications or receive any offers of employment. She testified that none of these employers offered three-hour shifts. NLEMMC submitted a labor market survey indicating a strong labor market for individuals with similar restrictions to Ms. Moon at $13.89 per hour.

[¶7] Based on the evidence, the ALJ found that the 2021, L5-S1 surgery was not related to her work injuries. The ALJ further found that Ms. Moon continued to experience work restrictions due to the established work injuries, and that the part-time trial of work described by the IME did not amount to a retained work capacity.

He therefore awarded Ms. Moon total incapacity benefits pursuant to 39-A M.R.S.A § 212 from the date of the IME's second report. NLEMMC filed a motion for further findings of facts and conclusion of law pursuant to 39-A M.R.S. § 318. The ALJ granted this motion and made additional findings, but did not alter the outcome. NLEMMC appeals.

II. DISCUSSION

A. Standard of Review

[¶8] 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 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). 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. Subsequent Non-Work Injury Claim, 39-A M.R.S.A § 201(5)

[¶9] NLEMMC contends that the ALJ erred in failing to apply 39-A M.R.S.A. § 201(5) to the facts of this case in order to account for incapacity attributable to the nonwork-related 2021 back injury. Having carefully reviewed the record, however, this panel is unable to locate any instance in which NLEMMC brought this argument

to the ALJ's attention. Although the parties were given an opportunity to state any issues before testimony was taken, NLEMMC did not raise section 201(5) at the hearing. Nor was the argument raised in the parties' position papers or in the motion for findings or proposed findings.

[¶10] Thus, the ALJ was not alerted to the section 201(5) issue and was not given the opportunity to address that issue at the hearing stage. Because NLEMMC raises this argument for the first time on appeal, it has not been preserved for appellate review and is waived. *Severy v. S.D. Warren Co.,* 402 A.2d 53, 56 (Me. 1979) ("Whether in the criminal or civil sphere, we have long adhered to the practice of declining to entertain arguments not presented to the original tribunal."); *Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46, ¶ 10 (App. Div. 2017) (explaining the importance of raising a legal argument at a time and manner sufficient to give the ALJ and opposing party a fair opportunity to respond and address it). The ALJ did not err by failing to separate out the effects of the subsequent nonwork-related injury because he was not asked to do so.

C. Work Capacity

[¶11] NLEMMC contends that the ALJ erred when determining that Ms. Moon was totally incapacitated under 39-A M.R.S.A § 212, and that the evidence

compels a finding that she has an ongoing fixed partial incapacity.[2] Specifically, NLEMMC asserts that Dr. Bradford and a functional capacity evaluation both indicated that Ms. Moon has some work capacity, although limited. NLEMMC contends that Dr. Bradford's recommendation of a trial of three hours per day twice per week within her restrictions, with a gradual increase in hours up to her tolerance, compels a finding of some work capacity. We disagree with these contentions.

[¶12] An employee's earning capacity "is based on (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). The Law Court has held that "trivial occasional employment under rare conditions at small renumeration" and extremely limited work capacity are sufficient to support an award of total incapacity benefits. *Hamel v. Pizzagalli Corp.*, 386 A.2d 741, 743 n.2 (Me. 1978); *see also Levesque v. Shorey*, 286 A.2d 606, 610-11 (Me. 1972). Likewise, the Law Court has held that a doctor's recommendation to try to return to work does not constitute evidence to support a finding of recovery of work capacity. *Lelievre v. Pitt Constr., Inc.*, 437 A.2d 636, 639 (Me. 1981) (citing *Grant v. Georgia-Pacific Corp.*, Me., 394 A.2d 289, 290-91 (1978)). Dr.

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[2] This argument is tied to NLEMMC's argument that the ALJ erred in failing to account for a subsequent nonwork injury. Because that aspect of the argument has been waived, we do not consider it.

Bradford's recommendation of a trial of work, coupled with his acknowledgment that the trial may be unsuccessful, is competent evidence to support the ALJ's finding of total incapacity.

[¶13] Alternatively, NLEMMC contends that Dr. Bradford's opinion and the functional capacity evaluation establish that Ms. Moon has partial earning capacity. Thus, she bears a burden of production to show that work is unavailable to her as a result of the injury, which she failed to meet. *See Dumond*, 670 A.2d at 941 ("On an employer's petition for review, the employer bears the burden of proof to establish the employee's earning capacity; however, when the employer shows that the employee has regained partial work-capacity, the employee bears a burden of production to show that work is unavailable as a result of the injury.").

[¶14] An employee, however, may demonstrate entitlement to total incapacity benefits by submitting medical evidence of a total physical incapacity to earn, without a showing of a work search or other evidence that work is unavailable. *Morse v. Fleet Fin. Group*, 2001 ME 142, ¶ 8, 782 A.2d 769. As stated above, Dr. Bradford's medical findings constitute competent evidence that support the ALJ's finding of total incapacity.

III. CONCLUSION

[¶15] We conclude that NLEMMC failed to timely raise its argument regarding section 201(5), and therefore the argument was waived. Additionally, the ALJ's finding of total incapacity is supported by competent evidence.

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.

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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