THERESA E. NIELSEN
(Appellant)

v.

KELLY SERVICES, INC.
(Appellee)

and

ACE USA/ESIS
(Insurer)

Conference held: December 9, 2015
Decided: May 5, 2016

PANEL MEMBERS: Administrative Law Judges[1] Jerome, Hirtle, and Stovall
BY: Administrative Law Judge Jerome

[¶1] Theresa Nielsen appeals from a decision of a Workers' Compensation Board administrative law judge (*Elwin, ALJ*) granting her Petition for Award and Petition for Payment of Medical and Related Services and awarding a closed-end period of total incapacity benefits and payment of medical expenses. The ALJ also denied Ms. Nielsen's request for partial incapacity benefits for the periods both before and after she recovered from her period of total incapacity. Ms. Nielsen maintains that this denial was in error. Finding no error, we affirm the decision of the ALJ.

[1] Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers licensed to practice law are now designated administrative law judges.

I. BACKGROUND

[¶2] Theresa Nielsen began working for Kelly Services in August of 2010. At the time, she lived in Stratton, Maine. She was assigned to clean the offices of the Kibby Mountain wind power project. She was also concurrently employed as the gymnastics program coordinator and office assistant at the Carrabassett Valley Antigravity Center. Ms. Nielsen suffered an injury to her left shoulder on January 8, 2013, while at her cleaning job, after lifting a bucket of water and emptying it into a sink. Ms. Nielsen reported the injury to the Kelly Services, but liability was disputed. The injury eventually required surgery, which occurred on March 19, 2014, in Massachusetts, where Ms. Nielsen had relocated in March of 2013.

[¶3] In the decree, the ALJ granted Ms. Nielsen the protection of the Workers' Compensation Act for the injury to her left shoulder that occurred on January 8, 2013. The ALJ also ordered that Kelly Services pay for the relevant medical expenses and for a period of total incapacity related to the period of time that Ms. Nielsen was unable to work on account of surgery: March 19, 2014 – June 12, 2014. The ALJ declined to order payment of 100% partial incapacity benefits for the period before or after the surgery because Ms. Nielsen had not demonstrated entitlement to those benefits based upon the quality of her work search. The ALJ further found that Ms. Nielsen had not demonstrated entitlement to any fixed level of partial incapacity benefits because her average weekly wage

was $171.90, with no employer-provided fringe benefits, and she had varied work experience including work as an administrative assistant, having worked at an advertising agency and in a doctor's office. The ALJ concluded that Ms. Nielsen was not entitled to any partial incapacity benefits despite her physical restrictions, because she would only have to work 20 hours per week earning minimum wage to earn more than she was earning at the time of injury. Ms. Nielsen now appeals.

II. DISCUSSION

A. Standard of Review

[¶4] The Appellate Division's role on appeal 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). When a party does not request further findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2015), the Appellate Division will treat the ALJ "as having made whatever factual determination could, in accordance with correct legal concepts, support [the ALJ's] ultimate decision, and we inquire whether on the evidence such factual determinations must be held clearly erroneous." *Daley v. Spinnaker Indus.*, 2002 ME 134, ¶ 17, 803 A.2d 446. The ALJ's findings of fact are not subject to appeal. 39-A M.R.S.A § 321-B(2) (Supp. 2015).

B. Extent of Incapacity and Work Search

[¶5] Ms. Nielsen maintains that the denial of 100% partial incapacity benefits during the period of time that she was partially incapacitated to earn because of her work injury was error. [2] It is her position that the ALJ ignored record evidence of her work search and that she had inadequate representation and preparation on this issue. [3]

[¶6] [A] partially incapacitated employee may be entitled to 100% partial incapacity benefits pursuant to 39-A M.R.S.A § 213 (Supp. 2015) based on the combination of a partially incapacitating work injury and the loss of employment opportunities that are attributable to that injury. *Morse v. Fleet Fin. Group*, 2001 ME 142, ¶ 6, 782 A.2d 749. In order to obtain the 100% benefit, it must be established, pursuant to the work search rule, that work is unavailable within the employee's local community as a result of the work injury. Id. ¶ 7. The work search rule is a judicially created doctrine designed to allocate the order and presentation of proof related to the availability of work. *Tripp v. Phillips Elmet Corp.*, 676 A.2d 927, 929 (Me. 1996).

[2] Ms. Nielsen specifically seeks an award of partial incapacity benefits through September 3, 2014 when she returned to work in her professional field of coaching gymnastics.

[3] Ms. Nielsen argues that her representation by the WCB Attorney Advocate was inadequate and therefore impacted her ability to present work search evidence and establish entitlement to 100% partial incapacity benefits. This claim has not been considered by the panel because it is outside of the statutory mandate of the Appellate Division, which limits the Appellate Division's review to the decision of the ALJ. *See* 39-A M.R.S.A §§ 321-A, 321-B. The Appellate Division has no statutory authority to review allegations of inadequate representation.

[¶7] When the employee is the petitioning party, the employee has the ultimate burden of proof to show that work is unavailable within the employee's local community as a result of the work injury. *Morse*, 2001 ME 142, ¶ 7; *Monaghan v. Jordan's Meats*, 2007 ME 100, ¶14, 928 A.2d 786. The work search rule is thus not just a prerequisite to the receipt of 100% partial incapacity benefits; it is the process by which an employee must demonstrate on a more likely than not basis that there is no work available to them because of the ongoing effects of their work injury. Further, the rule establishes that the existence or fact of doing a work search is not enough to satisfy an employee's burden of proof; there are both quantity and quality components that must be evaluated to determine whether an employee has made a reasonable exploration of the local community for suitable work. *See Monaghan*, 2007 ME 100, ¶ 21 (identifying numerous factors that an ALJ should consider when evaluating the adequacy of a work search, including the number of inquiries, method of searching, whether work search targeted to available positions, etc.).

[¶8] Ms. Nielsen maintains that the ALJ erred in evaluating her work search and in concluding that she had not demonstrated entitlement to 100% partial incapacity benefits. The ALJ found that "[t]he only evidence regarding Ms. Nielsen's work search is her testimony that she looked for work for two months, but then became discouraged and stopped looking. She has been receiving social

security disability benefits since August 2013 for non-work-related depression. Because Ms. Nielsen did not perform a thorough exploration of her community for work within her restrictions, either before or after her surgery, she is not entitled to 100% partial incapacity benefits."

[¶9] In her brief, Ms. Nielsen maintains that certain record evidence was ignored by the ALJ. She refers to medical records from Dr. Woelflein and her physical therapist noting that Ms. Nielsen had told those providers she was looking for work. She also refers to the fact that the record contains evidence that she had two job interviews during the two month period she looked for work. Ms. Nielsen also cites other evidence not contained in the record in support of her position that the ALJ was incorrect in concluding that there had been no thorough work search.

[¶10] The Appellate Division cannot consider new facts, testimony, exhibits or other factual materials not presented to the ALJ who decided the case. *See* Me. W.C.B. Rule, ch. 13, §§ 4(2), 8; *see also Samsara Mem'l Trust v. Kelly, Remmel & Zimmerman*, 2014 ME 107, ¶ 27, 102 A.3d 757. Further, we conclude that the ALJ's failure to recite the record evidence relied upon by Ms. Nielsen in her brief does not create reversible error. Specifically, Ms. Nielsen did not request further findings of fact and conclusions of law following the decision as allowed by section 318. This means that on appeal, the Appellate Division will treat the ALJ "as having made whatever factual determination could, in accordance with correct

legal concepts, support [the ALJ's] ultimate decision[.]" *Daley,* 2002 ME 134, ¶ 17, 803 A.2d 446.

[¶11] It was incumbent upon Ms. Nielsen to present work search evidence that was sufficient in quantity and quality to demonstrate that work was unavailable to her as a result of the work injury, such that she was unable to replicate her earning capacity of $171.90 per week. Under this standard of review, even after considering the record of facts not specifically recited by the ALJ, we find that there was competent evidence supporting the ALJ's conclusion that Ms. Nielsen failed to carry her burden of proof with respect to entitlement to 100% partial incapacity.

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. 2015).

Appellant:
Theresa E. Nielsen
P. O. Box 215
White Horse Beach, MA 02381

Attorney for Appellee:
Robert W. Bower, Jr., Esq.
Katlyn M. Davidson, Esq.
NORMAN, HANSON & DETROY, LLC
P.O. Box 4600
Portland, ME 04112-4600