JAMES JOHNSON
(Appellant)

v.

MAINE DEPARTMENT OF TRANSPORTATION
(Appellee)

Argument held: January 26, 2017
Decided: October 11, 2017

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

[¶1] James Johnson appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) denying his Petition for Review and declining his request for partial incapacity benefits. Mr. Johnson contends that the ALJ erred when (1) determining that he rejected a bona fide offer of reasonable employment without good and reasonable cause; and (2) that his period of refusal did not end when his doctor endorsed his decision to refuse the employer's job offer, when the employer withdrew the offer, or when he found work elsewhere.

[¶2] We disagree, and affirm the ALJ's decision.

I. BACKGROUND

[¶3] The ALJ found the following facts, which are supported by competent evidence, and therefore not subject to review. *See* 39-A M.R.S.A. §321-B(2) (Supp. 2016). Mr. Johnson suffered a low back injury on May 12, 2010, while

working for the Maine Department of Transportation (DOT). The injury caused a herniated lumbar disk. Mr. Johnson had surgery, but was unable to resume his pre-injury job duties. DOT accommodated him and paid benefits on a voluntary, non-prejudicial basis.

[¶4] On August 29, 2014, Mr. Johnson's primary care physician imposed new work restrictions that related to his low back condition. Specifically, she recommended that Mr. Johnson refrain from repetitive bending, lifting over 30 pounds, shoveling, raking, driving a plow truck, and long-term sitting. DOT was no longer able to accommodate Mr. Johnson and referred him to the State's Equal Employment Opportunity Coordinator to see if there were any open positions that were within his restrictions.

[¶5] A clerical position ("office assistant II") was eventually found in the Department of Health and Human Services (DHHS) and offered to Mr. Johnson. Mr. Johnson viewed the job site and met with a DHHS supervisor on October 2, 2014. They did not discuss Mr. Johnson's physical limitations or the physical demands of the prospective job during that meeting, but Mr. Johnson observed DHHS employees bending and lifting paper files during his visit.

[¶6] DHHS offered Mr. Johnson the position but he declined without giving it a try, in part because he perceived that it would entail more bending and lifting than he could tolerate, and in part because he and his family had had a negative

experience with DHHS in the past. DHHS released the position to be filled through the State's normal hiring process on October 10, 2014.

[¶7] On October 30, 2014, Mr. Johnson's physician endorsed Mr. Johnson's refusal of the offer from DHHS after Mr. Johnson had related his impression of the job. The physician wrote, "I agree that he would not be able to do any job that is involving a lot of bending or a lot of walking because that would aggravate his back. Also I think he would have difficulty keeping up with the busy pace at [DHHS]."

[¶8] After performing a work search, Mr. Johnson found part-time work as a convenience store clerk and then a full-time job as a manager for Pronto Oil Service. These jobs paid substantially less than the job at DHHS, which would have paid more than his pre-injury wages at DOT.

[¶9] After a hearing, the ALJ denied Mr. Johnson's claim for ongoing weekly incapacity benefits. The ALJ found that the employer had made a bona fide offer of reasonable employment and that Mr. Johnson did not have good and reasonable cause for refusing the offer. Although the ALJ specifically acknowledged the opinion of Mr. Johnson's physician—that the DHHS job was beyond Mr. Johnson's capacity to perform—the ALJ did not find it persuasive. Furthermore, the ALJ concluded that neither the State's retraction of the job offer nor Mr. Johnson's reentry into the work force ended his "period of refusal."

[¶10] Mr. Johnson filed a Motion for Further Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.

II. DISCUSSION

A. Title 39-A M.R.S.A. § 214(1)(A)

[¶11] An employee who receives a "bona fide offer of reasonable employment" and who refuses that employment without good and reasonable cause is not entitled to receive wage loss benefits during the period of refusal. *See* 39-A M.R.S.A. § 214(1)(A) (Supp. 2016). This rule both allows employers to mitigate the cost of workers' compensation benefits and encourages injured employees to return to work. *See Thompson v. Earle W. Noyes & Sons, Inc.*, 2007 ME 143, ¶ 7, 935 A.2d 663. Accordingly, an employee must accept a bona fide offer of reasonable employment "absent good and reasonable cause for refusal." 39-A M.R.S.A. § 214(1)(A). Otherwise, the employee will be considered to have voluntarily withdrawn from the work force and therefore, to be ineligible for incapacity benefits during the period of the refusal. *Id*. The employer bears the burden of proving that an employee received an offer of reasonable employment. *See Avramovic v. R.C. Moore Transp., Inc.*, 2008 ME 140, ¶ 14, 954 A.2d 449.

[¶12] Mr. Johnson contends that DHHS's offer was not a bona fide offer of reasonable employment because the job was not within his restrictions, and that he had good cause to refuse the offer for that same reason. Even if he did unjustifiably

refuse the offer, he argues, his disqualification from incapacity benefits ended either when his doctor ratified his decision, when DHHS withdrew its offer, or when he found other employment. We address these arguments separately below.

B. Bona Fide Offer of Reasonable Employment

[¶13] Section 214(5) defines "reasonable employment" as "any work that is within the employee's capacity to perform that poses no clear and proximate threat to the employee's health and safety and that is within a reasonable distance from that employee's residence." *See also Thompson v. Claw Island Foods*, 1998 ME 101, ¶ 8, 713 A.2d 316. Mr. Johnson contends that the job at DHHS was not "reasonable employment" because it exceeded the version of his restrictions set forth by his physician on October 30, 2014.

[¶14] It is apparent from the ALJ's decision, however, that the ALJ found that the offered position was within Mr. Johnson's capacity to perform and that it did not pose a threat to his health and safety at the time he refused the offer. Moreover, the ALJ found the medical evidence relied upon by Mr. Johnson—i.e., the opinion of his treating physician obtained after the offer had been rejected—to be unpersuasive on the issue of whether the offer constituted a bona fide offer of reasonable employment. The ALJ noted that the physician premised her opinion on Mr. Johnson's own perceptions about the physical demands of work at DHHS.

[¶15] We defer to the ALJ, as fact-finder, to determine what evidentiary weight to attach to particular evidence, and what inferences may or may not be drawn from the evidence. *Zablotny v. State Bd. of Nursing*, 2017 ME 29, ¶ 18, 156 A.3d 126. Accordingly, we find no error in the ALJ's conclusion that DOT met its burden to show that Mr. Johnson refused a bona fide offer of reasonable employment.[1]

C. Period of Refusal

[¶16] An employee who unjustifiably refuses suitable employment forfeits incapacity benefits "during the period of the refusal." 39-A M.R.S.A. § 214(1)(A). Thus, an employee can regain eligibility for incapacity benefits by affirmatively communicating to the employer a willingness to accept a previously-rejected offer, or by showing good and reasonable cause to justify continued refusal of the offer. *See Loud v. Kezar Falls Woolen Co.*, 1999 ME 118, ¶ 6, 735 A.2d 965.

[¶17] Mr. Johnson does not claim to have affirmatively communicated his willingness to accept work at DHHS. Nevertheless, he contends that his period of refusal ended when the State filled the position that it had previously offered.

[1] Mr. Johnson also cites his alleged inability to perform the physical work of the job at DHHS and his subjective reliance on his physician's post hoc opinion as "good and reasonable cause" for refusing the job, and as a basis for ending the period of refusal. *See* 39-A M.R.S.A. § 214(1)(A).The ALJ, however, did not find that Mr. Johnson was unable to perform the physical work of the job, and also found the medical opinion unpersuasive on the issue of whether the refusal was for good and reasonable cause. We find no error in the ALJ's decision on these points. *See Shaw v. Cumberland County Sherriff's Dep't*, Me. W.C.B. 17-14, ¶ 23 (App. Div. 2017) (affirming ALJ's decision concluding that an employee did not have good and reasonable cause to refuse an offer of employment when she did so in reliance on an inaccurate statement of her restrictions).

A similar argument was made and rejected in *Loud*. In that case, an employee argued that her former employer effectively withdrew its job offer when it laid off other workers in the employee's former job classification. *Id.* at ¶ 8. "The Act provides an incentive," the Law Court wrote, "for employers to find or create work for injured employees following an injury, and it is conceivable that Kezar Falls, given the opportunity, might have continued to employ Loud even after other . . . employees had been laid off." *Id.*

[¶18] Similarly, the fact that DHHS filled the position once offered to Mr. Johnson does not prove that the State was no longer willing or able to accommodate him. Had he communicated a willingness to work, the State would have had an incentive to find a suitable position for him. Thus, Mr. Johnson's failure to request reemployment with the State was not excused after DHHS filled the position that it had offered him.

[¶19] Alternatively, Mr. Johnson argues that his period of refusal ended when he found suitable employment elsewhere. But the Law Court has been averse to such an argument, noting that it would erode an employee's incentive to meet their earning potential. "[T]he mitigative purpose of subsection 214 (1)(A)," it wrote in *Loud*, "would be defeated if an employee could avoid forfeiture by obtaining underemployment at a substantially reduced wage." *Id.* at ¶ 9.

III. CONCLUSION

[¶20] The ALJ was free to reject the medical evidence proffered by Mr. Johnson and thus did not err in finding that he received a bona fide offer of reasonable employment within his work capacity. Moreover, whether an employee's asserted reason for refusing post-injury employment constitutes good and reasonable cause is a question of fact that falls within the sound discretion of the ALJ. *See Thompson v. Earle W. Noyes & Sons, Inc.*, 2007 ME 143, ¶ 12, 935 A.2d 663. The ALJ's conclusion that Mr. Johnson is not entitled to wage loss benefits involves no misconception of applicable law, and 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).

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).

Attorney for Appellant:
Christopher Cotnoir, Esq.
WCB ADVOCATE DIVISION
24 Stone Street, Suite 107
Augusta, ME 04330

Attorney for Appellee:
Stephen W. Moriarty, Esq.
NORMAN, HANSON & DETROY
P.O. Box 4600
Portland, ME 04112-4600