STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 16-0003
Decision No. 17-37

LORIE A. MONDOR
(Appellant)

v.

CITY OF PORTLAND
(Appellee/Cross-Appellant)

and

MAINE MUNICIPAL ASSOCIATION
(Insurer)

Argued: September 22, 2016
Decided: November 9, 2017

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

[¶1] Lori Mondor appeals a decision of a Workers' Compensation Board Administrative Law Judge (*Jerome, ALJ*) granting her Petitions for Review and Petition to Fix, and awarding ongoing partial incapacity benefits. Ms. Mondor contends that the ALJ erred when determining that she was not entitled to 100% partial incapacity benefits because she failed to demonstrate, through her work search, that work was unavailable to her within her restrictions in her local community. The City of Portland cross-appeals, contending that the ALJ erred in including the value of pension payments made by the City in the average weekly wage. We affirm the decision on the average weekly wage issue. With respect to

the work search issue, however, we vacate and remand the case for further proceedings.

I. BACKGROUND

[¶2] Ms. Mondor sustained a work-related injury to her low back, right knee, and left shoulder on May 5, 2009, when she slipped on a wet floor while working as a charge nurse at the Barron Center, a City-owned, long-term care facility. She was taken out of work in September 2010 due to an increase in symptoms. At the time of the hearing, she was living in San Antonio, Texas.

[¶3] The City voluntarily paid Ms. Mondor weekly incapacity benefits until September 2014. On May 5, 2015, Ms. Mondor underwent an independent medical evaluation pursuant to 39-A M.R.S.A. § 312 (Supp. 2016). The independent medical examiner (IME) imposed the following restrictions: "no lifting or carrying more than 10 pounds on a regular basis and 20 pounds occasionally with no repetitive bending or twisting at the waist and no prolonged sitting, standing, or walking more than 1 to 2 hours at a time without a change in position or rest break."

[¶4] Ms. Mondor sought to establish entitlement to 100% partial incapacity benefits with evidence of a work search, which she began in 2010. The ALJ evaluated the evidence in light of the factors articulated by the Law Court in *Monaghan v. Jordan's Meats*, 2007 ME 100, 928 A.2d 786. For the period most

relevant to the determination, from January 2014 to August 2014 when her work search ended, Ms. Mondor submitted approximately 140 on-line job applications. The ALJ indicated that the number of applications was "impressive," but was ultimately unpersuaded by the evidence because, she reasoned, Ms. Mondor had overemphasized and overstated her work restrictions on her applications. The ALJ granted Ms. Mondor's petitions, and awarded ongoing partial incapacity benefits, imputing a full-time sedentary earning capacity based on the minimum wage.

[¶5] The City contended that contributions made on Ms. Mondor's behalf to the ICMA/UNUM pension and disability plan or MainePERS, the State of Maine pension program, should be excluded from the average weekly wage on the basis that these contributions are the equivalent of contributions to Social Security, which are generally not includable fringe benefits. 39-A M.R.S.A. § 102(4)(H) (Supp. 2016); Me. W.C.B. Rule ch. 1, § 5.1(B). The ALJ disagreed, and included the $82.67 weekly pension contribution in the average weekly wage.

[¶6] Both parties filed motions for additional findings of fact and conclusions of law. The ALJ granted the motions and issued an amended decree with additional findings, but did not alter the outcome. Ms. Mondor appeals, contending that the ALJ erred when evaluating her work search evidence. The City cross-appeals, asserting that the ALJ erred when including its pension benefit contributions in Ms. Mondor's average weekly wage.

II. DISCUSSION

A. Standard of Review

[¶7] The Appellate Division's role on appeal is "limited to assuring that the [ALJ's] factual 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." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, the Appellate Division reviews "only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnnaker Indus.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Work Search Evidence

[¶8] "[A] partially incapacitated employee may be entitled to 100% partial incapacity benefits pursuant to [39-A M.R.S.A. § 213] based on the combination of a partially incapacitating work injury and the loss of employment opportunities that are attributable to that injury." *Monaghan*, 2007 ME 100, ¶ 13, 928 A.2d 786 (quotation marks omitted). To obtain 100% partial benefits pursuant to the "work search rule," the employee must establish that work is unavailable within the local community as a result of the work injury, by submitting "competent and persuasive evidence" that may include a work search, "labor market surveys, or other credible

evidence regarding availability of work for a particular employee in the local community." *Id*. ¶ 16. Ms. Mondor attempted to meet this burden with evidence of a work search.

[¶9] The Law Court has set forth several factors for consideration when evaluating work search evidence.[1] Those factors are not exhaustive and the Court has stated that a hearing officer should use a "broad lens" in evaluating whether the employee has satisfied his or her burden of proof. *Id.* ¶ 22. The Law Court has further stated:

> The issue of adequacy of a work search is a mixed question of fact and law. Findings regarding the actual efforts made by the employee to obtain work are factual. The evaluation of the reasonableness of those efforts, however, is a mixed question requiring us to examine the reasonableness and legality of the hearing officer's ultimate conclusion, with deference to her relevant expertise.

Id. ¶ 18 (citations omitted).

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[1] The factors are:

> (1) The number of inquiries made or applications submitted by an employee.
> (2) Whether the search was undertaken in good faith.
> (3) Whether the search was too restrictive.
> (4) Whether the search was limited solely to employers who were not advertising available positions, or whether the employee also made appropriate use of classified ads or other employment resources in the search.
> (5) Whether the search was targeted to work that the employee is capable of performing.
> (6) Whether the employee over-emphasized work restrictions when applying for jobs.
> (7) Whether the employee engaged in other efforts to find employment or increase prospects for employment.
> (8) The employee's personal characteristics such as age, training, education, and work history.
> (9) The size of the job market in the employee's geographic area.

Monaghan, 2007 ME 100, ¶ 21, 928 A.2d at 793 (citations omitted).

[¶10] Pursuant to *Monaghan*, the ALJ considered that Ms. Mondor had been consistently engaged in work search efforts since 2010; took course work to maintain her nursing license; used the internet to apply for work in both Maine and Texas that was arguably within her training and work capacity; and that she submitted approximately 140 on-line applications in 2014.

[¶11] The ALJ, however, also considered that Ms. Mondor had sent her resume along with the job applications that contained language describing her work restrictions. The resume states: "Have some work restrictions. No bending/twisting/lifting or prolonged sitting/standing at this time." The ALJ determined that this language "overstate[d] Ms. Mondor's restrictions as set forth in [the IME's] report," and that including it in her job application materials over-emphasized her work restrictions, and thereby "muddie[d] the water with respect to a work search analysis." The ALJ ultimately concluded that Ms. Mondor failed to carry her burden of proof, reasoning as follows:

> I find it likely that Employers are less willing to contact potential employees who disclose on their resume that they have significant physical problems than they are to contact potential employees who avoid a written statement of disability. I base this conclusion on my experience hearing labor market experts opine over the years on why the inclusion of such statements [is] detrimental to a successful work search. I find it likely that Employers might choose to exclude individuals with such statements on their resumes in favor of following up with persons who have not so labeled themselves, regardless of whether the work involved is consistent with the limitations.

[¶12] Ms. Mondor contends the ALJ erred when (1) considering evidence outside the record when evaluating the work search evidence; and (2) evaluating the *Monaghan* factors, specifically with regard to whether Ms. Mondor overstated and overemphasized her work restrictions when applying for jobs. We consider these issues in turn.

1. Evidence Outside the Record

[¶13] In the decree, the ALJ based her reasoning regarding the import of listing work restrictions on job applications in part on her "experience hearing labor market experts opine over the years on why the inclusion of such statements [is] detrimental to the successful work search." Ms. Mondor contends it was error to rely on evidence outside the record. However, by referring to labor market testimony from other cases "over the years," the ALJ was not relying on specific evidence from other cases, but rather describing one of the bases for her expertise as a Workers' Compensation Board administrative law judge in evaluating work search evidence: an expertise acknowledged by the Law Court and to which it generally defers. *See, e.g., Monaghan*, 2007 ME 100, ¶ 18, 928 A.2d 786 ("The evaluation of the reasonableness of those efforts . . . is a mixed question requiring us to examine the reasonableness and legality of the hearing officer's ultimate conclusion, with deference to her relevant expertise."). Accordingly, we find no

error in the ALJ's reference to her experience and expertise when applying the legal criteria set forth in *Monaghan* to the facts of this case.

2. Evaluation of the *Monaghan* Factors

a. Stating Work Restrictions on Resumé

[¶14] Ms. Mondor next contends that deciding whether an employee meets her burden of proof based on the "over-emphasis of work restrictions" factor is error because it places the employee in a "Catch-22" situation. She argues that if the employee fails to state her restrictions up front, she cannot prove that work was unavailable to her as a result of those restrictions; but if she discloses the restrictions, she sabotages the work search. Thus, she asserts that an employee should not be penalized for letting her restrictions be known.

[¶15] The ALJ, however, gave the following rationale for considering this particular factor to be dispositive in this case:

> The discussion of work restrictions may be appropriate and even necessary as part of a job application process. The distinction is when those restrictions are disclosed to a potential Employer. I find that an Employee likely diminishes the universe of jobs that might be offered when physical activity restrictions are listed on a resume. On the other hand, discussing such restrictions with an Employer in the context of a job interview or job offer (if they are relevant) is certainly appropriate, as long as such restrictions are not over-emphasized.

[¶16] We cannot say that the ALJ's application of the *Monaghan* factors was arbitrary or irrational, or represents a misconception or misapplication of the law in this regard. It is both a rational and logical inference from the facts that

employers may not agree to interview or extend a job offer to an applicant they perceive as unable to perform necessary job tasks.[2] Moreover, the ALJ's reasoning would not preclude an employee from proving that jobs were unavailable as a result of a work injury; restrictions could be appropriately discussed with a potential employer at a later time in the process, such as during an interview or when discussing an offer. The ALJ's consideration of whether Ms. Mondor over-emphasized her restrictions was an appropriate application of that *Monaghan* factor.

b. Overstating Restrictions

[¶17] Ms. Mondor also argues, however, that the ALJ erred when determining that she *overstated* her restrictions on her resume in comparison to the restrictions imposed by the IME. She asserts that the IME's report, relied on by the ALJ, was issued several months after she had completed her job search, and thus could not form the basis of the finding that she overstated her restrictions. Moreover, restrictions imposed by other doctors contemporaneously with her job search were not inconsistent with those she stated on her resume. Those records,

[2] We acknowledge Ms. Mondor's argument that discriminating against job applicants on the basis of disability may in some circumstances be illegal under the Americans with Disabilities Act. However, the ADA does not require employers to hire applicants who are not "qualified individuals," defined as "individual[s] who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C.S. §§ 12111(8), 12112(a). Thus, it is not irrational to conclude that placing a description of what the employee is not capable of doing on every job application may cause employers to conclude the applicant is not qualified, and could foreclose all discussion of whether the employee is capable of performing the specific job duties, with or without reasonable accommodation.

referenced in the decree, suggest that at the time Ms. Mondor conducted her work search in 2014, she had not been released to work at all. In fact, her treating physician in Texas determined she had no work capacity two months after the conclusion of that work search. This was consistent with other medical records, including a functional capacity evaluation, generated prior to the 2014 work search.

[¶18] Although it was legitimate to consider whether Ms. Mondor overstated her restrictions during her job search, *Pelchat v. Portland Box Co. Inc.*, 155 Me. 226, 231, 153 A.2d 615, 618 (1959), we conclude that the ALJ's finding regarding this overstatement is unsupported by the specific evidence she identified.

[¶19] Because Ms. Mondor requested additional findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2016), and submitted proposed additional findings related to the work search issue, we do not assume that the ALJ made all the necessary findings to support the ultimate conclusion that Ms. Mondor's work search was inadequate. *See Spear v. Town of Wells*, 2007 ME 54, ¶ 10, 922 A.2d 474. "Instead, we review the original findings and any additional findings made in response to a motion for findings to determine if they are sufficient, as a matter of law, to support the result and if they are supported by evidence in the record." *Id.* (quotation marks omitted).

[¶20] The ALJ's findings in the original decree and in response to the motion for additional findings of fact and conclusions of law did not adequately address the arguments raised by Ms. Mondor, and are inadequate for appellate review. Therefore, we remand this case to allow the ALJ to make additional findings regarding whether Ms. Mondor overstated her restrictions during her work search, and if not, to state whether the remaining *Monaghan* factors support the conclusion that the work search did not establish that work is unavailable to her as a result of her work injury. *See* 39-A M.R.S.A. § 318; *Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982) (holding that when requested, a commissioner is under an affirmative duty to make additional findings of fact and conclusions of law in order to create an adequate basis for appellate review).

C. Including Pension Contributions in Fringe Benefits

[¶21] The City has cross-appealed, arguing that the ALJ erred in considering pension contributions made on Ms. Mondor's behalf to the ICMA/UNUM pension and disability plan or MainePERS as a fringe benefit, and including those contributions in her average weekly wage. The ALJ found, and the parties do not dispute, that the City elects to contribute to these public, defined pension plans as a lawful alternative to the Social Security program. The City contends that the pension contributions are equivalent to Social Security payments, which are excludable from the average weekly wage by rule. The City further

argues that including the pension payments as a fringe benefit violates its right to equal protection under the United States and Maine Constitutions. We disagree.

[¶22] Title 39-A M.R.S.A. § 102(4)(H) (Supp. 2016) provides, in relevant part:

> "Average weekly wages, earnings or salary" does not include any fringe or other benefits paid by the employer that continue during the disability. Any fringe or other benefit paid by the employer that does not continue during the disability must be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount that is greater than 2/3 of the state average weekly wage at the time of injury.

[¶23] The Act does not further define "fringe benefits." The Board, however, pursuant to its rule-making authority under the Act, has defined fringe benefits as follows:

> 1. Fringe or other benefits shall be defined as anything of value to an employee and dependents paid by the employer which is not included in the average weekly wage. When the employer has paid the employee a sum to cover any special expense incurred by the employee by the nature of the employee's employment, that sum shall not be considered a fringe benefit. For those companies which self-fund health and dental coverage, the value of such health and dental coverage shall be equal to the cost to the employee for maintaining such coverage pursuant to the federal C.O.B.R.A. provisions less the employee's pre-injury contributions.
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> A. A "fringe or other benefit" pursuant to § 102(4)(H) shall include, but is not limited to, the following:
>
> . . .

> (3) The employer's cost to provide pension benefits, including 401(k) matching funds[.]
>
> . . . .
>
> B. The following generally shall not be considered a "fringe or other benefit" pursuant to § 102(4)(H):
>
> . . .
>
> (2) Employer contribution to Social Security, unemployment insurance or workers' compensation insurance[.]

Me. W.C.B. Rule, ch. 1, § 5.1.

[¶24] The ALJ's interpretation is consistent with the plain language of the rule. The City argues, however, that the rule is invalid because it conflicts with its lawful authority to pay into the public pension programs in lieu of Social Security. We disagree.

[¶25] The Law Court has recognized a legislative intent to delegate broad authority to the board to interpret the Act, either by rule or through its appellate authority, when the statutory language is ambiguous. *Jasch v. Anchorage Inn*, 2002 ME 106, ¶ 9, 799 A.2d 1216; *see Russell v. Russell's Appliance Serv.,* 2001 ME 32, ¶ 10 n.3, 766 A.2d 67. Although the Court has invalidated board rules when it has found those rules to be in direct contravention of a statute, *see, e.g.*, *Beaulieu v. Maine Med. Ctr.*, 675 A.2d 110, 111 (Me. 1996), it defers to the board where there

is no direct conflict between the rule and the statutory language. *Jasch*, 2002 ME 106, ¶ 10, 799 A.2d 1216.

[¶26] The statute is silent on the issue of what constitutes a fringe benefit; thus the rule, defining fringe benefits to include pension payments, does not conflict with the statute. The ALJ did not err in applying the plain meaning of the rule to include the pension payments in fringe benefits.[3]

[¶27] The City of Portland also argues that pension payments made to its employees replace Social Security and that treating the former differently from the latter violates its right to equal protection under the U.S. Constitution, Amend. XIV, § 1, and the Maine Constitution, art. 1, § 6-A. In her decision, as modified by Further Findings of Fact and Conclusions of Law, the ALJ rejected the City's arguments, finding that board rule that defines fringe benefits governed the outcome of the issue.

[¶28] Unless a suspect classification such as race or a fundamental interest, such as the right to vote, is involved, an equal protection challenge to a difference in treatment requires a showing that the state's classification is arbitrary or irrational. *Beaulieu v. City of Lewiston*, 440 A.2d 334, 338 (Me. 1982); *see also*

[3] Moreover, Rule, ch. 1, § 5.1 specifically defines pension benefits as fringe benefits to be included in the average weekly wage; thus, despite the City's contention, they cannot be considered an excludable "special expense." *See also* 39-A M.R.S. § 102(4)(F) ("When the employer has paid the employee a sum to cover any special expense incurred by the employee by the nature of the employee's employment, the sum paid is not reckoned as part of the employee's wages, earnings or salary."); *cf. Hackett v. W. Express, Inc.*, 2011 ME 71, ¶ 9, 21 A.3d 1019 (holding that regular per diem payments for lodging, meals, and telephone calls were "special expenses" properly excluded from average weekly wage).

Schweiker v. Wilson, 450 U.S. 221, 230, 238-39 (1981). A difference in treatment is constitutional "if facts may be reasonably conceived to justify the distinction." *McNicholas v. York Beach Village Corp*., 394 A.2d 264, 269 (Me. 1978). The City contends that the classification in the rule is irrational because it requires municipal employers that lawfully contribute to a Social Security alternative to include the value of those payments in the average weekly wage and will result in those municipalities paying higher workers' compensation benefits than those who do not.

[¶29] Treating pension payments as fringe benefits, however, is not irrational. These payments provide a real, if delayed, benefit to the employee. Moreover, the rule applies to all pension payments made by the employer regardless of whether Social Security benefits are also paid. The City has not come forward with evidence that demonstrates its theory. Rather, the City's position is a policy argument, which is best made before the Legislature or the Workers' Compensation Board, as opposed to a single ALJ in the context of resolving a specific dispute. Because we find that the City has failed to demonstrate that the rule lacks a rational basis, we affirm the ALJ's decision in this regard.

III. CONCLUSION

[¶30] To the extent the ALJ's findings regarding Ms. Mondor's work search are inadequate for appellate review, we vacate the decision and remand for additional findings of fact. In all other respects, we affirm the decision.

The entry is:

> The ALJ's decision is affirmed insofar as it determines that the pension benefits in issue should be included in average weekly wage to the extent allowable under section 102(4)(H). The decision is vacated in part and remanded for reconsideration of Ms. Mondor's work search evidence in light of the *Monaghan* factors.

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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