GINA HENDERSON
(Appellant)

v.

TOWN OF WINSLOW
(Appellee)

and

MAINE MUNICIPAL ASSOCIATION
(Insurer)

Argued: August 28, 2017
Decided: December 29, 2017

PANEL MEMBERS: Administrative Law Judges Collier, Goodnough, Hirtle, Jerome, Knopf, Pelletier, and Stovall
BY: Administrative Law Judge Hirtle

[¶1] Gina Henderson appeals from a decision of a Workers' Compensation Board administrative law judge (*Elwin, ALJ*) denying her Petitions for Award and Petition for Payment of Medical Services regarding two alleged dates of injury: November 24, 2010, and May 15, 2014.[1] The ALJ denied Ms. Henderson's petitions on the 2014 injury, concluding that she did not meet her burden to establish a mental stress injury under 39-A M.R.S.A. § 201(3) (2001). Ms. Henderson contends that the ALJ erred by applying section 201(3) when instead, the ALJ should have applied the legal causation standard set forth in *Bryant*

[1] The ALJ concluded that the notice and filing requirements of 39-A M.R.S.A. §§ 301 and 306 (Supp. 2016) barred her petitions on the 2010 injury. Ms. Henderson does not challenge this conclusion on appeal.

v. Masters Machine Co., 444 A.2d 329 (Me. 1982). Ms. Henderson also contends that the Workers' Compensation Act's treatment of workers with preexisting psychological conditions violates the Equal Protection Clauses of the United States and Maine Constitutions and the Americans with Disabilities Act (ADA). We disagree and affirm the decision.

I. BACKGROUND

[¶2] Gina Henderson was a detective for the Town of Winslow. On November 24, 2010, Ms. Henderson confronted a suspect who pointed a loaded firearm at her face. Ms. Henderson was able to subdue the suspect but was later diagnosed with post-traumatic stress disorder attributed to that experience. Despite her diagnosis, Ms. Henderson continued to work as a detective.

[¶3] In early 2014, Ms. Henderson went out of work for an unrelated medical condition. Shortly after she returned to work, on May 30, 2014, Ms. Henderson met with the newly appointed chief of police. She became upset after discussing the 2010 incident and other sources of nonwork-related stress. Ms. Henderson went out of work that day and later brought a claim for workers' compensation benefits alleging that she suffered psychological injuries caused by workplace stress on November 24, 2010, and May 30, 2014.

[¶4] During litigation, Ms. Henderson argued that the ALJ should not apply the heightened causation standard of 39-A M.R.S.A. § 201(3), which applies to a

"[m]ental injury resulting from work-related stress." Instead, Ms. Henderson argued that the ALJ should apply the legal causation standard established in *Bryant v. Masters Machine Co.*, 444 A.2d 329, and conclude that her May 30, 2014, injury was a compensable aggravation of a preexisting condition. In addition, Ms. Henderson argued that interpreting the Act to categorically preclude the compensability of aggravations of preexisting psychological conditions "would violate the Equal Protection Clause of both the Maine and United States Constitutions and the Americans with Disabilities Act[.]" Ms. Henderson's argument on this topic contained no citation to authority and comprised one paragraph of six sentences within her sixteen-page written closing argument. Ms. Henderson did not raise the constitutional or ADA issues at any point in the litigation prior to closing argument.

[¶5] The ALJ rejected Ms. Henderson's arguments and applied section 201(3). The ALJ reasoned that "[i]t would make no sense for the legislature to have imposed a higher standard of proof for establishment of mental stress injuries in [section 201(3)], but allow compensation for aggravations of preexisting psychological conditions under [section 201(4)]." The ALJ made no findings regarding the equal protection or ADA issues.

[¶6] Ms. Henderson filed a Motion for Additional Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318, and submitted proposed

findings. Within those findings, Ms. Henderson made no further arguments regarding the equal protection and ADA issues. After the ALJ declined to alter her decision, this appeal followed. The Notice of Intent to Appeal filed by Ms. Henderson did not list the equal protection or ADA issues. However, both parties included the issues in their briefs.

II. DISCUSSION

A. Standard of Review

[¶7] 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). When a party requests further findings of fact and conclusions of law following a decision, the Appellate Division is to "review only the factual findings actually made and the legal standards actually applied by the [ALJ]." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446. When a party fails to request further findings, the Appellate Division will treat the ALJ "as having made whatever factual determination could, in accordance with correct legal concepts, support [its] ultimate decision, and we inquire whether on the evidence such factual

determinations must be held clearly erroneous." *Id.* at ¶ 17 (citing *Gallant v. Boise Cascade Paper Group*, 427 A.2d 976, 977 (Me. 1981)).

B. Preservation of Issues for Appeal

[¶8] The Town argues that Ms. Henderson's brief mention of the Equal Protection Clauses and ADA in her closing written argument is insufficient to preserve those issues for appeal.[2] It accurately cites longstanding Law Court precedent that, with few exceptions, parties may not raise issues—even constitutional issues—for the first time before an appellate body. *Fitch v. Doe*, 2005 ME 39, ¶ 27, 869 A.2d 722; *Waters v. S.D. Warren Co.*, Me. W.C.B. No. 14-26, ¶ 18 (App. Div. 2014). Moreover, a party waives issues that it adverts to "in a perfunctory manner, unaccompanied by some effort at developed argumentation" because "[a]n issue that is barely mentioned in a brief is in the same category as an issue not mentioned at all." *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290; *see also State v. Jandreau*, 2017 ME 44, ¶ 14, 157 A.3d 239. The Town's argument is thus that the substance and timing of Ms. Henderson's equal protection and ADA arguments did not provide the Town a fair opportunity to introduce evidence relevant to the issues and did not give the ALJ a reasonable opportunity to decide them. *See Waters*, Me. W.C.B. No. 14-26 at ¶ 18.

[2] The Town also faults Ms. Henderson for not listing the issue in her Notice of Intent to Appeal; however, we do not reach that issue.

[¶9] We find the Town's argument persuasive. Ms. Henderson's written submission to the ALJ mentioned these issues in a "perfunctory manner, unaccompanied by some effort at developed argumentation." She did not mention them in her Motion for Findings of Fact and Conclusions of Law (unlike the appellant in *Waters*). In the absence of substantive argument presented to the ALJ on these legal issues of significant weight, we find no legal error in the ALJ's decision not to address them in her decision.

[¶10] Even if Ms. Henderson's written submission to the ALJ was substantively sufficient to raise the equal protection issue and preserve it for appeal, she nevertheless waived the issue by not raising it in a timely fashion. As we said in *Waters*:

> [T]he belated assertion of the argument did not give opposing counsel fair notice of the issue; nor did it provide the hearing officer with an opportunity to assess whether any factual predicate was necessary to decide the issue or whether she had the authority to rule a provision of the Act unconstitutional. *See Morey v. Stratton*, 2000 ME 147, ¶¶ 8–10, 756 A.2d 496 (emphasizing "the importance of bringing the specific challenge to the attention of the trial court at a time when the court may consider and react to the challenge").

Me. W.C.B. No 14-26, ¶ 18. Likewise, Ms. Henderson's belated arguments did not give opposing counsel or the ALJ a fair opportunity to address the issues that those arguments raised.

[¶11] Therefore, we conclude that Ms. Henderson forfeited consideration of her equal protection and ADA arguments both by raising them belatedly, doing so

in a perfunctory manner, as well as by failing to seek additional findings or conclusions regarding them.

C. Legal Standard Applied

[¶12] Apart from the constitutional challenge, Ms. Henderson argues that the ALJ committed legal error by applying the heightened standard of section 201(3) and requiring her to meet the "clear and convincing" burden of persuasion set out therein. Ms. Henderson argues that section 201(3) does not apply to the aggravation or acceleration of a preexisting condition by a work-related psychological injury and therefore, the ALJ should have employed the *Bryant* standard applicable to "combined effects" cases. The Town argues that section 201(3) sets a standard for all claims alleging psychological diagnoses resulting from workplace stress.

[¶13] The interpretation of a statute is an issue of law that we review de novo. *Bailey v. City of Lewiston*, 2017 ME 160, ¶ 9, 168 A.3d 762; *Freeman v. NewPage Corp.*, 2016 ME 45, ¶ 5, 135 A.3d 340. When construing provisions of the Workers' Compensation Act, "our purpose is to give effect to the Legislature's intent. In so doing, we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results." *Johnson v. Home Depot USA, Inc.*, Me. W.C.B. No. 14-2, ¶ 11 (App. Div. 2014) (quoting *Graves v. Brockway-Smith Co.*, 2012 ME 128, ¶ 9, 55 A.3d 456).

[¶14] Nothing in the plain language of section 201(3) supports the removal of aggravation injuries from its purview. To the contrary, it applies to "[M]ental injury resulting from work-related stress." This language is broad enough to accommodate mental injuries that are aggravations or exacerbations of preexisting conditions.

[¶15] Moreover, Ms. Henderson's rationale for invoking *Bryant v. Masters Machine Co.*, as a substitute for section 201(3) is unpersuasive. *Bryant* set a legal standard for a claimant when he or she possesses "some 'personal' element of risk because of a preexisting condition." 444 A.2d 329, 337. Notably, by the time of *Bryant*, the Law Court had already described a clear and convincing standard of proof for mental injury claims caused by mental stress. *Townsend v. Me. Bureau of Pub. Safety*, 404 A.2d 1014, 1020 (Me. 1979). *Bryant* neither disrupted nor superseded that standard. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 208 (Me. 1983) (applying the *Townsend* standard after *Bryant*). Likewise, the Legislature codified the standard of proof described in *Townsend* at 39 M.R.S.A. § 51(3) (1989), and later at 39-A M.R.S.A. § 201(3). There is nothing in the plain language of those statutes that excludes aggravations of preexisting psychological conditions from their "clear and convincing" standard of proof. Accordingly, we find no reversible legal error in the ALJ's application of section 201(3) as the required standard in this case.

III. CONCLUSION

[¶16] By averring to the equal protection issue for the first time in a written closing argument and developing the issue for the first time on appeal, and by failing to address it on a motion for further findings and conclusions, Ms. Henderson waived her arguments regarding the Equal Protection Clauses of the United States and Maine Constitutions and the Americans with Disabilities Act. Further, we find no legal error in the ALJ's application of 39-A M.R.S.A. § 201(3) to this case, where workplace stress allegedly aggravated, accelerated, or combined with a preexisting psychological condition.

The entry is:

The ALJ'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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