

KAREN ORNBERG  
(Appellant)

v.

PINELAND FARMS POTATO CO., INC.  
(Appellee)

and

MEMIC  
(Insurer)

Argument held: February 8, 2018<sup>1</sup>  
Decided: May 10, 2018

PANEL MEMBERS: Administrative Law Judges Hirtle, Collier, and Goodnough  
BY: Administrative Law Judge Hirtle

[¶1] Karen Ornberg appeals from a decision of an Administrative Law Judge of the Workers' Compensation Board (*Pelletier, ALJ*) granting the Employee's Petition for Award and Petition for Payment of Medical and Related Services regarding a December 8, 2015, date of injury. The ALJ denied the Employee's Petition for Reinstatement. Specifically, the ALJ denied the Petition for Reinstatement after finding that Ms. Ornberg did not request reinstatement at the hearing or in her closing written argument. Further, the ALJ found that Ms. Ornberg's claim for incapacity benefits was barred because she refused a post-injury offer of employment with Pineland Farms Potato Company, Inc. Ms.

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<sup>1</sup> Ms. Ornberg's unopposed request to participate in oral argument by telephone was granted.

Ornberg argues that she did request reinstatement and never refused a job offer, therefore the ALJ should have granted her request for reinstatement and incapacity benefits. We disagree and affirm the decision.

## I. BACKGROUND

[¶2] Karen Ornberg injured the left side of her neck at work on December 8, 2015, resulting in symptoms from her neck to her left hand. She has not worked for Pineland Farms since that time and filed the petitions listed above. At the hearing in her case, Ms. Ornberg testified that she wanted to return to her job at Pineland Farms, and she denied that Pineland Farms ever offered her a post-injury position. Pineland Farms presented testimony from the company's human resources manager, who stated that she had offered Ms. Ornberg work within her post-injury activity restrictions and that Ms. Ornberg did not respond to that offer. The parties have not disputed the ALJ's finding that Ms. Ornberg did not request reinstatement in her closing written argument following the hearing.

[¶3] In his decision, the ALJ found that Ms. Ornberg was injured in the manner she alleged and ordered that Pineland Farms pay for some of the disputed medical bills. However, the ALJ denied Ms. Ornberg's request for incapacity benefits after findings that she refused an offer of employment within her restrictions without good and reasonable cause pursuant to 39-A M.R.S.A. § 214(1)(A) (Supp. 2017). The ALJ also denied Ms. Ornberg's petition for

reinstatement because reinstatement was not requested in the closing argument or at the hearing. This appeal followed without either party requesting further findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2017).

## II. DISCUSSION

### A. Standard of Review

[¶4] 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 will “review only the factual findings actually made and the legal standards actually applied by the [ALJ].” *Daley v. Spinnaker Inds., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446. When a party fails to request further findings, the Appellate Division will treat the Board “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.* (citing *Gallant v. Boise Cascade Paper Gr.*, 427 A.2d 976, 977 (Me. 1981)).

## B. Refusal and Reinstatement

[¶5] Ms. Ornberg contends that Pineland Farms never made her a job offer after her injury and therefore the ALJ's decision should be reversed. Pineland Farms argues that because its witness testified that Ms. Ornberg did not respond to an offer of work within her restrictions, there is competent evidence to support the ALJ's findings and that those findings must therefore be upheld on appeal. We agree with Pineland Farms. The ALJ, as the factfinder, was well within his authority to choose between the testimony of competing witnesses, and we find no reversible error in the ALJ's decision to adopt testimony from Pineland Farms' witness in this case. *See Boober v. Great No. Paper Co.*, 398 A.2d 371, 375 (Me. 1979) (stating that where there is conflicting evidence and credibility is at issue, it is for the [ALJ], who "had the opportunity to hear the witnesses and judge their credibility . . . to resolve the evidentiary conflicts in the case.") (quoting *Lovejoy v. Beech Hill Dry Wall Co., Inc.*, 361 A.2d 252, 254 (Me. 1976)).

[¶6] On the issue of reinstatement, we similarly find no error. While Ms. Ornberg did testify that she wanted to return to work for Pineland Farms, in the absence of specific requested relief in closing argument or a motion for further findings of fact, it was not reversible error for the ALJ to find that the claim for reinstatement had been abandoned, and deny it. "Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation,

are deemed waived.” *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290. (further stating “[a]n issue that is barely mentioned in a brief is in the same category as an issue not mentioned at all.”); *see also Waters v. S.D. Warren Co.*, Me. W.C.B. No. 14-26, ¶¶ 17-18 (App. Div. 2014).

### III. CONCLUSION

[¶7] The ALJ’s finding of an unreasonable refusal of suitable employment without good and reasonable cause was not reversible error because the finding was supported by competent evidence. Further, the ALJ’s denial of Ms. Ornberg’s request for reinstatement was not reversible error because the request for that relief was averred to in only a passing manner through testimony and not in closing argument or further findings.

The entry is:

The Administrative Law Judge’s decision is affirmed.

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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. 2017).

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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