EDMUND LILLEY SR.
(Appellant)

v.

CT SIDES, LLC
(Appellee)

and

MAINE EMPLOYERS' MUTUAL INSURANCE COMPANY
(Insurer)

Conference held: July 19, 2017
Decided: October 12, 2018

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

[¶1] Edmund Lilley appeals a decision of a Workers' Compensation Board administrative law judge (*Pelletier, ALJ*) granting his Petition to Determine Average Weekly Wage. Mr. Lilley contends that (1) contrary to the ALJ's findings, he is not a seasonal worker under 39-A M.R.S.A § 102(4)(C)(2) (Supp. 2017); (2) the seasonal worker provision as it applies to him is unconstitutional; and (3) the ALJ abused his discretion when calculating Mr. Lilley's average weekly wage pursuant to section 102(4)(D). We disagree with these arguments and affirm the ALJ's decision.

I. BACKGROUND

[¶2] The compensability of Mr. Lilley's December 20, 2012, left hip injury was established in a June 14, 2014, consent decree. He was awarded benefits, but

the parties reserved the calculation of the average weekly wage for later determination. On July 6, 2016, the ALJ issued a decision addressing Mr. Lilley's Petition to Determine Average Weekly Wage.

[¶3] At the time of the injury, Mr. Lilley was involved in the short-haul trucking of logs for CT Sides. Mr. Lilley had performed this kind of work for Triple J Trucking for approximately ten years, ending in 2011, and then for CT Sides beginning in 2012. According to Mr. Lilley, he changed employers specifically to avoid the two-month layoff during mud season that is traditional in the industry. Although the work itself was the same, Mr. Lilley's job for CT Sides would not normally include a mud season layoff because the roads CT Sides used were passable year-round. Nonetheless, for reasons Mr. Lilley testified were unrelated to a seasonal layoff—namely, waiting for CT Sides to acquire needed equipment—he had no earnings for approximately the first eight weeks of 2012. Working approximately ten months of the year was consistent with his pattern of employment in the previous ten years at Triple J Trucking.

[¶4] In determining the average weekly wage, the ALJ rejected Mr. Lilley's argument that his benefits should be calculated pursuant to 39-A M.R.S.A. § 102(4)(B), which requires calculating the average weekly wage by dividing Mr. Lilley's total wages for the prior calendar year by the number of weeks worked. Instead, the ALJ determined that Mr. Lilley was a "seasonal worker" as defined in

paragraph (C)(2). However, the ALJ further determined that paragraph C could not reasonably and fairly be applied, and therefore calculated Mr. Lilley's average weekly wage under paragraph D.

[¶5] Mr. Lilley filed a Motion for Further Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Supp. 2017), which was denied. Mr. Lilley appeals.

II. DISCUSSION

[¶6] The Appellate Division may not review findings of fact made by an administrative law judge. 39-A M.R.S.A. § 321-B (Supp. 2017). Instead, appellate review is "limited to assuring that [the ALJ's] factual findings are supported by competent evidence . . . ." *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982). On issues of law, we assure "that [the ALJ's] decision involves no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Id.* When a party requests and proposes additional findings of fact, as in this case, we "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 (quotation marks omitted).

A. Application of Section 102(4)(C)

[¶7] "The average weekly wage is intended to provide a fair and reasonable estimate of what the employee in question would have been able to earn in the

labor market in the absence of a work-injury." *Alexander v. Portland Natural Gas*, 2001 ME 129, ¶ 8, 778 A.2d 343; *see also Nielsen v. Burnham & Morrill, Inc*., 600 A.2d 1111, 1112 (Me. 1991). The methods of calculating the average weekly wage are set forth in 39-A M.R.S.A. § 102(4)(A)-(D),[1] and the appropriate method is chosen by proceeding sequentially through the four alternatives. *Bossie v. S.A.D.*

[1] Title 39-A M.R.S.A. § 102(4) (Supp. 2017) provides, in relevant part:

> A. "Average weekly wages, earnings or salary" of an injured employee means the amount that the employee was receiving at the time of the injury for the hours and days constituting a regular full working week in the employment or occupation in which the employee was engaged when injured. . . . In the case of piece workers and other employees whose wages during that year have generally varied from week to week, wages are averaged in accordance with the method provided under paragraph B.
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> B. When the employment or occupation did not continue pursuant to paragraph A for 200 full working days, "average weekly wages, earnings or salary" is determined by dividing the entire amount of wages or salary earned by the injured employee during the immediately preceding year by the total number of weeks, any part of which the employee worked during the same period. The week in which employment began, if it began during the year immediately preceding the injury, and the week in which the injury occurred, together with the amounts earned in those weeks, may not be considered in computations under this paragraph if their inclusion would reduce the average weekly wages, earnings or salary.
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> C. Notwithstanding paragraphs A and B, the average weekly wage of a seasonal worker is determined by dividing the employee's total wages, earnings or salary for the prior calendar year by 52.
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> (1) For the purposes of this paragraph, the term "seasonal worker" does not include any employee who is customarily employed, full time or part time, for more than 26 weeks in a calendar year. The employee need not be employed by the same employer during this period to fall within this exclusion.
>
> (2) Notwithstanding subparagraph (1), the term "seasonal worker" includes, but is not limited to, any employee who is employed directly in agriculture or in the harvesting or initial hauling of forest products.
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> D. When the methods set out in paragraph A, B or C of arriving at the average weekly wages, earnings or salary of the injured employee can not reasonably and fairly be applied, "average weekly wages" means the sum, having regard to the previous wages, earnings or salary of the injured employee and of other employees of the same or most similar class working in the same or most similar employment in the same or a neighboring locality, that reasonably represents the weekly earning capacity of the injured employee in the employment in which the employee at the time of the injury was working.

No. 24, 1997 ME 233, ¶ 3, 706 A.2d 578. Paragraph D is a fallback provision applicable when none of the preceding methods can be "reasonably and fairly applied." *Alexander*, 2001 ME 129, ¶ 10, 778 A.2d 446.

[¶8] Mr. Lilley contends that the ALJ erred when concluding that section 102(4)(B) does not apply because Mr. Lilley was a seasonal worker as provided in section 102(4)(C). We disagree with this contention.

[¶9] Section 102(4)(C) provides:

> **C.** Notwithstanding paragraphs A and B, the average weekly wage of a seasonal worker is determined by dividing the employee's total wages, earnings or salary for the prior calendar year by 52.
>
> > (1) For the purposes of this paragraph, the term "seasonal worker" does not include any employee who is customarily employed, full time or part time, for more than 26 weeks in a calendar year. The employee need not be employed by the same employer during this period to fall within this exclusion.
> >
> > (2) Notwithstanding subparagraph (1), the term "seasonal worker" includes, but is not limited to, any employee who is employed directly in agriculture or in the harvesting or initial hauling of forest products.

"Harvesting forest products" is defined in 39-A M.R.S.A. § 102(12-A) (Supp. 2017):

> "Harvesting forest products" means to sever and remove standing trees from a forest as a raw material for commercial purposes. "Forest products" has the same meaning as in Title 12, section 8881, subsection 3.

[¶10] Although Mr. Lilley's testimony made clear that he did not harvest forest products within the meaning of section 102(12-A) because he was not involved in severing trees or removing them from the forest, the ALJ determined that Mr. Lilley was involved in the initial hauling of forest products. Mr. Lilley argues that "initial hauling" should be limited to hauling logs from the place in the forest where they were severed to the road. We disagree.

[¶11] Unlike "harvesting forest products," "initial hauling" is not defined in the Act. In construing provisions of the Act, "we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results." *Hanson v. S.D. Warren Co.*, 2010 ME 51, ¶ 12, 997 A.2d 730. "[N]othing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible." *Handyman Equip. Rental Co. v. City of Portland*, 1999 ME 20, ¶ 9, 724 A.2d 605 (quotation marks omitted). "If the statutory language is ambiguous, we then look beyond the plain meaning and consider other indicia of legislative intent, including legislative history." *Damon v. S.D. Warren Co.*, 2010 ME 24, ¶ 10, 990 A.2d 1028.

[¶12] By including "initial hauling" in section 102(4)(C)(2), the Legislature must have meant something different than removal of forest products from the forest, which is included in the definition of "harvesting forest products"; otherwise, the inclusion of "initial hauling" would be superfluous. Therefore, it is

reasonable to interpret that the discrete act of hauling fresh cut logs from the woods to local sawmills constitutes initial hauling of forest products.[2] We conclude that the ALJ's determination that Mr. Lilley is a seasonal worker comports with the statute's purpose, and we do not disturb it.

B. Constitutionality

[¶13] Mr. Lilley next argues that section 102(4)(C)(2) violates principles of equal protection and substantive due process because it treats those who haul forest products differently from those hauling other commodities. Although he more fully developed his arguments on appeal, at the hearing level Mr. Lilley included only a single, brief statement on the constitutional issues in his position paper and in his Motion for Findings of Fact and Conclusions of Law. Because Mr. Lilley raised those claims in only a perfunctory manner before the ALJ, we deem the issues waived. *See Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290.

[¶14] Even if Mr. Lilley had adequately preserved the constitutional claims for appellate review, however, we would conclude that they lack merit. The Legislature expressed its purpose when it first enacted paragraph (C)(2):

[2] That interpretation is further supported by the legislative history. The statutory language at issue was first enacted in 1989 as former 39 M.R.S.A § 2(2)(B-1)(2) and remains substantively unchanged. *See* P.L. 1989, ch. 511. The Statement of Fact explaining the new language indicates that "employees who are employed . . . directly in wood harvesting *or the first road transportation of harvested wood* are considered seasonal workers . . . ." House Amend. A to Comm. Amend. A to L.D. 1521, Statement of Fact (114th Legis. 1989) (emphasis added). Contrary to Mr. Lilley's interpretation, it appears the Legislature specifically intended that his kind of work be considered seasonal.

> The amendment concentrates the potential savings under the seasonal workers' provision in that area of the state's economy that has experienced the highest workers' compensation insurance premium costs.

House Amend. A to Comm. Amend. A to L.D. 1521, Statement of Fact (114th Legis. 1989). This statement articulates a legitimate State interest, and thus provides a rational basis for treating employees who harvest or initially haul forest products—a non-suspect class—differently from other haulers. Further, the common annual layoff in the forest products industry is persuasive evidence that truck drivers like Mr. Lilley are not similarly situated to truck drivers in other industries who work year round. Accordingly, paragraph (C)(2) would survive an equal protection challenge. *See In re D.P.,* 2013 ME 40, ¶¶ 11, 16, 65 A.3d 1216. For the same reason, Mr. Lilley fails to meet the standard to demonstrate a violation of his constitutional right to due process as set out by the Law Court in *In re D.P.* by disproving "any state of facts that would support the need for [the provision]." *See id.* ¶ 11 (quotation marks omitted). We would therefore conclude that his due process challenge also fails.

C. Application of Section 102(4)(D)

[¶15] Despite finding that Mr. Lilley is a seasonal worker for the purposes of section 102(4)(C)(2), the ALJ determined that paragraph C yields an unfair or unreasonable result in this case. As such, the ALJ turned to paragraph D of the average weekly wage provisions. Mr. Lilley contends the ALJ erred by applying

paragraph D because the ALJ calculated the wage based on his past pattern of working ten months per year, rather than his anticipated pattern of working year-round.

[¶16] Paragraph D reads:

> When the methods set out in paragraph A, B or C of arriving at the average weekly wages, earnings or salary of the injured employee can not reasonably and fairly be applied, "average weekly wages" means the sum, having regard to the previous wages, earnings or salary of the injured employee and of other employees of the same or most similar class working in the same or most similar employment in the same or a neighboring locality, that reasonably represents the weekly earning capacity of the injured employee in the employment in which the employee at the time of the injury was working.

Title 39-A M.R.S.A. § 102(4)(D) (Supp. 2017). The ALJ reviewed the comparable employee wage information, Mr. Lilley's actual earnings at Triple J Trucking and CT Sides, and Mr. Lilley's pattern of employment. The ALJ concluded that Mr. Lilley's employment pattern was similar to the "consistently intermittent" pattern of employment discussed in *Alexander v. Portland Natural Gas*, 2001 ME 129, ¶ 13, 778 A.2d 343 (determining that paragraph D should have applied because the employee's "relationship with the labor market . . . consisted of a series of discrete, short-term employments"). Based on these factors, the ALJ arrived at an average weekly wage of $673.07.[3]

[3] Mr. Lilley also argued briefly that his average weekly wage should have been calculated under section 102(4)(A), pursuant to the provisions in section 102(4)(D). Although application of paragraph D is a flexible calculation, *see Alexander*, 2001 ME 129, ¶ 17, 778 A.2d 343, we do not interpret it to

[¶17] Essentially, the ALJ's application of paragraph D is a determination of "the sum . . . that reasonably represents the weekly earning capacity of the injured employee" considering the facts of the case. Despite Mr. Lilley's testimony that he took the job at CT Sides to work year-round, the ALJ found as fact that during the one full year that Mr. Lilley was employed by CT Sides, he worked only ten months. This, along with his ten-year history of working only ten months per year, supports the finding of an intermittent pattern of employment. As such, we do not disturb it.

III. CONCLUSION

[¶18] Section 102(4)(C)(2) is rationally based and thus constitutionally valid. Despite its applicability, the ALJ determined that paragraph C could not be reasonably and fairly applied and instead applied the paragraph D "fallback provision." That determination is supported by competent evidence. We affirm the ALJ's decision in all respects.

The entry is:

The administrative law judge's decision is affirmed.

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circumvent paragraph C in this way. The ALJ did not apply paragraph A because it was excluded by the terms of paragraph C. We conclude that this was not an incorrect application of the law.

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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