PHILLIP PALMORE
(Appellee)

v.

TOWN OF LISBON
(Appellant)

and

MEMIC
(Insurer)

Conference held: August 20, 2020
Decided: December 13, 2021

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

[¶1] The Town of Lisbon appeals from a decision of a Workers' Compensation Board administrative law judge (*Goodnough, ALJ*) granting Phillip Palmore's Petitions for Award and for Payment of Medical and Related Services for his brain cancer. The Town of Lisbon contends that the ALJ erred by (1) applying the firefighter presumption set forth in 39-A M.R.S.A. §328-B(2) (Pamph. 2020) because Mr. Palmore did not establish certain prerequisites for the application of the presumption, and (2) imputing a post-injury earning capacity of $75.00 per week without a proper evidentiary foundation. We affirm the decision in part, regarding the application of the firefighter presumption, but vacate and remand for further findings of fact on the issue of Mr. Palmore's post-injury earning capacity.

I. BACKGROUND

[¶2] Phillip Palmore began working as a volunteer firefighter for the Town of Lisbon in 1985. He was concurrently employed as a roll tender by The Dingley Press. Mr. Palmore was diagnosed with brain cancer on July 13, 2017. Two weeks later Mr. Palmore underwent surgery to remove the tumor. Following surgery, Mr. Palmore underwent radiation, chemotherapy, and occupational and physical therapy. Mr. Palmore continues to have periodic brain MRIs and follows up with a neuro-oncologist. Mr. Palmore's cancer is currently in remission.

[¶3] By decision dated July 15, 2019, the board granted Mr. Palmore's petitions, based on application of the "firefighter presumption" set forth in 39-A M.R.S.A. §328-B(2) (Pamph. 2020). This provision shifted the burden of proof of causation of Mr. Palmore's brain cancer to the Town of Lisbon. The parties agreed that Mr. Palmore was a "firefighter" for more than five years and that he regularly responded to firefighting calls.

[¶4] The ALJ further found that Mr. Palmore satisfied the requirements of Me. W.C.B. Rule, ch. 1, § 10(2) by (1) undergoing the required medical screenings, and (2) submitting a sworn affidavit that cancer was not prevalent in his family and he had not been substantially exposed to carcinogens other than through firefighting. Because Mr. Palmore was entitled to operation of section 328-B(2)'s rebuttable presumption, and the Town of Lisbon offered no contrary medical evidence, the ALJ

found that Mr. Palmore's brain cancer was the result of his firefighting duties with the Town of Lisbon. The ALJ awarded Mr. Palmore total incapacity benefits from March 16, 2017, through April 20, 2018, and ongoing partial incapacity benefits thereafter based on an imputed earning capacity of $75.00 per week.

[¶5] In response to the Town of Lisbon's Motion for Findings of Fact and Conclusions of Law, the ALJ issued an Amended Decision on October 28, 2019. While not altering the result, the Amended Decision clarified the basis upon which the ALJ found that the required medical screenings had been performed and explained why Mr. Palmore's affidavit was satisfactory to trigger application of the presumption. This appeal followed.

II. DISCUSSION

[¶6] The Appellate Division's role on appeal "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).

A. Firefighter Presumption

[¶7] The Town contends that the ALJ erred when applying the firefighter presumption in 39-A M.R.S.A. §328-B(2) (Pamph. 2020) on the basis the Mr.

Palmore failed to establish that he underwent a required testicular examination before his cancer was diagnosed and by relying on a defective affidavit. We disagree.

[¶8] Section 328-B provides firefighters who develop cancer with a rebuttable presumption that the cancer was caused by their employment.[1] If

[1] Title 39-A M.R.S.A. § 328-B provides, in relevant part:

> **1. Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.
>
> **A.** "Cancer" means kidney cancer, non-Hodgkin's lymphoma, colon cancer, leukemia, brain cancer, bladder cancer, multiple myeloma, prostate cancer, testicular cancer or breast cancer.
>
> **B**. "Employed" means to be employed as an active duty firefighter or by the Office of the State Fire Marshal or to be an active member of a volunteer fire association with no compensation other than injury and death benefits.
>
> **C**. "Firefighter" means a member of a municipal fire department or volunteer fire association whose duties include the extinguishment of fires or an investigator or sergeant in the Office of the State Fire Marshal.
>
> **2. Presumption**. If a firefighter who contracts cancer has met the requirements of subsections 3, 6 and 7, there is a rebuttable presumption that the firefighter contracted the cancer in the course of employment as a firefighter and as a result of that employment, that sufficient notice of the cancer has been given and that the disease was not occasioned by any willful act of the firefighter to cause the disease.
>
> **3. Medical tests.** In order to be entitled to the presumption in subsection 2, during the time of employment as a firefighter, the firefighter must have undergone a standard, medically acceptable test for evidence of the cancer for which the presumption is sought or evidence of the medical conditions derived from the disease, which test failed to indicate the presence or condition of cancer.
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> . . . .
>
> **6. Length of service.** In order to qualify for the presumption under subsection 2, the firefighter must have been employed as a firefighter for 5 years and, except for an investigator or sergeant in the Office of the State Fire Marshal, regularly responded to firefighting or emergency calls.
>
> **7. Written verification.** In order to qualify for the presumption under subsection 2, a firefighter must sign a written affidavit declaring, to the best of the firefighter's knowledge and belief, that the firefighter's diagnosed cancer is not prevalent among the firefighter's blood-related parents, grandparents or siblings and that the firefighter has no substantial lifetime exposures to carcinogens that are associated with the firefighter's diagnosed cancer other than exposure through firefighting.

applied, the presumption establishes that (among other things) a firefighter's cancer (defined to include ten types of cancer, including brain cancer) was contracted in the course of and as a result of employment as a firefighter. To qualify for the presumption the firefighter must demonstrate (1) that the firefighter had undergone "a standard, medically acceptable test for evidence of the cancer for which the presumption is sought"; (2) that the firefighter had been employed as a firefighter for five years; and (3) by written affidavit, that the cancer is not prevalent among close, blood relatives and the firefighter has not had any "substantial lifetime exposures to carcinogens" associated with the cancer. *See* 39-A M.R.S.A §§ 328-B(2), (3), (6), (7) (Pamph. 2020). It is agreed by the parties that Mr. Palmore was a firefighter as defined in section 328-B(1)(C).

[¶9] In August of 2012, the board promulgated Me. W.C.B. Rule, ch. 1, § 10,[2] which identifies medical tests that a firefighter must undergo prior to qualifying for

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[2] Me. W.C.B. Rule, ch. 1, § 10 provides:

> **Cancer Presumption for Firefighters**
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> This rule applies to all cases now pending before the Workers' Compensation Board in which the evidence has not closed and in which the statute applies. For all dates of injury occurring before the effective date of these rules, sub-section 1 applies. For all dates of injury occurring on and after the effective date of these rules, sub-section 2 applies.
>
> 1. If a firefighter claims that he has contracted a cancer defined in § 328-B(1)(A), the firefighter shall be considered to have undergone a standard, medically acceptable test for evidence of the cancer for which the presumption is sought or evidence of the medical conditions derived from the disease, which test failed to indicate the presence or condition of the cancer for which the presumption is sought, if, during the time of employment as a firefighter, the firefighter underwent a standard

the evidentiary presumption. For some of the identified cancers, the rule requires that the firefighter undergo a specific screening test. For others, including brain cancer, the rule requires that the firefighter demonstrate that he or she underwent a standard physical examination with blood work, negative for the cancer for which

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physical exam with blood work and the examination and the blood work were not positive for the cancer for which the presumption is sought, or if the examination or blood work were positive for the cancer for which the presumption is sought, follow up tests ordered by the physician conducting the physical were determined to be negative for the cancer for which the presumption is sought.

2. If a firefighter claims that he has contracted a cancer defined in § 328-B(1)(A), the firefighter shall be considered to have undergone a standard, medically acceptable test for evidence of the cancer for which the presumption is sought or evidence of the medical conditions derived from the disease, which test failed to indicate the presence or condition of the cancer for which the presumption is sought, if, during the time of employment as a firefighter, the firefighter underwent a physical examination which included a complete history and physical examination, which included a history of malignancies regarding the firefighter's blood-related parents, grandparents or siblings, and a history of the firefighter's previous malignancies. The physical examination shall be considered complete if it included a lymph node and neurologic exam, a breast examination, and a testicular examination if a male. To be considered complete, an examination shall include blood count testing (CBC), metastolic profile (CMP) testing, and urinalysis testing. If a female firefighter is 40 years or older, the examination should include a mammography, and if a female firefighter is 50 years or older, a colonoscopy. If a male firefighter is 50 years or older, the examination shall include prostate examination and a colonoscopy. If any abnormality is disclosed during the examination or blood work for the cancer for which the presumption is sought and further testing reveals that the cancer for which the presumption is sought is not present, the examination shall be considered adequate for purpose of the application of the presumption. For the purpose of determining the completeness of an exam or testing for application of the presumption, the firefighter's age at the time of the exam is determinative.

3. If an examination or blood work is determined to be incomplete or positive for one or more cancers but not for the cancer for which the presumption is sought and the examination and blood work were complete and not positive for the cancer for which the presumption is sought, the firefighter is entitled to the presumption provided the remaining requirements of § 328-B have been met.

the presumption is sought. The standard physical examination must include a testicular examination for men. Me. W.C.B. Rule, ch. 1, § 10(2).

[¶10] Concluding that Mr. Palmore satisfied the requirements of the rule and the statute, the ALJ applied the presumption. The ALJ relied on a May 6, 2008, medical record to establish that Mr. Palmore had undergone urinalysis screening and a breast exam. He also concluded, based on that medical record and Mr. Palmore's testimony, that Mr. Palmore had undergone a testicular examination. Despite Mr. Palmore's later testimony that he would defer to medical records regarding whether certain "treatment" had occurred, the ALJ found that Mr. Palmore testified unequivocally and credibly in response to a direct question regarding whether he had undergone such an examination. The May 6, 2008, medical record and Mr. Palmore's "unequivocal and credible" testimony provided competent evidence for the ALJ's finding that Mr. Palmore had undergone the required testing.

[¶11] Regarding the sufficiency of the affidavit, 39-A M.R.S.A. § 328-B(7) requires that "… a firefighter must sign a written affidavit declaring, to the best of the firefighter's knowledge and belief … that the firefighter has no substantial lifetime exposures to carcinogens that are associated with the firefighter's diagnosed cancer other than exposure through firefighting." The Town of Lisbon asserts that Mr. Palmore did not satisfy this requirement because (1) his testimony contradicted the affidavit, as he was exposed to second hand smoke, used chewing tobacco and

was exposed to inks and other chemicals at his job at Dingley Press; and (2) he was unaware of which carcinogens are associated with brain cancer, so could not truthfully aver that he had no such exposures.

[¶12] The ALJ rejected these assertions, noting that the statute requires only that the firefighter declare "to the best of [his] knowledge and belief" that the type of cancer he has is not prevalent in his family and he has not had substantial lifetime exposures to nonwork-related carcinogens that cause such cancer. Mr. Palmore was under no obligation to conduct research to expand his knowledge about his family members' medical conditions or which substances may cause brain cancer; he needed only to provide the required information to the best of his knowledge and belief at the time he completed the affidavit. *See, e.g.*, *Englebrecht v. Dev. Corp. For Evergreen Valley*, 361 A.2d 908, 911 (Me. 1976).

[¶13] The ALJ found as fact that the key statements in the affidavit about the absence of family history of brain cancer and the lack of exposure to carcinogens associated with brain cancer were accurate, and we will not disturb this finding. "A finding of fact by an administrative law judge is not subject to appeal [before the Appellate Division]." 39-A M.R.S.A. § 321-B (Pamph. 2020). 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).

B. Imputed Earning Capacity

[¶14] The Town next contends that the ALJ erred by imputing a $75.00 per week earning capacity to Mr. Palmore without an evidentiary basis for this finding.

[¶15] Partial incapacity benefits are calculated based on the difference between the employee's pre-injury average weekly wage and the "earnings or salary that the employee is able to earn after the injury." *See* 39-A M.R.S.A. § 213(1)(B) (Pamph. 2020). Traditionally, an employee's earning capacity has been evaluated according to (1) the employee's physical capacity, (2) the availability of employment in his local community, and (3) other nonwork-related factors affecting employability, such as age, training, education, work history, etc." *Johnson v. Shaw's Distrib. Ctr.*, 2000 ME 191, ¶ 12, 760 A.2d 1057. When there has been no specific job offer or when the employee has failed to conduct a work search, the ALJ must nevertheless determine what the employee is "able to earn." *Hogan v. Great N. Paper*, 2001 ME 162, ¶ 9, 784 A.2d 1083.

[¶16] The Town of Lisbon requested findings of fact and conclusions of law and submitted proposed findings on the issue of Mr. Palmore's post-injury earning capacity. Therefore, we do not assume that the ALJ made all the necessary findings to support his conclusion. *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." *Maietta v. Town of Scarborough*, 2004 ME 97, ¶ 17, 854 A.2d 223. The failure to issue findings in support of a decision that are adequate for appellate review may constitute error requiring remand from the Appellate Division. *See Cote v. Town of Millinocket*, 444 A.2d 355, 359, n.5 (Me. 1982) ("The Commissioner's failure to articulate a basis for his failure to make findings when proposed findings are submitted will in most instances result in a remand of the action to the Commission.").

[¶17] The ALJ's summary assessment of Mr. Palmore's earning capacity is inadequate for appellate review. Because we are unable to discern the basis of the determination from the factual findings, we remand for additional findings of fact on this issue.

The entry is:

> The administrative law judge's decision is affirmed regarding application of the firefighter presumption but is vacated and remanded for further findings of fact regarding Mr. Palmore's ongoing earning incapacity.

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 (Pamph. 2020).

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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