ESTATE OF ROBERT BERRY[1]
(Appellee)

v.

1ST RATE BAIT
(Appellant)

Argued: October 22, 2020
Decided: February 28, 2022

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

[¶1] 1st Rate Bait appeals from a decision of a Workers' Compensation Board administrative law judge (*Collier, ALJ*) granting Robert Berry's Petitions for Award and for Payment of Medical and Related Services, and awarding total incapacity benefits from May 11, 2018, through the date that payment is made, based on a violation of the "fourteen-day rule," Me. W.C.B. Rule, ch. 1, § 1. 1st Rate Bait contends that the ALJ erred by (1) calculating Mr. Berry's average weekly wage pursuant to 39-A M.R.S.A. § 102(4)(B) instead of the seasonal worker provision in section 102(4)(C); and (2) finding 1st Rate Bait violated the fourteen-day rule by failing to timely pay or controvert the claim. We affirm the decision.

[1] Mr. Berry died during the pendency of this appeal, and Mr. Berry's Estate was substituted as a party in this matter.

I. BACKGROUND

[¶2] Robert Berry was a college graduate who had taken additional courses at the Culinary Institute of America and had worked in various positions in the restaurant industry. In September 2017, Mr. Berry was incarcerated at the Charleston correctional facility. On September 28, 2017, through the work release program, he obtained a job with 1st Rate Bait, which supplies raw pig hide bait for lobstering. Mr. Berry earned $15 per hour plus payment for piece work. His hours and earnings varied. Mr. Berry was 1st Rate Bait's first employee; it did not have workers' compensation insurance.

[¶3] On October 11, 2017, while cutting bait, Mr. Berry cut his middle and ring fingers with a saw blade. An extensor tendon and a ligament were cut, and he sustained a fracture to the base of his middle finger. Matthew McDonald, the owner of 1st Rate Bait, drove Mr. Berry to Eastern Maine Medical Center where he was treated initially in the emergency department and then underwent surgery to repair the lacerated tendon and ligament, as well as the fracture. At the emergency department, Mr. Berry informed personnel that he had injured his hand while cutting wood with a friend—a story invented on the way to the emergency room after Mr. McDonald told Mr. Berry he did not have workers' compensation insurance.

[¶4] Mr. Berry returned to work October 23, 2017. His earnings continued to vary. He was laid off the week ending November 21, 2017. By that time, Mr. Berry had been released from incarceration and was on home confinement.

[¶5] Mr. Berry went to work for a Bangor restaurant beginning the week of December 18, 2017, but left shortly thereafter due to an unrelated issue. He was hired at a different restaurant on January 2, 2018, where he was initially paid $13 per hour with an anticipated increase to $15 per hour after a satisfactory probationary period of 30 days. That employment ended on January 16, 2018, when Mr. Berry was re-incarcerated for violating of the terms of his home confinement. He remained incarcerated until April 23, 2018.

[¶6] On March 16, 2018, Mr. Berry's attorney notified Mr. McDonald of Mr. Berry's claim of a work-related injury. Mr. Berry's petitions, dated May 3, 2018, were received by the board on May 11, 2018. That same day, 1st Rate Bait filed a first report of injury prepared by Mr. McDonald. On May 30, 2018, Mr. McDonald filed a notice of controversy (NOC) on behalf of 1st Rate Bait denying the claim, stating that the injury was "highly likely to have been done on purpose."

[¶7] Mr. Berry asserted that 1st Rate Bait violated the fourteen-day rule, which requires that an employer accept or controvert a claim within fourteen days of notice or knowledge of that claim or be subject to penalties outlined in the rule. Rule, ch. 1, § 1. After a hearing, the ALJ found as fact that Mr. Berry notified 1st Rate Bait of

his claim for benefits on May 11, 2018—the date the board received Mr. Berry's filings and Mr. McDonald filed his first report of injury. The ALJ further determined the notice of controversy, filed on May 30, 2018, was filed more than fourteen days after Mr. McDonald had received notice of the claim. Thus, the ALJ determined that 1st Rate Bait violated Rule, ch. 1, § 1.1, and awarded total incapacity benefits based on Rule, ch. 1, § 1.3 and 39-A M.R.S.A. § 212 (Pamph. 2020).

[¶8] With regard to average weekly wage, in the initial decree, the ALJ calculated the figure pursuant to 39-A M.R.S.A. § 102(4)(C), applicable to seasonal employees.[2] However, in the ALJ's further findings of fact and conclusions of law, the ALJ determined, based on Mr. Berry's work history, that irrespective of his incarceration in 2017 in 2018, he was not a seasonal worker because he customarily worked year-round. As such, the ALJ recalculated the average weekly wage under section 102(4)(B), by averaging his total earnings for the previous 52 weeks over the number of weeks worked. 1st Rate Bait appeals.

[2] 39-A M.R.S.A. § 102(4)(C) provides:

> 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.

II. DISCUSSION

A. Standard of Review

[¶9] 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). Because 1st Rate Bait requested findings of fact and conclusions of law following the decision, the Appellate Division will "review only the factual findings actually made and the legal standards actually applied by the hearing officer." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Average Weekly Wage

[¶10] 1st Rate Bait argues that the ALJ erred in determining that Mr. Berry was entitled to benefits calculated pursuant to 39-A M.R.S.A. § 102(4)(B) rather than 39-A M.R.S.A. § 102(4)(C) because 1st Rate Bait is a seasonal business and Mr. Berry worked there for fewer than 26 weeks per year. We disagree.

[¶11] "The average weekly wage is designed 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 Nat. Gas*, 2001 ME 129 ¶ 8, 778 A.2d 343; *see also Nielson v. Burnham & Morrill, Inc*., 600 A.2d 1111,

1112 (Me. 1991) ("The purpose of calculating an average weekly wage is to arrive at an estimate of the employee's future earning capacity as fairly as possible."). The methods of calculating the average weekly wage are set forth in paragraphs A through D of 39-A M.R.S.A. § 102(4), and the appropriate method is chosen by proceeding sequentially through the four alternatives. *Alexander*, 2001 ME 129, ¶ 11, 778 A.2d 343.

[¶12] Section 102(4)(C) provides, in relevant part:

> **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.

[¶13] Paragraph C(1) contains an exclusion to the definition of seasonal worker. *Frank v. Manpower Temp. Servs.*, 687 A.2d 623, 625 (Me. 1996). For paragraph C to apply, the employee must first qualify as a seasonal worker and then meet the additional criteria of having worked fewer than 26 weeks in a calendar year. *Id.* The paragraph plainly provides that one who is "customarily" employed for more than 26 weeks per year is not a seasonal worker.

[¶14] The ALJ found that Mr. Berry did not qualify as a seasonal worker under paragraph C due to his customary relationship to the labor market as a year-

round employee in the restaurant industry. This finding is supported by competent evidence in the record, including Mr. Berry's resumé, which demonstrates that there was no seasonal aspect to his employment generally, and except for periods of incarceration in 2017 and 2018, he had consistently worked as a year-round employee. The ALJ committed no reversible error with respect to determining the average weekly wage pursuant to paragraph B.[3]

C. Violation of Me. W.C.B. Rule, ch. 1, § 1

[¶15] 1st Rate Bait next contends that the ALJ erred in determining that it violated the "fourteen-day rule" because no evidence established when Mr. McDonald received notice of Mr. Berry's claim, triggering the period for paying the claim or filing a NOC. The ALJ found that Mr. Berry first asserted a claim for benefits with the filing of his petitions on May 11, 2018. Mr. McDonald testified that he received the petitions in May of 2018 but did not know the exact date.

[¶16] The "fourteen-day rule" requires that an employer accept a claim, pay without prejudice, or file a notice of controversy within fourteen days of notice or knowledge of a claim for incapacity benefits, or be required to pay the employee

[3] 39-A M.R.S.A. § 102(4)(B) provides, in relevant part:

> **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.

total incapacity benefits from the date the claim is made until the violation is cured. Rule, ch. 1, § 1.[4]

[¶17] 1st Rate Bait specifically argues that because the rule is punitive in nature, it requires strict construction, and the penalty provision may not be applied based on an inferred finding that it has been violated. We disagree.

[¶18] Although the Law Court has referred to the fourteen-day rule as providing for a penalty, it has also stated that the rule "has the benefit of clarity and promotes numerous goals including . . . 'encourag[ing] the timely filing of a notice

[4] Me. W.C.B. Rule, ch. 1, § 1 provides, in relevant part:

> 1. Within 14 days of notice or knowledge of a claim for incapacity or death benefits for a work-related injury, the employer or insurer will:
>
> A. Accept the claim and file a Memorandum of Payment checking "Accepted"; or
>
> B. Pay without prejudice and file a Memorandum of Payment checking "Voluntary Payment Without Prejudice"; or
>
> C. Deny the claim and file a Notice of Controversy.
>
> . . . .
>
> 3. If the employer fails to comply with subsection 1 of this section, the employee must be paid total benefits, with credit for earnings and other statutory offsets, from the date the claim is made in accordance with 39-A M.R.S.A. § 205(2) and in compliance with 39-A M.R.S.A. § 204. The employer may discontinue benefits under this subsection when both of the following requirements are met:
>
> A. The employer files a Notice of Controversy; and
>
> B. The employer pays benefits from the date the claim is made.

of controversy to facilitate the administrative process and to ensure the speedy, efficient, just and inexpensive disposition of all proceedings under this Act." *Doucette v. Hallsmith/Sysco Food Servs*., 2011 ME 68, ¶ 25, 21 A.3d 99; (citing *Bridgeman v. S.D. Warren Co*., 2005 ME 38, ¶ 14, 872 A.2d 961). Accordingly, the Court views the rule's purposes as broader than merely punishing the employer.

[¶19] Moreover, the ALJ's inference that Mr. McDonald received notice of Mr. Berry's claim on May 11, 2018, triggering the fourteen-day period, is based on the following facts that are supported in the record: the board received its copies of the petitions on that date, Mr. McDonald filed a first report of injury on that date, and Mr. McDonald acknowledged receiving the petitions during the month of May. Although the record contains no *direct* evidence of the date on which 1st Rate Bait received the petitions, the record nevertheless contains competent evidence that provides a basis for the ALJ's inferred finding that 1st Rate Bait received notice of Mr. Berry's claim on May 11, 2018. *See, e.g., Dumont v. AT&T Mobility Servs.*, Me. W.C.B. No. 19-11, ¶ 14 (App. Div. *en banc* 2019). This finding is a reasonable and logical inference derived from the evidence and represents more than mere surmise or conjecture. *See id.*

III. CONCLUSION

[¶20] Because the ALJ neither misconceived nor misapplied the law, and because the factual findings are supported by competent evidence in the record, we affirm the decision.

The entry is:

The administrative law judge'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 (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.

Attorneys for Appellant:
Anne-Marie Storey, Esq.
John K. Hamer, Esq.
RUDMAN WINCHELL
P.O. Box 1401
Bangor, ME 04402

Attorney for Appellee:
Zachary J. Smith, Esq.
LAWSMITH LEGAL SERVICES, LLC
P.O. Box 1049
Bangor, ME 04402