SANDRA DOMINGUEZ
(Appellant)

v.

PYRAMID FORE STREET MANAGEMENT, LLC
(Appellee)

and

GALLAGHER BASSETT SERVICES
(Insurer)

Conference held: September 28, 2022
Decided: January 13, 2023

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

[¶1] Sandra Dominguez appeals from a decision of a Workers' Compensation Board administrative law judge (*Collier, ALJ*) granting in part her Petition for Award regarding a right wrist injury she sustained on March 26, 2019, while working for Pyramid Fore Street Management, LLC (Pyramid). Ms. Dominguez contends it was error for the ALJ (1) to adopt the medical opinion of one expert witness that the effects of Ms. Dominguez's injury had resolved and thus find that her right wrist injury does not significantly contribute to her disability pursuant to 39-A M.R.S.A. § 201(4); (2) to deny her claim of penalties for a violation of the "fourteen-day rule," Me. W.C.B. Rule, ch. 1, § 1; and (3) to endorse Pyramid's use of a unilateral discontinuance of her benefits pursuant to 39-A M.R.S.A. § 205(9)(A). We vacate

the decision in part and remand for further proceedings regarding the unilateral discontinuance issue only. In all other respects we affirm the decision.

I. BACKGROUND

[¶2] Ms. Dominguez worked as a housekeeper at one of Pyramid's hotels. On March 26, 2019, while mopping, Ms. Dominguez hit her right wrist on the wringer on the side of the bucket. She sought treatment for the injury the next day at ConvenientMD. The injury was characterized as right wrist strain, and she was given a brace. Ms. Dominguez was able to perform her work duties by modifying her activity and limiting use of her right arm and hand.

[¶3] After two visits at ConvenientMD, she was referred to OA Center for Orthopedics, and eventually to a hand surgeon, Dr. Kathryn Hanna. Dr. Hanna diagnosed a work-related right wrist sprain with synovitis, along with a preexisting TFCC tear and ulnar impaction syndrome. A cortisone injection and occupational therapy did not provide Ms. Dominguez with relief. She nevertheless continued working with restrictions until August 14, 2019, when she was taken out of work due to unrelated medical conditions. Bill Hagen, her supervisor, testified that he thought she would be returning to work after two weeks, but she never returned to work.

[¶4] On September 4, 2019, Ms. Dominguez left a voicemail for Mr. Hagen. Mr. Hagen attempted to call Ms. Dominguez twice in response and left voicemails

but received no answer. Mr. Hagen then sent her a letter seeking further information "in regards to [her] short-term leave of absence."

[¶5] On September 5, 2019, Dr. Hanna completed a return-to-work form provided by Coventry Workers' Comp Services, stating that Ms. Dominguez could return to work without restrictions effective August 6, 2019. Ms. Dominguez had been last seen by Dr. Hanna on July 15, 2019, and by a physician's assistant in Dr. Hanna's office on July 23, 2019.

[¶6] On September 25, 2019, Pyramid filed a memorandum of payment purporting to have begun paying Ms. Dominguez varying rates of partial incapacity benefits as of May 27, 2019, and sent Ms. Dominguez a payment of $1,157.45. On the same date, September 25, 2019, Pyramid utilized the mechanisms of 39-A M.R.S.A. § 205(9)(A) and Me. W.C.B. Rule, ch. 8, § 11(2)(A) and filed a discontinuance of benefits form unilaterally ending its payment of all incapacity benefits as of August 6, 2019—the date she had been retroactively released to full-duty work without restrictions by Dr. Hanna.

[¶7] On October 4, 2019, Ms. Dominguez met with Mr. Hagen at the hotel. Mr. Hagen told her at that meeting that she could return to work as long as she provided updated doctor's notes. Ms. Dominguez did not return to work for Pyramid, and Mr. Hagan subsequently sent her a letter stating that Pyramid was accepting her "verbal resignation, left via voice mail on 9/4/2019."

[¶8] Ms. Dominguez then filed her Petition for Award. During litigation, the parties participated in mediation pursuant to 39-A M.R.S.A. § 313, and thereafter filed a joint scheduling memorandum (JSM). The mediator's report and the JSM listed among the issues in dispute "improper termination of benefits," but did not list an alleged violation of the fourteen-day rule.

[¶9] The ALJ held a hearing with testimony from Ms. Dominguez and Mr. Hagen, and issued a decision dated January 19, 2022. The ALJ determined that Ms. Dominguez is entitled to the protection of the Act for the March 26, 2019, work injury, but relied upon the medical opinion of Dr. Hanna to find that the effects of that work injury had resolved by August 6, 2019, and that the work injury did not contribute to Ms. Dominguez's disability in a significant manner under 39-A M.R.S.A. § 201(4). Further, the ALJ found that the claim for a fourteen-day rule violation was either waived for failing to timely raise it or lacked merit because Ms. Dominguez did not articulate a claim for benefits in her voicemail of September 4, 2019. The ALJ also found that Pyramid did not violate section 205(9) by unilaterally discontinuing her benefits because Ms. Dominguez's employment status was "not entirely clear" at the time, and the use of the discontinuance was "a possible form filing error." Finally, the ALJ determined that Ms. Dominguez had refused a bona

fide offer of employment from Pyramid, and thus was not entitled to any incapacity benefits during the period of refusal, citing 39-A M.R.S.A. § 214(1)(A).[1]

[¶10] Ms. Dominguez filed a motion for further findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318. The original ALJ (*Collier, ALJ*) retired shortly after issuing the decision on January 19, 2022. The ALJ who succeeded him (*Chabot, ALJ*) denied the motion for further findings. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶11] In general, 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 Ms. Dominguez 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 [ALJ]." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446.

[1] On appeal, Ms. Dominguez does not challenge the ALJ's decision that she had refused a bona fide offer of reasonable employment and therefore she is not entitled to wage loss benefits during the period of refusal. *See* 39-A M.R.S.A. § 214(1)(A).

B. Competent Medical Evidence

[¶12] The ALJ adopted the medical opinion of Dr. Hanna that Ms. Dominguez sustained a right wrist strain that had resolved by August 6, 2019, and did not significantly accelerate or worsen her underlying wrist condition. Ms. Dominguez argues that the ALJ erred in adopting the opinion of Dr. Hanna and should have instead relied upon her testimony and the opinions of different medical experts in evidence who opined that the work injury caused a significant worsening of her underlying wrist condition, establishing that her ongoing disability is compensable pursuant to 39-A M.R.S.A. § 201(4).[2] We find no merit in this argument.

[¶13] When conflicting evidence is presented, 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." *See Boober v. Great N. Paper Co.*, 398 A.2d 371, 375 (Me. 1979) (quotation marks omitted). The ALJ, as fact-finder, must weigh competing evidence, and may accept or reject expert medical opinions in whole or in part. *Leo v. Am. Hoist & Derrick Co.*, 438 A.2d 917, 920-21 (Me. 1981). Dr. Hanna's medical opinion is competent evidence that the work injury had resolved

[2] Title 39-A M.R.S.A. § 201(4) provides: "If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner." Ms. Dominguez contends Dr. Hanna misunderstood the meaning of the word "significant" when opining on the contribution of the work injury to her ongoing disability. The ALJ credited Dr. Hanna's testimony that the work injury was a minor event that had resolved by August 6, 2019, and thus no longer contributed to Ms. Dominguez's disability in any manner. We find no error.

and did not contribute to Ms. Dominguez's disability in a significant manner. We therefore find no error.

C. Waiver

[¶14] Ms. Dominguez argues that it was error for the ALJ to deny her claim that Pyramid violated the fourteen-day rule without making a clear determination of whether the claim was waived or had failed on the merits. We disagree. Either alternative finding is supported by competent evidence and neither misstates nor misapplies the law, thus we find no reversable error.

[¶15] With regard to waiver, the record shows that Ms. Dominguez did not raise the fourteen-day rule claim at mediation or list it as an issue in dispute in the joint scheduling memorandum. She raised the issue for the first time after the hearing in her written closing arguments. As such, the timing of Ms. Dominguez's fourteen-day rule arguments did not provide Pyramid a fair opportunity to introduce evidence relevant to the issue and did not give the ALJ a reasonable opportunity to decide it. *See Waters v. S.D. Warren Co.*, Me. W.C.B. No. 14-26, ¶ 18 (App. Div. 2014) (finding a waiver when issue was raised for the first time in response to the employer's written closing argument). Moreover, it was within the ALJ's scope of allowable discretion to determine that Ms. Dominguez had forfeited consideration of the issue by failing to include it in the JSM. Me. W.C.B. Rule, ch. 12, § 9(3)

(authorizing the ALJ to "deem waived legal issues not raised in the Joint Scheduling Memo"). We find no error in the ALJ's conclusion that the issue had been waived.

[¶16] Alternatively, the ALJ found that the voicemail of September 4, 2019, was inadequate to make a claim for benefits and trigger the requirements of the fourteen-day rule. That rule requires the employer to pay or controvert a claim within fourteen days of notice or knowledge of a claim for incapacity benefits. Me. W.C.B. Rule, ch. 1, § 1.[3] However, "an employer's knowledge or notice of an injury does not equate to knowledge or notice of a claim that would give rise to a duty to pay

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

> **§ 1. Claims for Incapacity and Death Benefits**
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> 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:
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> A. Accept the claim and file a Memorandum of Payment checking "Accepted"; or
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> B. Pay without prejudice and file a Memorandum of Payment checking "Voluntary Payment without Prejudice"; or
>
> . . . .
>
> 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:
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> A. The employer files a Notice of Controversy; and
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> B. The employer pays benefits from the date the claim is made. If it is later determined that the average weekly wage/compensation rate used to compute the payment due was incorrect, and the amount paid was reasonable and based on the information gathered at the time, the violation of subsection 1 of this section is deemed to be cured.

benefits." *Pearson v. Freeport School Dep't,* 2006 ME 78, ¶ 17, 900 A.2d 728. To trigger the requirements of the fourteen-day rule, the employee is not required to file a formal claim, but there must be "some sort of claim or request" indicating the employee's demand. *Id.* (quoting *Carroll v. Gates Formed Fibre Prods.*, 663 A.2d 23, 25 (Me. 1995)). For example, in *Pearson*, despite a finding that the employer had knowledge of a work injury several months prior, the Court concluded a claim had not been made for purposes of the fourteen-day rule until the employee made an express request for workers' compensation benefits to the employer's business manager. 2006 ME 78, ¶ 18.

[¶17] Ms. Dominguez contends the September 4, 2019, voicemail establishes that she was making a claim for benefits. In that voicemail, Ms. Dominguez suggested that "workers' comp" had not been paying her perhaps because they thought she was out for medical issues unrelated to her wrist injury. She described herself as "still sick for [her] hand"; she also stated "I fight for this" and "I fight for my money." She also stated that she would not be returning to work.

[¶18] As the petitioner, Ms. Dominguez bore the burden of proof on a more probable than not basis on all issues. *See Farris v. Georgia-Pacific Corp.*, 2004 ME 14, ¶ 7, 844 A.2d 1143. The ALJ found it equally plausible to interpret the voicemail as "an expression of dissatisfaction with her treatment on the job or a statement of her intention to resign her position" or to interpret it as an assertion of a claim for

benefits. The ALJ was not persuaded on a more probable than not basis by the contents of the voicemail that Ms. Dominguez made a clear demand for payment that would trigger the requirements of the fourteen-day rule.[4] Accordingly we find no error.

D. Unilateral Discontinuance

[¶19] Finally, Ms. Dominguez argues that it was error for the ALJ to deny her claim for benefits based on Pyramid's use of an after-the-fact, unilateral discontinuance pursuant to 39-A M.R.S.A. § 205(9)(A), and instead to characterize Pyramid's actions as a harmless "form filing error." She contends Pyramid was obligated to follow the procedure in section 205(9)(B)(1), which allows for terminating benefits only after providing the employee with 21-days' notice, and asserts that Pyramid should be penalized for failure to comply with this provision.

[¶20] An employer under the Workers' Compensation Act is permitted to unilaterally and immediately discontinue weekly incapacity benefits in only a very narrow set of circumstances, some of which are described in 39-A M.R.S.A. § 205(9)(A).[5] The Board has exercised its rule-making authority to clarify the

[4] Ms. Dominguez further argues that it was error for the ALJ not to adjudicate her argument, first raised in her proposed findings, that the recently enacted P.L. 2019, ch. 344 (codified at 39-A M.R.S.A. § 205(2)(C) (effective September 17, 2019)) supported a penalty for Pyramid's violation of W.C.B. Rule, ch. 1, § 1. We disagree for two reasons: first because the argument was waived, having been introduced for the first time in proposed findings of fact and conclusions of law, *see Waters*, Me. W.C.B. No. 14-16, ¶ 18; and second because we affirm the ALJ's alternative determination that Pyramid was not liable under Rule, ch. 1, § 1.

[5] Title 39-A M.R.S.A. § 205(9) provides, in relevant part:

requirements before this discontinuance may occur. Me. W.C.B. Rule, ch. 8, § 11. Relevant to this case, such a discontinuance may occur when

> (A) The employee returns to work without restrictions or limitations, due to the injury for which benefits are being paid, according to the employee's treating health care providers; and
>
> (B) There are no conflicting medical records with respect to the lack of restrictions or limitations due to the injury for which benefits are being paid.

Id. at § 11(2)(A), (B).

[¶21] In this case, Pyramid unilaterally and immediately discontinued Ms. Dominguez's benefits with a filing on September 25, 2019, when Ms. Dominguez was out of work. Pyramid's filing, however, stated it was retroactive to August 6, 2019, a time when Ms. Dominguez was still working and her medical provider had

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> **9. Discontinuance or reduction of payments.** The employer, insurer or group self-insurer may discontinue or reduce benefits according to this subsection.
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> **A.** If the employee has returned to work with or has received an increase in pay from an employer that is paying compensation under this Act, that employer or that employer's insurer or group self-insurer may discontinue or reduce payments to the employee.
>
> **B.** In all circumstances other than the return to work or increase in pay of the employee under paragraph A, if the employer, insurer or group self-insurer determines that the employee is not eligible for compensation under this Act, the employer, insurer or group self-insurer may discontinue or reduce benefits only in accordance with this paragraph.
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> (1) If no order or award of compensation or compensation scheme has been entered, the employer, insurer or group self-insurer may discontinue or reduce benefits by sending a certificate by certified mail to the employee and to the board, together with any information on which the employer, insurer or group self-insurer relied to support the discontinuance or reduction. The employer may discontinue or reduce benefits no earlier than 21 days from the date the certificate was mailed to the employee. . . . The certificate must advise the employee of the date when the employee's benefits will be discontinued or reduced, as well as other information as prescribed by the board, including the employee's appeal rights.

not yet provided the opinion that she was free of restrictions. The "no restrictions" medical opinion was issued by Dr. Hanna on September 5, 2019, and lists an effective date of August 6, 2019.

[¶22] Ms. Dominguez filed a Motion for Findings of Fact and Conclusions of Law requesting additional findings on this issue. When requested, an ALJ is under an affirmative duty under 39-A M.R.S.A. § 318 to make additional findings to create an adequate basis for appellate review. *See Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982). Adequate findings include those that allow the reviewing body effectively to determine the basis of the board's decision. *See Chapel Road Assocs., L.L.C. v. Town of Wells*, 2001 ME 178, ¶ 10, 787 A.2d 137.

[¶23] Without weighing in on the legal consequences, if any, of Pyramid's actions, we find the ALJ's treatment of this issue as a form filing error, without further analysis, did not generate adequate findings to sustain reasoned appellate review. We therefore vacate the decision in part and remand for additional findings of fact and conclusions of law on that issue only. *See* 39-A M.R.S.A. § 318.

III. CONCLUSION

[¶24] We vacate the decision in part and remand for adequate findings on whether Pyramid's use of a unilateral and immediate discontinuance of benefits comported with 39-A M.R.S.A. § 205(9)(A) and W.C.B. Rule, ch. 8, § 11. In all other respects, the decision is affirmed.

The entry is:

> The ALJ's decision is affirmed in part, vacated in part, and remanded consistent with this decision.

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.

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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