KURT M. FEIEREISEN
(Appellee)

v.

BOISE CASCADE CORPORATION and
MEAD CORPORATION
(Appellants)

and

MSIGA/SYNERNET

Argued: February 7, 2024
Decided: November 27, 2024

PANEL MEMBERS: Administrative Law Judge Stovall, Elwin, and Smith

Dissenting in part: Administrative Law Judge Stovall

BY: Administrative Law Judge Elwin

[¶1] Boise Cascade Corporation and Mead Corporation ("collectively, the Employers") appeal from a Workers' Compensation Board administrative law judge (*Rooks, ALJ*) decision granting Kurt Feiereisen's Petition for Review in part and denying his Petitions for Order of Payment but referring the case to the board's Abuse Investigation Unit for a determination regarding possible penalties. The Employers contend that the ALJ erred when determining (1) the Petitions regarding the 1987 date of injury were not barred by the applicable ten-year statute of repose, 39 M.R.S.A. § 95; (2) Mr. Feiereisen's claim under the "fourteen-day rule," Me.

W.C.B. Rule, ch. 1, § 1, had not been waived and the Employers violated the rule; (3) the 2009 board decree required payment of benefits at any time other than when Mr. Feiereisen was laid off from the mill; and (4) by failing to make adequate findings of fact regarding several issues, including the amount of a setoff for pension benefits paid. We affirm in part, vacate in part, and remand the case for additional proceedings.

I. BACKGROUND

[¶2] This case involves Petitions for Review and for Order of Payment regarding two dates of injury: September 6, 1987, and November 30, 1997. A 2007 date of injury was settled in 2020.

[¶3] Kurt Feiereisen began working at the Rumford Paper Mill in 1986 as a belt driver in the shipping department. He injured his neck, mid-back, and left arm at work in 1987 when Boise Cascade owned the Mill, and sustained an aggravation of that injury in 1997, when Mead Corporation owned the Mill. Thereafter, Mr. Feiereisen was transferred to a light-duty job in the guardhouse at the Farrington Mountain Landfill. He sustained a gradual injury to his back in 2007 when the Mill was owned by NewPage Corporation. Mr. Feiereisen continued to work at the Mill in a light duty position and sustained no wage loss at that time.

[¶4] In 2008, Mr. Feiereisen filed petitions for award related to the 1987, 1997, and 2007 dates of injury.[1] The petitions were granted in a 2009 board decree (*Goodnough, HO*),[2] in which the hearing officer awarded 50% partial incapacity benefits for periods when Mr. Feiereisen was "laid off or otherwise separated from the mill." The hearing officer also awarded benefits for a closed-end period following a 2008 motor vehicle accident.

[¶5] In Further Findings of Fact and Conclusions of Law, the hearing officer determined that the 1987 date of injury was responsible for 15% of the incapacity, and Mr. Feiereisen was entitled to cost-of-living adjustments (COLAs) for that portion of his benefits. *See* 39 M.R.S.A. § 55-A (P.L. 1985, ch. 372, Pt. A, § 18, (effective June 30, 1985), repealed by P.L. 1987, ch. 559, Pt. B, § 28 (effective November 20, 1987)). NewPage, the employer on the most recent injury, paid 50% partial incapacity benefits based on the 2007 average weekly wage until 2020, when it settled the 2007 date of injury. Mr. Feiereisen was taken out of work due to his work injuries as of October 4, 2010, and he retired in 2011.

[1] An additional petition for award seeking compensation for injuries sustained in a 2008 motor vehicle accident was denied. That denial was affirmed by the Law Court on appeal. *Feiereisen v. NewPage Corp.,* 2010 ME 98, ¶ 13, 5 A.3d 669.

[2] Pursuant to P.L. 2015, ch. 297 (effective Oct. 15, 2015), Workers' Compensation Board hearing officers licensed to practice law are now designated as administrative law judges (ALJs). The decisions issued by hearing officer Goodnough in 2009 were made before this change.

[¶6] The Mill went into bankruptcy in 2012, and thereafter, the Maine Self Insurance Guaranty Association (MSIGA) became responsible for workers' compensation injuries incurred prior to 2005.

[¶7] NewPage filed a Petition for Reimbursement and for Order of Payment in 2015, seeking a contribution from Boise and Mead for their share of the payments NewPage made to Mr. Feiereisen. A consent decree was signed on October 4, 2016, dismissing the Petition without prejudice. A second Petition seeking contribution from Mead and Boise was dismissed without prejudice in September 2017.

[¶8] On November 10, 2020, Mr. Feiereisen filed Petitions for Review and for Order of Payment on the 1987, 1997, and 2007 dates of injury. On August 17, 2020, Mr. Feiereisen and NewPage settled the claim for the 2007 date of injury. The claims regarding the 1987 and 1997 injuries proceeded to hearing.

[¶9] The hearing officer in 2009 found that Boise had not filed a first report of injury on the 1987 injury until 2008, thus the 1987 injury was not barred by the two-year statute of limitations. *See* 39 M.R.S.A. § 95 (1989). He did not reach the issue regarding whether the claim was barred by the ten-year statute of repose, *see id.,* and allowed the claim to proceed.

[¶10] Boise argued in the current litigation that the 1987 injury claim was barred by the ten-year statute of repose. The ALJ determined, however, that the 2009 decree had "reset the clock" on the 1987 claim, and because payments made by

MSIGA to Sedgwick/NewPage from 2017 through 2020 were made with contemporaneous notice that they were in part for the 1987 injury, the period was extended an additional ten years from the date of the last payment. Thus, the Petition for Review filed in 2020 on the 1987 date of injury was deemed to be timely.

[¶11] The ALJ further held, despite the Employers' argument, that language in the 2009 decree did not limit the Employers' liability to only periods when Mr. Feiereisen had been laid off laid off from the Mill.

[¶12] The ALJ proceeded to find that Mr. Feiereisen had established changed medical and economic circumstances, granted the Petitions for Review, and determined that Mr. Feiereisen was entitled to 100% partial incapacity benefits from October 5, 2010, to the present and continuing. She further determined that the 2009 apportionment still applies, and that the claims for the 1987 and 1997 dates of injury are valid only to the extent that they exceed the potential claims commuted by the 2020 settlement on the 2007 date of injury.[3] The ALJ further concluded that she did not need to reach the issue whether Mead is entitled to an offset for a disability pension Mr. Feiereisen has been receiving.

[¶13] Mr. Feiereisen also sought an order of payment for all benefits due under the 2009 decree, including COLAs on the 1987 date of injury. The ALJ held

[3] The hearing officer in 2009 apportioned 15% responsibility for Mr. Feiereisen's incapacity to the 1987 injury, but did not assign percentages to the other two dates of injury. The ALJ in the current litigation divided the remaining responsibility equally between the 1997 and 2007 injuries. The parties do not dispute this allocation on appeal.

that the only mechanism available to enforce the 2009 decree lies in the Superior Court pursuant to 39-A M.R.S.A. § 323, but referred the case to the board's Abuse Investigation Unit for a determination whether the imposition of penalties for failure to pay the 2009 award is appropriate.

[¶14] Mr. Feiereisen also alleged a violation of Board Rule ch. 1, § 1, the "fourteen-day rule." The ALJ found that the employer had filed a notice of controversy on the fifteenth day, and thus was in violation of the rule.

[¶15] The ALJ denied the Employers' Motion for Findings of Fact and Conclusions of Law. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶16] In general, the Appellate Division's role on appeal is "limited to assuring that the [ALJ's] . . . 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). The ALJ's findings of fact are not subject to appeal. 39-A M.R.S.A. § 321-B(2). 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 hearing officer." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

[¶17] When construing provisions of the Workers Compensation Act:

> [O]ur purpose is to give effect to the Legislature's intent. In so doing, we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results. We also consider the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved. If the statutory language is ambiguous, we then look beyond the plain meaning and consider other indicia of legislative intent, including legislative history.

Graves v. Brockway-Smith Co., 2012 ME 128, ¶ 9, 55 A.3d 456 (citations and quotation marks omitted).

B. Statute of Repose

[¶18] At issue is whether, pursuant to 39 M.R.S.A. § 95 (1989),[4] the ALJ erred when determining that the 1987 injury claim remained viable when Mr. Feiereisen's Petition for Review was filed on November 10, 2020.

[¶19] Section 95 established a two-year statute of limitations for filing a petition for workers' compensation benefits, and further provided that "no petition of any kind may be filed more than 10 years following the date of the latest payment made under this Act."[5] The two-year period does not begin to run until a first report

[4] Section 95 has since been amended, repealed, and replaced. P.L. 1989, ch. 256, § 4 (effective Sept. 30, 1989); P.L. 1991, ch. 615, § A-44 (effective Oct. 17, 1991); P.L. 1991, ch. 885, §§ A-7, A-8, A-11 (effective Jan. 1, 1993) (codified at 39-A M.R.S.A. § 306). The statute has been amended after 1993, but those amendments are not relevant here.

[5] Title 39 M.R.S. § 95 provides, in relevant part:

> Any employee's claim for compensation under this Act shall be barred unless an agreement or petition . . . shall be filed within 2 years after the date of the injury, or, if the employee

of injury is filed. *Id.* The purpose of a statute of limitations in the context of workers' compensation "is to reconcile an injured party's interest in compensation with the employer's interest in a terminal date to litigation." *Hird v. Bath Iron Works Corp*., 512 A.2d 1035, 1037 (Me. 1986); *see also Pino v. Maplewood Packing Co*., 375 A.2d 534, 537 (Me. 1977).

[¶20] The Law Court has held that the limitations period for a claim is tolled if payments made by the employer or insurer for a subsequent injury were made with "contemporaneous notice" that the payments were made in part for the earlier injury. *Pottle v. Bath Iron Works Corp.*, 551 A.2d 112, 114 (Me. 1988). This rule applies to both the two-year period, *id.*, and the ten-year period in section 95, *Klimas v. Great N. Paper Co*., 582 A.2d 256, 258-59 (Me. 1990).

[¶21] In the 2009 decree, the hearing officer determined the 1987 date of injury was not barred by the statute of limitations because the employer had not filed a first report of injury until 2008, and the petition was filed within two years thereafter. The hearing officer did not reach the issue whether the ten-year period had expired.

> is paid by the employer or the insurer, without the filing of any petition or agreement, within 2 years of any payment by such employer or insurer for benefits otherwise required by this Act. The 2-year period in which an employee may file his claim does not begin to run until his employer, if he has actual knowledge of the injury, files a first report of injury. . .. No petition of any kind may be filed more than 10 years following the date of the latest payment made under this Act.

[¶22] In the current litigation, Mr. Feiereisen argued that the ten-year period in section 95 did not bar the 1987 claim because the 2009 decree, which established that injury, shielded that date of injury from a limitations defense. The ALJ rejected this argument, concluding instead that the 2009 decree "reset the clock" on the ten-year statute of repose, and the ten-year period would not have expired until September 2019.

[¶23] The ALJ further found as fact that MSIGA, for Boise, made a series of reimbursement payments to NewPage from 2017 to 2019 with contemporaneous notice that the payments were made in part for the 1987 injury date. The ALJ concluded that the ten-year period, which began to run in 2009, had not expired before the 2017 payments were made and the period of repose was further extended an additional ten years from the 2017-2019 payments. Thus, the ALJ concluded, the Petition for Review filed November 10, 2020, was timely.

[¶24] Boise asserts that there is no statutory authority for the proposition that the September 15, 2009, decree "reset the clock"; that section 95 contains no provision for extending the statute of repose due to the establishment of a work injury by decree. Boise suggests that the ALJ's rationale stems from language in the current version of the statute of limitations, which does not apply. *See* 39-A M.R.S.A § 306(3) (providing that if an injury is established by board decree, a party has six years from the date of the decree to file a petition). Pursuant to the plain language of

section 95, Boise contends the ten-year period can be extended only by payments. And because the record contains no evidence that any payments were made by Boise within ten years after 1987, or with contemporaneous knowledge that any payments were made in part for the 1987 date of injury during that period, the 1987 claim is barred.

[¶25] In the 2009 decree, the hearing officer gave no reason for not addressing whether the ten-year statute of repose barred the 1987 injury claim. Nevertheless, he determined that the claim was viable and compensable, and established a payment scheme.[6] The payment scheme under that valid decree—even if erroneous—was in effect and enforceable up until the ALJ in the current litigation found sufficient changed circumstances to revisit that decree. *See Ervey v. Ne. Log Homes*, 638 A.2d 709, 710-11 (Me. 1994) (stating that doctrine of res judicata would require the ALJ to follow an existing payment scheme without proof of changed circumstances, even if erroneous).

[6] The ALJ may have concluded that the ten-year period had not expired on the theory that the two-year period had to commence before the ten-year period would start to run, or because the employers had not filed a first report of injury until 2008. The language of section 95, however, does not appear to require the filing of a first report or the commencement of the two-year period before the ten-year period would begin to run. *See Joyce v. S.D. Warren Co*., 2000 ME 163, ¶ 12, 759 A.2d 712 (stating "the statute of limitations is not tolled when one does not file a first report of injury that is not required to be filed" when construing the two-year statute of limitations provision in section 95, applicable in 1992); *cf. Graves v. Brockway-Smith Co*., 2012 ME 128, ¶¶ 17-18, 55 A.3d 456 (holding that the six-year period of repose in 39-A M.R.S.A § 306(2) did not begin to run until a first report of injury had been filed, based mainly on language added by the Legislature in 1999, P.L. 1999, ch. 354, § 6 (effective Sept. 18, 1999)).

[¶26] Moreover, the determination that the 1987 claim remained viable in 2009, a ruling made by a hearing officer and not overturned on appeal, became the law of the case. *See Blance v. Alley*, 404 A.2d 587, 588 (Me. 1979) (stating that the law of the case doctrine is "the practice of courts generally to refuse to open what is decided"). To accept Boise's argument—that the 1987 claim expired in 1997—would effectively invalidate a final, valid judgment. That we cannot do.

[¶27] The ALJ found that payments made by MSIGA to Sedgwick/ NewPage from 2017 through 2020 were made with contemporaneous notice that they were in part for the 1987 injury. This factual finding is supported by competent evidence in the record. Thus, the ALJ did not err when determining that the period was extended an additional ten years from those payments, and the Petition for Review filed in 2020 on the 1987 date of injury was timely filed.

C. Interpretation of the 2009 Decree

[¶28] The Employers argue that the ALJ misconstrued the 2009 decree. They contend the decree orders the payment of benefits only during periods when Mr. Feiereisen was laid off from the Mill; thus, the decree imposed no payment obligation on them after October 4, 2010, when Mr. Feiereisen was taken out of work for medical reasons. We disagree.

[¶29] An ALJ decision clarifying or construing a prior decree is subject to a two-part analysis: (1) whether the prior decree is ambiguous as a matter of law;

and (2) whether the ALJ's construction of the prior judgment is consistent with its language read as a whole and is objectively supported by the record. *See Thompson v. Rothman*, 2002 ME 39, ¶¶ 6-8, 791 A.2d 921. The resolution of an ambiguity is reviewed for abuse of discretion. *Id*.

[¶30] The 2009 decree provides, in relevant part:

> Based upon an analysis of such factors as the employee's pre-injury AWW (2007 DOI), age, education, vocational profile and work restrictions related to the injury (a blend of all three noted above), I find and conclude that *the employee is 50% partially incapacitated, but obviously only when laid-off or otherwise separated from the Mill*. *He therefore must be paid a partial benefit upon each lay-off*, from and after January 2, 2008, pursuant to § 213(1) of the Act.
>
> I recognize that Mr. Feiereisen was not out on lay-off while out of work following the January 2, 2008 [motor vehicle accident]. Rather, he was out primarily because of injuries sustained in that accident. He was nevertheless still 50% partially incapacitated on account of the three work injuries noted above and is entitled to a 50% partial benefit for that period.

(Emphasis added). The Employers assert that the order of payment "upon each layoff" governs the analysis, and the phrase "otherwise separated from the mill" is included in a sentence concerning the extent of incapacity and is not a payment order. The Employers further argue that if the order to pay Mr. Feiereisen applied to all times he was out of work, the order to pay while he was out of work due to the motor vehicle accident would have been redundant and unnecessary.

[¶31] We are unpersuaded by the Employers' proposed construction. The 2009 decree is susceptible of different meanings and is therefore ambiguous.

However, the ALJ's construction of the prior judgment to mean that payment was authorized during periods when Mr. Feiereisen was out of work for reasons other than a layoff is consistent with the language read as a whole and is objectively supported by the record. The inclusion of the phrase "otherwise separated from the mill" suggests the hearing officer did not intend to limit the Employers' payment obligation to periods of layoff only. We read the order to pay during the period following the motor vehicle accident not as redundant language but as evidence of intent to require the Employers to pay benefits in circumstances other than layoffs.

[¶32] Additionally, in 2009 the hearing officer issued Further Findings of Fact and Conclusions of Law, in which he stated:

> I also recognize that the award fashioned herein is in the nature of a capped varying rates payment scheme. This payment scheme is justified herein due to the frequent lay-offs to which the employee has recently been subjected…. Given the employee's fairly static medical profile and the reality of frequent lay-offs in currently difficult economic times, … it is administratively more efficient to put in place, at least for the time being, a capped varying rates scheme, as opposed to inviting an ongoing litigation process before the Board. Either party may, of course, file a Petition for Review to change this payment scheme when warranted by a change in the employee's medical or vocational status.

This language likewise supports the interpretation of the decree as taking Mr. Feiereisen's medical condition and employment status into account.

[¶33] The ALJ did not abuse her discretion when construing the 2009 decree to require the Employers to pay benefits at times other than when Mr. Feiereisen had been laid off from the Mill.

D. Rule Chapter 1, § 1, The Fourteen-Day Rule

[¶34] Maine W.C.B. Rule, Chapter 1, § 1 provides for penalties to employers who fail to accept, pay, or controvert a claim for incapacity benefits within fourteen days of notice or knowledge of that claim. The ALJ determined that Mr. Feiereisen (1) timely and sufficiently raised the issue of whether the Employers violated the fourteen-day rule, and (2) the Employers violated the rule because they filed a notice of controversy on the fifteenth day after having notice or knowledge of Mr. Feiereisen's claim for incapacity benefits.

[¶35] The record shows that Mr. Feiereisen did not raise the fourteen-day rule claim at mediation or list it as an issue in dispute in the joint scheduling memorandum.[7] The ALJ nevertheless found the claim was adequately raised at the beginning of the formal hearing when Mr. Feiereisen's counsel stated, "I don't think they ever filed a Notice of Controversy. And they certainly haven't paid him." The

[7] The dissent notes that Me. W.C.B. Rule ch. 12, § 3 provides "The Administrative Law Judge may deem waived legal issues not raised in the Joint Scheduling Memo," thereby affording the ALJ with discretion in this regard. Had the ALJ decided the issue on the basis of a rule violation alone, the issue on appeal would be whether that decision fell within the reasonable bounds of her discretion. The inquiry here is broader as the Employers assert that the issue was also not adequately raised at mediation or at the hearing. The inquiry is nevertheless the same. The bounds of the ALJ's discretion are defined by due process, the touchstone of which is fundamental fairness. *See Kuvaja v. Bethel Savings Bank,* 495 A.2d 804, 806 (Me. 1985).

issue was raised and argued after the hearing in Mr. Feiereisen's written position paper. The Employers contend the rule violation claim was not timely raised or raised in a manner that gave them fair notice, and was therefore waived. We agree.

[¶36] We review a determination regarding whether an issue has been raised and preserved by evaluating whether "there was a sufficient basis in the record to alert the court and any opposing party to the existence of that issue." *Verizon New England v. PUC,* 2005 ME 16, ¶ 15, 866 A.2d 844 (quotation marks omitted). An argument may be waived if it is not raised in a manner that provides opposing counsel with fair notice of the issue, and a full and fair opportunity to create a factual predicate sufficient for the ALJ to fairly decide the issue. *See Waters v. S.D. Warren Co.*, Me. W.C.B. No. 14-26, ¶ 18 (App. Div. 2014).

[¶37] For example, in *Dominguez v. Pyramid Fore Street Management, LLC,* Me. W.C.B. No. 23-03, ¶ 15 (App. Div. 2023), the employee did not raise her 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 formal hearing, in her written closing argument. *Id.* The Appellate Division panel concluded that the timing of Ms. Dominguez's fourteen-day rule arguments did not provide the employer with a fair opportunity to introduce evidence relevant to the issue, did not give the ALJ a reasonable opportunity to decide it, and it was therefore waived. *Id.*

[¶38] Similarly, here, Mr. Feiereisen did not raise the fourteen-day rule claim at mediation or list it as an issue in dispute in the joint scheduling memorandum. He raised the issue in only a perfunctory manner at the hearing and raised it adequately for the first time after the hearing in his position paper. Counsel's statement at the hearing did not provide the Employers with fair notice or opportunity to introduce evidence relevant to the fourteen-day rule issue. *See Mehlhorn v. Derby,* 2006 ME 110, ¶ 11, 905 A.2d 290 (stating "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived" (quotation marks omitted)); *see also Waters*, ¶ 18 (App. Div. 2014) (finding a waiver when issue was raised for the first time in response to the employer's written closing argument).

[¶39] Additionally, Mr. Feiereisen's counsel asserted at the hearing that no Notice of Controversy had been filed and no benefits had been paid in response to Dr. Eshelman's out of work note of October 2010. The ALJ however, found that the fourteen-day violation occurred when Mr. Feiereisen visited Dr. Wooden, the mill doctor, in August of 2010. The Law Court has noted that in order to trigger a fourteen-day violation, a claim for incapacity benefits must have been clearly and specifically asserted by the employee. *Pearson v. Freeport School Dep't,* 2006 ME 78, ¶ 17, 900 A.2d 728. To the extent any claim for a fourteen-day rule violation

may have been asserted at the hearing, it was not asserted with the clarity and specificity required.

[¶40] Accordingly, we determine the fourteen-day rule issue was not sufficiently raised and has therefore been waived. Because Mr. Feiereisen forfeited consideration of the issue, we do not reach the merits of the Employer's arguments on the fourteen-day rule, and we do not address the Employers' argument regarding the adequacy of factual findings on the issue of ownership of the Mill at the time of the alleged Rule violation.[8]

E. Adequacy of Factual Findings

1. Payment Order[9]

[¶41] The Employers contend that the ALJ's findings regarding the amount the Employers are obligated to pay are unclear. The Employers request that the

[8] We disagree with the dissent's position that a procedural waiver (in the sense of a failure to preserve an issue for decision or for appellate review) requires a finding of a voluntary relinquishment of a known right. The cases cited for this proposition are inapposite, as they refer not to the failure to preserve an issue, but to a different question entirely—whether one has waived an established right such as a statutory, constitutional, or contractual right. *See Dzekian v. Colvin*, 2013 U.S. Dist. LEXIS 106250, 192 Soc. Sec. Rep. Serv. 493 (discussing alleged waiver of statutory rights to counsel and to appear before an administrative law judge in a Social Security disability hearing). Distinctly, the failure to raise an issue in a timely or sufficient manner may arise due to mere inadvertence or negligence.

Pino v. Maplewood Packing, cited by the dissent, is also inapposite. *Pino* involved an estoppel claim, alleging that the employer had "waived" or was estopped from alleging a statute of limitations defense because it had acted as if the claim were still viable, and the employee had relied on those actions—not that it had failed to raise the defense in a timely or sufficient manner. 375 A.2d 534, 538-39 (1977).

[9] Neither party contests the ALJ's determination that the appropriate venue to seek enforcement of a board decree is with the Superior Court. *See* 39-A M.R.S.A § 323. Here, the Employers request that this panel review the findings regarding the amount of incapacity benefits they are required to pay pursuant to the decree. *See Estate of Boyle v. Lappin Bros.*, Me. W.C.B. No. 23-18, ¶¶ 9-11 (App. Div. 2023). Except for findings regarding the pension offset, the ALJ's findings concerning the amount of incapacity benefits owed are adequate for appellate review, and we merely restate her findings herein.

Appellate Division modify the decree to clarify the parties' payment obligations. *See* 39-A M.R.S.A § 321-B(3).

[¶42] The Employers further contend that because the 2007 injury was settled, and because the 2007 average weekly wage exceeds that related to the 1997 and 1987 wages, the decree should be clarified to indicate that Employers owe no benefits after the date of the settlement, citing *Bourque v. Frank X. Pomerleau, Inc*., 472 A.2d 933 (Me. 1984).

[¶43] In *Bourque*, the employee suffered two injuries while employed by the same employer: a back-injury while working as a laborer in 1974 and an anxiety-related injury working as a dispatcher in 1977. *Id.* at 934-35. The employee settled the later injury and then filed a petition for further compensation related to the earlier injury. *Id.* The commissioner denied the employee's petition, concluding that the settlement precluded recovery for the 1974 back-injury. *Id.* at 935.

[¶44] The Law Court vacated the commissioner's decision, reasoning that the employee's claim for the 1974 injury "remains valid to the extent it *exceeds* the potential claims commuted by the lump sum settlement" of the 1977 injury. *Id.* at 936 (emphasis in original). Thus, the Law Court determined that the non-settling employer was only responsible for that portion of the incapacity claim that exceeded the claims resolved by the lump sum settlement, thus preventing the employee from receiving a double recovery. *Id.*

[¶45] The Employers rely on *dictum* in *Bourque* wherein the Court opined on a hypothetical scenario in which the employer on the earlier injury would owe no additional benefits because the average weekly wage on the later, settled injury was higher than that for an earlier injury, and all incapacity was attributable to the earlier injury. *Id.* at 936 n.5. This case is distinguishable from the Court's hypothetical because the there is no finding in this case that any of the three work injuries no longer contributes to Mr. Feiereisen's incapacity.

[¶46] The ALJ relied on *Edwards v. Travelers Ins. Co.*, 2001 ME 148, 783 A.2d 163, when concluding that the Employers had a continuing obligation to pay their apportioned share of the benefit to the extent not relieved by the NewPage settlement. In that case, the employee had settled her claim against the insurer on the most recent injury after liability had been apportioned equally between two injuries. *Id.* at ¶¶ 5-6. The Law Court determined in order to prevent double recovery, the non-settling insurer was liable only for its apportioned amount of the benefit. *Id*. at ¶¶ 10, 20. The Court reasoned that the unilateral lump-sum settlement agreement could not alter the prior apportionment when the employee had participated in the apportionment proceedings. *Id*. at ¶ 19.

[¶47] Neither of these cases stands for the proposition that when the average weekly wage associated with a settled claim exceeds that of the remaining claims, the amount owed by the non-settling employers is commuted in its entirety.

Accordingly, the ALJ did not err when awarding benefits to the extent they exceed potential claims commuted by the NewPage settlement.

[¶48] The ALJ awarded 100% partial incapacity benefits from October 5, 2010, to the present and continuing on account of the 1987 and 1997 dates of injury, with credit for the 50% partial incapacity benefits already paid up to the date of the NewPage settlement, to the extent liability for the 1987 and 1997 injuries exceeds potential claims commuted by the settlement. Thus, based on the 2009 apportionment, up to the date of the settlement Boise is responsible for 15% and Mead, 42.5%, of the remaining 50% of the 100% partial incapacity benefit.

[¶49] As a result of the settlement with NewPage, 42.5% of the 100% partial incapacity benefit has been commuted. The Employers' post-settlement liability exceeds the potential liability commuted by 57.5%. Mead is responsible to pay 57.5% of the 100% partial incapacity benefit based on the 1997 average weekly wage, and Boise must reimburse Mead 15% of the 100% partial incapacity benefit payment based on the 1987 average weekly wage.

[¶50] Additionally, Boise must pay Mr. Feiereisen all COLAs on benefits attributable to the 1987 date of injury. 39 M.R.S.A. § 55-A.

2. Pension Offset

[¶51] The ALJ concluded that she did not need to reach the issue whether Mead was entitled to "offset Mr. Feiereisen's incapacity benefits against a pension

that he has been receiving from the Employers, in light of the fact that Mr. Feiereisen's claim is limited from the settlement of the 2007 date of injury." Mead contends this finding provides an inadequate basis for appellate review on the issue whether it is entitled to any portion of a pension offset. We agree.

[¶52] Mead asserts that when NewPage acquired the Mill in 2005, the pension plan established by Mead ultimately became the NewPage pension plan, and thus it is entitled to a share of the pension offset. Mead 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 pursuant to 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.

[¶53] Pension offsets are governed by 39-A M.R.S.A § 221(3)(A)(5), which provides that workers' compensation benefit amounts be reduced by:

> The proportional amount, based on the ratio of that employer's contributions to the total contributions to the plan or program, of the after-tax amount of the pension or retirement payments received or being received by the employee pursuant to a plan or program established or maintained by the same employer from whom benefits under section 212 or 213 are received, regardless of whether the employee contributed directly to the pension or retirement plan or program;

[¶54] The ALJ's treatment of the issue in a summary fashion, without issuing further findings of fact and conclusions of law, did not generate adequate findings to sustain reasoned appellate review on the issue of whether Mead is entitled to any portion of a pension offset. 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.

The entry is:

> The ALJ's decision is vacated insofar as it determines that the appellant Employers violated the fourteen-day rule, Me. W.C.B. Rule, ch. 1, § 1. The decision is remanded for additional findings of fact regarding whether the appellant Mead is entitled to offset any portion of Mr. Feiereisen's pension benefit pursuant to 39-A M.R.S.A § 221(3)(A)(5). In all other respects, the decision is affirmed.

Stovall, J., dissenting

[¶55] I dissent for five reasons. First, the ALJ had discretion whether to find waiver of an issue not listed in the Joint Scheduling Memorandum. Second, the finding of waiver is a finding of fact entitled to a higher standard of review than that used by the majority. Third, the hearing transcript establishes that near the start of the hearing, Mr. Feiereisen twice raised the issue that he had been taken out of work due to his work-related injuries and twice raised the fact that the Employers had

failed to file a notice of controversy. Fourth, Mr. Feiereisen did not raise the issue of the Employers' failure to file a notice of controversy in a "perfunctory" manner. Fifth, the Employer was given and took the opportunity to be heard on the issue of the fourteen-day violation; therefore, there was no due process violation.

A. Waiver

[¶56] The majority overruled the ALJ's use of her discretion in deciding whether an issue was waived. Workers' Compensation Board Rule, Chapter 12, § 9(3) states, "The Administrative Law Judge *may deem waived* legal issues not raised in the Joint Scheduling Memo." (Emphasis added). The rule makes it clear that the ALJ has discretion on waiver. An Appellate Division panel has held:

> Although Rule 12, § 12(1) authorizes an ALJ to "exclude an exhibit offered at hearing that was not exchanged by the parties at least 7 days before the final hearing in the matter," *it does not require exclusion*. *Board rules provide the ALJ with broad discretion in matters regarding the sequence and conduct of hearings and the admission of evidence. Smith v. Me. Sea Coast Vegetables*, Me. W.C.B. No. 20-1, ¶ 13 (App. Div. 2020).

Carlow v. *Fulghum Fibres*, Me. W.C.B. No. 22-29, ¶ 11 (App. Div. 2022) (emphasis added).

[¶57] In this case, the majority removes this broad discretion from the ALJ. This decision effectively changes Rule Ch. 12, § 9(3) to read, "The Administrative Law Judge *shall* deem waived legal issues not raised in the Joint Scheduling Memo."

B. Waiver is a Finding of Fact

[¶58] Black's Law Dictionary defines waiver as "The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right… ." Consistent with this definition, the Law Court has held in a workers' compensation case that "waiver is the intentional relinquishment of a known right." *Pino* v. *Maplewood Packing Co*., 375 A.2d 534, 538 (1977).

[¶59] A "waiver" is a finding of fact as it requires a factual determination of whether a party intentionally relinquished a known right based on their actions or statements, which is a factual question to be decided by the ALJ based on the evidence presented; not a legal interpretation. An ALJ's determination that there has been a valid waiver is a finding of fact. *Dziekan* v. *Colvin*, 2013 U.S. Dist. LEXIS 106250, 192 Soc. Sec. Rep. Serv. 493. The Law Court has come to the same conclusion: "This Court has previously determined that waiver is a matter of fact. *Colbath* v. *H.B. Stebbins Lumber Co*., 127 Me. 406, 144 A. 1 (1929)." *Interstate Indus. Uniform Rental Serv., Inc*. v. *Couri Pontiac*, 355 A.2d 913, 919 (Me. 1976). While the ALJ's findings of fact are not subject to appeal, as noted in 39-A M.R.S.A. § 321-B (2), there appears to be an exception to this rule. That is, the ALJ's findings of fact must be supported by competent evidence.

[¶60] "[Review] over fact finding by the Commission is narrow, requiring our deference to the Commissioner's conclusions if they are supported by competent

evidence." *St. Pierre* v. *Morin Brick Co*., 427 A.2d 492, 494 (Me. 1981) (citing *Wing* v. *Cornwall Industries*, 418 A.2d 177 (Me. 1980)). Therefore, to overturn an ALJ's factual finding, the Appellate Division must find that no competent evidence exists in the record to support that finding. That majority has made no such finding in this matter. The majority does not express the standard of review it employed to overturn the ALJ's findings of facts. This approach contradicts our permitted scope of review.

> Our review of factual questions is circumscribed by statute, 39-A M.R.S.A. § 318 ("The administrative law judge's decision . . . on all findings of fact is final,") and is limited to assuring that those findings are supported by competent evidence*, Pomerleau* v. *United Parcel Serv*., 464 A.2d 206, 209 (Me. 1983) ("The Appellate Division is not empowered to engage in de novo review of factual questions before the Commission."). *Competent evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion*." *See In re Maine Clean Fuels, Inc*., 310 A.2d 736, 751 (Me. 1973) (quotation marks omitted).

Potter v. *Cooke Aquaculture*, Me. W.C.B. No. 19-37, ¶ 7 (App. Div. 2019) (emphasis added).

C. The Fourteen-Day Rule Issue Was Sufficiently Raised

[¶61] The hearing transcript shows that the failure to file a timely notice of controversy was sufficiently raised during the hearing. Near the start of the hearing, the Employer was twice given notice of that issue and twice given the opportunity to be heard on that issue. The hearing transcript also shows that the Employer took the opportunity to be heard.

[¶62] The transcript reads in part:

> Attorney MacAdam [Mr. Feiereisen's counsel]: [A]s I stated earlier, we're also seeking – the letter or the report taking him out of work by Dr. Eshleman, that occurred in 2010, which is after the decree. He said he's totally disabled. I don't think they ever filed a Notice of Controversy. And they certainly haven't paid him.

Addressing this issue, the ALJ asked the Employer's attorney,

> ALJ: Can you just address -- Attorney MacAdam referenced the M-1 taking Mr. Feiereisen out of work back in 2010? What's your position --

The Employer's attorney was initially interrupted as he was responding to the lack of a notice of controversy being filed.

> Attorney Getchell [Employer's counsel]: Well --
>
> Attorney MacAdam: Do you have that . . . in front of you?
>
> ALJ: Yeah.
>
> Attorney MacAdam: Look at page -- Bates stamp 154. Is it M-1?
>
> ALJ: Yep. I'm here.
>
> Attorney MacAdam: He lists all three dates of injury and states no work. I asked him to take notice that they did not file a notice of controversy after that. If you look at the next page, he talks about him being taken out of work and being referred to Dr. Burke. And then Dr. Burke, I think, also said no work capacity. And again, no notice of controversy.

[¶63] The ALJ reiterated the opportunity she was giving the Employers to be heard on the issue of failing to file a notice of controversy upon learning that Mr. Feiereisen was taken out of work because of his work injury. She stated:

> ALJ: Attorney Getchell, I just want to give you an opportunity to respond.

> Attorney Getchell: Well, whether or not there was a notice of controversy, we paid benefits. We paid -- I would say NewPage paid benefits immediately by agreement with the employee and we contributed by apportionment to NewPage. So that's my position on that.

D. Perfunctory

[¶64] The majority finds, "He [Mr. Feiereisen] raised the issue in only a perfunctory manner at the hearing and raised it adequately for the first time after the hearing in his position paper." Webster's Encyclopedic Unabridged Dictionary of the English Language (1989) defines perfunctory as "Performed merely as an uninteresting or routine duty; hasty and superficial…. Without interest, care or enthusiasm; indifferent." If this exchange during the hearing did not address, with interest or care, the failure to file a timely notice of controversy when Mr. Feiereisen was taken out of work due to his work injuries, one is left to wonder what explanation is to be given for the above colloquy. "Competent evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Potter* ¶ 7. I believe, at a minimum, a reasonable mind might accept this evidence as adequate to support the conclusion that the issue of the Employers' failure to file a notice of controversy on Mr. Feiereisen's lost time claim was properly raised.

[¶65] Black's Law Dictionary defines waiver as "The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." Black's Law Dictionary (6th ed. 1990). Consistent

with this definition, the Law Court held in a workers' compensation case that "waiver is the intentional relinquishment of a known right." *Pino* v. *Maplewood Packing Co*. 375 A.2d 534, 538 (1977). Of course, an employee can be found, by inference, to have waived his rights and that would have the effect of a procedural forfeiture for failure to timely raise an issue, but the ALJ has discretion to make that factual finding, it is not mandatory.[10] The failure to raise an issue in a timely or sufficient manner may be a basis for the ALJ to find that the issue is not properly before the board, but it is not a basis on which to find a mandatory waiver. Further, it is the burden of the party seeking the waiver to prove waiver, as it is an affirmative defense. During the hearing the Employers did not raise that defense, but the ALJ is being overturned because she did find waiver.[11]

E. Opportunity to Be Heard

[¶66] "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews* v. *Eldridge*, 424 U.S. 319, 333 (1976); *see also Bartlett* v. *Nestle Waters N. Am*., *Inc*., Me. W.C.B.

[10] The majority finds "We disagree with the dissent's position that a procedural waiver (in the sense of a failure to preserve an issue for decision or for appellate review) requires a finding of a voluntary relinquishment of a known right. The cases cited for this proposition are inapposite, as they refer not to the failure to preserve an issue, but to a different question entirely—whether one has waived an established right such as a statutory, constitutional, or contractual right." Inconsistent with this distinction is the fact that the majority's opinion takes away the Employee's right to pursue benefits based on the Employers' fourteen-day violation as established by Workers' Compensation Board Rule § 1.1. That is a depravation of a right as described in *Black's Law Dictionary, Pino, Dziekan, Colbath* and *Interstate Indus.*

[11] While the Rules of Civil Procedure do not apply in workers' compensation law, they can provide guidance. Under Me. Rule Civ. Pro. 8(c), waiver is classified as an affirmative defense.

No. 21-14, ¶ 13 (App. Div. 2021). The majority states, "Counsel's statement at the hearing did not provide the Employers with fair notice or opportunity to introduce evidence relevant to the fourteen-day rule issue."

[¶67] What has been determined to be sufficient notice of a claim of incapacity benefits has been defined by the Law Court:

> We conclude that, although the employee may not be required to give affirmative notice of a claim in all cases, the employer must have some knowledge, either from the employee or from the circumstances of the injury, that it has an obligation to pay incapacity benefits before it will be deemed to have accepted an injury by failing to controvert a claim.

Carroll v. *Gates Formed Fibre Prods.*, 663 A.2d 23, 25 (Me. 1995). Because the Employers were told during the hearing that Mr. Feiereisen had been taken out of work because of his work-related injuries, that the mill doctor had been given this information, and that Mr. Feiereisen had not filed a notice of controversy, I cannot agree with the majority that this was insufficient notice. Not only was the Employer heard, but had it wanted to, it could have asked for more time to dig deeper into that issue or to consider bringing additional witnesses or documents. Instead, it chose to state its position regarding the lack of a notice of controversy, which was that Mr. Feiereisen was being paid and left it at that.[12]

[12] The ALJ determined that the fourteen-day violation was for one day. I do not think the evidence supports that conclusion. The Employers did not file a notice of controversy as of the time of the hearing.

[¶68] To support its holding that Mr. Feiereisen did not raise the fourteen-day issue in a timely manner, the majority cites *Dominguez* v. *Pyramid Fore Street Management*, *LLC*, Me. W.C.B. No. 23-03 (App. Div. 2023) and *Waters* v. *S.D. Warren Co*., Me. W.C.B. No. 14-26 (App. Div. 2014). These cases are inapposite, as they refer to issues raised after the hearing, not issues raised during the hearing. In *Dominguez*, the Appellate Division specifically found that the Employee had not raised a fourteen-day issue until *after* the hearing. "She raised the issue for the first time after the hearing." No. 23-03, ¶ 15.

[¶69] The *Waters* decision reads in part, "Mr. Waters contends that the hearing officer erred when determining that he had waived consideration of an equal protection challenge to section 213(1-A)(A) because he did not raise the issue until *after* the decision had been issued in the case." *Id*. at ¶ 16 (emphasis added). In this matter, the exact opposite is true; Mr. Feiereisen raised the fourteen-day rule issue near the start of the hearing.[13]

[¶70] I would find that the ALJ's factual findings regarding waiver are discretionary, that a finding of waiver is a finding of fact that can only be overturned upon a finding that no competent evidence supports that finding, that there is

[13] The Majority holds that the ALJ's finding of a fourteen-day violation was flawed in part, because the ALJ found the violation based on what the Employee told a "mill" doctor, Dr. Wooden instead of what the Employee argued, which was that the 14-Day violation was based on what he told another "mill" doctor, Dr. Eshelman. The ALJ was within her discretion to review all the evidence presented and make findings upon that evidence. Her review of the evidence was not limited to evidence specifically mentioned by the parties, nor was she required to accept their arguments.

competent evidence in the record supporting that finding; and that the ALJ's decision on waiver falls within the reasonable bounds of her sound discretion.

[¶71] Additionally, I would remand this case to the ALJ for further findings regarding when and if the fourteen-day rule violation has ended.

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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