STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 17-0034
Decision No. 20-09

PAMELA PUIIA
(Appellant)

v.

MEADWESTVACO CORPORATION
(Appellee)

and

MAINE SELF-INSURANCE GUARANTEE ASSOCIATION
(Insurer)

Argued: February 7, 2018
Decided: May 20, 2020

PANEL MEMBERS: Administrative Law Judges Knopf, Stovall, and Jerome
BY: Administrative Law Judge Jerome

[¶1] Pamela Puiia appeals from a decision of a Workers' Compensation Board administrative law judge (*Elwin*, *ALJ*) denying her Petition for Penalties in Accordance with 39-A M.R.S.A. §§ 359, 360 (Pamph. 2020). The ALJ concluded that Meadwestvaco Corporation did not violate either penalty provision when it unilaterally reduced a benefit amount it had been paying pursuant a 2008 decree. Ms. Puiia contends this is error because (1) Meadwestvaco was bound by the doctrine of res judicata to continue paying the amount she asserts was ordered in the 2008 decree, even if erroneous; and (2) Meadwestvaco was entitled to reduce the benefit only after filing a petition and obtaining an order from the board pursuant to 39-A M.R.S.A. § 205(9)(B)(2) (Pamph. 2020). We disagree with these contentions and affirm the decision.

I. BACKGROUND

[¶2] Ms. Puiia sustained two respiratory injuries due to chemical exposures while working at the Rumford Paper Mill, then owned by Meadwestvaco, on May 31, 2001, and January 29, 2004. In a 2008 decree, a hearing officer (*Goodnough, HO*) determined that Ms. Puiia was entitled to receive fixed partial incapacity benefits from March 29, 2006, through November 27, 2006, and, based upon a good faith work search, 100% partial incapacity benefits thereafter.

[¶3] The periods of fixed partial and 100% partial benefits were addressed separately in the 2008 decree. When calculating the fixed partial benefit, the hearing officer took the appropriate percentage of the difference between Ms. Puiia's applicable average weekly wage, including fringe benefits, and her post-injury earnings. *See* 39-A M.R.S.A. § 213 (Pamph. 2020).[1] The Act authorizes the inclusion of fringe benefits in average weekly wage to the extent it results in a compensation rate that does not exceed 2/3 of the State average weekly wage on the date of the

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[1] Title 39-A M.R.S.A. § 213 provides:

> If the injured employee's date of injury is prior to January 1, 2013, the weekly compensation is equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage that the injured employee is able to earn after the injury, but not more than the maximum benefit under section 211.

injury. 39-A M.R.S.A. § 102(4)(H) (Pamph. 2020).[2] The calculation yielded a partial rate of $353.96.

[¶4] The hearing officer addressed the 100% partial incapacity benefit in a separate paragraph of the decree, stating: "The employee is entitled to 100% partial benefits (limited by the statutory maximum) for the period November 28, 2006 through the present, and continuing." The decision was not appealed.

[¶5] Pursuant to that decree, Meadwestvaco began paying Ms. Puiia a 100% partial compensation benefit in the amount of $574.08, which was the maximum compensation rate for the period at issue. This figure was based on the hearing officer's determination of the "total compensation" rate in the paragraph governing partial incapacity ($668.89), which included the value of fringe benefits. However, fringe benefits should have been excluded because the resulting benefit amount exceeded 2/3 of the applicable state average weekly wage. *See id.*

[¶6] In 2009, Meadwestvaco filed a Motion to Correct Clerical Errors, in which it alleged a number of errors, including the failure to recite that Ms. Puiia's 100% partial incapacity rate was limited not only by the statutory maximum, but

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[2] Defining "average weekly wage," section 102(4)(H) provides:

> Any fringe or other benefit paid by the employer that does not continue during the disability must be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount that is greater than 2/3 of the state average weekly wage at the time of injury.

also by section 102(4)(H). The hearing officer denied the motion, finding that the decree, which specified no formula or calculation, contained no clerical errors.

[¶7] Meadwestvaco continued to pay the state maximum rate (adjusting it periodically to reflect a new maximum rate) until July 1, 2014, when it unilaterally reduced the benefit to $492.96, an amount calculated without including fringe benefits in the average weekly wage. Thereafter, Ms. Puiia filed her petitions seeking penalties, contending that Meadwestvaco's conduct reflected a pattern of questionable claims-handling techniques or unreasonably contested claims, and that it had willfully violated the Act by unilaterally reducing her benefits.

[¶8] Based on a set of stipulated facts, the board (*Elwin, ALJ*) denied the petition for penalties. Reasoning that the 2008 decision did not include a specific dollar amount for the period of 100% partial incapacity, and that both the statutory maximum and the limitation on inclusion of fringe benefits apply regardless of whether they are set forth in a decree, the ALJ found no legal basis for the imposition of penalties. Ms. Puiia filed a Motion for Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Pamph. 2020), which was denied. Ms. Puiia appeals.[3]

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[3] The Act provides that appeals of decisions regarding claims under section 360 are governed by the Administrative Procedures Act, and that those appeals must be taken to the Superior Court. 39-A M.R.S.A. § 360(3). This decision therefore addresses only her claims under section 359.

Ms. Puiia also contends the ALJ erred by issuing a decision before obtaining a determination on the truth of the allegations from the board's Abuse Investigation Unit pursuant to Me. W.C.B. Rule, ch. 15. This issue was not raised by Ms. Puiia until she filed her brief with the Appellate Division. She did not raise

II. DISCUSSION

[¶9] 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).

[¶10] Ms. Puiia contends that the ALJ erred when failing to impose penalties pursuant to section 359(2) of the Act. Section 359(2) provides:

> **Penalty.** In addition to any other penalty assessment permitted under this Act, the board may assess civil penalties not to exceed $25,000 upon finding, after hearing, that an employer, insurer or 3rd-party administrator for an employer has engaged in a pattern of questionable claims-handling techniques or repeated unreasonably contested claims.

She argues the ALJ made two specific errors of law when declining to impose penalties. She asserts that (1) Meadwestvaco was barred by the doctrine of res judicata from paying less than what it had been paying prior to 2014 (which she contends is the actual amount ordered by the 2008 decree) even if erroneous; and (2)

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it in her position paper, her proposed findings of fact, or her Notice of Intent to Appeal. She nevertheless contends that the issue has been preserved for appellate review because Meadwestvaco raised it in its position paper. Although Meadwestvaco set forth the requirements of the rule, it made no legal arguments regarding the effect of the rule on this case. Mention of the rule in a position paper without more is insufficient to preserve the issue for appellate review. *Mehlhorn v. Derby,* 2006 ME 110, ¶ 11, 905 A.2d 290 (stating that a party waives issues that it adverts to "in a perfunctory manner, unaccompanied by some effort at developed argumentation" because "[a]n issue that is barely mentioned in a brief is in the same category as an issue not mentioned at all.").

Meadwestvaco violated the Act by reducing the benefit amount without first filing a petition for review, pursuant to section 205(9)(B)(2).

[¶11] The ALJ construed the provision of the 2008 decree as it pertains to the 100% partial incapacity benefit as follows:

> The Board's 2008 Decree did not set forth a specific dollar amount, but instead instructed Employer to pay "100% partial benefits (limited by the statutory maximum)." Even if the decree had excluded this parenthetical language, Employer would not have been required to pay benefits in excess of the statutory maximum (established by 39-A M.R.S.A. § 211 [(Pamph. 2020)]). Similarly, 39-A M.R.S.A. § 102(4)(H) applies to benefit calculations whether or not specified in a decree.

Thus, she concluded there was no basis for imposition of penalties when Meadwestvaco unilaterally reduced the benefit to an amount that reflected the statutory limitation on the inclusion of fringe benefits set forth in section 102(4)(H).

[¶12] The doctrine of res judicata would require the ALJ to enforce an existing payment scheme without proof of changed circumstances, even if erroneous. *Ervey v. Ne. Log Homes,* 638 A.2d 709, 710-11 (Me. 1994). The ALJ interpreted the 2008 decree to award an ongoing 100% partial benefit limited by both section 211 and 102(4)(H). Meadwestvaco paid benefits consistent with the ordered payment scheme, as interpreted by the ALJ, after reducing the benefit in 2014. Thus, this case turns on whether the ALJ erred when construing the 2008 decree. Ms. Puiia argues that the decree must be read to order a 100% partial benefit based on a figure that includes fringe benefits.

[¶13] 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*.

[¶14] The ALJ found no ambiguity in the prior decree. She construed it as plainly ordering two discrete periods of benefits and read the provision pertinent to the 100% partial benefit as not containing a specific figure for the average weekly wage. She further construed it as providing for the calculation of a benefit consistent with section 102(4)(H) and section 211. This interpretation falls within the reasonable bounds of her discretion, is consistent with the decree as a whole, and is supported in the record. *See id.*

[¶15] An Appellate Division panel addressed a similar issue in *Eaton v. S.D. Warren Co.*, Me. W.C.B. No. 19-08 (App. Div. 2019). In that case, a sentence inserted in an amended decree raised an ambiguity as to whether the employer was required to pay benefits based on the wage for a 1998 or 1983 date of injury. *Id.* ¶ 8. The employer paid benefits based on the higher 1983 average weekly wage (which included adjustments for inflation) for several years, then filed a modification of benefits form with the board and unilaterally reduced the benefit to reflect the

lower 1998 average weekly wage. *Id.* ¶ 5. The employee filed a petition seeking penalties under section 359, among other things. *Id.* ¶ 6. The ALJ determined that the amended decree was ambiguous and construed that decree to require benefits to be paid based on the 1998 average weekly wage. *Id.* ¶ 10. The Appellate Division affirmed, determining that the ALJ's resolution of the ambiguity was within the bounds of her discretion, and that under the circumstances, where the employer unilaterally reduced the benefit to the correct amount, there was no basis to impose penalties pursuant to section 359. *Id.* ¶ 12.

[¶16] Section 359 requires a showing of a pattern of questionable claims handling techniques or a pattern of unreasonably contested claims. In this case, as in *Eaton*, the facts as stipulated by the parties show no such pattern. Meadwestvaco decided, on its own, to lower the compensation rate to an amount consistent with section 102(4)(H) and consistent with the 2008 decree. The ALJ did not err when determining that these facts do not rise to a level warranting penalties under section 359.

[¶17] Ms. Puiia's contention that the unilateral reduction was nonetheless inconsistent with section 205(9)(B)(2) does not involve claims handling techniques or a pattern of unreasonably contested claims under section 359. Any penalties related to this contention could only derive from section 360(2). As noted above, the Appellate Division lacks authority to review the ALJ's ruling with respect to section

360, because an appeal from that claim is governed by the Administrative Procedures Act and must be taken to Superior Court. 39-A M.R.S.A. § 360(3).

III. CONCLUSION

[¶18] The ALJ neither misconceived nor misapplied the law when determining that penalties were not warranted pursuant to 39-A M.R.S.A. § 359 of the Act.

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:
James J. MacAdam, Esq.
Nathan A. Jury, Esq.
Donald M. Murphy, Esq.
MacADAM JURY, P.A.
45 Mallett Drive
Freeport, ME 04032

Attorney for Appellee:
Thomas E. Getchell, Esq.
TROUBH HEISLER
P.O. Box 9711
Portland, ME 04104