JESSICA CORO
(Appellant)

v.

LIBERTY MUTUAL INSURANCE COMPANY
(Appellee)

and

LIBERTY INSURANCE CORP.
(Insurer)

Conference held: April 11, 2019
Decided: June 22, 2021

PANEL MEMBERS: Administrative Law Judges Stovall, Collier, and Pelletier
BY: Administrative Law Judge Pelletier

[¶1] Jessica Coro appeals from a decision of a Workers' Compensation Board Administrative Law Judge (*McElwee, contract ALJ*) awarding her ongoing partial incapacity benefits pursuant to her Petition for Review, filed after Liberty Mutual Insurance Company unilaterally reduced her benefits from total to fixed rate partial effective January 16, 2017. Ms. Coro contends that the contract ALJ erred by failing to make additional findings of fact and conclusions of law in response to her motion, and that the original findings, including a finding regarding her post-injury work-search, are inadequate for appellate review. Ms. Coro also contends that the contract ALJ erred by failing to explicitly grant her petition and establish a formal compensation payment scheme.

[¶2] After careful review of the law and the evidentiary record, we affirm the decision as modified herein. *See* 39-A M.R.S.A. § 321-B(3) (Pamph. 2020).

I. BACKGROUND

[¶3] From July 2009 to May 2015, Jessica Coro was employed as an in-house lawyer for Liberty Mutual, handling primarily workers compensation cases. On October 21, 2011, her vehicle was rear-ended while driving to a hearing in Augusta, resulting in injury to her neck, back, upper extremities, and head. She underwent medical treatment and continued to work for her regular salary at Liberty Mutual following the work injury, but with diminished work capacity and increased pain. Ms. Coro had difficulty driving long distances and working on a computer due to neck pain and upper extremity pain and numbness. She underwent a cervical disc replacement at C5-6 in October 2014.

[¶4] Ms. Coro was unable to recover her pre-injury work capacity after her surgery, and in May 2015, she was laid off by Liberty Mutual. Liberty Mutual paid her total incapacity benefits which, due to her relatively high weekly wages, were capped at the maximum benefit level. *See* 39-A M.R.S.A. § 211 (Pamph. 2020).

[¶5] Within a month of being laid off, Ms. Coro started her own company, Parent Support Alliance, through which she helped parents who had children suffering from addiction and substance abuse navigate the treatment system. She earned income in 2015, 2016, and 2017 from this self-employment. In 2015 through

2016, she worked for an inpatient facility on a contract basis. After her contract was not renewed in 2017, she was hired independently by parents to provide support services. In September 2017, she was hired by Ignite Treatment Center to conduct "utilization review" services for $19.00 per hour, 20 hours per week.

[¶6] Effective January 16, 2017, Liberty Mutual unilaterally reduced her weekly compensation to a partial fixed rate of $469.73 (she had been receiving $710.00 at total). The partial benefit was calculated by imputing a part-time annual earning capacity of $33,000, based upon a labor market survey conducted on behalf of Liberty Mutual. Ms. Coro filed a petition for review seeking to restore her previous level of benefits. Due to Ms. Coro's involvement with the workers' compensation system, a contract ALJ was appointed to preside over her case.

[¶7] The contract ALJ denied Ms. Coro's request for a provisional order on October 24, 2017. A hearing was held on February 22, 2018, at which Ms. Coro testified. After an updated labor market survey and deposition testimony from the labor market analyst were submitted on April 18, 2018, the evidentiary record was closed.

[¶8] The sole issue in dispute was the extent of Ms. Coro's earning capacity after January 16, 2017, when her weekly compensation had been unilaterally reduced to a fixed rate of $469.73. Ms. Coro contended that the evidence showed that she was entitled to partial benefits at varying rates from January 16 through

September 30, 2017, and benefits reflecting total incapacity from October 1, 2017, to the present and continuing. Liberty Mutual contended that Ms. Coro should receive benefits for partial incapacity from January 16, 2017, and continuing, based upon an imputed earning capacity of $50,000.00 per year. Ms. Coro's average weekly wage with fringe benefits is $1,559.48, or $81,093.00 per year.

[¶9] In a decree issued July 12, 2018, the contract ALJ determined that the "evidence as a whole" established that the "employee has the work capacity, and that there is available employment, within the lower range of the labor market survey evidence ($36,160 - $97,460) for her to earn $40,000 annually." The decree did not contain the customary "mandate" explicitly granting the petition and instituting a weekly compensation payment scheme.

[¶10] Ms. Coro timely filed a Motion for Findings of fact and Conclusions of Law in which she reiterated her position that she is entitled to partial benefits at varying rates from January 16 through September 30, 2017, and total benefits thereafter. The contract ALJ denied the motion, and this appeal followed.

II. DISCUSSION

A. Standard of Review

[¶11] 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. Coro requested findings of fact and conclusions of law following the decision, the Appellate Division may "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 (quotation marks omitted). 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, 741 (Me. 1973) (quotation marks omitted).

B. Findings of Fact and Conclusions of Law

[¶12] Ms. Coro asserts that the contract ALJ erred when failing to issue additional findings of fact and conclusions of law when requested. She contends the original findings are inadequate for appellate review, either because they are contradictory and unreconcilable, or fail to explain the legal basis for the finding. We disagree.

[¶13] When requested, an administrative law judge is under an affirmative duty to make additional findings of fact and conclusions of law in order to create an adequate basis for appellate review. 39-A M.R.S.A. § 318 (Pamph. 2020); *Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982). Adequate findings include those that allow a reviewing body effectively to determine the basis of the ALJ's

decision; that is, whether the decision is supported by competent evidence or the ALJ misconstrued or misapplied the law. *See Chapel Road Assocs., L.L.C. v. Town of Wells*, 2001 ME 178, ¶ 10, 787 A.2d 137.

[¶14] Ms. Coro first contends she is entitled to a remand for clarification because the contract ALJ states that he based his findings, including his findings on work capacity, on the reports of Drs. Kowash, Esponnette, and Omsberg, when Dr. Kowash opined that Ms. Coro has no work capacity, and Drs. Esponnette and Omsberg opined that Ms. Coro has part-time work capacity.

[¶15] However, the ALJ explicitly stated that he based his finding "most significantly" on Ms. Coro's testimony regarding the work she performed after her injury. It is apparent that the ALJ considered Dr. Kowash's opinion, but ultimately found Ms. Coro's testimony describing "very substantial work activity (in part, at least, for significant remuneration)" to be most persuasive. And, while Drs. Omsberg and Esponnette opined that Ms. Coro was limited to part-time work, both also stated that she could be expected to increase to full-time.

[¶16] Ms. Coro further argues that the findings regarding her ability to earn $40,000 per year are inadequate because the ALJ did not consider that her law license had lapsed (due to the inability to pay for required continuing education classes after being terminated from Liberty Mutual); the ALJ overlooked documented business expenses when establishing her post injury earning capacity;

and the ALJ based the earning capacity finding on the labor market report that he also found to have significant shortcomings.

[¶17] The contract ALJ found that in the period after her employment, Ms. Coro "used virtually all of her life, education and work history skills to engage in significant work activity." Thus, based on Ms. Coro's testimony, he found that her post-injury work activity demonstrated that she retained considerable marketable skills during the period when she did not have a current law license.

[¶18] Further, although Ms. Coro's evidence of net profit from self-employment arguably met her burden to produce *prima facie* evidence of her post-injury earning capacity, the contract ALJ was not bound to accept the net figure as conclusive proof of her earning capacity. *Thurlow v. Rite Aid of Maine*, Me. W.C.B. 16-23, ¶ 18 (App. Div. 2016). Having made a *prima facie* case, the burden shifted to Liberty Mutual to establish that regular employment at higher wages within employee's restrictions was reasonably available to her.[1] *Fecteau v. Rich Vale*, 349 A.2d 162, 166 (Me. 1975); *Thurlow* Me. W.C.B. 16-23, ¶ 18 (holding that the *Fecteau* burden shifting analysis applies equally to employee petitions). The labor

[1] On an employee's petition for review, it is the employee's initial burden to submit evidence of substantial post-injury earnings. Once submitted, the burden shifts to the employer to come forward with evidence that regular employment paying wages higher than those being earned by the employee and compatible with her restrictions is reasonable available. If the employer comes forward with this evidence, the employee bears the ultimate burden of persuasion. The ALJ evaluates all of the evidence submitted and determines what the employee is able to earn based on the employee's physical capacity to earn wages and the availability of work within the employee's limitations. *Thurlow v. Rite Aid of Maine*, Me. W.C.B. 16-23, ¶¶ 21-22 (App. Div. 2016).

market evidence was sufficient to meet that burden. Moreover, the contract ALJ acknowledged and considered the shortcomings in the labor market evidence, but when he viewed it in the context of all of the evidence, including Ms. Coro's limited work search and her considerable skills and abilities, determined that it established that there was "available employment within the lower range of the market survey." The testimony of the labor market expert is competent evidence supporting the finding that Ms. Coro is able to earn $40,000 a year.

[¶19] Faced with conflicting evidence, it was within the contract ALJ's purview to determine the weight and credibility to assign to that evidence. *See Sloan v. Christianson*, 2012 ME 72, ¶ 33, 43 A.3d 978 ("The trial court is not bound to accept any testimony or evidence as fact, and determinations of the weight and credibility to assign to the evidence are squarely in the province of the fact-finder."). Moreover, the ALJ was not required to believe a witness—lay or expert—even if the witness's testimony was uncontradicted. *Dionne v. LeClerc*, 2006 ME 34, ¶ 15, 896 A.2d 923.

[¶20] As part of his responsibility to assess credibility and resolve conflicts in the evidence, the contract ALJ was free to credit evidence of Ms. Coro's testimony regarding her abilities, activities, and documented earnings, as well as the labor market evidence, and arrive at an earning capacity that surpassed a rigid 20 hours per week limit. Accordingly, we conclude that the findings in the original decree

regarding earning capacity are adequate for appellate review and are supported by competent evidence.

C. The Work Search Rule

[¶21] Ms. Coro contends that the contract ALJ erred when basing his decision regarding earning capacity in part on "the narrow window of the employee's work search efforts" without considering the relevant factors listed by the Law Court in *Monaghan v. Jordan's Meats*, 2007 ME 100, ¶ 22, 928 A.2d 786.

[¶22] Ms. Coro did not request an evaluation of the *Monaghan* factors in her position paper; nor did she call the contract ALJ's attention to this alleged error in her Motion for Findings of Fact and Conclusions of Law. Because the issue was raised for the first time in Ms. Coro's appellate brief, it has not been preserved for appellate review. *See Henderson v. Town of Winslow*, Me. W.C.B. 17-46, ¶ 10 (App. Div. 2017). Even if we were to consider this argument on appeal, for the reasons that follow, we would conclude that it lacks merit.

[¶23] An employee's post-injury earning capacity is based on (1) the employee's physical capacity to earn wages, and (2) the availability of work within the employee's physical limitations. *See Dumond v. Aroostook Van Lines*, 670 A.2d 939, 941 (Me. 1996). There are three circumstances in which an injured employee may be entitled to the full amount of workers' compensation benefits: when the employee demonstrates (1) total physical incapacity; (2) total incapacity (in limited

circumstances) despite retaining some ability to work when work is unavailable in the local community and the employee is physically unable to perform full-time work in the statewide labor market; or (3) 100% partial incapacity, when the employee is partially incapacitated and work in unavailable in the local community as a result of the work injury. *Monaghan*, 200 ME 100, ¶¶ 11-13. An employee may demonstrate the unavailability of work in the local community with evidence of a work search or any other competent, probative evidence, including labor market evidence. *Id.* ¶ 16.

[¶24] In *Monaghan*, the Law Court set forth a nonexclusive list of factors for an ALJ to consider when evaluating evidence of an employee's work search in order to determine whether the employee has made a reasonable exploration of the market for work in the community. *Id.* ¶ 21. Logically, these factors are relevant only to whether an employee is entitled to full benefits despite retaining some ability to earn—not to when an employee is seeking full benefits based on total physical incapacity.

[¶25] Although Ms. Coro did submit work search evidence to rebut Liberty Mutual's labor market evidence, in this round of litigation she has not requested an award of benefits for 100% partial incapacity or total based on the physical inability to perform full-time work in the statewide labor market. She requested a varying rate

partial scheme based upon earnings from work prior to October 16, 2017. From that date forward, she based her claim upon total *physical* incapacity.

[¶26] The contract ALJ did allude to "the narrow window of employee's work search efforts." However, he explicitly based his findings that the evidence "establishes work availability" upon testimony from the employer's labor market expert. Moreover, in her testimony, Ms. Coro acknowledged that she had earnings from self-employment and a part-time job in 2017.

[¶27] The contract ALJ did not err by failing to evaluate the *Monaghan* factors or issue findings based thereon.

D. Compensation Payment Scheme

[¶28] Ms. Coro contends that the panel must remand for further proceedings because the ALJ failed to state explicitly whether the petition was granted or denied, or to mandate a specific payment scheme for fixed partial incapacity benefits based on his determination of Ms. Coro's earning capacity. However, pursuant to 39-A M.R.S.A. § 318, an ALJ's obligation is to "decide the merits of the controversy," and the only issue in controversy was the extent of Ms. Coro's earning capacity related to her established work injury.

[¶29] The ALJ decided the merits of this controversy when determining that Ms. Coro has the ability to earn $40,000 per year notwithstanding the effects of the work injury. There is no contention that the parties were unable to determine the

effect of the decision, which, while not explicit, calls for a fixed-rate partial benefit based on that earning capacity from the date Liberty Mutual unilaterally reduced the weekly benefit amount. In her motion for further findings, Ms. Coro did not allege that she was unable to calculate her weekly benefit based on the ALJ's determination of her annual earning capacity.

[¶30] We acknowledge that it has long been our practice to include in our decrees a mandate specifying the parties' obligations as the result of a decree. However, the failure to include the usual payment scheme language in the decree is not necessarily reversible error. Title 39-A M.R.S.A. § 321-B (3) (Pamph. 2020) authorizes the Appellate Division to "affirm, vacate, remand, or *modify*" a decree of an administrative law judge. (Emphasis added). For example, in *Boucher v. John F. Murphy Homes, Inc*., Me. W.C.B. No. 15-6, ¶ 10 (App. Div. 2015), the ALJ ordered an employer to continue to pay for employee's palliative massage treatments twice a month up to 24 per year, without temporal limitation. The Appellate Division held it was error to make a prospective order for massage therapy on an open-ended basis and without a reasonable time limit. *Id.* ¶ 18. However, rather than vacate that decision and remand for additional proceedings, the panel exercised its statutory authority to modify the ALJ's decision to provide that the required payments would end after eighteen months. *Id.* ¶ 19.

[¶31] In this case, where the ALJ has decided the merits of the dispute based on competent evidence and consistent with applicable law, we exercise our authority to modify the decree by adding a specific mandate consistent with the ALJ's findings and conclusions.

III. CONCLUSION

[¶32] The contract ALJ's decision is modified to provide that the Petition for Review is GRANTED IN PART, and Liberty Mutual is ordered to pay Ms. Coro a weekly benefit for partial incapacity based upon an imputed earning capacity of $40,000 per year ($769.23 per week), from January 16, 2017, to the present and continuing, with credit for benefits paid since that date.[2]

This entry is:

> As modified, the contract Administrative Law Judge's decision is affirmed.

[2] Based on this opinion, it is not necessary to reach Ms. Coro's additional argument that this panel should remand the matter to a permanent ALJ, rather than the contract ALJ, for further proceedings.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Pamph. 2020).

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

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