PATRICIA PIZZI
(Appellee)

v.

NESTLE WATERS NORTH AMERICA, INC.
(Appellant)

and

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.
(Insurer)

Conference held: September 26, 2018
Decided: September 8, 2020

PANEL MEMBERS: Administrative Law Judges Collier, Elwin, and Jerome
BY: Administrative Law Judge Collier

[¶1] Nestle Waters North America appeals from a decision of a Workers' Compensation Board administrative law judge (*Goodnough, ALJ*) granting Patricia Pizzi's Petition for Review of Incapacity. Nestle contends that the ALJ erred by concluding that (1) Ms. Pizzi had good and reasonable cause to refuse a bona fide offer of reasonable employment, *see* 39-A M.R.S.A. § 214(1)(A) (Pamph. 2020); and (2) her earnings from post-injury employment of 20 to 30 hours per week accurately reflected her ability to earn in the competitive labor market. We disagree with these contentions and affirm the decision.

I. BACKGROUND

[¶2] Patricia Pizzi began working for Nestle Waters North America (Nestle) as a production worker in 2004. She is 57 years of age with a tenth-grade education, and her prior experience includes work as a certified nursing assistant. At Nestle, she ran a machine that fills bottles with water and places a label on the bottles. Her job duties were repetitive in nature; they included opening packs of labels and placing the labels in the machine at regular intervals, and required extensive gripping, pinching, and lifting. She also cleaned the machine periodically.

[¶3] In 2015 Ms. Pizzi developed a bilateral upper extremity injury as a result of her repetitive work at Nestle. Her diagnoses included tendinopathy, carpal tunnel syndrome, right ulnar neuropathy, cervical strain, and myofascial pain syndrome. She underwent two surgical procedures on the right side (carpal tunnel release and right ulnar nerve decompression) with limited success. Her treating physician, Dr. Carrier, imposed numerous restrictions including avoiding repetitive work with her arms; no forceful pinching or gripping; only occasional gripping, squeezing and pinching; and limitations on lifting.

[¶4] Following her second surgery, Ms. Pizzi was out of work for more than a year. In December of 2016 Nestle offered her a full-time modified duty position, which the ALJ found "was essentially her regular job, with the understanding that

she would try to abide by Dr. Carrier's restrictions." Ms. Pizzi attempted to return to work in this position but lasted only four hours due to significant arm pain.

[¶5] During this period Dr. Carrier performed a site visit and observed a worker performing the duties of Ms. Pizzi's position. In May of 2017, Ms. Pizzi underwent a functional capacity evaluation, as a result of which Dr. Carrier increased her lifting limit but maintained significant limitations on gripping, squeezing, pinching, and reaching.

[¶6] Nestle again offered Ms. Pizzi her old position with the understanding that she would not perform repetitive activity with either upper extremity and that she would follow all of Dr. Carrier's other recommendations regarding lifting, pushing, pulling, and other activities. Ms. Pizzi attempted the job for two days in June of 2017, but once again could not continue due to renewed arm pain.

[¶7] Ms. Pizzi located alternative employment, including a brief babysitting engagement and a cleaning position working 20 to 30 hours per week and earning $10.00 per hour, which was less than her earnings at Nestle.

[¶8] Nestle discontinued Ms. Pizzi's incapacity benefits after her initial attempt to return to work, *see* 39-A M.R.S.A. § 205(9)(B)(1) (Pamph. 2020), on the basis that she had refused a bona fide offer of reasonable employment, *see* 39-A M.R.S.A. § 214(1)(A). Ms. Pizzi filed a Petition for Review and a Request for Provisional Order, pursuant to which her benefits were reinstated.

[¶9] After a hearing, the ALJ found that although Nestle's offer constituted a bona fide offer of reasonable employment, Ms. Pizzi had good and reasonable cause to reject that offer due to the employer's inability to modify Ms. Pizzi's job in order to accommodate her restrictions. The ALJ further concluded that Ms. Pizzi's earnings from the cleaning position are substantial and likely reflect her current ability to earn in the local competitive labor market, and that Nestle did not present any evidence to prove otherwise. The ALJ therefore granted the Petition for Review and awarded Ms. Pizzi partial incapacity benefits based on a weekly post-injury earning capacity of $285.00.

[¶10] Nestle thereafter moved for additional findings of fact and conclusions of law. The ALJ granted the motion and amended the decree but did not alter the outcome. Nestle now appeals.

II. DISCUSSION

A. Standard of Review

[¶11] The Appellate Division is "limited to assuring that the [ALJ's] factual 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." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). When a party requests and proposes additional findings of fact and conclusions of law, as in this case, the panel

reviews 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.

B. Title 39-A M.R.S.A. § 214(1)(A)

[¶12] Nestle argues that the ALJ's determination that Ms. Pizzi had good and reasonable cause to refuse the position and to seek work elsewhere was arbitrary, capricious, without a rational basis, and constitutes an error of law.

[¶13] Pursuant to 39-A M.R.S.A. § 214(1)(A):

> If an employee receives a bona fide offer of reasonable employment … and the employee refuses that employment without good and reasonable cause, the employee is considered to have voluntarily withdrawn from the workforce and is no longer entitled to any wage loss benefits under this Act during the period of refusal.

[¶14] The evaluation of whether an employee's refusal of a bona fide offer is supported by good and reasonable cause is a broad inquiry requiring the consideration of "all facts relevant to the employee's decision." *Thompson v. Claw Island Foods*, 1998 ME 101, ¶ 16, 713 A.2d 316. Further, the decision whether an asserted reason for refusal or resignation from post-injury employment constitutes good and reasonable cause falls within the sound discretion of the ALJ, upon careful consideration of the facts and circumstances unique to each case. *Id* at ¶19.

[¶15] The ALJ conducted such an evaluation and summarized the reasons for his decision as follows:

> 1) she made two good faith return to work efforts that did not work out secondary to pain and an inability on the part of the employer to meet her restrictions in real time, on the floor; 2) her pain complaints, although subjective in nature, are credible and have continued unabated since the injury; and 3) Dr. Carrier's opinion regarding the employee's ability to do her regular job with restrictions was not based upon complete information.

[¶16] These findings are supported by Ms. Pizzi's testimony that when she returned to work, she had significant difficulty with pinching and grasping, including twisting bottle caps, which the ALJ specifically found credible. Further, Dr. Carrier testified that he thought Ms. Pizzi likely could to the job with modifications but acknowledged that there were certain job tasks with which he was not familiar and advised against "power-pinching, power gripping, type jobs, which is, I think, not a small part of that job" as well as "[l]oading the machine and taking out jams, that sort of thing."

[¶17] We conclude that there was competent evidence to support the ALJ's factual findings and that his conclusion that Ms. Pizzi had good and reasonable cause to reject the offer of employment was neither arbitrary nor without a rational foundation, nor was it based upon an error of law.

C. Post-injury Earning Capacity

[¶18] The ALJ determined that Ms. Pizzi's earnings in her subsequent employment accurately, if roughly, reflect her post-injury earning capacity. Nestle challenges that determination, pointing out that Ms. Pizzi works less than 40 hours

per week at the cleaning position but has no medical restriction limiting her to part-time work.

[¶19] Ms. Pizzi testified that the job is "somewhat self-directed." The ALJ explained that "the cleaning job is on the whole less physically demanding than her position with Nestle, and gives her a measure of control over her work activities," and he specifically noted that "the employee's job options are necessarily limited given not only her restrictions but also her limited education and narrow work history." These findings are supported by facts in the record and are an adequate basis upon which to find that Ms. Pizzi's subsequent earnings accurately reflect her post-injury earning capacity.[1]

III. CONCLUSION

[¶20] There is competent evidence to support the ALJ's factual findings, and the ALJ applied the appropriate legal standards to those facts. See *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995).

The entry is:

The administrative law judge's decision is affirmed.

[1] The ALJ analyzed this issue pursuant to the Appellate Division's decision in *Thurlow v. Rite Aid of Maine, Inc.*, Me. W.C.B. No. 16-23, ¶¶15-18 (App. Div. 2016), stating that Ms. Pizzi had met her burden of production by producing prima facie evidence of earning capacity and Nestle had failed to meet its burden of proof by presenting evidence showing that she had a greater ability to earn. The ALJ actually concluded, however, that Ms. Pizzi had met her burden of proof on this issue, stating: "I find and conclude that the employee's earnings with Jackie's Cleaning are substantial, and more or less accurately reflect her current ability to earn in the local competitive labor market." For this reason, we don't reach the issue of whether *Thurlow* applied in this case or whether it compelled the result reached by the ALJ.

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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