GAETAN H. BOURGOIN
(Appellant)

v.

TWIN RIVERS PAPER COMPANY
(Appellee)

and

SEDGWICK CMS
(Insurer)

Argument held: July 20, 2022
Decided: January 6, 2023

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

[¶1] Gaetan Bourgoin appeals from a decision of a Workers' Compensation Board administrative law judge (*Pelletier, ALJ*) denying his Petition for Payment of Medical and Related Services regarding an established 1989 work injury. Mr. Bourgoin asserts that the ALJ erred in concluding that he did not meet his burden of proof that the Cannabidiol (CBD) products for which he was seeking reimbursement contained less than 0.3% Tetrahydrocannabinol (THC), and therefore were not prohibited by the Controlled Substances Act. *See Bourgoin v. Twin Rivers Paper Co., LLC*, 2018 ME 77, ¶ 12, 187 A.3d 10; 21 U.S.C.S. § 802; 7 U.S.C.S. § 1639o(1). We disagree and affirm the decision.

I. BACKGROUND

[¶2] Gaetan Bourgoin suffers from chronic pain disorder related to a work injury incurred at Fraser Papers, the predecessor to Twin Rivers Paper, in 1989. In addition to medical cannabis, Mr. Bourgoin takes hemp-based CBD to alleviate the effects of the injury and filed a Petition for Payment of Medical and Related Services, seeking reimbursement from Twin Rivers for the CBD.

[¶3] This is not the first round of litigation in this case. In *Bourgoin v. Twin Rivers Paper Co., LLC*, 2018 ME 77, ¶ 29, 187 A.3d 10, the Law Court held that federal law (the Controlled Substances Act) reigns supreme under the Constitution of the United States and preempts Maine's law legalizing and regulating medical marijuana, determining that an employer cannot be ordered to pay for it despite its reasonableness and effectiveness. This decision did not deal with other cannabis products or cannabis plants such as hemp, which contains CBD as its active ingredient. Hemp with more than 0.3% THC remains illegal under federal law and Twin Rivers is exposed to the same potential hazards identified by the Law Court in *Bourgoin*. *Id.* at ¶ 29; 21 U.S.C.S. § 802; 7 U.S.C.S. § 1639o(1).

[¶4] Mr. Bourgoin purchased "CBD gummies" from Safe Alternatives, a medical marijuana retail store in Aroostook County. Safe Alternatives does not grow the plants from which the products it sells are derived. Instead, it purchases the products on its shelves from a third party. The ALJ therefore concluded that Safe

Alternatives has no way of verifying whether the CBD gummies have less than 0.3% THC. The ALJ also noted that the FDA has not approved the use of CBD in the form of gummies or other food products.

[¶5] The ALJ denied Mr. Bourgoin's Petition seeking reimbursement for CBD gummies purchased from Safe Alternatives. Mr. Bourgoin requested Further Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.

II. DISCUSSION

[¶6] Mr. Bourgoin contends the ALJ erred in concluding he did not meet his burden of proof that the CBD products for which he was seeking reimbursement contained less than 0.3% THC thereby exempting it from the Controlled Substances Act. He also contends that the ALJ erred in failing to issue additional findings of fact on the issue of whether the products used by Mr. Bourgoin contain less than the prohibited amount of THC. We disagree with these contentions.

[¶7] The role of the Appellate Division on appeal 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 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). *See also Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995). In addition,

because Mr. Bourgoin requested further findings of fact and conclusions of law following the decision, the Appellate Division will "review only the factual findings actually made and the legal standards actually applied by the [ALJ]." *Daley v. Spinaker*, 2002 ME 134, ¶ 17, 803 A.2d 446.

[¶8] As the petitioner, Mr. Bourgoin bore the burden of proof on a more likely than not basis. *See Fernald v. Dexter Shoe Co.*, 670 A.2d 1382, 1385 (Me. 1996). "When an [ALJ] concludes that the party with the burden of proof failed to meet that burden, we will reverse that determination only if the record compels a contrary conclusion to the exclusion of any other inference." *Kelley v. Me. Pub. Employees Ret. Sys.*, 2009 ME 27, ¶ 16, 967 A.2d 676. Thus, to prevail on appeal, Mr. Bourgoin must demonstrate that the ALJ was compelled by the evidence to find that the CBD gummies contain less than 0.3% THC in accordance with the Controlled Substances Act. *See Savage v. Georgia Pacific*, Me. W.C.B. No. 13-5, ¶ 7 (App. Div. 2013). It is the exclusive province of the ALJ as fact-finder, to determine the existence or nonexistence of facts necessary to meet a party's burden of proof. When, upon conflicting evidence, the ALJ has not found such facts to exist, we cannot substitute our judgment for that of the ALJ. *See Bruton v. City of Bath*, 432 A.2d 390, 394 (Me. 1981).

[¶9] We are not persuaded that the ALJ was compelled by the evidence to find that the CBD gummies contain less than 0.3% THC in accordance with the

Controlled Substances Act. The evidence established that Safe Alternatives has no way of verifying whether the CBD gummies sold to Mr. Bourgoin contain less than 0.3% THC. The lab test results produced by Mr. Bourgoin on a variety of CBD gummies did not establish that the gummies sold to Mr. Bourgoin contain no more than 0.3% of THC[1]; the FDA has not approved the use of CBD in the form on gummies or other food products; and while hemp production has been expressly authorized under federal law, the FDA has approved CBD from the hemp plant to treat only epileptic seizures.

[¶10] If Twin Rivers were to subsidize Mr. Bourgoin's acquisition of CBD containing more than 0.3% THC it would require Twin Rivers to engage in conduct that could violate the Controlled Substances Act. Because the record does not compel a contrary conclusion and because the decree contains findings that are adequate for appellate review[2], we affirm the ALJ's decision.

[1] Mr. Bourgoin submitted into evidence testing results from a variety of CBD products finding that the amount of THC was so small that it was not detected, in support of his argument that it is outside the realm of the Controlled Substances Act. However, the testing results that he submitted into evidence are from independent labs with no association with Safe Alternatives where he obtains his CBD gummies. The difficulty with this argument is that the product is only being tested at a wholesale level. Safe Alternatives is not required to routinely test its products because there are no laws in Maine requiring the testing of medical cannabis for licensees, unlike adult use licensees. 28-B M.R.S.A. § 601. Without testing results from the specific product that Mr. Bourgoin obtains from Safe Alternatives, his argument falls short.

[2] In his Motion for Further Findings of Fact and Conclusions of Law, Mr. Bourgoin asked the board to issue additional findings regarding whether the products contained less than the prohibited amount of THC. The board denied the request for additional findings. On appeal, Mr. Bourgoin contends that the ALJ erred by not issuing additional findings on this issue. We find that the ALJ's original decision, which found that Safe Alternatives had no verifiable way of determining the amount of THC in the CBD gummies it sells, provides an adequate basis for appellate review on this issue and the ALJ did not err by not issuing additional findings.

III. CONCLUSION

[¶11] The ALJ's findings are supported by competent evidence, the decision involved no misconception of applicable law and the application of the law to the facts was neither arbitrary nor without rational foundation.

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.

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.

Attorney for Appellant:
Norman G. Trask, Esq.
Currier, Trask & Dunleavy
55 North Street
Presque Isle, ME 04769

Attorney for Appellee:
Anne-Marie Storey, Esq.
Rudman & Winchell
P.O. Box 1401
Bangor, ME 04402-1401