JOSEPH GROSS
(Appellant)

v.

AMES DRYWALL CONSTRUCTION
(Appellee)

and

MAINE EMPLOYERS' MUTUAL INSURANCE COMPANY
(Insurer)

Conference held: January 29, 2015
Decided: March 10, 2016

PANEL MEMBERS: Administrative Law Judges[1] Pelletier, Collier, and Jerome
BY: Administrative Law Judge Pelletier

[¶1] Joseph Gross appeals from a decision of a Workers' Compensation Board Administrative Law Judge (*Stovall, ALJ*) denying his Petition for Award. A previous panel of the Appellate Division vacated the administrative law judge's (ALJ) earlier decision denying Mr. Gross's Petition for Award. *See Gross v. Ames Drywall Constr.*, Me. W.C.B. No. 13-10 (App. Div. 2013). The panel remanded the case to the ALJ with instructions to apply the statutory presumptions set forth in §105(1-A)(A) (Supp. 2015) and §105-A(2)(A) (Supp. 2015) to determine whether Mr. Gross was an employee or construction subcontractor on the date of

[1] Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers licensed to practice law are now designated administrative law judges.

his injury. On remand, the ALJ determined that the presumptions are conflicting and must be disregarded, leaving Mr. Gross with the burden to prove that he was an employee of Ames Drywall on the date of injury. The ALJ determined that he did not meet his burden, and denied the petition. We affirm the ALJ's decision.

I. BACKGROUND

[¶2] Mr. Gross has worked as a drywall taper his entire career. He sought and obtained predetermined status as an independent contractor from the Workers' Compensation Board pursuant to 39-A M.R.S.A. § 105(1-A) (Supp. 2015).[2] Mr. Gross's predetermination was valid for one year, from October 25, 2010, until October 24, 2011. Mr. Gross testified that on June 24, 2011, he was hired by Michael Ames of Ames Drywall at the rate of $30.00 per hour for 40 hours per week. Mr. Gross testified that the week prior to the above-referenced job, he was working for Ames Drywall as a subcontractor making $20.00 per hour. On June 30, 2011, Mr. Gross was injured while mudding drywall. He filed his Petition for Award.

[2] Title 39-A M.R.S.A. § 105(1-A) provides:

> **Predetermination permitted for construction subcontractors.** A person, as defined in section 105-A, subsection 1, paragraph E, may apply to the board for a predetermination that the person performs construction work in a manner that would not make the person an employee of a hiring agent, as defined in section 105-A, subsection 1, paragraph D.
>
> > **A.** The predetermination issued by the board pursuant to this subsection is valid for one year and creates a rebuttable presumption that the determination is correct in any later claim for benefits under this Act.

[¶3] In his initial decree of October 31, 2012, the ALJ did not apply the statutory presumptions set forth in section 105(1-A)(A) and section 105-A(2)(A) when he denied Mr. Gross's Petition for Award.[3] This decision was vacated by a panel of the Appellate Division and remanded to the ALJ to apply the statutory presumptions. *Gross,* Me. W.C.B. No. 13-10. On remand, the parties offered no additional evidence. Instead, each party argued that the application of the two presumptions required a ruling in their favor on the question of whether Mr. Gross was or was not an employee on the date of injury.

[¶4] Upon remand, the ALJ issued a decision that again denied Mr. Gross's Petition for Award, concluding that the presumptions are in conflict and therefore cancel each other out, *see* M.R. Evid. 301(c); that Mr. Gross had the burden of proof; and that Mr. Gross did not meet his burden to prove that he was an employee of Ames Drywall on the date of injury. Mr. Gross filed a motion for additional findings of fact and conclusions of law, which the ALJ denied. Mr. Gross now appeals.

[3] Title 39-A M.R.S.A §105-A(2)(A) provides, in relevant part:

> **Status of persons performing construction work**. Beginning January 1, 2010, a person performing construction work on a construction site for a hiring agent is presumed to be the employee of the hiring agent for purposes of this Act, unless:
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> **A**. The person is a construction subcontractor.

II. DISCUSSION

A. Standard of Review

[¶5] 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). The ALJ's findings of fact are not subject to appeal. 39-A M.R.S.A § 321-B(2) (Supp. 2015).

B. "Dueling Presumptions"

[¶6] When considering the two presumptions at issue, the ALJ determined that they were in conflict with each other; that is, that they are "dueling presumptions." We agree that the two presumptions, one that Mr. Gross is a subcontractor and thus not covered by the Act, and the other presuming him to be an employee covered by the Act, are in direct conflict with each other. Looking to the Maine Rules of Evidence for guidance in this situation, the ALJ applied section 301(c), which provides:

> **Inconsistent presumptions**. If two presumptions arise which are conflicting with each other, the court shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance, both presumptions shall be disregarded.

[¶7] The ALJ further determined there was nothing in the record to show which presumption was "founded on the weightier considerations of policy or logic." In this circumstance, the ALJ found that "the presumptions cancel each other out," consistent with section 301(c) of the Maine Rules of Evidence, and disregarded both presumptions. We find no error of law in the ALJ's analysis. It was entirely appropriate to resort to a rule of evidence dealing specifically with conflicting presumptions for guidance when attempting to resolve the conflict between the presumptions in this case. *See, e.g., Estate of Gregory Sullwold v. The Salvation Army*, Me. W.C.B. No. 13-13, ¶ 21 (App. Div. *en banc* 2013).

C. Application of Section 105-A

[¶8] In the absence of an applicable statutory presumption, the ALJ determined that Mr. Gross had the burden of proof, *see Fernald v. Dexter Shoe Co.*, 670 A.2d 1382, 1385 (Me. 1996) ("As a general matter, the petitioning party has the burden of proof on all issues."); and that his burden was to disprove any one of the twelve criteria set forth in 39-A M.R.S.A. § 105-A(1)(B) (Supp. 2012).[4]

[4] Title 39-A M.R.S.A. § 105-A(1)(B) (Supp. 2012) has since been amended. P.L. 2011, ch. 643, § 9 (effective Dec. 31, 2012). That provision defined "construction subcontractor" as "a person who performs construction work on a construction site for a hiring agent, if the person satisfies the following criteria:"

> **(1)** The person possesses or has applied for a federal employer identification number or social security number or has agreed in writing to carry out the responsibilities imposed on employers under this chapter;
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> **(2)** The person has control and discretion over the means and manner or performance of the construction work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the hiring agent;

Mr. Gross contends that this was error, and that the ALJ should have instead applied the definition of independent contractor in 39-A M.R.S.A. § 102(13) (Supp. 2012).[5] However, the plain language of section 102(13), in pertinent part, states "*except as provided by Section 105-A*, 'independent contractor' means a person who performs services for another under contract, but who is not under the essential control or superintendence of the other person while performing those services." (Emphasis added). Because Mr. Gross is a specific kind of independent contractor, a "construction subcontractor," section 105-A applies and section

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> **(3)** The person has control over the time when the work is performed and the time of performance is not dictated by the hiring agent. Nothing in this paragraph prohibits the hiring agent from reaching an agreement with the person as to a completion schedule, range of work hours and maximum number of work hours to be provided by the person;
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> **(4)** The person hires and pays the person's assistants, if any, and, to the extent such assistants are employee, supervises the details of the assistants' work;
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> **(5)** The person purports to be in business for that person's self;
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> **(6)** The person has continuing or recurring construction business liabilities or obligations;
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> **(7)** The success or failure of the person's construction business depends on the relationship of business receipts to expenditures;
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> **(8)** The person receives compensation for construction work or services performed and remuneration is not determined unilaterally by the hiring agent;
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> **(9)** The person is responsible in the first instance for the main expenses related to the service or construction work performed; however, nothing in this paragraph prohibits the hiring agent from providing the supplies or materials necessary to perform the work;
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> **(10)** The person is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;
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> **(11)** The person supplies the principal tools and instruments used in the work except that the hiring agent may furnish tools or instruments that are unique to the hiring agent's special requirements or are located on the hiring agent's premises and
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> **(12)** The person is not required to work exclusively for the hiring agent.

[5] Title 39-A M.R.S.A. § 102(13) (Supp. 2012) was repealed and replaced by 39-A M.R.S.A. § 102 (13-A) (Supp. 2015). P.L. 2011, ch. 643, ¶ (effective Dec. 31, 2012).

102(13) does not apply. *See WCB Abuse Investigation Unit v. Holyoke*, Me. W.C.B. No. 14-11, ¶ 28 (App. Div. 2014). The ALJ did not err in this regard.

[¶9] Mr. Gross further contends that the ALJ erred when applying section 105-A(1)(B) because his testimony served to disprove several of the criteria listed therein. He contends that his testimony established: that he did not have control over the means and manner of the work, *see* 39-A M.R.S.A. § 105-A(1)(B)(2); that he did not have control over the time when the work could be performed, *see id.*, § 105-A(1)(B)(3); that he was not responsible for the main expenses related to the work, *see id.*, § 105-A(1)(B)(9); and that he was not contractually responsible for the satisfactory completion of the work, *see id.*, § 105-A(1)(B)(10). He further testified that he and Mr. Ames met and decided to convert his status from a subcontractor to an employee about one week prior to the date of injury. Mr. Gross admitted that until then, he was a subcontractor for Mr. Ames.

[¶10] Mr. Gross was the only witness who testified in this case. When the party who bears the burden of proof introduces evidence that is undisputed, the Law Court has held that the "fact-finder has the prerogative selectively to accept or reject it, in terms of the credibility of the witnesses or the internal cogency of the content." *Dionne v. LeClerc*, 2006 ME 34, ¶ 15, 896 A.2d 923; *see also In RE Andrea W.*, 537 A.2d 596, 598 (Me. 1988) ("We have long recognized the principle that the [fact-finder] has the responsibility to assess the credibility of the

witnesses and to find facts, and may reject the entire testimony of an uncontradicted witness.").

[¶11] The ALJ found that the testimony of Mr. Gross was "inconsistent" with his prior statements, internally "contradictory," and in general "unpersuasive." Findings regarding credibility are uniquely within the province of the fact finder, who has the opportunity to directly observe witnesses and hear the testimony. A fact-finder is not required to believe witnesses, even if their testimony is not disputed. *Dionne*, 2006 ME 34 at ¶ 15.

III. CONCLUSION

[¶12] The ALJ properly disregarded the conflicting statutory presumptions, and properly assigned the burden of proof to Mr. Gross on the issue of his status as an employee versus construction subcontractor. The ALJ did not err when concluding that Mr. Gross did not establish that he was an employee.

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 (Supp. 2015).

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