ESTATE OF J. MICHAEL BOYLE, SR. and FAYE BOYLE
(Appellants)

v.

W.W. OSBORNE,
(Appellee)

FIREMAN'S FUND INSURANCE COMPANY,

and

THE AMERICAN INSURANCE COMPANY
(Insurers)

Conference held: September 24, 2015
Decided: February 28, 2017

PANEL MEMBERS:

Majority: Administrative Law Judges Goodnough and Pelletier
Dissent: Administrative Law Judge Stovall

BY: Administrative Law Judge Goodnough

[¶1] Faye Boyle and the Estate of J. Michael Boyle, Sr., (collectively, "the Estate") appeal from a decision of a Workers' Compensation Board administrative law judge (*Greene, ALJ*) denying their Petition for Order of Payment pursuant to Me. W.C.B. Rule, ch. 1, § 1, the "fourteen-day rule." The Estate contends: (1) the ALJ failed to make sufficient findings of fact and conclusions of law regarding the applicability of amendments to Board Rule, ch. 1, § 1; and (2) the ALJ refused to address an argument that notice to one of W.W. Osborne's alleged insurers was

sufficient as a matter to law to trigger the penalty provisions of the Rule as to one or both of those insurers. We disagree, and affirm the decision.

I. BACKGROUND

[¶2] The employee, J. Michael Boyle, Sr., died in 2010 from mesothelioma. The Estate filed petitions against W.W. Osborne and two alleged insurers, Fireman's Fund and The American Insurance Company (among several other employers and insurers), seeking death benefits and benefits under the Occupational Disease Law. *See* 39-A M.R.S.A. §§ 215, 614 (2001 & Supp. 2016). The petitions filed against W.W. Osborne and Fireman's Fund were sent by certified mail with return receipt requested on June 21, 2011, to Fireman's Fund only; they were not mailed to W.W. Osborne at the location listed on the petition. The return receipt from Fireman's Fund was received at the Estate's counsel's office on July 5, 2011, showing an illegible signature with no date of delivery or designation of the status of the person who received the mailing.

[¶3] The petitions filed against W.W. Osborne and American Insurance Company were also sent on June 21, 2011, by certified mail, return receipt requested, to both W.W. Osborne and American Insurance Company at addresses Estate counsel obtained from the Workers' Compensation Board. Those Petitions were returned to the Estate's counsel as "undeliverable."

[¶4] On August 9, 2011, in anticipation of a mediation, Estate counsel faxed copies of the petitions to Fireman's Fund. On August 10, 2011, Pete Teahan, a general adjuster with Fireman's Fund, filed a notice of controversy indicating on behalf of W.W. Osborne and American Insurance that incapacity benefits and medical benefits were in dispute.

[¶5] The Estate filed its Petition for Order of Payment on March 11, 2013, asserting that the petition allegedly received by Fireman's Fund on or before July 5, 2011, provided sufficient notice or knowledge of a claim to trigger the penalty provisions under Board Rule, ch. 1, § 1 with respect to Fireman's Fund, W.W. Osborne, and American Insurance. Board Rule, ch. 1, § 1 generally provides for penalties on employers or insurers who, once notified, fail to timely pay or controvert a claim.

[¶6] Based on stipulated facts, the ALJ determined that American Insurance was W.W. Osborne's insurer during the claimed period of exposure; that American Insurance was a subsidiary of Fireman's Fund but issued policies in its own name; and that American Insurance did not have knowledge or notice of the claim until August 9, 2011, after which it timely filed a notice of controversy on its behalf and on behalf of W.W. Osborne.

[¶7] The ALJ denied the petition for payment. Strictly construing Board Rule, ch. 1, § 1, the ALJ determined that Fireman's Fund was not the insurer on

the claim, and that neither Fireman's Fund, American Insurance, nor W.W. Osborne was subject to penalties under the Rule.

[¶8] The Estate filed a Motion for Further Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.[1]

II. DISCUSSION

A. Standard of Review

[¶9] Appeals from decisions of administrative law judges are governed by 39-A M.R.S.A. §§ 321-B, 322 (Supp. 2016). 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). Because the Estate 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 [administrative law judge]." *Daley v. Spinnaker Inds., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted). The ALJ's findings of fact are not subject to appeal. 39-A M.R.S.A. § 321-B(2).

[1] Me. W.C.B. Rule, ch. 13, § 3 provides that the Appellate Division will take appeals from decisions that fully dispose of the matters before the ALJ. The decision appealed here does not finally resolve all issues in the case, and thus, is interlocutory. However, for the reasons stated in *Estate of Boyle v. Lappin Brothers*, Me. W.C.B. No. 17-08 (App. Div. 2017), we proceed to decide the appeal.

B. Adequacy of the Findings

[¶10] The Estate contends that the ALJ, in response to its Motion for Additional Findings of Fact and Conclusions of Law, erred by failing to issue additional findings and conclusions related to four issues: (1) whether the ALJ applied the amended version of Board Rule, ch. 1, § 1 or its precursor and, if he applied the amended rule, whether it was an improper retroactive application of the amended rule; (2) if the ALJ applied the amended rule, whether both alternatives in subsection two for providing notice were considered; (3) whether notice to Fireman's Fund was sufficient to provide notice to W.W. Osborne; and (4) whether Fireman's Fund and American Insurance should be treated as the same entity for purposes of notice or knowledge of a claim under the rule.

[¶11] When requested, an administrative law judge is under an affirmative duty pursuant to 39-A M.R.S.A. § 318 (Supp. 2016) to make additional findings of fact and conclusions of law in order to create an adequate basis for appellate review. *See 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.

1. Rule Amendments

[¶12] Board Rule, ch. 1, § 1 was amended effective April 2, 2012, during the pendency of this litigation. The Estate contends that the findings in the decree are insufficient because they lack analysis regarding which version of the rule should apply and, if the amendment applied, whether both alternatives for providing notice were considered. The Estate further contends that retroactive application of the Rule would constitute error because it would alter the legal significance of actions taken more than a year before the amendment went into effect.

[¶13] The Board made two relevant changes when amending Rule, ch.1, § 1 in 2012.[2] First, it added the requirement that notice of a claim be "provided

[2] The current version of the Rule, as amended in 2012, provides:

> § 1. Claims for Incapacity and Death Benefits
>
> 1. Within 14 days of notice or knowledge of a claim for incapacity or death benefits for a work-related injury, the employer or insurer will:
>
> A. Accept the claim and file a Memorandum of Payment checking "Accepted"; or
>
> B. Pay without prejudice and file a Memorandum of Payment checking "Voluntary Payment Pending Investigation"; or
>
> C. Deny the claim and file a Notice of Controversy.
>
> 2. *Notice of the claim must be provided consistent with 39-A M.R.S.A. § 301, or to the employer's insurance carrier at the address registered with the Bureau of Insurance.*
>
> 3. If the employer fails to comply with the provisions of Rule 1.1, the employee must be paid total benefits, with credit for earnings and other

consistent with 39-A M.R.S.A. § 301, or to the employer's insurance carrier at the address registered with the Bureau of Insurance." Formerly, the requirement to pay or controvert a claim within fourteen days was triggered when the employer or insurer had "notice or knowledge of a claim for incapacity or death benefits for a work-related injury."

[¶14] Second, the board amended the rule to add subsection seven, which provides: "This rule applies to all dates of injury and all pending claims."

> statutory offsets, from the date the claim is made in accordance with 39-A M.R.S.A. § 205(2) and in compliance with 39-A M.R.S.A. § 204. The employer may discontinue benefits under this subsection when both of the following requirements are met:
>
> A. The employer files a Notice of Controversy; and
>
> B. The employer pays benefits from the date the claim is made. If it is later determined that the average weekly wage/compensation rate used to compute the payment due was incorrect, and the amount paid was reasonable and based on the information gathered at the time, the violation of Rule 1.1 is deemed to be cured.
>
> 4. Payment under Section 1.3 requires the filing of a Memorandum of Payment.
>
> 5. Benefits paid under this section are indemnity payments and are credited toward future benefits in the event that benefits are ordered or paid.
>
> 6. Failure to comply with the provisions of Rule 1.1 may also result in the imposition of penalties pursuant to 39-A M.R.S.A. §§ 205(3), 359, and 360.
>
> 7. *This rule applies to all dates of injury and all pending claims*.

(Emphasis added to indicate relevant amendments).

[¶15] Although the ALJ does note in the decree that the correct addresses for Fireman's Fund and American Insurance were available in the Bureau of Insurance records at all applicable times, the ALJ did not hold the failure to provide notice at those addresses, i.e., consistently with subsection two of the 2012 amendment, against the Estate. The dispositive findings and conclusions were that (1) Fireman's Fund was not W.W. Osborne's insurer during the relevant period, thus notice to Fireman's Fund—even if in compliance with the amended rule—was of no consequence; and (2) that American Insurance, W.W. Osborne's insurer, did not have knowledge or notice of the claim until August 9, 2011, after which it filed a timely notice of controversy.

[¶16] Because these findings are consistent with a determination of no notice or knowledge of a claim under either the broader, prior version of the rule or the 2012 amendments, the failure to expressly state which version of the Act applied, if erroneous, is harmless. Accordingly, it is not necessary to evaluate whether the ALJ applied the amended rule and its alternative standards for notice, or whether he improperly applied the amendments retroactively. The ALJ's findings on this issue are adequate for appellate review.

2. Fireman's Fund

[¶17] The Estate next contends that the ALJ erred by failing to issue additional findings of fact and conclusions of law regarding whether notice to

Fireman's Fund, as evidenced by the return receipt received by the Estate's counsel on July 5, 2011, gave rise to an obligation on the part of Fireman's Fund to pay or controvert the claim.

[¶18] When deciding whether the penalty provisions applied to Fireman's Fund, the ALJ focused on Board Rule ch. 1, § 1(1), identical in both the 2012 amended version and its precursor:

> 1. Within 14 days of notice or knowledge of a claim for incapacity or death benefits for a work-related injury, the employer or insurer will:
>
> A. Accept the claim and file a Memorandum of Payment checking "Accepted"; or
>
> B. Pay without prejudice and file a Memorandum of Payment checking "Voluntary Payment Pending Investigation"; or
>
> C. Deny the claim and file a Notice of Controversy.

[¶19] The ALJ construed the phrase "*the* employer or insurer will" in Board Rule, ch. 1, § 1(1) to mean that only the insurer on the risk for the claim was required to respond to notice of a claim. The ALJ reasoned:

> The use [of] the article "the" rather than "an" indicates that notice to *any* employer or *any* insurer is not sufficient to invoke the requirements of Board Rule 1.1. … Rather, only the employer against which the claim is directed and the insurer on the risk with that employer at the time of the alleged injury… have any obligation to respond to such a notice of a claim.

[¶20] The ALJ's findings and conclusions on this issue are adequate for appellate review, and the ALJ did not err when interpreting the rule. *See Lydon v. Sprinkler Servs.*, 2004 ME 16, ¶¶ 13-14, 841 A.2d 793. The ALJ's strict construction against payment is consistent with the rule's plain meaning, *see Bridgeman v. S.D. Warren Co.*, 2005 ME 38, ¶ 17, 872 A.2d 961, and is appropriate because the sanction imposed for a violation of the rule is in the nature of a penalty, *see Estate of Joyce v. Commercial Welding Co.*, 2012 ME 62, ¶ 24, 55 A.3d 411. Moreover, although a fourteen-day rule penalty is payable to an employee without regard to whether the employee suffered any incapacity as a result of a work injury, *id.* ¶ 21, the penalty cannot be ascribed to an insurer that has no underlying contractual obligation to the employer. Put simply, Fireman's Fund was not the insurer required to take action pursuant to subsection 1(1).

[¶21] Additionally, because Fireman's Fund was not "the insurer," any notice it received is not imputed to W.W. Osborne by virtue of the fact that the definition of employer in 39-A M.R.S.A. § 102(12) (Supp 2016) includes the insurer, when the employer is insured.

3. Notice to American Insurance

[¶22] The Estate also argues that the ALJ erred by failing to make additional findings of fact and conclusions of law on the issue of whether notice to

Fireman's Fund constituted notice to American Insurance, its subsidiary, as a matter of law. On this issue, the ALJ stated:

> Even though American [Insurance], the actual insurer, is a subsidiary of Fireman's Fund, it issues policies in its own name and its own coverage policy for the relevant period was on file with the board. Thus, any notice to Fireman's Fund by petitions designating it as the "insurer" was not sufficient itself to establish that American [Insurance] had "notice or knowledge" of the claim as of July 5, 2011.

[¶23] The Estate points to the affidavit of Pete Teahan dated November 6, 2013, in which Mr. Teahan states that he is a "general adjuster with Fireman's Fund" and "[u]pon information and belief, The American Insurance Company was the insurer for W.W. Osborne effective 1/01/70 to 12/31/76." The Estate also points to the fact that Mr. Teahan filed the Notice of Controversy for American Insurance on August 10, 2011, asserting that he was acting as agent for both entities. The Estate contends the ALJ was obligated to make findings explaining why these facts do not establish a sufficient relationship between the two corporate entities such that notice to Fireman's Fund did not equal notice to American Insurance.

[¶24] The Estate cites no authority for the proposition that as a matter of law, notice to a parent company constitutes notice to a subsidiary. The parties stipulated that American Insurance, although a subsidiary of Fireman's Fund, issues policies in its own name and issued its own coverage policy for the relevant period, which was on file with the board. It gives no further details regarding the

relationship between the two entities. Moreover, the stipulation does not describe or state whether Mr. Teahan acted as an agent capable of receiving notice for Fireman's Fund or American Insurance at the time Fireman's Fund was originally served with a petition in June 2011, and does not establish Mr. Teahan's role with American Insurance at the time the Estate alleges that Fireman's Fund received notice of the claim on or before July 5, 2011. Finally, the parties attached the certified mail return receipt for the Fireman's Fund petition to the stipulation. The receipt contains an illegible signature of an unidentified individual and is not dated.

[¶25] The ALJ did not err by failing to impute a corporate relationship between Fireman's Fund and American Insurance beyond that set forth in the stipulation. The ALJ's decision is well-grounded within the four corners of the stipulation and does not contain a misconception of the law as applied to the stipulated facts.

III. CONCLUSION

[¶26] The ALJ's decision contained findings based upon the stipulated facts that were adequate for appellate review. His strict construction of Board Rule, ch. 1, § 1 was correct given the penal nature of the Rule. Finally, he did not err by failing to speculate or find facts beyond those contained in the stipulation regarding Mr. Teahan's role as an alleged agent for both Fireman's Fund and

American Insurance Company in June 2011, and the legal relationship between Fireman's Fund and American Insurance Company.

The entry is:

The administrative law judge's decision is affirmed.

Administrative Law Judge Stovall, dissenting

[¶27] I respectfully dissent. It is my opinion that, in light of Me. W.C.B. Rule, ch. 13, § 3, and *Estate of James Cole v. Girl Scouts of Maine*, Me. W.C.B. No. 14-27 (App. Div. 2014), this appeal should be dismissed because it is not a final decision.

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. 2016).

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