JODI TINER
(Appellant)

v.

OAK GROVE CENTER
(Appellee)

and

BROADSPIRE SERVICES, INC.
(Insurer)

Conference held: September 27, 2018
Decided: November 20, 2018

PANEL MEMBERS: Administrative Law Judges Hirtle, Goodnough, and Stovall
BY: Administrative Law Judge Hirtle

[¶1] Jodi Tiner appeals from a decision of an administrative law judge (*Elwin, ALJ*) denying her Petition regarding an August 13, 2013, work injury. The ALJ found that Ms. Tiner continues to refuse a bona fide offer of reasonable employment, *see* 39-A M.R.S.A. § 214(1)(A) (Supp. 2017), and alternatively that she failed to establish a change of circumstances sufficient to revisit a 2016 determination that she suffered no earning incapacity from the 2013 injury. On appeal, Ms. Tiner argues that ALJ erred when determining that her recent actions were insufficient to end the period of her refusal, and when finding that her economic circumstances have not changed due to her recent work search. We disagree, and affirm the decision.

I. BACKGROUND

[¶2] Ms. Tiner was injured at work on August 13, 2013, while employed as a CNA for Oak Grove Center. The board (*Elwin, ALJ*) issued a decree dated January 26, 2016, which granted protection of the Act for the injury and ordered payment of medical and related services, but denied Ms. Tiner's request for incapacity benefits. The initial denial of incapacity benefits was based, first, on the ALJ's conclusion that Ms. Tiner had refused a bona fide offer of reasonable employment under 39-A M.R.S.A. § 214(1)(A), and second, on the ALJ's determination that Ms. Tiner had no earning incapacity because she was not restricted from increasing her hours from part-time to full-time.

[¶3] Between the time of the prior decree and the current petition, Ms. Tiner undertook a work search. The ALJ made no finding that she actually applied for any positions. Rather, after presenting her restrictions to prospective employers, Ms. Tiner only recorded that those prospective employers told her the advertised position was not within those restrictions.

[¶4] As part of that same work search, Ms. Tiner contacted several employers owned by the same parent company as Oak Grove and asked about advertised positions. During those contacts, she did not identify herself as a former employee of Oak Grove.

[¶5] With the current petition, Ms. Tiner again seeks to establish entitlement to incapacity benefits. Regarding the period of refusal, she submitted evidence of her recent contacts with Oak Grove's related facilities. To support a change in economic circumstances, she submitted the results of her whole work search. The ALJ concluded that Ms. Tiner's contact with Oak Grove's related facilities was insufficient to end the period of refusal, and thus determined that she was still not entitled to incapacity benefits. The ALJ also found that, even if Ms. Tiner had been entitled to benefits, her economic circumstances had not changed sufficiently since the prior decree to allow a review of her level of incapacity.

[¶6] Ms. Tiner filed a Motion for Additional Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Supp. 2017). The ALJ denied that motion, and Ms. Tiner appeals.

II. DISCUSSION

[¶7] "A finding of fact by an administrative law judge is not subject to appeal [before the Appellate Division]." 39-A M.R.S.A. § 321-B (Supp. 2017). Instead, appellate review is "limited to assuring that [the ALJ's] factual findings are supported by competent evidence . . . ." *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982). On issues of law, we assure "that [the ALJ's] decision involves no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Id.*

A. Period of Refusal

[¶8] Title 39-A M.R.S.A. § 214(1)(A) provides:

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

A refusal ends "when the employee communicates to the employer a willingness to accept the offer previously rejected" by "some affirmative step." *Loud v. Kezar Falls Woolen Co.*, 1999 ME 118, ¶¶ 6-7, 735 A.2d 965.

[¶9] The Law Court in *Loud* found that a refusal was not ended by speaking "informally and in generalities" with a former supervisor during a happenstance encounter in public. *Id.* ¶ 7. The Court also noted:

> [The employee] never contacted her employer at its place of business or at any other location where applications for work are customarily made. Neither in writing, nor by telephone, did she request a job or accept the offer previously rejected.

Id. The Court held that, under those circumstances, the employee had failed to take the kind of affirmative step that the statute requires to end a period of refusal. *Id.*

[¶10] In this case, Ms. Tiner argues that the ALJ applied a higher standard than articulated by the Law Court in *Loud*. We disagree. The ALJ determined that Ms. Tiner did not end the period of refusal because, when contacting the Oak Grove facilities, she "never identified herself as a former employee of Oak Grove who was trying to return to work after an injury there." Thus, the ALJ determined

that failing to identify oneself to the employer as a former employee seeking to return to work after an injury fell short of the level of communication required by section 214(1)(A). This is consistent with the "affirmative step" standard required by the Court in *Loud*.

[¶11] The ALJ's finding that Ms. Tiner failed to identify herself as an injured former employee seeking to return to work is supported by competent evidence in the record, and the ALJ neither misapplied nor misconceived the law when determining that Ms. Tiner had not met the requirements of section 214(1)(A), as interpreted by the Court in *Loud*, to end her period of refusal.

B. Change in Circumstances

[¶12] Ms. Tiner also asked the board to review the level of her earning incapacity established by the 2016 decree, and contends on appeal that the ALJ erred in concluding that she had failed to show the change in circumstances requisite for review. *See Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 7, 837 A.2d 117 (holding that a petition to increase or decrease compensation from a previous decree imposes a burden to show a change in circumstances). Because we affirm the dispositive determination that Ms. Tiner continues to refuse a bona fide offer of reasonable employment from Oak Grove in the context of a claim for partial incapacity benefits, we do not need to reach this issue. However, even if Ms. Tiner

had prevailed on the section 214(1)(A) issue, we would affirm the ALJ's determination that she has not proven a change in circumstances.

[¶13] In support of her contention that her economic circumstances have changed sufficiently to allow a review of her incapacity level, Ms. Tiner produced the results of a work search. *See Pelletier v. Gerald Pelletier, Inc.*, Me. W.C.B. No. 17-34, ¶ 7 (App. Div. 2017) (holding that work search evidence may be sufficient to show a change in economic circumstances). The ALJ found the work search to be insufficiently persuasive, and thus declined to find that Ms. Tiner's circumstances had changed. The ALJ's negative assessment of the work search is supported, as she points out, by evidence that Ms. Tiner regularly presented her restrictions to employers immediately at initial contact, and before submitting any application or resumé showing her positive qualifications. *See Monaghan v. Jordan's Meats*, 2007 ME 100, ¶ 21, 928 A.2d 786 (identifying over-emphasis on work restrictions as a relevant factor when determining whether an employee has made a reasonable exploration of the labor market); *see also Mondor v. City of Portland*, Me. W.C.B. No. 17-37 ¶¶ 14-16 (App. Div. 2017) (listing work restrictions on resumé was reasonable basis to conclude that restrictions were over-emphasized). Because the ALJ's conclusion is reasonable and supported by competent evidence, we would not disturb it.

III. CONCLUSION

[¶14] The ALJ applied the correct legal standard in determining that Ms. Tiner had not ended her period of refusal of employment pursuant to 39-A M.R.S.A. § 214(1)(A). Because competent evidence supports the finding that the period of refusal continues, the ALJ did not err when determining that she is not entitled to incapacity benefits. The ALJ's finding that Ms. Tiner's circumstances have not changed is reasonable and supported by competent evidence; thus, the ALJ did not err by declining to review Ms. Tiner's level of incapacity.

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. 2017).

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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