PAUL MORRISON
(Appellee)

v.

CITY OF SANFORD
(Appellant)

and

MAINE MUNICIPAL ASSOCIATION
(Insurer)

Argued: December 8, 2017
Decided: June 26, 2019

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

[¶1] The City of Sanford appeals a decision of a Workers' Compensation Board administrative law judge (*Stovall, ALJ*) granting Paul Morrison's Petition for Award, and ordering the City to pay closed-end periods of wage loss benefits. Because Mr. Morrison is a firefighter and alleges that he suffers from a work-related brain cancer, the ALJ applied the presumption in 39-A M.R.S.A. § 328-B (Supp. 2018), based on criteria set forth in the statute and in Me. W.C.B. Rule, ch. 1, § 10(1) (effective August 15, 2012). On appeal, the City contends mainly that (1) the rule is invalid as it conflicts with the statute and was promulgated outside the board's authority; (2) Mr. Morrison did not meet the statutory criteria for application of the presumption; (3) the ALJ misapplied the statutory presumption by shifting the

burden to the City to disprove the presumed facts; and (4) the ALJ erred when concluding that the City did not meet its burden. We affirm the ALJ's decision.

I. BACKGROUND

[¶2] Paul Morrison began working for the City as a firefighter in 1981. Throughout his career he fought fires ranging from small house fires to fires that encompassed entire industrial buildings. On February 27, 2011, without warning, Mr. Morrison suffered a seizure. He sought medical treatment and was ultimately diagnosed with a right frontal oligodendroglioma, a cancerous brain tumor. In March of 2011 he underwent surgery to remove the tumor. He was eventually able to return to work for a concurrent employer, then for the City as a part-time facilities manager and then, in March of 2012, as a full-duty firefighter.

[¶3] Mr. Morrison filed his Petition for Award with the board in July 2012. He argued that he was entitled to the evidentiary presumption afforded to firefighters who suffer from cancer, found in 39-A M.R.S.A. § 328-B.[1] Section 328-B, enacted

[1] Title 39-A M.R.S.A. § 328-B provides, in relevant part:

> **1. Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.
>
> **A.** "Cancer" means kidney cancer, non-Hodgkin's lymphoma, colon cancer, leukemia, brain cancer, bladder cancer, multiple myeloma, prostate cancer, testicular cancer or breast cancer.
>
> **B.** "Employed" means to be employed as an active duty firefighter or by the Office of the State Fire Marshal or to be an active member of a volunteer fire association with no compensation other than injury and death benefits.
>
> **C.** "Firefighter" means a member of a municipal fire department or volunteer fire association whose duties include the extinguishment of fires or an investigator or sergeant in the Office of the State Fire Marshal.

by the Legislature in 2009, creates a rebuttable presumption that, among other things, a firefighter's cancer (defined to include ten types of cancer, including brain cancer) was contracted in the course of and as a result of employment as a firefighter. To qualify for the presumption the firefighter must demonstrate (1) that the firefighter had undergone "a standard, medically acceptable test for evidence of the cancer for which the presumption is sought"; (2) that the firefighter had been employed as a firefighter for five years; and (3) by written affidavit, that the cancer is not prevalent among close, blood-related relatives and the firefighter has not had

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> **2. Presumption.** If a firefighter who contracts cancer has met the requirements of subsections 3, 6 and 7, there is a rebuttable presumption that the firefighter contracted the cancer in the course of employment as a firefighter and as a result of that employment, that sufficient notice of the cancer has been given and that the disease was not occasioned by any willful act of the firefighter to cause the disease.
>
> **3. Medical tests.** In order to be entitled to the presumption in subsection 2, during the time of employment as a firefighter, the firefighter must have undergone a standard, medically acceptable test for evidence of the cancer for which the presumption is sought or evidence of the medical conditions derived from the disease, which test failed to indicate the presence or condition of cancer.
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> . . . .
>
> **6. Length of service.** In order to qualify for the presumption under subsection 2, the firefighter must have been employed as a firefighter for 5 years and, except for an investigator or sergeant in the Office of the State Fire Marshal, regularly responded to firefighting or emergency calls.
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> **7. Written verification.** In order to qualify for the presumption under subsection 2, a firefighter must sign a written affidavit declaring, to the best of the firefighter's knowledge and belief, that the firefighter's diagnosed cancer is not prevalent among the firefighter's blood-related parents, grandparents or siblings and that the firefighter has no substantial lifetime exposures to carcinogens that are associated with the firefighter's diagnosed cancer other than exposure through firefighting.

any "substantial lifetime exposures to carcinogens" associated with the cancer. *See* 39-A M.R.S.A § 328-B(2), (3), (6), (7) (Supp. 2018).

[¶4] The Workers' Compensation Board promulgated rules to implement the statute and further define the medical testing requirement. In August of 2012, the board promulgated Rule, ch. 1, § 10,[2] which identifies medical tests that a firefighter

[2] Me. W.C.B. Rule, ch. 1, § 10 provides:

> **Cancer Presumption for Firefighters**
>
> This rule applies to all cases now pending before the Workers' Compensation Board in which the evidence has not closed and in which the statute applies. For all dates of injury occurring before the effective date of these rules, sub-section 1 applies. For all dates of injury occurring on and after the effective date of these rules, sub-section 2 applies.
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> 1. If a firefighter claims that he has contracted a cancer defined in § 328-B(1)(A), the firefighter shall be considered to have undergone a standard, medically acceptable test for evidence of the cancer for which the presumption is sought or evidence of the medical conditions derived from the disease, which test failed to indicate the presence or condition of the cancer for which the presumption is sought, if, during the time of employment as a firefighter, the firefighter underwent a standard physical exam with blood work and the examination and the blood work were not positive for the cancer for which the presumption is sought, or if the examination or blood work were positive for the cancer for which the presumption is sought, follow up tests ordered by the physician conducting the physical were determined to be negative for the cancer for which the presumption is sought.
>
> 2. If a firefighter claims that he has contracted a cancer defined in § 328-B(1)(A), the firefighter shall be considered to have undergone a standard, medically acceptable test for evidence of the cancer for which the presumption is sought or evidence of the medical conditions derived from the disease, which test failed to indicate the presence or condition of the cancer for which the presumption is sought, if, during the time of employment as a firefighter, the firefighter underwent a physical examination which included a complete history and physical examination, which included a history of malignancies regarding the firefighter's blood-related parents, grandparents or siblings, and a history of the firefighter's previous malignancies. The physical examination shall be considered complete if it included a lymph node and neurologic exam, a breast examination, and a testicular examination if a male. To be considered complete, an examination shall include blood count testing (CBC), metastolic profile (CMP) testing, and urinalysis testing. If a female firefighter is 40 years or older, the examination should include a mammography, and if a female firefighter is 50 years or older, a colonoscopy. If a male firefighter is 50 years or older, the examination shall include prostate

must undergo prior to qualifying for the evidentiary presumption. For some of the identified cancers, the rule requires that the firefighter undergo a specific screening test. For others, including brain cancer, the rule requires that they demonstrate that the firefighter underwent a standard physical examination with blood work, negative for the cancer for which the presumption is sought.

[¶5] The City challenged the rule as *ultra vires.* The ALJ concluded that the rule is valid, and that Mr. Morrison satisfied the requirements of the rule and the statute; he thus applied the presumption. In so doing, he shifted the burden of proof to the City, requiring the City to disprove the presumed facts on a more likely than not basis. Testimony was taken from Mr. Morrison's expert witness, Dr. Weaver, and from the City's experts, Drs. Harbison and Inhorn.

[¶6] After hearing the experts' testimony on the general etiology of oligodendroglioma and Mr. Morrison's brain cancer specifically, the ALJ concluded that none of the experts, including Dr. Weaver, was in a position to assess Mr.

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examination and a colonoscopy. If any abnormality is disclosed during the examination or blood work for the cancer for which the presumption is sought and further testing reveals that the cancer for which the presumption is sought is not present, the examination shall be considered adequate for purpose of the application of the presumption. For the purpose of determining the completeness of an exam or testing for application of the presumption, the firefighter's age at the time of the exam is determinative.

3. If an examination or blood work is determined to be incomplete or positive for one or more cancers but not for the cancer for which the presumption is sought and the examination and blood work were complete and not positive for the cancer for which the presumption is sought, the firefighter is entitled to the presumption provided the remaining requirements of § 328-B have been met.

Morrison's individual exposure risk from fighting fires for the City. The ALJ concluded that the evidence on causation was in equipoise and thus, the presumption had not been rebutted. Accordingly, the ALJ found the presumed facts, including that Mr. Morrison contracted cancer in the course of and as a result of his employment as a firefighter.

[¶7] The City filed a Motion for Additional Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Supp. 2018), which the ALJ denied. The City appeals.

II. DISCUSSION

[¶8] The role of 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." *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982). When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, "we review only the factual findings actually made and the legal standards actually applied by the [ALJ]." *Daley v. Spinnaker Indus.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

A. Validity of the Rule

[¶9] The City contends that Rule, ch. 1, § 10(1) is invalid, and that without operation of the rule, Mr. Morrison fails to meet the prerequisites for application of the statutory presumption.[3] We disagree.

[¶10] Title 39-A M.R.S.A. § 328-B(3) provides that for the presumption to apply, the firefighter must have undergone a "standard, medically acceptable test for evidence of the cancer for which the presumption is sought or evidence of the medical conditions derived from the disease, which test failed to indicate the presence or condition of cancer." 39-A M.R.S.A. § 328-B(3).

[¶11] For firefighters like Mr. Morrison with a date of injury before August 15, 2012,[4] the rule provides that the statutory presumption may apply

[3] The City also argues that Mr. Morrison's affidavit pursuant to section 328-B(7) is invalid because, as the City understands, he lacked personal knowledge of carcinogens associated with his cancer, and thus his denial of any such exposure lacks evidentiary value. We consider this argument waived because it was not addressed in the City's motion for findings. The City specifically sought findings on other issues and then attempted to generally incorporate all other arguments and issues previously identified in closing papers. Such a general incorporation did not adequately bring the issue of the validity of the affidavit to the ALJ's attention. *See Melhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 (finding issues raised only in a perfunctory manner to be waived). In addition, the affidavit issue appears for the first time on appeal in the City's reply brief. Because the ALJ was not fairly presented with that argument, the issue is not preserved for appellate review. *See Morey v. Stratton*, 2000 ME 147, ¶¶ 8–10, 756 A.2d 496 (emphasizing "the importance of bringing the specific challenge to the attention of the trial court at a time when the court may consider and react to the challenge"). In any event, it appears that Mr. Morrison complied with the statutory requirement set forth in 328-B(7) that he file an affidavit declaring "to the best of [his] knowledge and belief" that his cancer was not prevalent among family members nor had he substantial lifetime exposures to carcinogens associated with his cancer. The City's complaint is that Mr. Morrison lacked any personal knowledge of such carcinogens; but the statute does not, by its terms, require such knowledge.

[4] The effective date of the rule is August 15, 2012. Subsection 2 of the rule provides similar and more specific requirements for firefighters with dates of injury after the effective date. *See* Rule, ch. 1, § 10, *supra* note 2.

> if, during the time of employment as a firefighter, the firefighter underwent a standard physical exam with blood work and the examination and the blood work were not positive for the cancer for which the presumption is sought, or if the examination or blood work were positive for the cancer for which the presumption is sought, follow up tests ordered by the physician conducting the physical were determined to be negative for the cancer for which the presumption is sought.

Me. W.C.B. Rule, ch. 1, § 10(1).

[¶12] The City contends that the board exceeded its rulemaking authority when enacting the rule, and that the rule itself is invalid because it conflicts with the statute. We disagree.

[¶13] The board derives its rulemaking authority from 39-A M.R.S.A. § 152(2) (Supp. 2018), which provides:

> **Rules.** Subject to any applicable requirements of the Maine Administrative Procedure Act, the board shall adopt rules to accomplish the purposes of this Act. Those rules may define terms, prescribe forms and make suitable orders of procedure to ensure the speedy, efficient, just and inexpensive disposition of all proceedings under this Act.

The Law Court has recognized

> a legislative intent to delegate broad authority to the Board to interpret the Act, either by rule or through its decision-making authority when the statutory language is ambiguous. *See Bridgeman v. S.D. Warren Co.*, 2005 ME 38, ¶ 11, 872 A.2d 961, 964-65; *Jasch v. Anchorage Inn*, 2002 ME 106, ¶ 9, 799 A.2d 1216, 1218; *see also Russell v. Russell's Appliance Serv.*, 2001 ME 32, ¶ 10 n.3, 766 A.2d 67, 71. [The Court has] noted that "[t]he Act reflects not so much a legislative intent to comprehensively address every workers' compensation issue in a detailed and specific way, but to commit some issues to a process in which the participants in the system, labor and management, can work

> out flexible and realistic solutions." *Russell*, 2001 ME 32, ¶ 10 n.3, 766 A.2d at 71 (quoting *Bureau v. Staffing Network, Inc.*, 678 A.2d 583, 588 n.2 (Me. 1996)). Accordingly, [the Court] gives deference to board rules interpreting the Act and has encouraged the board to enact rules to fill in the "gray areas" that were intentionally left in the Act. *See, e.g., Bridgeman*, 2005 ME 38, ¶ 11, 872 A.2d at 964-65; *Russell*, 2001 ME 32, ¶ 10 n.3, 766 A.2d at 71; *Bureau*, 678 A.2d at 588 n.2.

Baker v. S. D. Warren Co., 2010 ME 87, ¶ 10, 3 A.3d 380. However, the board's rulemaking authority is not unlimited. A rule may be struck down, for example, when the rule is in direct conflict with a statutory provision. *See, e.g., Lydon v. Sprinkler Servs.*, 2004 ME 16, ¶¶ 12-15, 841 A.2d 793; *Beaulieu v. Me. Med. Ctr.*, 675 A.2d 110, 111 (Me. 1996).

[¶14] The ALJ determined that section 328-B could be interpreted in more than one way, thus it was within the board's authority to promulgate the rule. We agree with this assessment. The phrase "standard, medically acceptable test for evidence of the cancer for which the presumption is sought" is not further defined in the statute. As the expert testimony indicated, in the case of brain cancer, it could require invasive, expensive imaging ordinarily employed only when symptoms are present. Or, the phrase could mean a general health screening that would look for "evidence of medical conditions derived from the disease." Because the provision is reasonably susceptible of different interpretations, it is ambiguous, *see Damon v. S.D. Warren Co.*, 2010 ME 24, ¶ 10, 990 A.2d 1028, and the board was within its authority to define an ambiguous term, *see* 39-A M.R.S.A. § 152(2); *see also*

Bridgeman v. S.D. Warren Co., 2005 ME 38, ¶ 11, 872 A.2d 961; *Russell v. Russell's Appliance Serv*., 2001 ME 32, ¶ 10 n.3, 766 A.2d 67; *Bureau v. Staffing Network, Inc.*, 678 A.2d 583, 588 n.2 (Me. 1996).

[¶15] The City further argues that the rule conflicts with the statute because it lowers the level of medical certainty the Legislature intended when requiring a standard, medically acceptable test for brain cancer. The City asserts that the only standard, medically acceptable test for brain cancer requires imaging, such as an MRI or CAT scan. Because, the City contends, a standard physical exam with blood work is insufficient to test for preexisting brain cancer, the rule is invalid as inconsistent with the statute.

[¶16] The ALJ determined that the rule does not conflict with the statute; he concluded that "it simply defines what constitutes a medically acceptable 'standard' to be used in the analysis." We agree that there is no conflict.

[¶17] The rule reflects an intent to strike a balance between acceptable medical practice and the need to screen for preexisting malignancies. The board viewed a "medically acceptable test" as one that "comports with good medical practice." Workers' Compensation Board, Cancer Presumption for Firefighters, Basis Statement to Secretary of State Pursuant to Maine Administrative Procedures Act, 5 M.R.S.A. § 8052(5) (2012) (available by request from office of Me. Sec. of State). Significantly, the Legislature deemed a negative test for *evidence* of cancer—

as distinct from a conclusive showing of the cancer itself—to be adequate for application of the presumption. Because the Legislature was not precise or explicit in stating what is required, the board exercised its rulemaking authority to fill in the "gray areas," bringing practical and appropriate considerations to bear on the operation of the Act. And by defining "medically acceptable test," the board intended to reduce litigation, add clarity, and enhance efficiency in the system. *Id.*

[¶18] The City further argues that if there is no screening test for the cancer at issue that can reasonably rule out preexisting cancer, the statutory presumption should not be available, and the firefighter asserting a claim for such work-related cancer should be put to their proof. The City argues in its brief:

> It is accurate that, at this immediate juncture in medical history, few if any firefighters could satisfy the 'standard, medically acceptable test' prerequisite. . . . This fact, while understandably unwelcome to the firefighter community, does not permit the Board to gut the statutory standard on the rationale that all firefighters are entitled to the presumption.

[¶19] This issue, however, was decided by the Legislature. The Legislature heard expert testimony, considered public policy and the state of the science, debated which cancers should be covered by the presumption, and despite disagreements, ultimately voted to include brain cancer. *See generally* 1 Legis. Rec. H-494-501 (1st Reg. Sess. 2009) (House floor debate on bill and amendments); Legis. Rec. S-601-07 (1st Reg. Sess. 2009) (Senate floor debate on bill and amendments). Moreover, the board considered this contention when promulgating the rule, and determined

that to accept it "would effectively remove seven of the ten cancers from the Act, [which] would go beyond the board's rulemaking authority." *Basis Statement.*

[¶20] Workers' Compensation Board Rule, ch. 1, § 10(1), providing for a standard physical exam with blood work for purposes of cases involving brain cancer, is not in conflict with section 328-B and is therefore valid. Further, because the ALJ found facts establishing that Mr. Morrison met the requirements of the rule,[5] it was not error to apply the section 328-B presumption to his case.

B. Operation of the Presumption

[¶21] The ALJ evaluated the evidence and observed that none of the parties' experts could "honestly testify to [Mr. Morrison's] individual carcinogenic risk." He further determined that without the presumption, the evidence in this case would be in equipoise, and concluded that "[the City] has not carried its burden of proving that it is more probable than not that [Mr. Morrison's] cancer is unrelated to firefighting."

[¶22] The City argues that the ALJ misapplied the section 328-B presumption by shifting the burden to the City to disprove the presumed facts on a more likely than not basis pursuant to *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982). It urges

[5] The City also argues that the ALJ erred by failing to find as fact what specifically Mr. Morrison did to satisfy section 328-B(3). The ALJ expressly found that Mr. Morrison had "met the requirements of . . . W.C.B. Rule, Ch. 1, § 10(1)." This is equivalent to a finding that Morrison underwent a physical exam with blood work. This finding is supported by competent evidence in the record, including a letter from Mr. Morrison's treating physician, Dr. Tockman, and a report from Dr. Weaver, indicating that standard physical examinations with bloodwork were performed on Mr. Morrison over the course of his medical care with Dr. Tockman, none of which indicated evidence of brain cancer.

that the correct operation of the presumption is established in *Toomey v. City of Portland*, 391 A.2d 325 (Me. 1978), wherein an employer need only show that a presumed fact is as likely false as true, at which point the presumption disappears and the employee must prove the fact by a preponderance of the evidence. *See id.* at 332 n.7.

[¶23] In *Estate of Gregory Sullwold v. The Salvation Army*, Me. W.C.B. No. 13-13 (App. Div. 2013), an en banc panel of the Appellate Division rejected the *Toomey* approach, and adopted the burden shifting approach set forth in *Hall* and M.R. Evid. 301. *Id.* ¶ 21. Although on appeal the Law Court noted that the *Toomey/Hall* discussion in the Appellate Division's *Sullwold* decision was likely *obiter dictum*, *Estate of Gregory Sullwold v. The Salvation Army*, 2015 ME 4, ¶ 18 n.5, 108 A.3d 1265, two subsequent Appellate Division panels have adopted the *Hall* approach, holding that when an employee meets the statutory prerequisites for a presumption, the burden of proof shifts to the employer to prove the non-existence of the presumed fact by a more probable than not standard. *See Lavalle v. Town of Bridgton*, Me. W.C.B. No. 15-13, ¶ 13 (App. Div. 2015) (applying the presumption in 39-A M.R.S.A. § 327 (2001)); *see also Axelsen v. Interstate Brands Corp.*, Me. W.C.B. No. 15-27, ¶ 18 (App. Div. 2015) (en banc) (applying the presumption in 39-A M.R.S.A. § 217 (Supp. 2018)).

[¶24] The ALJ did not err when shifting the burden of proof to the City to disprove the presumed facts, or when concluding that the City failed to sustain its burden.

III. CONCLUSION

[¶25] Me. W.C.B. Rule, ch. 1, § 10(1) is not in conflict with 39-A M.R.S.A. § 328-B, and was validly adopted pursuant to board's rulemaking authority. The ALJ did not err by concluding that Mr. Morrison's physical exam and history satisfied the requirements of section 328-B(3) pursuant to that rule. In applying the section 328-B presumption, the ALJ did not misconstrue or misapply the law by shifting the burden of proof to the City, nor by determining that the City did not meet its burden of proof.

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. 2018).

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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