DARLA J. POTTER
(Appellee)

v.

COOKE AQUACULTURE
(Appellee)

and

GREAT FALLS INSURANCE COMPANY
(Appellant)

Argument held: September 12, 2019
Decided: October 18, 2019

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

[¶1] Great Falls Insurance Company appeals from a decision of a Workers' Compensation Board administrative law judge (*Pelletier, ALJ*) granting Darla Potter's Petitions for Award. Great Falls contends that the ALJ erred when determining that Ms. Potter's claims do not fall under the exclusive jurisdiction of federal law, specifically the Jones Act, 46 U.S.C.S. § 30104; and further contends that the ALJ abused his discretion by denying the request to allow testimony from a legal expert on the Jones Act and by failing to grant a motion to conduct a view of the workplace. We disagree with these contentions and affirm the ALJ's decision.

I. BACKGROUND

[¶2] Darla Potter has worked as a marine technician for Cooke Aquaculture's salmon farming operation for approximately 25 years. During the period at issue, her job required her to travel from shore to salmon pens located at Deep Cove, less than a mile offshore of Eastport, in either a skiff or motorized barge. The salmon pens are typically 300 feet in diameter and consist of piping and nets. Her duties involved securing the netting; feeding and otherwise tending the fish; harvesting the fish; and cleaning, maintaining, and repairing the pens and nets—all while bobbing up and down on the ocean. To perform her work duties, she would stand on pipes that secure the nets that hold the salmon. In addition, Ms. Potter's work required her, from time to time, to travel in a skiff or motorized barge to work on shore; or to travel to a fixed, nonmotorized feed barge located near the pens to get supplies.

[¶3] Ms. Potter suffered an injury to her left knee on November 29, 2015, when her foot slipped on the pipes connected to the salmon pens and her left knee struck a hard surface. She continued working until January of 2017, at which point her left knee condition progressed to the point that she could no longer work on the salmon cages. She was given a lighter duty job on-shore, and continues to work in that capacity. The ALJ found that Ms. Potter suffered two work-related injuries to her left knee: an acute injury on November 19, 2015, and a gradual injury on January 27, 2017.

[¶4] Great Falls initially challenged the board's subject matter jurisdiction in the case, maintaining that Ms. Potter's claims fall within the exclusive jurisdiction of the Jones Act, and therefore she could not be considered an "employee" entitled to the protection of the Maine Workers' Compensation Act. 39-A §102(11)(A)(1) (Supp. 2018) (expressly excluding "[p]ersons engaged in maritime employment . . . who are within the exclusive jurisdiction of admiralty law or the laws of the United States" from the definition of "employee"). Resolution of this issue required a finding of whether Ms. Potter is a "seaman" under the Jones Act. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 370 (1995). The ALJ determined that Great Falls had not carried its burden of proof on this issue, applied the Maine Workers' Compensation Act, and awarded the protection of the Act for the two injuries to her left knee.

[¶5] Great Falls filed a motion for findings of fact and conclusions of law, which the ALJ denied, and then filed this appeal.

II. DISCUSSION

A. Standard of Review

[¶6] Great Falls initially contends that we should review the ALJ's determination on the issue of subject matter jurisdiction *de novo*, consistent with the Law Court's decision in *Dorr v. Maine Maritime Academy*, 670 A. 2d 930, 932 (Me. 1996). In that case, the commissioner had denied the claimant's petition for review on the basis that the claimant was a Jones Act seaman, subject to "the exclusive

jurisdiction of admiralty law or the laws of the United States." *Id.* at 931. The Law Court reviewed the decision *de novo*, reasoning that:

> The issue of whether an employee falls within the exclusive jurisdiction of a federal statute does not involve an interpretation of the Workers' Compensation Act, nor does it fall within the Commission's traditional area of expertise. We therefore conduct an independent review of the Commission's decision.

Id. at 932. The Court vacated the commissioner's conclusion that the employee was a Jones Act seaman and remanded for additional proceedings pursuant to the Workers' Compensation Act. *Id.*

[¶7] We disagree with Great Falls' contention that we should apply the broad scope of review employed by the Court in *Dorr*. The issue of whether a claimant is a Jones Act seaman is a mixed question of fact and law. *Chandris*, 515 U.S. at 369. Our review of factual questions is circumscribed by statute, 39-A M.R.S.A. § 318 ("The administrative law judge's decision . . . on all findings of fact is final,") and is limited to assuring that those findings are supported by competent evidence, *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) ("The Appellate Division is not empowered to engage in *de novo* review of factual questions before the Commission."). Competent evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See In re Maine Clean Fuels, Inc.*, 310 A.2d 736, 751 (Me. 1973) (quotation marks omitted).

[¶8] Because we do not possess superior expertise than the ALJ in evaluating the claimant's status as an employee or a seaman, we apply our ordinary standard of review, as set forth in *Pomerleau.* And, because Great Falls requested and proposed additional findings of fact and conclusions of law, "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). The party who has the burden of proof at hearing may successfully challenge an ALJ's conclusion on that burden only if they can show that a contrary conclusion was compelled by the evidence. *Efstathiou v. Efstathiou*, 2009 ME 107, ¶ 10, 982 A.2d 339; *Savage v. Georgia Pacific Corp*., Me. W.C.B. No. 13-5, ¶ 7 (App. Div. 2014). Lack of subject matter jurisdiction is an affirmative defense for which Great Falls bore the burden of proof. *See, e.g., Patriotti v. General Elec. Co.*, 587 A.2d 231, 232 (Me. 1991).

B. Subject Matter Jurisdiction

[¶9] Great Falls contends the ALJ erred when determining that the board has subject matter jurisdiction in this case. We disagree.

[¶10] Subject matter jurisdiction refers to whether the judicial or administrative body has statutory or common law authority to adjudicate the matter. Donald G. Alexander, *Maine Appellate Practice* § 201 at 197 (4th ed. 2013); *see also Jensen v. Jensen*, 2015 ME 105, ¶ 11, 121 A.3d 809; *Hawley v. Murphy*, 1999

ME 127, ¶ 8, 736 A.2d 268. An Appellate Division panel recently held that "the issue of an injured worker's status as an employee or Jones Act seaman is a threshold question that determines whether the board has statutory authority to adjudicate the claim. Thus, the issue goes to the board's subject matter jurisdiction." *Wallace v. Cooke Aquaculture USA, Inc.*, Me. W.C.B. No. 19-35, ¶ 19 (App. Div. 2019).[1]

[¶11] The Jones Act, also known as the Merchant Marine Act, 46 U.S.C.S. § 30104, supersedes state law dealing with injuries suffered by a "seaman" in the course of employment. *Lindgren v. United States*, 281 U.S. 38, 45 (1930); *Dorr*, 670 A. 2d at 932. Pursuant to the Jones Act:

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C.S. § 30104.

[1] The panel stated in *Wallace:*

> The Workers' Compensation Act gives the board the authority to adjudicate the rights of "an employee who . . . receives a personal injury arising out of and in the course of employment or is disabled by occupational disease" as against that employee's employer and workers' compensation insurer. 39-A M.R.S.A.§ 201 (2001). The statutory definition of an "employee" expressly excludes "[p]ersons engaged in maritime employment . . . who are within the exclusive jurisdiction of admiralty law or the laws of the United States. . . ." 39-A M.R.S.A. §102(11)(A)(1) (Supp. 2018). Thus, the Act does not give the board the authority to decide cases involving persons within the exclusive jurisdiction of federal law.

Id. ¶ 9.

[¶12] The Supreme Court parsed the definition of "seaman" in *Chandris*, 515 U.S. 347, reserving the Jones Act remedy to "sea-based maritime employees whose work regularly exposes them to the special hazards and disadvantages to which they who go down to sea in ships are subjected." *Id.* at 370 (quotation marks omitted). "A seaman must have a connection with a vessel in navigation that is substantial in both duration and nature." *Id.* The durational element requires a showing that the worker spends "about 30% of [their] time in the service of a vessel in navigation." *Id.* at 371. A "vessel in navigation" is a "watercraft . . . practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 497 (2005) (applying Longshore & Harbor Workers' Compensation Act); *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295, 299 (5th Cir. 2008) (holding that *Stewart*'s analysis of the term "vessel" applies equally to the LHWCA and to the Jones Act). The parties stipulated that the salmon cages are not vessels in navigation.

[¶13] The ALJ heard testimony from Ms. Potter regarding her duties. She testified that she spent about 75% of her time working on the cages, and her remaining time on the skiff or motorized barge traveling either to and from shore or around the cages, and occasionally working on shore or on the nonmotorized feed barge. The ALJ found Ms. Potter's testimony to be credible and found as fact that Ms. Potter spends less than 30% of her time in the service of a vessel in navigation,

including the time spent commuting back and forth from the pens to shore, and time spent on the skiff during the work day. The ALJ concluded that the nonmotorized feed barge is not a vessel in navigation.

[¶14] Great Falls maintains that the ALJ misconstrued Ms. Potter's testimony regarding the amount of time she spent on the cages and therefore his finding that she spent less than 30% of her time on a vessel in navigation is not supported by competent evidence. Although the ALJ found that Ms. Potter's testimony referred to 75% of her entire work day, Great Falls maintains that the testimony must be read to support the proposition that *once on the cages*, 75% of her time was spent on the cages and the rest of her time spent performing duties that required the skiff such as getting materials or pushing the net in. Additionally, Great Falls contends the ALJ did not count the time Ms. Potter testified that she travels to shore during the workday on the skiff or barge to obtain supplies.

[¶15] We disagree with this contention. The ALJ's factual finding that Ms. Potter spent 75% of her work day undertaking duties associated with the salmon pens or on shore and not on a vessel in navigation is supported by competent evidence. Ms. Potter testified:

> Q [by Ms. Potter's counsel]. And so how much time are you spending on the boat versus how much time you spend on -- on the pens or cages?
>
> A [Ms. Potter]. When you're working on a cage, you're spending probably 75% of your time on the cage. The only reason you'd get up on the boat is if you -- you've got to actually push the net in or you're

> -- you're getting material that you need to tie in around the cages. So when you're working on the -- on the cages, you're working on the cages.

She later testified on cross-examination:

> Q [by Great Falls' counsel]. And you said when you're working on a cage, you're about 75% of your time on the cage?
>
> A. Right.
>
> Q. Now you're not always working on cages, correct?
>
> A. No. It runs in -- like I say in cycles.
>
> Q. Okay. Is there a time when you're not working on the cages that you would be say in a vessel for greater than 30 percent of your day?
>
> A. Not really.

[¶16] Ms. Potter further testified that after the fish are harvested, the cages must remain fallow for a period, and her duties vary during that time. She testified that during one fallow period, she spent six months on shore cutting rope.

[¶17] Although the alternative interpretation of Ms. Potter's testimony proffered by Great Falls is possible, it is certainly not compelled by the record before us. In considering whether the ALJ's findings are supported by competent evidence, "[i]t is immaterial that there was also evidence which would have supported a different conclusion." *Rowe v. Bath Iron Works Corp.*, 428 A.2d 71, 73 (Me. 1981). The ALJ found Ms. Potter to be a credible witness, and her testimony is evidence that a reasonable mind would accept as adequate to support the finding that she

worked less than 30% of her time in the service of a vessel in navigation. *See Boober v. Great No. Paper Co.*, 398 A.2d 371, 375 (Me. 1979) (stating that it is for the ALJ, who "had the opportunity to hear the witnesses and judge their credibility . . . to resolve the evidentiary conflicts in the case." (quoting *Lovejoy v. Beech Hill Dry Wall Co., Inc.*, 361 A.2d 252, 254 (Me. 1976)).

[¶18] Great Falls' argument that the ALJ erred by failing to include time spent on the feed barge as time spent in service of a vessel in navigation also lacks merit. Great Falls conceded in its reply brief that "[t]he vessel in navigation in these circumstances is the skiff or barge the crew takes from the shore to the salmon cages." It argues that the time spent on the cages or feed barge is spent in service of the skiff's mission, which is transportation to and from the cages and as a work station for servicing the cages. In this scenario, the skiff is the main vessel, and all work is done in its service. Ms. Potter argues the opposite: that the time spent on the skiff, motorized barge, and feed barge are all spent in the service of the salmon farming operation—not in the service of a vessel in navigation.

[¶19] The ALJ did not address this issue other than to state that the feed "barges are in service of the pens," and we do not need to reach it for the following reason. There is no evidence in the record of how much time Ms. Potter spent on the feed barge. Therefore, Great Falls did not meet its burden of proof on this issue of whether that time should be included.

[¶20] The ALJ did not err when determining that Great Falls did not meet its burden to establish that Ms. Potter is under the exclusive jurisdiction of admiralty law or the laws of the United States; therefore, he did not err when treating her as an employee under the Workers' Compensation Act.

C. Discretionary Rulings

[¶21] Great Falls contends that the ALJ abused his discretion when denying its requests for a site visit and to present expert legal testimony regarding the Jones Act, because it deprived it of a reasonable opportunity to meet and rebut evidence produced by Ms. Potter or Cooke Aquaculture.

[¶22] We review the ALJ's decisions regarding the conduct of a hearing to determine whether, in light of all the circumstances, the ALJ acted beyond the scope of his allowable discretion. *See Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 (Me. 1985) (applying abuse of discretion standard of review for administrative body's ruling on a motion to dismiss); *Matthews v. Shaw's Supermarkets*, Me. W.C.B. No. 15-25, ¶ 28 (App. Div. 2015) (applying abuse of discretion standard to ALJ's decision to conduct hearings in a certain manner). We will vacate the hearing officer's decision if the proceedings violated due process; that is, if they were fundamentally unfair. *See Kuvaja*, 495 A.2d at 806.

[¶23] The ALJ determined that a site visit in this case would not assist in the decision-making process. However, the ALJ did allow testimony from a coworker,

also employed as a marine technician, who testified regarding the work site and distances traveled on the skiff or motorized barge during the workday.

[¶24] Regarding the decision to exclude the proposed expert testimony, Great Falls sought to have a Massachusetts attorney testify as an expert in the field of maritime law. The ALJ refused the request because such testimony amounted to legal argument rather than evidence, and therefore was not relevant. The ALJ reasoned that it would be acceptable for the attorney to act as counsel for Great Falls in order to advance legal arguments, but not to testify as an expert witness. Great Falls does not contend that it was otherwise denied the opportunity to present legal arguments regarding the Jones Act, and in fact did so in its position papers.

[¶25] The ALJ's decisions to deny the site visit and to exclude the proposed expert testimony were not fundamentally unfair and therefore did not violate due process.

III. CONCLUSION

[¶26] The ALJ's factual findings are supported by competent evidence and the decision involved no misconception or misapplication of the law. The ALJ did not abuse his discretion in denying the motions for expert testimony and for a view of the workplace.

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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