DONALD PELKEY, III
(Appellee)

v.

W.E. AUBUCHON CO. INC.
(Appellant)

and

CITIZENS INSURANCE CO. OF AMERICA
(Insurer)

Argument held: February 11, 2021
Decided: June 6, 2022

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

[¶1] W.E. Aubuchon Co., Inc., (Aubuchon) appeals from a decision of an administrative law judge of the Workers' Compensation Board (*Stovall, ALJ*) granting Donald Pelkey's Petition for Award regarding an injury date of December 9, 2017. The ALJ concluded that Mr. Pelkey's physical work injury contributed to a psychological sequela and awarded retroactive and ongoing partial incapacity benefits reduced to reflect a full-time imputed earning capacity. Aubuchon argues that the ALJ committed reversible error by (1) admitting into evidence a letter from Mr. Pelkey's licensed clinical professional counselor (LCPC); (2) finding that Mr. Pelkey established a psychological sequela to his physical injury; (3) finding that Mr. Pelkey refused an offer of work with good and reasonable cause pursuant to 39-

A M.R.S.A. § 214; and (4) making findings regarding Mr. Pelkey's treatment in the workplace by supervisors and the psychological component of the case when a Petition to Remedy Discrimination under 39-A M.R.S.A. § 353 was pending but not consolidated with the Petition for Award. We disagree and affirm the decision.

I. BACKGROUND

[¶2] Donald Pelkey worked in the construction trades before going to work in the Portland, Maine, Aubuchon hardware store in January of 2015. Mr. Pelkey was promoted to store manager and had a history of left knee injuries when he again injured his left knee at work on December 9, 2017. There is no dispute that Mr. Pelkey's preexisting left knee condition and work injury meet the statutory requirements for compensation pursuant to 39-A M.R.S.A. § 201(4). He underwent surgery on his left knee and returned to work with reduced pay and duties. Mr. Pelkey testified that his post-injury restrictions were not honored at work and that he was humiliated by denigrating treatment from his supervisor and a human resources representative. Mr. Pelkey experienced a panic attack while driving to work on September 24, 2018, and has not returned to work since.

[¶3] After September 24, 2018, Aubuchon closed the Portland store where Mr. Pelkey had worked. Mr. Pelkey sought further employment at the company's store in Buxton, close to his home, but was instead offered a position in the company's store in Naples, a farther drive from Mr. Pelkey's home. Mr. Pelkey

testified that he did not accept the offer to work in the Naples store because it was too far to drive with his left knee condition and due to his mental health, he is unable to work at this time, particularly for Aubuchon.

[¶4] Hearings were held in the case on April 5, 2019, May 15, 2019, and July 8, 2019. Mr. Pelkey began treating with an LCPC on June 24, 2019. At the conclusion of the hearing on July 8, 2019, the parties stated their intention to acquire the records of the LCPC. The ALJ advised that the case would be next set for a conference of counsel and any further issues would be discussed at that time.[1]

[¶5] The parties then received the LCPC's treatment records and a letter from the LCPC dated August 15, 2019, in which the LCPC advised that he had previously treated Mr. Pelkey for depression in 2007, ending when that condition was in remission in 2008. Further, the LCPC advised that Mr. Pelkey is currently being treated for post-traumatic stress disorder (PTSD) due to "public humiliation, a demotion due to injury and a negative work environment[.]" The LCPC opined that Mr. Pelkey could not return to work for Aubuchon due to his knee and PTSD symptoms.

[¶6] Counsel for the parties attended a conference with the ALJ on October 2, 2019, at which the LCPC's records were admitted into evidence.[2]

[1] With his written submission, counsel for Mr. Pelkey asserted that the parties agreed that the LCPC's records would be admissible. This assertion is unsupported by the transcript of the proceeding.

[2] Although the parties disagree about when Aubuchon objected to admission of the LCPC's letter, the record demonstrates that Aubuchon objected no later than in its post decree proposed further findings of

[¶7] During the course of this litigation, Mr. Pelkey filed a Petition to Remedy Discrimination under 39-A M.R.S.A. § 353. The two proceedings were not consolidated.

[¶8] The ALJ issued a decision on the Petition for Award dated December 31, 2019, finding that Mr. Pelkey was ill-treated by his supervisors because of his work injury and that the work injury resulted in a psychological sequela as set out in the LCPC's letter of August 15, 2019. Further, the ALJ relied upon the opinion of the LCPC and the testimony of Mr. Pelkey to find that he refused the offer to work in the Naples store with good and reasonable cause pursuant to 39-A M.R.S.A. § 214. Finally, the ALJ awarded Mr. Pelkey ongoing partial incapacity benefits reduced by an imputed earning capacity of $440.00 per week.

[¶9] Aubuchon filed a Motion for Additional Findings of Fact and Conclusions of Law repeating its objection to the admission of the LCPC's records, among other issues. In a modified decision dated March 30, 2020, the ALJ determined that the LCPC's records were not subject to the discovery deadlines of 39-A M.R.S.A. § 309(3) because an LCPC's credentials are not among the medical credentials listed in that subsection. Rather, the ALJ applied the more general standard for admission of evidence pursuant to 39-A M.R.S.A. § 309(2), found that

fact and conclusions of law, which in a reasonable exercise of his discretion, the ALJ treated as timely and proceeded to address in his further findings of fact and conclusions of law.

the LCPC's records met that standard, and declined to alter the outcome of the decision. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶10] In general, the role of the Appellate Division "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 Aubuchon requested 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 [ALJ]." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446.

B. Admission of LCPC's records

[¶11] Title 39-A M.R.S.A. § 309(3) provides, in relevant part:

> Sworn written evidence may not be admitted unless the author is available for cross-examination or subject to subpoena; except that sworn statements by a medical doctor or osteopathic physician relating to medical questions, by a psychologist relating to psychological questions, by a chiropractor relating to chiropractic questions, by a certified nurse practitioner who qualifies as an advanced practice registered nurse relating to advanced practice registered nursing questions or by a physician's assistant relating to physician assistance questions are admissible in workers' compensation hearings only if notice of the testimony to be used is given and service of a copy of the

> letter or report is made on the opposing counsel 14 days before the scheduled hearing.

In contrast, 39-A M.R.S.A. § 309(2) provides that the standard for admissibility of evidence in a board proceeding generally is whether "it is the kind of evidence on which reasonable persons are accustomed to relying in the conduct of serious affairs."

[¶12] Aubuchon argues that the ALJ erred when he admitted the letter of the LCPC after reasoning that since the LCPC's credentials are not listed in section 309(3), the general standard of admissibility under section 309(2) applies. Specifically, Aubuchon argues that if an LCPC's opinion is to be relied upon as that of a medical expert, then such an opinion should have been subject to the stricter discovery rules that control the listed medical experts in section 309(3). Mr. Pelkey argues that the ALJ correctly applied section 309(2) because the opinion of an LCPC does not fall within the plain language of section 309(3).

[¶13] Aubuchon's position is well reasoned but contrary to the plain language of the Workers' Compensation Act. The Act is "uniquely statutory" and therefore actions by an ALJ must be authorized by Title 39-A; there are no powers of "general equity" available upon the request of the parties. *Grubb v. S.D. Warren*, 2003 ME 139, ¶ 19, 837 A.2d 117. When asked to review an interpretation of the Act, we follow the Law Court's guidance to "first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent

results." *Graves v. Brockway-Smith*, 2012 ME 128, ¶ 9, 55 A.3d 456. It is only when the statutory language is ambiguous that an adjudicator may "look beyond the plain meaning and consider other indicia of legislative intent, including legislative history." *Damon v. S.D. Warren Co.*, 2010 ME 24, ¶ 10, 990 A.2d 1028.

[¶14] In this case, the ALJ applied the plain language of sections 309(2) and (3) and determined that the LCPC's credentials are not listed as subject to the stricter discovery timelines of section 309(3), therefore the general admissibility standard of section 309(2) is applicable. We find no reversible error in the decision to admit the LCPC's letter.[3]

C. Establishing Psychological Sequela

[¶15] Aubuchon argues that the evidence of record does not support the ALJ's finding that Mr. Pelkey's orthopedic knee injury led to a compensable psychological sequela. Further, Aubuchon argues that because Mr. Pelkey had a prior mental health diagnosis, the ALJ was required to apply 39-A M.R.S.A. § 201(4) in any analysis of whether his current mental health condition is covered by the Workers' Compensation Act. We disagree with these contentions.

[¶16] First, the ALJ cited portions of Mr. Pelkey's testimony and the LCPC's causation opinion as the basis for finding that Mr. Pelkey sustained a psychological

[3] We find the alternative argument raised by Aubuchon that the LCPC's letter also fails to meet the standard of admissibility under section 309(2) to be without merit.

sequela to his physical injury. Because this constitutes competent evidence that supports the factual finding, the finding is not subject to reversal on appeal. 39-A M.R.S.A. § 318. Although Aubuchon asserts that the evidence supporting its position carries more persuasive weight than that relied on by the ALJ, it is within the scope of the ALJ's, discretion, and indeed, it is the ALJ's responsibility, to assign weight to the evidence and resolve the evidentiary conflicts in the case. *See Boober v. Great N. Paper Co.*, 398 A.2d 371, 375 (Me. 1979).

[¶17] Further, we find no requirement that an ALJ apply section 201(4),[4] which by its plain language discusses "preexisting physical conditions" to a case such as Mr. Pelkey's, in which a compensable orthopedic injury contributes to the development of a psychological sequela, when the worker had a prior psychological condition.

D. Refusal of Work

[¶18] Aubuchon next argues that the ALJ erred regarding Mr. Pelkey's refusal to work in the Naples store when he offered to work in the Buxton store and gave two reasons for his inability to work in the Naples store: the driving distance and his emotional state. We disagree.

[¶19] Section 214(1)(A) provides:

[4] Title 39-A M.R.S.A. § 201(4) provides: "If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner."

> If an employee receives a bona fide offer of reasonable employment from the previous employer or another employer or through the Bureau of Employment Services and the employee refuses that employment without good and reasonable cause, the employee is considered to have voluntarily withdrawn from the work force and is no longer entitled to any wage loss benefits under this Act during the period of the refusal.

[¶20] There is no dispute that the job offered to Mr. Pelkey was a bona fide offer of employment. Accordingly, once Aubuchon offered this employment, Mr. Pelkey was obligated to accept that offer, absent good and reasonable cause for refusal. *Thompson v. Earle W. Noyes & Sons, Inc*., 2007 ME 143, ¶ 7, 935 A.2d 663.

[¶21] The ALJ relied upon the opinion of the LCPC and the testimony of Mr. Pelkey to find that he refused the offer to work in the Naples store with good and reasonable cause. The evidence cited by the ALJ is competent to support a finding of good and reasonable cause for Mr. Pelkey to refuse to return to work. 39-A M.R.S.A. § 214(5) (‘“Reasonable employment,’” as used in this section, means any work that is within the employee’s capacity to perform that poses no clear and proximate threat to the employee’s health and safety and that is within a reasonable distance from that employee’s residence.”); *Thompson v. Aroostook Medical Ctr*., Me. W.C.B. No. 20-6, ¶ 13 (App. Div. 2020) (holding that the ALJ’s finding that the employee’s anxiety existed at a sufficient level to constitute good and reasonable cause to refuse the employer’s bona fide offer of employment is supported by competent evidence and falls within the bounds of the ALJ’s sound discretion).

E. Discrimination Pleadings, Due Process, and Equitable Relief

[¶22] Aubuchon argues that where a separate petition to remedy discrimination was pending but not consolidated with Mr. Pelkey's petition for award, the ALJ violated its due process right to have notice and be heard when the ALJ made findings regarding Mr. Pelkey's treatment by supervisors. Further, Aubuchon argues that the ALJ engaged in equitable relief when granting the pending petition. We find no support for either argument.

[¶23] Though uncited by Aubuchon in its written submission, the standard required by the due process clause of the Maine (art. I, § 6-A) and Federal (14th amendment) constitutions are the same:[5] "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Valliere v. Workers' Compensation Bd.*, 669 A.2d 1328, 1330 (Me. 1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

[¶24] Here, Aubuchon was party to three hearings and submitted written arguments before the ALJ's initial decision. Moreover, it submitted proposed findings of fact and conclusions of law following the ALJ's decision as provided in 39-A M.R.S.A. § 318. Under these facts, we find no violation of due process before the ALJ. The ALJ discharged his statutory duty to "in a summary manner decide the merits of the controversy." 39-A M.R.S.A. § 318. That there was also pending an

[5] *In re Heather C.*, 2000 ME 99, ¶ 21, 751 A.2d 448 ("the Maine Constitution and the Constitution of the United States are declarative of identical concepts of due process.") (internal citations omitted).

unconsolidated petition to remedy discrimination pursuant to section 353 does not alter this conclusion. Because Mr. Pelkey alleged that psychological distress stemmed from his treatment in the workplace due to his work injury, the ALJ did not commit reversible error in considering the merits and impact of such alleged distress when determining whether a sequela had occurred and weighing the evidence regarding Mr. Pelkey's earning capacity.

[¶25] Finally, we find no merit in the argument that the ALJ ordered equitable relief in the case. Rather, the only relief ordered was retroactive and ongoing partial incapacity benefits reduced by an imputed earning capacity--relief authorized by 39-A M.R.S.A. § 213.

III. CONCLUSION

[¶26] We find no reversible error in the ALJ's decision (1) admitting the LCPC's letter under 39-A M.R.S.A. § 309(2); (2) finding that Mr. Pelkey established a psychological sequela to his physical injury; (3) finding that Mr. Pelkey refused an offer of work with good and reasonable cause; and (4) making findings regarding Mr. Pelkey's treatment in the workplace by supervisors and the psychological component of the case when a Petition to Remedy Discrimination under 39-A M.R.S.A. § 353 was pending but not consolidated with the Petition for Award.

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.

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.

Attorney for Appellant:
Timothy J. Wannemacher, Esq.
Robinson, Kriger & McCallum
12 Portland Pier
Portland, ME 04101

Attorney for Appellee:
Mark A. Cloutier, Esq.
Cloutier, Conley & Duffett, P.A.
465 Congress Street
Portland, ME 04101