ESTATE OF DALE HENDERSON
(Appellant/Cross-Appellee)

v.

OAK LEAF REALTY, INC.
(Appellee/Cross-Appellant)

and

MAINE EMPLOYERS' MUTUAL INSURANCE COMPANY
(Appellee/Cross-Appellee)

and

AETNA/THE RAWLINGS COMPANY
(Appellee)

Conference held: April 11, 2018
Decided: February 12, 2020

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

[¶1] The Estate of Dale Henderson[1] appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) denying its Petitions for Award, for Payment of Medical and Related Services, and for Penalties. The Estate of Dale Henderson (hereinafter, the Estate) contends, among other things, that the ALJ erred in determining that (1) Mr. Henderson did not meet his burden to establish that he was working for Oak Leaf Realty, Inc., at the time of his March 2, 2011,

[1] Mr. Henderson died on February 22, 2018, during the pendency of this litigation. A motion to substitute the personal representative of his Estate as a party has been filed, and is now granted.

injury; and that (2) Mr. Henderson had not provided notice that he was pursuing a workers' compensation claim to Oak Leaf or its insurer, MEMIC, sufficient to trigger the penalty provision in Me. W.C.B. Rule, ch. 1, § 1(1), the "fourteen-day rule."

[¶2] Oak Leaf cross-appeals, contending the ALJ erred in determining the board did not have authority to enforce a contractual provision that, it asserts, requires MEMIC to provide Oak Leaf with a defense in Mr. Henderson's workers' compensation case.

[¶3] Aetna/The Rawlings Company (hereinafter, Aetna), which joined the litigation as an interested party, contended the ALJ erred by failing to order MEMIC to indemnify it for payments made on Mr. Henderson's behalf as his general health insurer. We affirm the decision in all respects.

I. BACKGROUND

[¶4] On the date of injury, March 2, 2011, Dale Henderson was the sole owner of several corporate entities, including three relevant to this case: Dale Henderson Logging, Inc.; Dale Henderson Trucking and Excavation, Inc.; and Oak Leaf Realty, Inc. One or more of Mr. Henderson's businesses had contracted with Prentiss & Carlisle Management Company, Inc., to chip brush underneath powerlines in the town of Hancock. According the one of his employees, Mr.

Henderson occasionally came to the jobsite in Hancock to deliver fuel or direct his employees.

[¶5] Mr. Henderson visited the Prentiss & Carlisle jobsite on March 2, 2011. He had traveled to the site in a truck owned by Oak Leaf, which had an external fuel tank that he used to fuel equipment. He also used the truck for personal travel. While there, Mr. Henderson learned that his daughter's[2] vehicle was stuck in the snow along a direct route between the jobsite and his home. After driving in the Oak Leaf truck to assist his daughter, Mr. Henderson had just stepped from the truck when a snow plow hit her vehicle, which in turn hit the truck Mr. Henderson had been driving. Mr. Henderson suffered injuries that required multiple surgeries, and he did not work again after the accident.

[¶6] The parties disputed whether Mr. Henderson was covered under the Act as an employee of Oak Leaf. As the sole owner of his businesses, Mr. Henderson was permitted under 39-A M.R.S.A. § 102(11)(A)(4) (Supp. 2018) to exclude himself from workers' compensation coverage by providing a written waiver to the board.[3] Mr. Henderson had provided such a waiver with respect to Dale Henderson

[2] Mr. Henderson's daughter, Heidi Henderson, holds a real estate license and had, before Mr. Henderson's injury, sold real estate for commission on behalf of Oak Leaf. Her last sale was in 2008.

[3] Title 39-A M.R.S.A. § 102(11)(A)(4) exempts from the definition of "employee" "any person who, in a written statement to the board, waives all the benefits and privileges provided by the workers' compensation laws, provided that the board has found that person to be a bona fide owner of at least 20% of the outstanding voting stock of the corporation by which that person is employed or a shareholder of the professional corporation by which that person is employed and that this waiver was not a prerequisite condition to employment."

Logging and Dale Henderson Trucking and Excavation. Although the contract between MEMIC and Oak Leaf contains a provision excluding Mr. Henderson from coverage, there is no evidence that Oak Leaf had filed the required waiver with the board.

[¶7] To determine which employer Mr. Henderson was allegedly working for when the injury occurred, the ALJ reviewed relevant contracts, paperwork, and testimony related to the Prentiss & Carlisle job. The Prentiss & Carlisle contract referred to Oak Leaf and Dale Henderson Trucking & Excavation as the "contractor" for the work. As part of the contract negotiations, Oak Leaf sent paperwork to Prentiss & Carlisle documenting no reportable OSHA violations between 2008-2012. The document, however, covered incident history for Dale Henderson Logging, not Oak Leaf. The office manager for Mr. Henderson's businesses, Judy Sawyer, testified that invoices for work performed under the Prentiss & Carlisle contract were sent from Dale Henderson Logging, but Mr. Henderson testified that this was an accounting error. Heavy equipment used on the job site was insured by Hanover Insurance Group. The Hanover contract initially listed Oak Leaf as the insured party, but was later amended to include Mr. Henderson, "Dale Henderson Trucking," and "Dale Henderson Logging and Excavation, Inc."

[¶8] Oak Leaf was the only employer potentially responsible for Mr. Henderson's injuries under the Workers' Compensation Act. The ALJ determined

that Mr. Henderson did not demonstrate on a more probable than not basis that he was working for Oak Leaf rather than of any of his other businesses on the day of the accident.

[¶9] The ALJ then declined to address whether Mr. Henderson's injury arose out of and in the course of employment, reasoning that resolution of that issue was made unnecessary by his conclusion that Mr. Henderson failed to establish that Oak Leaf was the responsible employer under the Workers' Compensation Act.

[¶10] The fourteen-day rule claim stemmed from Oak Leaf's failure to file a Notice of Controversy until October 26th, 2015, (three days after it filed a First Report of Injury). Mr. Henderson testified that he provided notice to Oak Leaf or that Oak Leaf and MEMIC had notice or knowledge of his claim more than fourteen days before the Notice of Controversy was filed, and argued that as such, Oak Leaf or MEMIC was subject to penalties for a violation of Me. W.C.B. Rule, ch. 1, § 1(1).[4] The ALJ considered testimony from Mr. Henderson and Judy Sawyer on

[4] Me. W.C.B. Rule, ch. 1, § 1 currently provides, in relevant part:

> **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 without Prejudice"; 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.

this issue. Ms. Sawyer testified that she learned of Mr. Henderson's accident and injury on the date they occurred, and she knew he had been working on the Prentiss & Carlisle jobsite that day. Mr. Henderson testified that he informed his insurance agent of the details of the accident shortly after the date of injury. Mr. Henderson argued that those two sets of facts established that Oak Leaf and/or MEMIC had notice or knowledge of his workers' compensation claim sufficient to give rise to an obligation to pay or controvert his claim under the fourteen-day rule. The ALJ rejected that contention, writing: "neither witness identified notice or knowledge of a claim for benefits made by Mr. Henderson or on his behalf that is sufficient to trigger an obligation to file a notice of controversy."

[¶11] Oak Leaf argued before the ALJ that MEMIC violated its contractual duty to defend Oak Leaf in the workers' compensation dispute. Based on MEMIC's contract with Oak Leaf, which excluded Mr. Henderson from coverage, MEMIC declined to provide Oak Leaf with a defense to Mr. Henderson's claims. Oak Leaf, having retained independent counsel, argued that MEMIC should be ordered to reimburse Oak Leaf for its attorney's fees.

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3. If the employer fails to comply with subsection 1 of this section, the employee must be paid total benefits, with credit for earnings and other 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. . . .

[¶12] The ALJ declined to decide whether MEMIC had a contractual duty to defend Oak Leaf against Mr. Henderson's claim, concluding that the board does not have the authority to resolve such contractual disputes. The ALJ stated, however, that if the board had such authority, he would conclude that the insurance contract expressly excluded Mr. Henderson from workers' compensation insurance coverage.

[¶13] Lastly, Aetna sought reimbursement from MEMIC for payment of Mr. Henderson's medical bills related to the accident, which the ALJ denied because reimbursement from MEMIC was contingent on a finding that Mr. Henderson's medical expenses were covered by the Act.

[¶14] The ALJ denied Mr. Henderson's Petitions for Award, for Payment of Medical and Related Services, and for Penalties. He therefore also denied Aetna's Petition. MEMIC and Oak Leaf filed motions for additional findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2018), which the ALJ granted, amending the decision without changing the result. The Estate (as substituted for Mr. Henderson) appeals, and Oak Leaf cross-appeals.

II. DISCUSSION

[¶15] "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(2) (Supp. 2018). 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). "When an [ALJ] concludes that the party with the burden of proof failed to meet that burden, we will reverse that determination only if the record compels a contrary conclusion to the exclusion of any other inference." *Anderson v. Me. Pub. Employees Ret. Sys.*, 2009 ME 134, ¶ 28, 985 A. 2d 501; *Kelley v. Me. Pub. Employees Ret. Sys*, 2009 ME 27, ¶ 16, 967 A. 2d 676; *Civiello v. Coventa Energy*, Me. W.C.B. No. 16-45, ¶ 2 (App. Div. 2016).

A. Employment Status

[¶16] The Estate contends the ALJ erred in determining that Mr. Henderson did not meet his burden to establish on a more probable than not basis that he was working for Oak Leaf on the date of the accident. We disagree.

[¶17] As the petitioning party, Mr. Henderson had the burden of proof with respect to all aspects of his claim. *Fernald v. Dexter Shoe Co.*, 670 A.2d 1382, 1385 (Me. 1996).[5] Only an employee may pursue a claim for benefits under the Workers'

[5] The Estate also contends that the board erred in determining that Mr. Henderson, as the employee, had the burden of proof to establish the identity of his employer at the time of the injury, "particularly when the employer admitted in pleadings Dale Henderson was an employee." The Estate argues that the Law Court has recognized exceptions to the rule that the petitioning party has the burden of proof "when placing the burden on the moving party is impractical or unreasonable," citing *Farris v. Ga.-Pacific Corp.*, 2004 ME 14, ¶ 844 A.2d 1143 (quotation marks omitted). It argues that MEMIC's refusal to provide counsel for Oak Leaf created the "unique circumstances" that warrant an exception to the standard burden allocation. We are not persuaded that MEMIC's refusal to defend Oak Leaf has any bearing on the Estate's burden of proof for this issue, and we reject this argument.

Compensation Act. *See* 39-A M.R.S.A. § 201(1) (Supp. 2018). "Employee" is defined in the Act as "every person in the service of another under any contract of hire, express or implied, oral or written." at 39-A M.R.S.A. § 102(11) (Supp. 2018). An employer is liable under the Act only when there is or has been an employer-employee relationship between that employer and the claimant. *See, e.g., Harlow v. Agway, Inc.*, 327 A.2d 856, 860 (Me. 1974); *WCB Abuse Investigation Unit v. Price*, Me. W.C.B. No. 14-20, ¶ 13 (App. Div. 2014).

[¶18] The issue in this case is not whether there was an employer-employee relationship between Mr. Henderson and Oak Leaf Realty, Inc., but whether Mr. Henderson established on a more probable than not basis that he was performing work in the service of Oak Leaf on the date in question. The ALJ determined that Mr. Henderson did not establish this fact:

> As named by contract, equipment ownership, and payroll, a variety of corporate entities solely owned by Mr. Henderson were involved with efforts chipping brush in Hancock, Maine in March of 2011. As a business owner, Mr. Henderson chose to structure his business affairs in a particular manner, presumably to maximize benefits to his businesses. Those choices however, produced a tangled web of corporate entities with distinct liabilities and areas of insurance coverage. Only one corporate entity is alleged as the Employer in Mr. Henderson's claim: Oak Leaf Realty, Inc. There is evidence of many corporate entities with a presence in Mr. Henderson's business affairs chipping brush in Hancock, Maine at the time of the March 2, 2011, date of injury. I find that the Employee has not demonstrated, on a more probable than not basis, that he was working for Oak Leaf Realty, Inc., rather than another of his corporate entities, on March 2, 2011. Without

> this foundational finding, the Employee has not demonstrated on a more probable than not basis that his injuries suffered on that date fall within the boundaries of the Workers' Compensation Act.

[¶19] The ALJ therefore denied Mr. Henderson's claim, and in turn, Aetna's claim for reimbursement. We discern no error. The ALJ correctly reasoned that, in cases with multiple potential employers and complicated insurance arrangements, it is incumbent on an employee to prove, on a more probable than not basis, that the employee was performing work for the identified employer, so that the board can assess whether the injury was covered under the Act. Here, based on the evidence adduced by Mr. Henderson, the ALJ was not compelled to find on a more probable than not basis that Oak Leaf was the employer engaged in the brush clearing work.[6]

B. Fourteen-Day Rule Violation

[¶20] The Estate argues that the ALJ erred in concluding that before October 2015, neither Oak Leaf nor MEMIC as its insurer had notice or knowledge of a claim

[6] The Estate raises multiple additional arguments. It contends that the ALJ erred in looking to the MEMIC contract as an alternative basis for determining that Mr. Henderson was not covered under the Workers' Compensation Act. Because we affirm on the basis that the ALJ did not err in determining that Mr. Henderson did not establish on a more probable than not basis that Oak Leaf was the responsible employer, we do not reach this argument.

The Estate also contends that the board violated Maine Constitution, Article I, section 11, regarding the impairment of contracts, by failing to enforce the contract between Prentiss & Carlisle and Oak Leaf, which required workers' compensation coverage for anyone working at its jobsite. The Estate has waived this issue because it was not raised prior to appeal. Parties may not raise issues—even constitutional issues—for the first time before an appellate body. *Fitch v. Doe*, 2005 ME 39, ¶ 27, 869 A.2d 722; *Waters v. S.D. Warren Co.*, Me. W.C.B. No. 14-26, ¶ 18 (App. Div. 2014).

The Estate additionally argues that the ALJ erred in failing to analyze whether Oak Leaf was a joint employer with another employer at that job site. However, we conclude that this argument is waived because it was not presented prior to appeal. *See id.* As the ALJ stated, "Only one corporate entity is alleged as the Employer in Mr. Henderson's claim: Oak Leaf Realty, Inc."

for incapacity benefits sufficient to trigger an obligation to file a notice of controversy within fourteen days as required by Me. W.C.B. Rule, ch. 1, § 1(1). We reject this contention.

[¶21] The fourteen-day rule provides that an employer must voluntarily pay or controvert a claim for incapacity benefits within fourteen days of notice or knowledge of the claim. The Notice of Controversy for Mr. Henderson's injury was filed on October 26, 2015. Thus, as the party bringing the Petition for Penalties, Mr. Henderson bore the burden to prove that either Oak Leaf or MEMIC had notice or knowledge of his claim for benefits earlier than fourteen days prior to that date.

[¶22] Notice or knowledge sufficient to give rise to an obligation under Rule, ch. 1, § 1(1) does not require an employee to file a formal claim, but it does require "some sort of claim or request by an employee." *Pearson v. Freeport Sch. Dep't*, 2006 ME 78, ¶ 17, 900 A.2d 728 (quoting *Carroll v. Gates Formed Fibre Products*, 663 A.2d 23, 25 (Me. 1995)). "[A]n employer's notice that an employee may have suffered an injury is not synonymous with an employer's notice of an employee's claim for incapacity benefits." *Id.*[7]

[7] We note that our recent decision in *Ouellette v. Ouellette Funeral & Memorial Services, Inc.*, Me. W.C.B. No. 19-28 (App. Div. 2019), which was decided after this case was fully briefed, has no bearing on the current matter because it involved notice pursuant to 39-A M.R.S.A. § 301 (Supp. 2018). Section 301 specifies the manner of providing notice of an injury, rather than notice of a claim for workers' compensation benefits under Rule, ch. 1, § 1(1).

[¶23] On this factual question, the ALJ assumed for the purpose of analysis that the testimony of Mr. Henderson and Ms. Sawyer was "entirely accurate." Nevertheless, he found that even accepting those facts, neither Oak Leaf nor MEMIC had sufficient knowledge of a claim or potential claim by Mr. Henderson to give rise to a duty under Rule, ch. 1, § 1(1).

[¶24] "For an appellant who had the burden of proof at trial to prevail on a sufficiency of the evidence challenge on appeal, that party must demonstrate that a contrary finding was compelled by the evidence." *Efstathiou v. Efstathiou*, 2009 ME 107, ¶ 10, 982 A.2d 339. The record here does not compel the conclusion that Oak Leaf had a duty before October 2015 to pay or controvert Mr. Henderson's claim. While the testimony of Ms. Sawyer and Mr. Henderson makes clear that agents of Oak Leaf and MEMIC were aware of the accident, the injury, and Mr. Henderson's activities on that day, the evidence does not demonstrate that Mr. Henderson asserted a claim for workers' compensation benefits. Although Mr. Henderson's conversation with Oak Leaf's insurance agent suggests that he was interested in availing himself of any insurance benefit to which the accident may have entitled him, he did not make it clear then that he was making a workers' compensation claim. Indeed, Ms. Sawyer testified that she did not understand Mr. Henderson was making a workers' compensation claim at that time.

[¶25] Because the record does not compel the conclusion that either Oak Leaf or MEMIC had sufficient notice or knowledge of Mr. Henderson's claim for benefits prior to October 2015, we cannot conclude that the ALJ erred in determining otherwise.

C. MEMIC's Duty to Defend Oak Leaf

[¶26] Oak Leaf argues that MEMIC had a duty to defend it in the proceedings before the board and requests payment of attorney's fees generated as a result of its failure to do so. MEMIC argued, and the ALJ agreed, that the board does not have statutory authority to adjudicate the fee dispute. *See Guar. Fund Mgmt. Servs. v. Workers' Comp. Bd.*, 678 A.2d 578, 583 (Me. 1996) (holding that "the rights of a party under the Workers' Compensation Act are purely statutory" (quoting *Jordan v. Sears, Roebuck & Co.*, 651 A.2d 358, 362 (Me. 1994)). In response to the ALJ's conclusion, Oak Leaf argues that the board has authority to address questions concerning insurance contracts when doing so is necessary to resolve issues dealing with an employee's rights. *See* 14 Arthur Larson, Lex K. Larson & Thomas A. Robinson, *Larson's Workers' Compensation Law*, § 150.04[1] at 150-24 (2019).

[¶27] Here, Mr. Henderson's rights as an employee were not affected by MEMIC's refusal to pay Oak Leaf attorney's fees. As such, disputes between MEMIC and Oak Leaf on issues unrelated to Mr. Henderson's rights, including Oak Leaf attorney's fees, are not within the board's purview. This is strictly a question

between the insurer and insured, which is appropriately addressed by another forum. *See id.* § 150.04[2] at 150-25.

III. CONCLUSION

[¶28] The ALJ did not err in determining that Mr. Henderson did not establish on a more probable than not basis that he was working for Oak Leaf on the day of the accident. Competent evidence supports the ALJ's finding that Mr. Henderson did not provide notice to Oak Leaf or MEMIC that he was asserting a claim for workers' compensation benefits more than fourteen days before the Notice of Controversy was filed; thus the ALJ did not err when determining that no violation of Me. W.C.B. Rule, ch. 1, § 1(1) occurred. The ALJ neither misconceived nor misapplied the law in determining that the board did not have jurisdiction to decide the dispute between Oak Leaf and MEMIC regarding MEMIC's contractual duty to provide a legal defense for workers' compensation claims or to pay Oak Leaf's attorney fees. Finally, the ALJ did not err in declining to order MEMIC to reimburse Aetna for medical payments made on Mr. Henderson's behalf.

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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