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WC Appellate Division Decision issued on May 10, 2018 – Waiver of Issues

Waiver of Issues The employee filed a Petition for Award resulting from a December 8, 2015 injury to her neck and left hand. She also filed a Petition for Reinstatement. She had not worked for the employer since the date of injury, and a dispute arose as to whether the employer had offered her suitable employment which had then been rejected without good and reasonable cause. Also in dispute was the issue of whether or not the employee had properly preserved her claim for reinstatement. In *Ornberg v. Pineland Farms Potato Company, Inc.*, Me. W.C.B. No. 18-17 (App. Div. 2018), the Petition for Award was granted and the employee was given the protection of the Act. However, the claim for incapacity benefits was denied on the grounds that the employee had rejected a bona fide offer of employment within her restrictions without good and reasonable cause. There was conflicting evidence on this issue; the employer's evidence showed that an offer had been made while the employee argued that no such offer had been extended. The ALJ, as the fact finder, accepted the testimony from the employer's witnesses, and the Appellate Division affirmed, finding that an ALJ has full authority to select between the testimony of conflicting witnesses. On the Petition for Reinstatement, the employee evidently had made only a vague and limited reference to the issue during litigation, without actually requesting reinstatement. No mention of the issue was made in the employee's written position paper or in a post-hearing Motion for Findings of Fact. Following in the footsteps of *Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46 (App. Div. 2017) and *Waters v. S.D. Warren Company*, Me. W.C.B. No. 14-26 (App. Div. 2014), the panel found that the ALJ committed no error in finding that the claim for reinstatement had been abandoned. The key conclusion is that all issues raised by the parties, whether in the nature of claims for benefits or defenses to such claims, must be explicitly raised and maintained both during litigation and in the post-litigation stage in closing memos and Motions for Findings. A party that barely mentions an issue at all and fails to back up their positions with developed argumentation will be found to have waived the issue.

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