PATRICIA LAVALLE
(Appellee)

v.

TOWN OF BRIDGTON
(Appellant)

and

MAINE MUNICIPAL ASSOCIATION
(Insurer)

Conference held: September 17, 2014
Decided: April 10, 2015

PANEL MEMBERS: Hearing Officers Goodnough, Greene, and Knopf

Majority: Hearing Officers Goodnough and Knopf
Dissent: Hearing Officer Greene

BY: Hearing Officer Knopf

[¶1] The Town of Bridgton appeals from a decision of a Workers' Compensation Board hearing officer (*Stovall, HO*) granting Patricia Lavalle's Petition for Award-Fatal, following the death of her husband, James A. Lavalle, from a heart attack. *See* 39-A M.R.S.A. § 215 (1) (Supp. 2014). The Town contends that the hearing officer incorrectly applied the rebuttable presumption in 39-A M.R.S.A. § 327 (2001) to conclude that a personal injury arising out of and in the course of employment caused Mr. Lavalle's death. The Town also contends that the hearing officer erred when calculating Mr. Lavalle's average weekly wage. Finding no error, we affirm the hearing officer's decision.

## I. BACKGROUND

[¶2] James Lavalle began working for the Town of Bridgton as manager of the Salmon Point Campground on April 14, 2010. He was in charge of the non-financial operations, and his duties included cleaning up debris from winter storms, fixing leaking water lines, painting, making repairs, and other functions as needed. Mr. Lavalle supervised two coworkers, Peter Wenthe and Zachary Nilsen, who did most of the heavy physical work at the campground. He worked at the campground from April through October.

[¶3] On May 14, 2012, Mr. Wenthe and Mr. Nilsen worked until about noon, but Mr. Lavalle continued to work beyond that time. He performed some substantial physical work, including land-clearing, although his level of exertion is unknown. At around 3:30 that afternoon, after he had stopped working for the day, Mr. Lavalle spoke to his wife. He reported that he felt very tired. For the next hour or so, Mr. Lavalle passed the time in the company of Gary McIver, and enjoyed a small glass of wine. During the visit, Mr. Lavalle fell asleep, but was awake by the time Mr. McIver left. At around 5:00 p.m., Mr. Lavalle called 911 because he was experiencing symptoms. Mr. Lavalle, who was then 72 years old, died of a heart attack at approximately 3:30 the next morning at Maine Medical Center. He had a previous heart attack in 1995.

[¶4] Ms. Lavalle filed her Petition for Award-Fatal, pursuant to 39-A M.R.S.A. § 215 (Supp. 2014). The parties agreed that the presumption afforded by 39-A M.R.S.A. § 327 (2001) applied in this case. Pursuant to *Estate of Gregory Sullwold v. The Salvation Army,* Me. W.C.B. No. 13-13, ¶ 21 (App. Div. 2013) (en banc), the hearing officer shifted the burden of proof to the Town to negate the facts established by the presumption, including that Mr. Lavalle's heart attack was work-related. Concluding that the Town did not meet its burden, the hearing officer granted Ms. Lavalle's petition and awarded benefits pursuant to section 215, based on an average weekly wage of $532.96 calculated pursuant to 39-A M.R.S.A. § 102(4)(B) (Supp. 2014). The Town filed a motion for additional findings of fact and conclusions of law, which the hearing officer denied. The Town now appeals.[1]

## II. DISCUSSION

### A. Standard of Review

[¶5] The Appellate Division's role on appeal is "limited to assuring that the [hearing officer'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*

[1] This appeal was placed in temporary abeyance while the Maine Supreme Judicial Court considered the appeal in *Estate of Gregory Sullwold v. The Salvation Army*, 2015 ME 4, 108 A.3d 1265. The Court issued its decision affirming the judgment on January 22, 2015.

*v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). The hearing officer's findings of fact are not subject to appeal. 39-A M.R.S.A. § 321-B(2) (Supp. 2014).

B. Operation of the Section 327 Presumption

[¶6] Title 39-A M.R.S.A. § 327 provides:

> In any claim for compensation, when the employee has been killed or is physically or mentally unable to testify, there is a rebuttable presumption that the employee received a personal injury arising out of and in the course of employment, that sufficient notice of the injury has been given and that the injury or death was not occasioned by the willful intention of the employee to injure or kill the employee or another.

[¶7] The Town contends that the hearing officer erred by shifting the burden of proof to the Town to disprove the facts established by the section 327 presumption, pursuant to *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982), and *Sullwold*, ¶ 21 (App. Div. en banc). The Town contends the correct approach was established by the Law Court in *Toomey v. City of Portland*, 391 A.2d 325, 332 & n.7 (Me. 1978). For the reasons that follow, we affirm the hearing officer's decision.

[¶8] In *Toomey*, the Law Court applied the longstanding rule of *Hinds v. John Hancock Mutual Life Ins. Co*., 155 Me. 349, 363-64, 155 A.2d 721 (1959) (superseded by Rule as noted in *Poitras v. R.E. Glidden Body Shop, Inc*., 430 A.2d 1113, 1119 n. 1 (Me. 1981)) to the Workers' Compensation context. Pursuant to

*Hinds* and then *Toomey,* when the presumption applied, an employer was required to adduce evidence which, if believed, was sufficient to make it *as probable that the presumed facts did not exist as that they did exist*, at which point the effect of the presumption was negated and the claimant would have to affirmatively prove all elements of the claim. *Toomey*, 391 A.2d at 332 n.7; *Metcalf v. Marine Colloids, Inc.*, 285 A.2d 367, 368 (Me. 1972).

[¶9] When the Law Court decided *Toomey,* neither the statute nor the board's rules required that the Maine Rules of Evidence be applied in board proceedings. By the time of the *Hall* decision in 1982, however, the Workers' Compensation Board had promulgated a rule making the rules of evidence applicable. Me. W.C.C. Rule 15 (effective August 31, 1981 to Jan. 8. 1993; renumbered in 1984 as Rule 22.5 and in 1985 as Rule 22.7). Therefore, when applying the presumption in *Hall,* the Law Court followed M.R. Evid. 301(a), which directs that an evidentiary presumption "impose[s] on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

[¶10] As part of the 1992 reform of the Workers' Compensation Act, *see* P.L. 1991, ch. 885, §§ A-7, A-8 (effective Jan. 1, 1993), the Legislature enacted 39-A M.R.S.A. § 309(2), which provides that "[t]he board or its designee need not

observe the rules of evidence observed by courts[.]"[2] Since the enactment of section 309(2), some hearing officers have continued to apply *Hall*, and some have called its continued viability into question.[3]

[¶11] The Law Court recently addressed the section 327 presumption in *Estate of Gregory Sullwold v. The Salvation Army*, 2015 ME 4, 108 A.3d 1265. In that case, the Salvation Army had argued to the Appellate Division that the hearing officer erred because, although she purported to apply the lower *Toomey* standard, she had in fact applied higher standard set forth in *Hall*. *Id.* ¶ 17. The en banc Appellate Division panel acknowledged that *Hall's* continued viability was in question, but after analyzing the applicable law, expressed the opinion that if the hearing officer had applied *Hall*, she would have committed no error because the burden-shifting scheme articulated in *Hall* is the correct approach. *Sullwold*, ¶ 22 (App. Div. en banc). However, the Appellate Division further concluded that the

[2] Title 39-A M.R.S.A. § 309(2) (Supp. 2014) provides:

> The board or its designee need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. The board or its designee shall admit evidence if it is the kind of evidence on which reasonable persons are accustomed to relying in the conduct of serious affairs. The board or its designee may exclude irrelevant or unduly repetitious evidence.

[3] At least two hearing officers expressly discussed whether the *Hall* case remained good law, analyzed the issue, and decided that it did. *See Dorazio v. General Inv. and Dev.*, W.C.B. 98-005471 (Me. 2013) (*Goodnough, HO*); *Demers v. Morin Brick Co*., W.C.B. 07022004 (Me. 2009) (*Jerome, HO*). Another hearing officer had questioned whether *Hall* remained good law in two cases. *Ness v. Securitas*, W.C.B. 05-003190 (Me. 2007) (*Greene, HO*) (questioning but applying *Hall*); *Simpson v. Downeast Toyota*, W.C.B. 09003163 (Me. 2010) (*Greene, HO*) (questioning *Hall's* continued applicability but not needing to decide). Other hearing officers applied *Hall* without question. *Bouchard v. Great N. Paper Co*., W.C.B. 05-03-09-56; 81-05-22-35 (Me. 2010) (*Pelletier, HO*); *Cyr v. LPO Transp.*, W.C.B. 03-00-97-10 (Me. 2007) (*Pelletier, HO*); *Estate of Wuerthner v. Rumerys Boat Yard*, W.C.B. 04-006334 (Me. 2006) (*Stovall, HO*).

hearing officer had applied *Toomey*, and that the hearing officer did not err when determining that the Salvation Army had not rebutted the presumption even under the lesser *Toomey* standard. *Id.* ¶ 25.

[¶12] The Law Court granted the Salvation Army's Petition for Appellate Review, and ultimately affirmed the Appellate Division's decision that the hearing officer had not erred in determining that the Salvation Army did not meet its burden under *Toomey*. 2015 ME 4, ¶ 17, 108 A.3d 1265. Moreover, because the Salvation Army's burden under *Toomey* was less stringent, the Law Court declined to reach the issue of whether *Hall* should have applied instead. *Id.* ¶ 18. That issue, however, is squarely presented in this case.

[¶13] The Appellate Division in *Sullwold* also observed that the hearing officer had evaluated the evidence using the *Toomey* standard and affirmed the hearing officer's decision that the Salvation Army had not rebutted the presumption by placing the evidence in equipoise. *See Sullwold* ¶ 27 (App. Div. en banc). Thus, the Appellate Division's ruling that *Hall* remains good law may have been *obiter dictum*. However, we recognize that the decision represents the view of six of the seven members of an en banc Appellate Division panel, and as such, represents strong persuasive authority on the issue. Pursuant to that authority, we conclude that the hearing officer did not err when shifting the burden of proof to the Town to disprove the presumed facts. *Sullwold*, ¶ 23 (App. Div. en banc).

C. Application of the *Hall* Standard in this Case

[¶14] When evaluating whether the Town rebutted the presumption, the hearing officer considered two conflicting medical opinions: that of (1) Dr. Hoffmann, who opined that Mr. Lavalle had not engaged in strenuous physical activity that day and that his heart attack was not caused by his employment; and (2) Dr. Starobin, who opined that the cause of Mr. Lavalle's death was intense work activity combined, significantly, with his pre-existing heart condition. The hearing officer did not find Dr. Hoffmann's opinion to be more persuasive than Dr. Starobin's; the hearing officer found both opinions to be based on speculation, and thus, equally unpersuasive. The hearing officer also found as fact that Mr. Lavalle had engaged in substantial work activity (road clearing) that day.

[¶15] Contrary to the Town's contentions, the hearing officer was not obligated to accept Dr. Hoffmann's opinion over Dr. Starobin's, *see Handrahan v. Malenko*, 2011 ME 15, ¶ 14, 12 A.3d 79 (determining what weight to give expert testimony is exclusively within the province of the fact-finder); nor was the hearing officer compelled to find that Mr. Lavalle did not engage in substantial work that day, *see Savage v. Georgia Pacific Corp.*, Me. W.C.B. No. 13-5, ¶ 7 (App. Div. 2013) (stating that on appeal, the party that had the burden of proof at the hearing must demonstrate that the evidence compels a contrary finding). Having appropriately shifted the burden of proof, the hearing officer did not err

when concluding that the Town had not met its burden to negate the presumed facts.

D. Average Weekly Wage

[¶16] The Town contends that the hearing officer erred when calculating Mr. Lavalle's average weekly wage pursuant to 39-A M.R.S.A. § 102(4)(B), because that method does not factor in that Mr. Lavalle works only during the summer months, and as such, results in an inflated average weekly wage. The Town asserts that the hearing officer should have used 39-A M.R.S.A. § 102(4)(D) to calculate the wage. We find no error.

[¶17] The methods of calculating average weekly wage are set forth in paragraphs A through D of 39-A M.R.S.A. § 102(4), and the appropriate method is chosen by proceeding sequentially through the four alternatives. *Bossie v. S.A.D. No. 24*, 1997 ME 233, ¶ 3, 706 A.2d 578. Paragraph D is a fallback provision applicable when none of the preceding methods can be "reasonably and fairly applied." *Alexander v. Portland Natural Gas*, 2001 ME 129, ¶ 10, 778 A.2d 343. "[T]he party asserting the application of subsection D . . . [bears] the burden of providing evidence to support a determination pursuant to that subsection." *Bossie*, 1997 ME 233, ¶ 6, 706 A.2d 578. Paragraph D requires the examination of comparable employees' earnings to ascertain what a reasonable average weekly wage for the employee would be. *Id.* ¶ 5.

[¶18] The parties agree that paragraph A does not apply because Mr. Lavalle did not work 200 full days before his work injury. The hearing officer further concluded paragraph C does not apply because Mr. Lavalle worked more than 26 weeks per year, and that paragraph D could not be applied here because the Town did not submit evidence of comparable employee wages.

[¶19] The Town asserts that even without evidence of comparable employee wages, the hearing officer should have applied subsection D to arrive at a figure that more accurately reflects Mr. Lavalle's actual work history. However, evidence of comparable employee salaries is required for the application of paragraph D. *See Bossie*, 1997 ME 233, ¶ 6, 706 A.2d 578; *see also Gushee v. Point Sebago*, Me. W.C.B. No. 13-1 ¶¶ 16-17 (App. Div. 2013) (affirming calculation of summer-only employee's average weekly wage pursuant to paragraph B). The hearing officer neither misconceived nor misapplied the law when calculating the average weekly wage pursuant to paragraph B.

## III. CONCLUSION

The entry is:

The hearing officer's decision is affirmed.

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Hearing Officer Greene, dissenting

[¶20] I agree with the majority that, because it is not disputed that the presumption in 39-A M.R.S.A. § 327 applies in this case, the only issue that remains to be decided with respect to section 327 is that which the Law Court specifically declined to decide in *Sullwold*, i.e. the employer's burden in view of the presumption. *See Estate of Gregory Sullwold v. The Salvation Army*, 2015 ME 4, ¶ 18, 108 A.3d 1265. However, I disagree that the en banc Appellate Division decision in *Sullwold* has any remaining authoritative force on this question given the Law Court's decision in the same case. Therefore, I respectfully dissent from the majority's decision to affirm the hearing officer's decision without a remand for additional findings and conclusions.

[¶21] Initially, the Law Court in *Sullwold* did not affirm the decision of the Appellate Division, as the majority states, but, rather, "find[ing] no error in the hearing officer's application of the presumption . . . affirm[ed] the judgment." *Id.* ¶ 1. I interpret this to mean the original "judgment" (i.e. decision) of the hearing officer. Such a disposition is consistent with a de novo review by the Law Court of the legal issues presented on appeal, disregarding the legal conclusions reached by an intermediate appellate body.

[¶22] I agree with the majority that a decision of the Appellate Division may be considered persuasive (but non-binding) authority for another Appellate

Division panel and that an en banc decision carries particular, if not binding, persuasive force on another panel. However, in my view the Law Court's decision in *Sullwold* rendered the Appellate Division's decision in the same case a nullity, regardless of the size of the panel, leaving it with no more authoritative force than that inherent in the persuasiveness of the reasoning itself. Moreover, as the majority acknowledges, the Appellate Division decision in *Sullwold*, itself, addressed the issue of the continued viability of *Hall* after the 1992 Act reforms even though, like the Law Court, it recognized that it was unnecessary to do so. Yet it concludes that this *obiter dictum* "represents strong persuasive authority on the issue."

[¶23] Having concluded that the hearing officer in this case correctly shifted the burden of proof to the Town under *Hall*, the majority concludes that the evidence did not compel a finding that Mr. Lavalle's death did not arise out of and in the course of his employment and that, therefore, the hearing officer's decision should be affirmed. Assuming that, despite Mr. Lavalle's preexisting cardiovascular condition, the Appellate Division's review of the determinations of legal causation and a significant employment contribution, under 39-A M.R.S.A § 201 (4), is so limited, I disagree that the findings and conclusions of the hearing officer, particularly with his denial of the Town's request for additional findings and conclusions, clearly demonstrate that he shifted the burden of proof under

*Hall*, rather than the burden of establishing only evidentiary equipoise under *Toomey*.

[¶24] I would remand for additional findings and conclusions so that, like the Law Court in *Sullwold*, we do not address the questions of (1) the present authoritative force of the Appellate Division's dictum in *Sullwold* or (2) the continued viability of *Hall*, unless it is necessary to do so. Therefore, I respectfully dissent from the decision to affirm the hearing officer's present decision.

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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. 2014).

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