DIANA CASEY
(Appellant)

v.

NEWPAGE PAPER
(Appellee)

and

MAINE SELF-INSURANCE GUARANTEE ASSOCIATION and
SEDGWICK CLAIMS MANAGEMENT SERVICE

Conference held: March 18, 2015
Decided: March 22, 2016

PANEL MEMBERS: Administrative Law Judges[1] Collier, Goodnough and Stovall
BY: Administrative Law Judge Goodnough

[¶1] Diana Casey appeals from a decision of a Workers' Compensation Board Administrative Law Judge (*Knopf, ALJ*) awarding her the protection of the Act for three work-related injuries, but denying her request for ongoing incapacity benefits due to the operation of the retiree presumption in 39-A M.R.S.A. § 223 (2001). Ms. Casey contends the ALJ erred in determining that she "terminate[d] active employment" pursuant to section 223 upon retiring at a time that she was performing tasks that were later determined to be inconsistent with work restrictions stemming from her work-related injuries. We disagree with Ms. Casey's contentions and affirm the ALJ's decision.

[1] Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers are now designated administrative law judges.

I. BACKGROUND

[¶2] Diana Casey began working at the Rumford paper mill (the Mill), owned and operated by NewPage at the time of this litigation, in 1981. She worked for many years driving a hyster (a type of forklift) and loading boxcars. In the course of performing her duties, she sustained work-related injuries to her left upper extremity in 2003, her neck and right shoulder in 2004, and bilateral elbows in 2007. The most serious was the 2007 injury, when she fell on stairs, fracturing both elbows. She was out of work for about seven weeks, eventually returning to regular duty with an eight-hour per day work restriction. This restriction was subsequently lifted at Ms. Casey's request. She completed medical treatment related to her elbows in May of 2008.

[¶3] Although Ms. Casey's injury-related aches and pains persisted, she continued working until her retirement on January 1, 2011. She was 62 when she retired and had worked at the mill for 25 years, thereby entitling her to ongoing employer-paid medical insurance. The ALJ, referring to Ms. Casey's testimony, noted that:

> [I]f she did not have lingering physical problems attributable to the work injuries, she would have worked until age 65. When she left, she was working full-time regular duty. No doctor had taken her out of work or restricted her work activities. In her exit interview with the mill, she did not mention any reason for her decision to retire.

After she retired, Ms. Casey was evaluated by Dr. Pavlak. The ALJ found:

> Dr. Pavlak indicated, in a report of September 2011, that the work she had been doing was more demanding than what she should have been doing in any event. There is no suggestion in the record, however, that Ms. Casey is totally incapacitated. She has performed no work search, but testified that there is nothing she can do and no work available in Rumford.

[¶4] The ALJ determined, despite Dr. Pavlak's retrospective analysis regarding work capacity and restrictions, that Ms. Casey was actively employed at the time of retirement and rejected her argument that the section 223 presumption did not apply. The ALJ also found that Ms. Casey failed to rebut the presumption based on her level of incapacity and lack of a work search. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶5] The Appellate Division's role on appeal is "limited to assuring that the [ALJ's] factual findings are supported by competent evidence, that [the] decision involved no misapplication of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, "we review only the factual findings actually made and the legal standards actually applied by the ALJ. *Daley v. Spinnaker Inds*., 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Retiree Presumption

[¶6] "The retiree presumption is designed to assist fact-finders in determining when an employee who has reached or neared the conclusion of his or her working career will remain eligible to receive workers' compensation benefits." *Downing v. Dep't of Transp.,* 2012 ME 5, ¶ 8, 34 A.3d 1150 (quoting *Costales v. S.D. Warren Co.*, 2003 ME 115, ¶ 7, 832 A.2d 790). "Pursuant to that presumption, an employee who 'terminates active employment' and is receiving nondisability retirement benefits is presumed to have no loss of earnings or earning incapacity as a result of a compensable injury." *Downing*, 2012 ME 5, ¶ 8; 39-A M.R.S.A. § 223.

[¶7] Section 223(1) provides:

> **Presumption.** An employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension…that was paid by or on behalf of an employer from whom weekly benefits under this Act are sought is presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under this Act. This presumption may be rebutted only by a preponderance of the evidence that the employee is unable, because of a work-related disability, to perform work suitable to the employee's qualifications, including training or experience.

[¶8] The ALJ found and concluded:

> Although Ms. Casey may have been entitled [to] some accommodation or incapacity benefits had she pursued a claim under workers' compensation at the time she retired, she did not. In fact, she was working full duty without restriction. She did not complain to her employer or ask for any accommodation. Rather, she decided to retire

> from work. Although her decision may well have been informed by her physical conditions, she plainly terminated active employment and began receiving non-disability or retirement benefits. As such, the presumption applies.

[¶9] On appeal, Ms. Casey contends that because she was working under restrictions—and sometimes above her restrictions—as established by Dr. Pavlak, as a matter of law she was not actively employed on the date of her retirement. She cites *Cesare v. Great N. Paper Co.*, 1997 ME 170, 697 A.2d 1325, as authority.

[¶10] In *Cesare*, the employee had announced an intention to retire early and was on the cusp of retirement when he sustained a new work injury. *Id.* ¶ 2. Due to the effects of the new work injury, he went out of work involuntarily before his retirement date, and was not working on the day he retired. *Id.* ¶¶ 3-4. He proceeded nevertheless to retire on his earlier-scheduled retirement date, and began receiving nondisability retirement benefits. *Id.* ¶ 3. The Court, relying in part on Michigan law, held:

> Because he was not working as a result of a work-related injury, Cesare did not terminate active employment on February 1, 1987. The fact that an employee has announced an intention to retire, or requested the necessary paperwork, or applied for retirement, does not affect the status of the employee as actively employed until the effective date of retirement. The Board therefore correctly refused to apply the presumption of section 223.

Id. ¶ 5.

[¶11] The Court in *Cesare* distinguished *Bowie v. Delta Airlines*, 661 A.2d 1128 (Me. 1995). In *Bowie*, the employee contended that because he was working

light duty at the time of his retirement, he was not actively employed for purposes of section 223. *Id.* at 1131. The Court disagreed, holding that the performance of light duty work at the time of retirement constituted "active employment" for purposes of applying the retirement presumption, stating:

> The phrase "active employment" does not imply that the employee must be working at his or her full work capacity at the time of retirement. The phrase "active employment" is usually understood to mean one who is actively on the job and performing the customary work of his job.

Id.

[¶12] As we stated in a recent decision:

> It is apparent that the Court has adopted a pragmatic, bright-line approach to applying the concept of "active employment" in the context of the retirement presumption. If the employee is actually working up to the effective date of retirement, even in a light duty position that is within the workers' customary employment, then the employee is "actively employed" and the retirement presumption may be applied. If the employee is not working up to the effective date of retirement due to the effects of a work injury, even if the employee previously announced an intention to retire, the employee is not considered "actively employed" and is not subject to the retirement presumption.

Wing v. NewPage Paper, Me. W.C.B. No. 16-5, ¶ 12 (App. Div. 2016).

[¶13] Because Ms. Casey was working in a full-time regular duty position at the time of her retirement, the ALJ did not err when concluding that she was actively employed at that time and, therefore, correctly applied the retiree presumption.

[¶14] Ms. Casey also suggests that her financial need to work until age 62 in order to receive medical insurance in retirement constituted force or coercion to work above her restrictions, and that being required to work above one's restrictions is impermissible under the Act. *See Lindsay v. Great N. Paper Co.*, 532 A.2d 151, 153 (Me. 1987). However, Ms. Casey's decision to continue working for financial reasons despite her injuries is not evidence of force or coercion on the part of NewPage. *See Wing*, No. 16-5, ¶ 14.

[¶15] The ALJ did not err when applying the retiree presumption to Ms. Casey's circumstances because Ms. Casey was actively employed at the time of retirement. In addition, Ms. Casey was not forced or coerced to work above her restrictions and to continue working to age 62 due to financial considerations related to the need for medical insurance.

III. CONCLUSION

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. 2015).

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