STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 15-0057
Decision No. 17-22

DOLORES M. CORTES
(Appellee)

v.

LEPAGE BAKERIES, INC.
(Appellant)

and

CANNON COCHRAN MANAGEMENT SERVICES, INC.

Conference held: June 8, 2016
Decided: May 12, 2017

PANEL MEMBERS: Administrative Law Judges Stovall, Hirtle, and Pelletier
BY: Administrative Law Judge Stovall

[¶1] LePage Bakeries, Inc., appeals from a decision of a Workers' Compensation Board administrative law judge (*Goodnough, ALJ*) denying its Petition for Review. The ALJ concluded that LePage did not meet its burden to prove a change of economic circumstances sufficient to justify a reduction of incapacity benefits. LePage asserts that the evidence demonstrated that any discrepancy between Ms. Cortes's current earnings and her average weekly wage was due solely to a change in LePage's overtime policy, and not her work injury. LePage further contends that the ALJ erred in concluding that it was required to produce evidence that work was available in the community that would have paid wages commensurate with her pre-injury earnings. We affirm the ALJ's decision.

I. BACKGROUND

[¶2] Dolores Cortes began working for LePage Bakeries, Inc., in 1978 as a pan and dough operator in the production department. On February 25, 2009, Ms. Cortes injured her right knee when she slipped and fell in an icy parking lot owned or maintained by LePage. The parties entered into a consent decree on June 7, 2013, whereby LePage agreed to pay certain medical bills. Ms. Cortes underwent right knee surgery in August of 2013. Following a recovery period during which she was paid total incapacity benefits, Ms. Cortes returned to regular full-time work, with restrictions requiring a sit-stand work station. Ms. Cortes works twelve hour days, three or four days per week.

[¶3] Ms. Cortes's wages did not match her pre-injury average weekly wage of $844.60, and LePage voluntarily payed varying partial benefits. Embedded in Ms. Cortes's pre-injury average weekly wage was approximately $200.00 of overtime, which is no longer available because of a change in LePage's policies. LePage, under new ownership, opted to hire more workers and to keep overtime to a bare minimum. LePage argued that Ms. Cortes should not be compensated for her earning loss because the diminished earnings are not the result of her work-related injury, but rather its change of policy about overtime.

[¶4] The ALJ concluded that LePage did not show a change in economic circumstances that would justify a reduction of Ms. Cortes's partial incapacity

benefits. LePage filed a motion for additional findings of fact and conclusions of law, which the ALJ denied. This appeal followed.

II. DISCUSSION

[¶5] The role of the Appellate Division on appeal is "limited to assuring that the [ALJ]'s factual findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that 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). *See also Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995). In addition, because LePage requested further 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 hearing officer." *Daley v. Spinaker*, 2002 ME 134, ¶ 17, 803 A.2d 446.

[¶6] LePage contends that because it established that Ms. Cortes's current earnings were not the result of any "limited physical ability to work," it is no longer obligated to pay benefits. To support its contention, LePage cites *Tucker v. Associated Grocers of Maine, Inc.,* 2008 ME 167, ¶ 20, 959 A.2d 75 (holding that an injured employee with full-time earning capacity who elects to return to school full-time is not eligible for 100% partial benefits based on a search for only part-time work), and *Folsom v. New England Tel. & Tel. Co.,* 606 A.2d 1035, 1037

(Me. 1992) (holding that the moving party need not offer comparative medical evidence when attempting to prove change in economic opportunity and not a change in the degree of physical disability).

[¶7] The ALJ analyzed this case pursuant to *Fecteau v. Richvale Construction, Inc*. 349 A.2d 162 (Me. 1975) and *Flanigan v. Ames Department Store,* 652 A.2d 83 (Me. 1995). These cases provide that once an employee has come forward with evidence that the employee is earning substantial post-injury wages, the burden of proof falls on the employer to demonstrate that regular employment paying wages higher than those being earned by the employee and compatible with the employee's limited physical ability to work was reasonably available to the employee. *Fecteau,* 349 A.2d at 166; *see also Flanagin,* 652 A.2d at 84.

[¶8] We agree with this approach. Pursuant to *Fecteau* and *Flanigan*, Ms. Cortes's post-injury earnings represent prima facie evidence of her earning capacity. LePage introduced no evidence to demonstrate that other, consistently higher-paying work is available to Ms. Cortes within her restrictions, nor does it argue that Ms. Cortes's current wages do not accurately reflect her post-injury earning capacity. Because the loss of overtime as the result of a corporate change in its approach to overtime is not evidence that Ms. Cortes can earn her pre-injury average weekly wage, the ALJ did not err in concluding that LePage did not meet

its burden of proof. *See also Bragg v. Champion Int'l,* 636 A.2d 436, 437-38 (1994) (concluding that because a pre-injury average weekly wage was definitive, an employer is prevented from taking advantage of post-injury wage decreases due to loss of premium pay as negotiated in a labor agreement).

III. CONCLUSION

[¶9] Because the ALJ's findings were supported by competent evidence, and the application of the law to the facts was neither arbitrary or without rational foundation, we affirm the ALJ's decision.

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. 2016).

Attorney for Appellant:
Dale L. Gavin, Esq.
THOMPSON & BOWIE, LLP
Three Canal Plaza
Portland, ME 04112

Attorney for Appellee:
Benjamin DeTroy, Esq.
LEARY & DETROY
90 Main Street
P.O. Box 3130
Auburn, ME 04212-3130