LISA THIBEAULT
(Appellee)

v.

TWIN RIVERS PAPER COMPANY, LLC
(Appellant)

and

SEDGWICK CMS

Conference held: April 11, 2018
Decided: June 14, 2018

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

[¶1] Twin Rivers Paper Company, LLC appeals from a decision of a Workers' Compensation Board administrative law judge (*Pelletier, ALJ*) granting Ms. Thibeault's Petitions for Award and to Determine Average Weekly Wage, and ordering payment of benefits based on an average weekly wage of $1166.01 for her December 17, 2014, work injury.

[¶2] Twin Rivers asserts that the ALJ erred in determining the average weekly wage by excluding weeks during which Ms. Thibeault was out on medical leave and receiving short-term disability benefits for a nonwork-related condition. Because we conclude that the ALJ correctly applied 39-A M.R.S.A. §102(4)(B) (Supp. 2017), we affirm the decision.

## I. BACKGROUND

[¶3] Ms. Thibeault, who worked for Twin Rivers from 1988 until February 2016, filed petitions alleging five work injuries. The board issued a decree on July 26, 2017, granting all of the petitions except for one that alleged a mental stress injury on September 7, 2014. The parties stipulated to average weekly wage figures for all dates of injury except for the December 17, 2014, injury. The ALJ determined that the base average weekly wage for that injury is $1166.01, by dividing Ms. Thibeault's earnings in the year preceding her injury by 39, the number of weeks she worked during that period. Twin Rivers contended that because Ms. Thibeault was employed for the entire year, her earnings should have been divided by 52 weeks. The only issue on appeal is whether the calculation of this figure was appropriate.

[¶4] Twin Rivers filed its Motion for Further Findings of Fact and Conclusions of Law, which the ALJ denied. Twin Rivers appealed.

## II. DISCUSSION

[¶5] There is no dispute that the correct provision for determining Ms. Thibeault's average weekly wage is 39-A M.R.S.A. § 102(4)(B). That section provides, in relevant part:

> **4. Average weekly wages or average weekly wages, earnings or salary.** The term "average weekly wages" or "average weekly wages, earnings or salary" is defined as follows.

> **A.** "Average weekly wages, earnings or salary" of an injured employee means the amount that the employee was receiving at the time of the injury for the hours and days constituting a regular full working week in the employment or occupation in which the employee was engaged when injured…. In the case of piece workers and other employees whose wages during that year have generally varied from week to week, wages are averaged in accordance with the method provided under paragraph B.
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> **B.** When the employment or occupation did not continue pursuant to paragraph A for 200 full working days, "average weekly wages, earnings or salary" is determined by dividing the entire amount of wages or salary earned by the injured employee during the immediately preceding year by the total number of weeks, any part of which the employee worked during the same period. The week in which employment began, if it began during the year immediately preceding the injury, and the week in which the injury occurred, together with the amounts earned in those weeks, may not be considered in computations under this paragraph if their inclusion would reduce the average weekly wages, earnings or salary.

[¶6] The wage statement submitted by Twin Rivers includes dollar amounts for each of the 52 weeks prior to the December 17, 2014, date of injury. Ms. Thibeault was out of work on medical leave and received short-term disability benefits from mid-September through mid-December, 2014.[1] The ALJ found and the wage statement shows that during her medical leave, the payments to Ms. Thibeault were substantially lower than the average of what she was paid the rest

[1] The parties assert slightly different dates for receipt of short-term disability benefits. Ms. Thibeault responded affirmatively when asked if she had received short-term disability benefits "during the weeks of September 20th, 2014 right to the week of December 13th, 2014." Twin Rivers asserts that Ms. Thibeault received short-term disability benefits from September 7, 2014, until December 13, 2014. The ALJ found that she received short-term disability benefits during the thirteen weeks between September 20 and December 13, 2014.

of the year. The ALJ excluded those weeks when determining average weekly wage.

[¶7] Twin Rivers contends that the payments made to Ms. Thibeault during her medical leave represent vacation pay provided to supplement her short-term disability. It further argues that because she received vacation pay, she remained employed during that period, and it was therefore error to exclude those weeks from the average weekly wage calculation, citing *Nielsen v. Burnham & Morrill, Inc.*, 600 A.2d 1111 (Me. 1991). We disagree.

[¶8] In *Nielsen*, the employee had argued that his two-week vacation period should not be included in "weeks worked" for purposes of calculating average weekly wage under the prior version of the Workers' Compensation Act. *Id.* at 1112. The Law Court, affirming the commissioner's decision, construed "weeks worked" as "weeks employed," and held that the vacation time should be included. *Id.* at 1112-13. The Court reasoned:

> Neither the language nor the purpose of the statute requires us to vacate the Commission's decision. The word "worked" is commonly used to mean "employed." Moreover, the purpose of calculating an average weekly wage is to arrive at an estimate of the employee's future earning capacity as fairly as possible. The Commission's interpretation fulfills this purpose. In contrast, the statute as interpreted by Nielsen, to include all wages but not include the entire period of employment in the calculation, results in an artificially inflated average weekly wage[.]"

*Id.* (citations and quotation marks omitted).

[¶9] *Nielsen* is distinguishable from this case. Here, the ALJ found that Ms. Thibeault was not on "vacation" during the thirteen weeks in which lower earnings figures appear on the wage statement, and that instead, she had been taken out of work by her physician due to non-work-related stress. The ALJ also found that during this period, Ms. Thibeault received short-term disability benefits and received no wages, earnings, or salary.[2] Moreover, to accept Twin Rivers' argument and include the disputed weeks in the calculation would result in an artificially deflated average weekly wage, rather than an estimate that fairly represents Ms. Thibeault's future earning capacity. *Cf. Nielsen*, 600 A.2d at 1112-13.

## III. CONCLUSION

[¶10] The ALJ did not err when calculating average weekly wage. The ALJ's factual findings have support in the record, and the ALJ neither misapplied nor misconstrued applicable law when arriving at the $1166.01 figure. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983).

The entry is:

The administrative law judge's decision is affirmed.

[2] Although Twin Rivers asserts that it supplemented the short-term disability payments with vacation pay, it identifies no evidence in the record, other than the wage statement itself, to support this assertion. The wage statement does not classify the payments as vacation pay, and Twin Rivers points to no other documentary evidence or testimony in the record that identifies the payments as vacation pay. Ms. Thibeault testified that she received short-term disability benefits during that period, and that she had to return to work because she could not afford to remain out of work.

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. 2017).

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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