LORRI BOSSE
(Appellee)

v.

SARGENT CORPORATION
(Appellant)

and

CROSS INSURANCE TPA, INC.
(Insurer)

Argument held: February 6, 2019
Decided: March 24, 2021

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

[¶1] Sargent Corporation appeals from a decision of a Workers' Compensation Board administrative law judge (*Goodnough, ALJ*) granting Lorri Bosse's Petition for Award. Sargent contends that the ALJ erred by (1) calculating Ms. Bosse's average weekly wage pursuant to 39-A M.R.S.A. § 102(4)(B) (Pamph. 2020) rather than section 102(4)(D); and (2) determining that Ms. Bosse suffered a work-related low back injury; and (3) failing to analyze that claim pursuant to 39-A M.R.S.A. § 201(4) (Pamph. 2020). Because the ALJ based the decision to employ section 102(4)(B) on an unsupported factual finding, and because the ALJ should have applied the legal standard in section 201(4) when analyzing the back injury, we vacate the decision in part and remand for further proceedings.

I. BACKGROUND

[¶2] From 2000 to 2009, Lorri Bosse was self-employed as a truck driver. In 2009 she went to work as an employee driving a truck for Gendron & Gendron, a construction firm. She left that firm in 2011 and began working as a truck driver for Sargent Corporation. Ms. Bosse primarily drove dump trucks and often worked 50-70 hours per week. At Sargent, Ms. Bosse was laid off during the winter months and rehired in the spring.

[¶3] In 2011 Ms. Bosse experienced low back pain and missed some time from work. In 2015 she began having hip pain. She was taken out of work in October of that year for hip and back pain. A left hip replacement in 2016 alleviated her hip symptoms, but she continued to experience low back pain. Ms. Bosse filed a Petition for Award alleging a gradual work injury arising out of her work for Sargent. She was examined by John Bradford, M.D., pursuant to 39-A M.R.S.A. § 312 (Pamph. 2020) of the Act.

[¶4] Dr. Bradford concluded in his written report that Ms. Bosse's hip arthritis had been caused by her work as a truck driver, but that her work had not caused a significant low back problem. When Dr. Bradford was later deposed, however, he stated that Ms. Bosse's truck driving activities at Sargent probably contributed to the development of degenerative disk disease in her low back. The ALJ concluded that Dr. Bradford had altered his opinion at his deposition and adopted what he

determined to be Dr. Bradford's ultimate opinion: that Ms. Bosse sustained a gradual injury to both hips and to her low back occurring, at least in part, because of her work for Sargent.

[¶5] The ALJ awarded a closed-end period of total incapacity benefits corresponding to her hip surgery and recovery period, and ongoing partial incapacity benefits related to her ongoing low back problem. Because Ms. Bosse had been laid off during the winter months, Sargent contended that the ALJ should calculate her average weekly wage using the fallback method in section 102(4)(D), rather than the standard averaging method in section 102(4)(B). Sargent argued that using paragraph B would unfairly and unreasonably inflate her average weekly wage. The ALJ nevertheless employed section 102(4)(B).

[¶6] In response to the decision, Sargent filed a Motion for Findings of Fact and Conclusions of Law. The ALJ issued an amended decision but did not alter the outcome. Sargent appeals.

II. DISCUSSION

A. Standard of Review

[¶7] The Appellate Division 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 the application of the law to the facts was neither arbitrary nor without rational foundation." *Pomerleau v. United Parcel Serv.*,

464 A.2d 206, 208-09 (Me. 1983). Because Sargent requested findings of fact and conclusions of law following the decision, the Appellate Division may review only the factual findings actually made and the legal standards actually applied by the [ALJ.]" *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446.

B. Average Weekly Wage Calculation

[¶8] Sargent contends the ALJ erred in the method used to calculate average weekly wage. "The average weekly wage is intended to provide a fair and reasonable estimate of what the employee in question would have been able to earn in the labor market in the absence of a work-injury." *Alexander v. Portland Natural Gas*, 2001 ME 129, ¶ 8, 778 A.2d 343; *see also Nielsen v. Burnham & Morrill, Inc*., 600 A.2d 1111, 1112 (Me. 1991). The methods of calculating the average weekly wage are set forth in 39-A M.R.S.A. § 102(4)(A)-(D),[1] and the appropriate method is chosen by

[1] Title 39-A M.R.S.A. § 102(4) provides, in relevant part:

> 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.

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*, 2001 ME 129, ¶ 10, 778 A.2d 446.

[¶9] The ALJ found that Ms. Bosse's wage could be fairly and reasonably calculated pursuant to paragraph B, as opposed to paragraph D, for three reasons: (1) the annualized wage using method B is not so high as to be *per se* unreasonable; (2) the reasons Ms. Bosse worked less than year-round were linked to Sargent's considerations; and (3) she did not have, historically, an intermittent relationship with the labor market but had worked on a year-round basis prior to working for Sargent.

> C. Notwithstanding paragraphs A and B, the average weekly wage of a seasonal worker is determined by dividing the employee's total wages, earnings or salary for the prior calendar year by 52.
>
> (1) For the purposes of this paragraph, the term "seasonal worker" does not include any employee who is customarily employed, full time or part time, for more than 26 weeks in a calendar year. The employee need not be employed by the same employer during this period to fall within this exclusion.
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> (2) Notwithstanding subparagraph (1), the term "seasonal worker" includes, but is not limited to, any employee who is employed directly in agriculture or in the harvesting or initial hauling of forest products.
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> D. When the methods set out in paragraph A, B or C of arriving at the average weekly wages, earnings or salary of the injured employee can not reasonably and fairly be applied, "average weekly wages" means the sum, having regard to the previous wages, earnings or salary of the injured employee and of other employees of the same or most similar class working in the same or most similar employment in the same or a neighboring locality, that reasonably represents the weekly earning capacity of the injured employee in the employment in which the employee at the time of the injury was working.

[¶10] Sargent challenges the finding that Ms. Bosse had worked on a year-round basis before she was hired at Sargent.[2] The ALJ specifically found that Ms. Bosse's work for Gendron & Gendron was comparable to the work she had been doing for herself, but with fewer hours. As a self-employed truck driver from 2000 to 2009, Ms. Bosse had worked year-round without any seasonal layoff. In analyzing the wage issue, the ALJ specifically considered that before Ms. Sargent commenced working for Sargent, she was a consistently full-time, year-round worker.

[¶11] However, undisputed testimony at the hearing demonstrates that Ms. Bosse was subject to seasonal winter layoffs during the two years she worked at Gendron & Gendron, from 2009 to 2011, immediately before going to work for Sargent. Ms. Bosse testified that she usually worked from spring until winter and specifically stated that in 2011 she was called back to work for Gendron in March. While there is no reason to doubt that Ms. Bosse had worked consistently year-round prior to starting her employment at Gendron & Gendron in 2009, the ALJ's finding that she had consistently worked on a year-round basis before going to work for Sargent is not supported by competent evidence.

[¶12] Because a critical finding on which the ALJ based the decision to employ paragraph B is not supported by competent evidence, we remand for

[2] Although Sargent does not directly challenge the support in the record for this finding in its brief, counsel for Sargent raised this at the oral argument before this panel.

reconsideration of the appropriate method to use to calculate her average weekly wage.

C. Low Back Injury

[¶13] Sargent contends that the ALJ erred when finding that Ms. Bosse's low back injury was caused by her employment at Sargent because this finding deviates from the IME's medical findings and is not otherwise supported by clear and convincing contrary evidence. *See* 39-A M.R.S.A. § 312(7) (Pamph. 2020).[3] We disagree.

[¶14] As Sargent asserts, the IME's report states that "I do not feel that her work caused a significant low back problem, on the contrary." However, the IME also stated in his deposition testimony that Ms. Bosse's activities at Sargent probably contributed to the development of ongoing degenerative disc disease in her lower back. Moreover, the ALJ noted that the IME's deposition testimony was generally consistent with two other medical opinions in the record.

[¶15] We conclude that the ALJ did not reject the IME's medical findings in this case. After considering both the written report and the deposition testimony, the

[3] Title 39-A M.R.S.A. § 312(7) provides:

> The board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings. Contrary evidence does not include medical evidence not considered by the independent medical examiner. The board shall state in writing the reasons for not accepting the medical findings of the independent medical examiner.

ALJ concluded that the IME had changed his opinion, and adopted the findings expressed at the deposition. The ALJ was not required to find clear and convincing evidence contrary to the written report in order to find the IME's deposition testimony more persuasive. *See, e.g.*, *Traussi v. B & G Foods*, Me. W.C.B. No. 15-10, ¶ 17 (App. Div. 2015).

D. Title 39-A M.R.S.A. § 201(4)

[¶16] Sargent next contends that the ALJ erred by failing to apply 39-A M.R.S.A. § 201(4)[4] when determining whether the low back injury was compensable. Section 201(4) is applicable to work injuries that aggravate, accelerate, or combine with a preexisting physical condition. Sargent contends that the ALJ failed to account for the requirement that disability resulting from such injuries is compensable only if contributed to by the employment in a significant manner.

[¶17] When asked about a preexisting condition, Dr. Bradford specifically noted in his written report that it was unequivocal that Ms. Bosse was having low back pain at least by 2011, four years prior to the date of injury. Dr. Bradford further explained that the injury seemed to be mechanical back pain, in part related to Ms.

[4] Title 39-A M.R.S.A. § 201(4) provides:

> If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner.

Bosse's age, in part related to obesity, and in part related to her job of driving a dump truck for many years.

[¶18] Accordingly, we determine that section 201(4) is implicated here. Neither Dr. Bradford in his deposition testimony nor the ALJ in his decision adopting that testimony addressed the provision or its requirement that the employment contribute in a significant manner to any resulting disability. We therefore remand the case to permit an application of Section 201(4).

III. CONCLUSION

[¶19] We affirm the ALJ's decision insofar as it finds, based on Dr. Bradford's deposition testimony and other medical evidence, that Ms. Bosse's work injury included an injury to her low back. However, because we find no competent evidence to support the ALJ's factual finding that Ms. Bosse's employment immediately prior to her employment with Sargent was year-round—a critical factual underpinning of the decision to employ section 102(4)(B)—we remand for a determination of whether section 102(4)(B) was the appropriate method to use to calculate the average weekly wage. We also vacate the decision insofar as the ALJ determined, without applying Section 201(4) of the Act, that Ms. Bosse's low back injury is compensable, and we remand for a determination regarding whether her employment contributed to her disability in a significant manner.

The entry is:

> The administrative law judge's decision is affirmed in part and vacated in part, and the matter is remanded for further proceedings consistent with this decision.

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 (Pamph. 2020).

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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