RALPH MARTIN
(Appellee)

v.

GEORGE C. HALL & SONS, INC.
(Appellant)

and

ACADIA INSURANCE COMPANY
(Insurer)

Conference Held: May 7, 2020
Decided: October 6, 2021

EN BANC PANEL MEMBERS: Administrative Law Judges Collier, Chabot, Hirtle, Knopf, Pelletier, and Stovall
By: Administrative Law Judge Pelletier

[¶1] This case presents the issue whether a statutory increase in the State minimum wage from $7.50 to $12.00 per hour, by itself, constitutes a change in economic circumstances sufficient to reconsider a previous partial incapacity benefit award based on an imputed earning capacity. On the facts of this case, we conclude that the increase in the minimum wage since the prior decree is insufficient to constitute the changed economic circumstances that would justify altering the previous award, and we affirm the administrative law judge's (*Elwin, ALJ*) decision.

I. BACKGROUND

[¶2] A prior board decree in this case established that in December 2013, while working for George C. Hall & Sons, Inc. (Hall & Sons), Ralph Martin suffered a work-related compression fracture of his lumbar spine, causing chronic lower back

and leg pain. Mr. Martin's work experience had consisted exclusively of physically demanding jobs and his restrictions prevented him from returning to the type of jobs he had held before he was injured. As a result, and based on his age, lack of high school education, physical restrictions, and employment history, the ALJ found that Mr. Martin had a full-time sedentary to light work capacity and was entitled to ongoing partial incapacity benefits. The ALJ calculated the benefit based on the difference between Mr. Martin's pre-injury average weekly wage of $616.91 and an imputed earning capacity of "$320.00 per week (40 hours at $8.00)."

[¶3] In the current round of litigation, Mr. Martin filed a petition for review of incapacity, asserting that he injured his right shoulder when he sustained a fall due to weakness in his right leg from the 2013 work injury. In a decree issued September 24, 2018, the ALJ found that the resulting right shoulder surgery and incapacity were compensable sequela of the 2013 work injury. She awarded medical benefits and a closed-end period of total incapacity benefits related to the right shoulder.[1] The ALJ further determined that once Mr. Martin had recovered from the shoulder surgery, he regained the full-time sedentary to light work capacity established in the previous decree. The ALJ therefore reinstated the previous partial incapacity benefit on an ongoing basis.

[1] The issue of compensability of the right shoulder treatment and incapacity has not been appealed; nor has the issue of whether the employer had a burden to demonstrate a change of circumstances notwithstanding the ALJ's implicit finding of a change in circumstances in Mr. Martin's level of incapacity, albeit temporary, due to his surgery.

[¶4] Hall & Sons filed a timely motion for further findings of fact and conclusions of law contending that because Mr. Martin's partial incapacity benefit was calculated based on an imputed earning capacity, and because the statutory minimum wage had increased from $7.50 to $12.00 per hour, Mr. Martin's economic circumstances had changed. Hall & Sons asserted that the imputed partial earning capacity level going forward should be based on the prevailing minimum wage of $12.00 per hour, to reflect an imputed $480.00 per week earning capacity (40 hours at $12.00 per hour).

[¶5] The ALJ issued additional findings of fact and conclusions of law in an amended decree, but did not change the outcome. This appeal followed.

II. DISCUSSION

A. *Res Judicata*

[¶6] It is well settled that "valid and final decisions of the Workers' Compensation Board are subject to the general rules of res judicata and issue preclusion." *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 9, 837 A.2d 117. Thus, in order to increase or decrease compensation when a benefit level has been established by a previous decision, the moving party must "first meet its burden to show a change of circumstances since the prior decree, which may be met by either providing comparative medical evidence or by showing changed economic circumstances." *Id.* ¶ 7 (quotation marks omitted). To determine whether changed

circumstances exist, "it is necessary to determine the basis on which the previous award has been made." *McIntyre v. Great N. Paper, Inc.*, 2000 ME 6, ¶ 6, 743 A.2d 744; *see also Folsom v. New England Tel. & Tel. Co*., 606 A.2d 1035, 1037-38 (Me. 1992).

[¶7] This case was heard in the context of Mr. Martin's Petition for Review. However, because Hall & Sons sought a decrease in the level of compensation, it bore a burden to establish that Mr. Martin's economic circumstances had changed, and if so, to establish that his earning capacity had increased. *Cf. McIntyre*, 2000 ME 6, ¶ 6, 743 A.2d 744; *Tripp v. Philips Elmet Corp.*, 676 A.2d 927, 929 (Me. 1996).

B. Partial Incapacity

[¶8] The determination of partial incapacity requires a calculation based on the difference between the employee's pre-injury wage and what the employee is "able to earn" after the injury. 39-A M.R.S.A. § 213 (Pamph. 2020); *Hogan v. Great N. Paper, Inc*., 2001 ME 162, ¶ 9, 784 A.2d 1083. Post-injury earning capacity is based on the employee's physical capacity to earn wages *and* the availability of work within the employee's restrictions. *Id.* (citing *Dumond v. Aroostook Van Lines*, 670 A.2d 939, 941 (Me. 1996)). "In all cases involving partial incapacity, including those in which there is no specific job offer or when the employee has failed to conduct a work search, the obligation of the [ALJ] is to determine what the employee is able

to earn." *Id.* (quotation marks omitted).[2] In carrying out this task, an ALJ must consider not only whether the employee is physically capable of performing the employment, but also whether the employment *is actually open to him*. *Id.* ¶ 10 (citing *Johnson v. Shaw's Distrib. Ctr.*, 2000 ME 191, ¶¶ 14-17, 760 A.2d 1057).

[¶9] Moreover, an employee's post-injury earning capacity is established based on multiple factors. Age, educational background, intelligence, work experience, vocational training, among other factors, are appropriately considered when determining what jobs are available to the employee and thus, what the employee is able to earn after being injured at work. *See Morse v. Fleet Fin. Group*, 2001 ME 142, ¶ 9, 782 A.2d 769; *see also Belanger v. Miles Mem'l Hosp.*, Me. W.C.B. No. 17-23, ¶¶ 11-12 (App. div. 2017) (stating that factors relevant to a change in economic circumstances include extent of employee's work search, time out of work in employee's profession, whether the employee underwent vocational rehabilitation services, and job loss).

C. Analysis

[¶10] The ALJ determined that Hall & Sons failed to prove that that from the time of his recovery from shoulder surgery and ongoing, Mr. Martin's economic circumstances had changed. On appeal, Hall & Sons reasserts its argument that the statutory increase in the minimum wage is sufficient to establish that Mr. Martin's

[2] The Court in *Hogan* cited to a previous version of the partial incapacity stature, 39 M.R.S.A. § 55, which in pertinent part is identical to the current provision in the Act, 39-A M.R.S.A. § 213.

economic circumstances have changed. *See* 26 M.R.S.A. § 664.[3] Hall & Sons contends that the ALJ erred by declining to modify the benefit payout scheme based on an imputed earning capacity of $480.00 per week (40 hours at $12.00 per hour). Because the prior partial incapacity benefit was not calculated based on the minimum wage, we disagree.

[¶11] In *McIntyre v. Great Northern Paper*, the board awarded the employee partial benefits based on a 25% post-injury earning capacity in a 1992 decree. 2000 ME 6, ¶ 2, 743 A.2d 744. Several years later, the employee filed a petition for review. *Id.* ¶ 4. Pursuant to that petition, the employee was awarded a closed-end period of total incapacity benefits due to a surgical procedure related to his work injury. *Id.* For the period after his recovery, however, the hearing officer determined that the

[3] Title 26 M.R.S.A. § 664 provides:

> **Minimum wage; overtime rate**
>
> Except as otherwise provided in this subchapter, an employer may not employ any employee at a rate less than the rates required by this section. [PL 1995, c. 305, §1 (RPR).]
>
> **1. Minimum wage.** The minimum hourly wage is $7.50 per hour. Starting January 1, 2017, the minimum hourly wage is $9.00 per hour; starting January 1, 2018, the minimum hourly wage is $10.00 per hour; starting January 1, 2019, the minimum hourly wage is $11.00 per hour; and starting January 1, 2020, the minimum hourly wage is $12.00 per hour. On January 1, 2021 and each January 1st thereafter, the minimum hourly wage then in effect must be increased by the increase, if any, in the cost of living. The increase in the cost of living must be measured by the percentage increase, if any, as of August of the previous year over the level as of August of the year preceding that year in the Consumer Price Index for Urban Wage Earners and Clerical Workers, CPI-W, for the Northeast Region, or its successor index, as published by the United States Department of Labor, Bureau of Labor Statistics or its successor agency, with the amount of the minimum wage increase rounded to the nearest multiple of 5¢. If the highest federal minimum wage is increased in excess of the minimum wage in effect under this section, the minimum wage under this section is increased to the same amount, effective on the same date as the increase in the federal minimum wage, and must be increased in accordance with this section thereafter.

employee reverted to his pre-surgical medical condition and did not experience a change in economic circumstances, and thus the board reinstated the partial benefit award established in a prior decree. *Id.*

[¶12] The Law Court held that the hearing officer erred in finding that the employee's economic circumstances had not changed. *Id.* ¶ 7. The Court noted that the prior award had been based on the employee's failure to conduct a proper exploration of the labor market. *Id.* The Court determined that the employee's circumstances had changed because factors that formed the basis of the ALJ's prior assessment of post-injury earning capacity had changed—the employee had sought out and completed vocational training, engaged in a search for employment, and committed himself to that new employment. *Id.* Thus, the Court vacated the hearing officer's decision and remanded the case for a determination of the employee's ongoing earning capacity. *Id.* ¶ 8.

[¶13] Pursuant to *McIntyre*, changed economic circumstances must be established with reference to factors that formed the basis of the ALJ's prior assessment of post-injury earning capacity. *See id.* ¶ 7.

[¶14] In this case, in the prior decree, the ALJ provided the following basis for the award of partial incapacity benefits with an imputed earning capacity of $320.00 per week:

> Mr. Martin has a 10th grade education and no GED. In the past, he ran his own business although he needed his daughter to help him with written work. His work experience is limited to physically demanding construction, masonry, and excavating work, which his restrictions prevent him from doing. Nevertheless, the labor market survey identifies a number of available jobs within Mr. Martin's restrictions, including light assembly, local delivery and security work. Because the higher paying jobs identified, such as oil delivery driver, are likely beyond Mr. Martin's restrictions, the Board does not believe Mr. Martin could find an entry level job paying $10.50 per hour. Instead, based on Mr. Martin's age, limited education, physical restrictions and work experience, the Board imputes an earning capacity of $320.00 per week (40 hours at $8.00 per hour).

[¶15] The ALJ neither referred to nor applied the prevailing minimum wage in imputing Mr. Martin's earning capacity.[4] Rather, as outlined in *Morse*, the ALJ considered vocational evidence in the context of an injured worker whose residual physical capacity prevents him from obtaining jobs consistent with his prior work experience.

[¶16] In the decree currently under appeal, the ALJ found no change in circumstances for the following reasons:

> Employer/insurer offered no labor market evidence to support a finding that Mr. Martin's employment prospects had improved or that he was able to earn more than the imputed earning capacity established in the prior decree. As in *McIntyre,* Mr. Martin was entitled to a period of increased benefits due to surgery necessitated by his work injury; however, the surgery (and the resulting closed-end period of increased benefits) did not constitute a "change of circumstances" sufficient to trigger an adjustment of the ongoing level of partial incapacity benefits.

[4] In contrast to the decree under appeal, in a provisional order the ALJ awarded Mr. Martin a partial benefit based on the prevailing minimum wage of $7.50 per hour, underscoring the absence of reliance on the minimum wage in the current award.

[¶17] Thus, with reference to the basis on which the previous award was granted, the ALJ found that after the closed-end period of total incapacity ended, Mr. Martin retained the same physical capacity for work (full-time light to sedentary) as he retained at the time of the prior decree. Hall & Sons presented no evidence on the availability of suitable work in Mr. Martin's community paying the $12.00 minimum wage, or of a change in any other factor the ALJ found relevant to establishing Mr. Martin's earning capacity in the prior decree, such as vocational or other training, that might have improved his prospects. *See McIntyre*, 2000 ME 6, ¶ 5, 743 A.2d 744 (holding that the party with burden of proof must show change from the previous decree sufficient to justify a different result). Thus, the ALJ did not err when finding that Mr. Martin's economic circumstances did not change.

IV. CONCLUSION

[¶18] In this case, Hall & Sons failed to overcome the *res judicata* effect of the previous decree when the only basis it asserted as the change in the employee's economic circumstances was an increase in the State minimum wage, and the prior award was not based on the minimum wage. Competent evidence supports the ALJ's factual findings, and the ALJ neither misconceived nor misapplied the law when declining to revisit the prior award. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983).

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 (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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