STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
App. Div. Case No. 20-0008
Decision No. 21-30

CRAIG CARVER
(Appellant)

v.

WALMART/SAM'S CLUB
(Appellee)

and

CLAIMS MANAGEMENT, INC.
(Third-Party Administrator)

Oral argument: October 22, 2020
Decided: November 9, 2021

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

[¶1] Craig Carver appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) granting Walmart/Sam's Club's Petition for Review and reducing Mr. Carver's ongoing partial incapacity benefits for a May 27, 2015, work-related low back injury. Mr. Carver asserts that the ALJ erred in reducing his benefits based solely on an increase in the State minimum wage without any showing regarding the availability of work within his restrictions. We vacate the ALJ's decision, and remand for further proceedings.

I. BACKGROUND

[¶2] Mr. Carver suffered a compensable low back injury on May 27, 2015, while working as a commercial truck driver for Walmart/Sam's Club. By decision dated April 27, 2017, the board ordered Walmart/Sam's Club to pay Mr. Carver

partial incapacity benefits based on an imputed earning capacity of $360.00 per week, which the ALJ found to be "a full time, minimum wage earning capacity." At the time of the decision, the State minimum wage was $9.00 per hour.

[¶3] Two years later, Walmart/Sam's Club filed a Petition for Review seeking to reduce Mr. Carver's benefits. Walmart/Sam's Club asserted that Mr. Carver's economic circumstances had changed because the State minimum wage had increased from $9.00 to $11.00 per hour.[1] The ALJ agreed, finding that while there was no evidence of any other change in circumstances, the increased statewide minimum wage was a change sufficient to warrant revisiting and adjusting the prior award. Based on the then-applicable minimum wage of $11.00 per hour (effective

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[1] The minimum wage was increased pursuant to 26 M.R.S.A. § 664, which 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.
>
> **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.

January 1, 2019), the ALJ reduced Mr. Carver's partial benefits to reflect an imputed earning capacity of $440.00 per week.

[¶4] Mr. Carver filed a Motion for Further Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Pamph. 2020), which the ALJ denied. Mr. Carver appeals.

II. DISCUSSION

[¶5] 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. Res judicata and issue preclusion in the workers' compensation setting are intended to promote "judicial economy and efficiency, the stability of final judgments, and fairness to litigants." *Id.* (quoting *Crawford v. Allied Container Corp.*, 561 A.2d 1027, 1028 (Me. 1989)). "Consequently, in order to prevail on a subsequent petition for review, the party petitioning must show a change of circumstances from the previous decree sufficient to justify a different result." *McIntyre v. Great N. Paper, Inc.*, 2000 ME 6, ¶ 5, 743 A.2d 744. The burden to show changed circumstances since the prior decree "may be met by either providing comparative medical evidence or by showing changed economic circumstances." *Grubb,* 2003 ME 139, ¶ 7 (quotation marks omitted). The purpose of the rule is "to prevent the use of one set of facts to reach different conclusions." *McIntyre*, 2000 ME 6, ¶ 5, 743 A.2d 744

(quotation marks omitted). To determine whether changed circumstances exist, "it is necessary to determine the basis on which the previous award has been made." *Id.* ¶ 6; *see also Folsom v. New England Tel. & Tel. Co*., 606 A.2d 1035, 1037-38 (Me. 1992).

[¶6] An en banc panel of the Appellate Division recently addressed whether an increase in the State minimum wage could constitute a change in economic circumstances sufficient to revisit a prior partial benefit award based on an imputed earning capacity. *Martin v. George C. Hall & Sons, Inc.*, Me. W.C.B. No. 21-27 (App. Div. 2021). Reasoning that the determination of post-injury earning capacity requires a multifactorial analysis based on the employee's physical capacity to earn wages and the availability of work within the employee's restrictions, *id.* ¶ 9*,* the en banc panel held that 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, *id.* ¶ 13 (citing *McIntyre*, 2000 ME 6, ¶ 6, 743 A.2d 744).

[¶7] Applying this principle, the *Martin* panel looked to the factors on which the original partial incapacity award was based: the ALJ had considered vocational evidence along with the employee's residual physical capacity that precluded him from obtaining jobs consistent with his prior work experience. *Id.* ¶ 14. The panel specifically noted that "[t]he ALJ neither referred to nor applied the prevailing minimum wage in imputing Mr. Martin's earning capacity." *Id.* ¶ 15.

[¶8] The en banc panel in *Martin* then looked to the factors considered by the ALJ when evaluating whether sufficient changed circumstances had been established. The panel noted that the employer had offered no labor market or other evidence to show that, for example: (1) Mr. Martin's employment prospects had improved, (2) suitable work in Mr. Martin's community paying the current minimum wage was available to him within his restrictions, (3) he had undergone vocational or other training or gained new skills to increase his employability, or (4) that any other factor the ALJ found relevant to establishing the employee's earning capacity in the prior decree had changed in a way that may have improved his economic circumstances. *Id.* ¶ 17. Specifically noting the ALJ had not based the imputed earning capacity on the minimum wage, the en banc panel determined that evidence that the minimum wage had increased alone was not sufficient to establish changed economic circumstances. *Id. ¶* 18.

[¶9] In the initial litigation in this case, Mr. Carver bore the burden of proof regarding his earning capacity. Mr. Carver had argued that he was totally incapacitated, and he did not submit work search evidence or any other evidence regarding the availability of employment within his restrictions in the community. The ALJ considered that Mr. Carver was precluded from working in his previous occupation as a commercial vehicle operator, and thus was partially incapacitated. The ALJ imputed a full-time, minimum wage-earning capacity.

[¶10] In this round of litigation, Walmart/Sam's Club sought to decrease the level of partial compensation ordered in the prior decision. It therefore bore the burden of proving that Mr. Carver's economic circumstances had changed and 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).

[¶11] Under *Morrisette v. Kimberly-Clark Corp.*, 2003 ME 138, ¶ 15, 837 A.2d 123, and *Grubb v. S.D. Warren, Co.*, 2003 139, ¶ 11, 837 A. 2d 117, a statutory change in the method of calculating incapacity benefits under the Act was held not to constitute a change in economic circumstances. In distinguishing *Morrisette* and *Grubb*, the ALJ in this case reasoned that an increase in the statewide minimum wage "changes the economic circumstances of every Maine worker whose employer is subject to that section and by extension, changes the economic circumstances of individuals like Mr. Carver, whose incapacity benefits are reduced by an imputed earning capacity reflecting what individuals are capable of earning in the labor market."

[¶12] Although we agree that an increase in the minimum wage may represent changed economic circumstances, we conclude that the ALJ applied incorrect legal principles in this case when reasoning that a change in the minimum wage changes the economic circumstances of every individual whose imputed income was initially based on the minimum wage. Changed economic circumstances remains a case

specific inquiry and should not be viewed in a vacuum.[2] Allowing a statutory change in the minimum wage, by itself, to automatically constitute a change in an individual employee's economic circumstances assumes the availability of theoretical opportunities to earn without evidence of actual ones. For example, while the minimum wage increased in January 2020, this did not represent an automatic improvement in economic conditions for all workers in March 2020, when a pandemic caused many businesses to shut down, eliminate jobs, or stop hiring new workers.

[¶13] Additionally, not every change in the State minimum wage justifies, nor should it occasion, the filing of a petition for review in cases involving an imputed income based on the minimum wage. To allow an automatic reduction of an employee's partial benefits could thwart the related goals of judicial economy and protecting litigants from the "uncertainty associated with ongoing and repetitive litigation." *Bailey v. City of Lewiston*, 2017 ME 160, ¶ 17, 168 A.3d 762. It is also important to consider that under the current version of the Act, an employee's average weekly wage is not adjusted for inflation, remaining static in time while the minimum wage increases. Given these considerations, the adoption of a mechanical

[2] Changes in general economic conditions alone ordinarily do not constitute sufficient changed circumstances to justify reopening a prior benefit award. *See* 13 Arthur Larson, Lex K. Larson & Thomas A. Robinson, *Larson's Workers' Compensation Law,* § 131.03 (2020) (footnotes omitted).

approach to a recalculation of benefits would appear to fall into the province of the Legislature, rather than the board.

[¶14] Accordingly, the analysis upon a contention of changed economic circumstances should go deeper than a mere consideration of the change in the State minimum wage. Factors that might be considered when determining whether an employee's economic circumstances have changed include, but are not limited to, the amount of time between the award of partial benefits and the petition for review, the magnitude of the change in minimum wage during that interval, the resulting change in benefit amount,[3] and the overall economic conditions in the community at the time of the review.

[¶15] In this case, two years had passed since the initial award of benefits. In that time, the minimum wage had increased from $9.00 to $11.00 per hour, an increase of 22%. Moreover, Mr. Carver's initial partial incapacity award was calculated based on an imputed income that refers specifically to the minimum wage at the time. Although the ALJ made the determination that Mr. Carver's economic circumstances had changed with reference to the basis of the prior award, consistent with *Martin*, and in the interim that basis changed due to the increase in the minimum wage, in light of the principles articulated herein, we cannot say that the ALJ fully

[3] For example, if there is only a modest per week change in the benefit amount, the interest in judicial economy may outweigh the employer's interest in adjusting the benefit.

explored whether the increase in the minimum wage constituted a change in Mr. Carver's individual economic circumstances sufficient to revisit the prior award.

III. CONCLUSION

[¶16] Because we have not previously addressed the factors to be considered in determining when and in what circumstances a change in the State minimum wage may constitute a change in economic circumstances that would justify revisiting a previous award calculated with reference to the minimum wage, and because we are unable to determine how those factors would ultimately have been weighed by the ALJ, we vacate the decision and remand to the ALJ for reconsideration of the evidence in light of principles announced in this decision. *See Monaghan v. Jordan's Meats*, 2007 ME 100, ¶ 25, 928 A.2d 786.

[¶17] On remand, if the ALJ determines that Walmart/Sam's Club has established changed circumstances sufficient to revisit the prior benefit award, the ALJ should next determine (1) whether Walmart/Sam's Club has established an increased earning capacity; and if so, (2) whether the employer is entitled to a reduction in benefits following the guidelines set forth by the Law Court to allocate the order and presentation of proof:

> On an employer's petition for review, the employer bears the burden of proof to establish the employee's earning capacity; however, when the employer shows that the employee has regained partial work-capacity, the employee bears a burden of production to show that work is unavailable as a result of the injury. *Ibbitson v. Sheridan Corp.*, 422 A.2d 1005, 1009 (Me. 1980). If the employee meets the burden of

> production, the employer's "never shifting" burden of proof may require it to show that it is more probable than not that there is available work within the employee's physical ability. *Id.* at 1009-10; *Poitras v. R.E. Glidden Body Shop*, 430 A.2d 1113, 1118 (Me. 1981).

Dumond v. Aroostook Van Lines, 670 A.2d 939, 941-42 (Me. 1996).

The entry is:

> The administrative law judge's decision is vacated, and the matter is remanded to the administrative law judge for 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 (Supp. 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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