STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 24-0020
Decision No. 25-17

WAYNE IRELAND
(Appellant)

v.

EUROVIA ATLANTIC COAST, LLC
(Appellee)

and

AMERICAN ZURICH INSURANCE COMPANY
(Appellee)

Argued: July 10, 2025
Decided: October 17, 2025

PANEL MEMBERS: Administrative Law Judges Stovall, Chabot, and Murphy
BY: Administrative Law Judge Chabot

[¶1] Wayne Ireland appeals a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*), granting in part his Petition for Award related to a September 13, 2019, date of injury, but denying his Petition for Award related to an August 19, 2020, date of injury. Mr. Ireland contends that the ALJ erred in calculating his average weekly wage for the 2019 work injury pursuant to 39-A M.R.S.A § 102(4)(D), and by denying his request for an independent medical examination for the 2020 date of injury pursuant to 39-A M.R.S.A § 312. We affirm the decision.

I. BACKGROUND

[¶2] Wayne Ireland, age 57, worked as a heavy equipment operator for his entire career. He began working in that role for Eurovia in April 2019. He had sustained a previous work-related injury to his back in 2016, which was settled in 2018. On September 13, 2019, Mr. Ireland was operating a grader when his supervisor, who was intoxicated, repeatedly struck the grader with a bulldozer, injuring Mr. Ireland's neck and back. Mr. Ireland returned to his regular work schedule after a few days out of work. On October 25, 2019, Mr. Ireland was laid off for the season. He returned to work in May of 2020.

[¶3] On August 19, 2020, Mr. Ireland was assigned to operate a bulldozer to spread fill that would form the base of a roadway. The fill, however, was not suitable for that purpose. Eurovia then arranged with a local farmer to trade the unsuitable fill material for material the farmer was processing into loam. A Department of Transportation representative approved the material for use as fill. Mr. Ireland testified that the farmer's fill had a strong odor like glue, and during his ten-hour shift moving this material, he experienced a sore throat, dizziness, watering eyes, a flushed face, and an odd taste. He further testified that he has had ongoing symptoms since this event, and he has not returned to work. He filed his Petitions for Award regarding both dates of injury in December 2023.

[¶4] A hearing was scheduled for April 11, 2024. Mr. Ireland requested independent medical examinations pursuant to 39-A M.R.S.A § 312, regarding both the September 13, 2019, back and neck injury, and the August 19, 2020, alleged toxic exposure injury. Eurovia objected on the grounds, among others, that Mr. Ireland had caused numerous previous delays in the litigation (having dismissed his petitions without prejudice twice and refiled) and the current request was untimely. The ALJ entered an order permitting the examinations over Eurovia's objection. A physiatrist was assigned to conduct the examination regarding the 2019 injury, and that examination took place on March 2, 2024.

[¶5] On March 15, 2024, Mr. Ireland filed an unopposed motion to continue the hearing set for April 11, 2024, because no independent toxicology examination had been scheduled. On March 21, 2024, the Office of Medical/Rehabilitation Services advised the ALJ and the parties that it had been unsuccessful in identifying a doctor who could perform the toxicology examination. There being no "section 312 examination on the horizon," the ALJ denied the request to continue the hearing.

[¶6] Based on the evidence, the ALJ granted the Petition for Award on the September 13, 2019, date of injury in part. The ALJ determined the average weekly wage to be $1,355.76 pursuant to 39-A M.R.S.A. §102(4)(B), rejecting Eurovia's argument that the wage should be calculated pursuant to 39-A M.R.S.A.

§102(4)(D), and stating, "I find that method B may be reasonably and fairly applied… ." The ALJ further found that the injury had resolved as of May 15, 2020, but ordered payment due to a violation of Me. W.C.B. Rule, ch. 1, § 1, the "fourteen-day rule). The ALJ denied the Petition for Award on the August 19, 2020, date of injury, stating that Mr. Ireland had not met his burden to establish that his symptoms are causally related to his employment.

[¶7] Both parties filed motions for further findings of facts and conclusion of law pursuant to 39-A M.R.S. § 318. The ALJ granted the motions and altered the decision regarding average weekly wage only. The ALJ applied section 102(4)(D) instead of section102(4)(B), and found that Mr. Ireland's average weekly wage for the September 13, 2019, injury was $862.66. Mr. Ireland appeals.

II. DISCUSSION

A. Standard of Review

[¶8] The role of the Appellate Division "is limited to assuring that the [ALJ's] 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." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). The Appellate Division will not disturb a factual finding made by the ALJ absent a showing that it lacks competent evidence to support it. *Dunkin Donuts of Am., Inc. v. Watson*, 366 A.2d 1121, 1125 (Me. 1976).

B. Average Weekly Wage

[¶9] The issue in this case is whether it is appropriate to calculate average weekly wage by applying 39-A M.R.S.A § 102(4)(D) when the employee is subject to periodic layoffs associated with the nature of the employer's business. Mr. Ireland contends that section 102(4)(B) should have been applied. We disagree.

[¶10] The methods of calculating 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 proceeding

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[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.
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> **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.

sequentially through the four alternatives. *Bossie v. S.A.D. No. 24*, 1997 ME 233, ¶ 3, 706 A.2d 578. Subsection 102(4)(D) is a fallback provision applicable when none of the preceding methods can be "reasonably and fairly applied." *Bosse v. Sargent Corp.*, 2025 ME 74, ¶ 11, 340 A.3d 673; *Alexander v. Portland Nat. Gas*, 2001 ME 129, ¶ 10, 778 A.2d 343. "[T]he party asserting the application of subsection D . . . [bears] the burden of providing evidence to support a determination pursuant to that subsection." *Bossie*, 1997 ME 233, ¶ 6. Paragraph D requires the examination of comparable employees' earnings to ascertain what a reasonable average weekly wage for the employee would be, but otherwise does not require strict adherence to an exact mathematical formula. *Alexander*, 2001 ME 129, ¶ 17.

[¶11] The ALJ specifically found that paragraph A did not apply because the employee had not worked 200 days before the injury. Although the ALJ initially found that paragraph B could be reasonably and fairly applied, upon receiving the parties' proposed additional findings of fact and conclusions of law, he was persuaded by Eurovia's argument that due to the seasonal layoff experienced by Mr.

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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.

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.

Ireland, applying paragraph B would unfairly result in gross earnings that were higher than Mr. Ireland's earnings in 2019 and 2020. Paragraph C did not apply because Mr. Ireland worked more than 26 weeks per year and thus was not a seasonal worker. The ALJ therefore applied paragraph D and imputed minimum wage for the weeks Mr. Ireland was out of work due to the seasonal layoff.

[¶12] The Law Court has stated that paragraph D might provide the best method of determining the average weekly wage in cases where the employee has a history of employment for less than the full year. *Bossie*, 1997 ME 233, ¶¶ 5-6. The Appellate Division endorsed such an approach when employees have a "consistently intermittent" relationship with the labor market but are not seasonal employees pursuant to paragraph C. *Pastula v. Lane Constr. Corp.*, Me. W.C.B. No. 15-17 (App. Div. 2015).

[¶13] *Pastula* involved similar circumstances to this case. The hearing officer had determined that the employee's pattern of regular, yearly layoffs over a period of nine years constituted a consistently intermittent relationship with the labor market, making application of paragraph D appropriate. *Id.* ¶ 36. The employer had submitted evidence of comparable employee earnings, which the hearing officer found demonstrated that layoff periods were consistent in the industry. *Id.* ¶ 37. Because there was no evidence of actual earnings during the layoff period, the ALJ imputed a minimum wage-earning capacity during that period, added that amount to the employee's total earnings with the employer, and divided by 52 to arrive at the average weekly wage. *Id.*

[¶14] The Appellate Division panel affirmed, reasoning:

> Under the particular circumstances of this case, we conclude that the hearing officer neither misconceived nor misapplied the law when applying paragraph D. *See Bossie*, 1997 ME 233, ¶ 5 (suggesting paragraph D is best method of determining average weekly wage when employee has chosen a consistent part-time relationship to the labor market). Because calculation pursuant to that paragraph is flexible as long as comparable earnings are considered, we cannot say that it was error to impute $360 per week in wages during Ms. Pastula's layoff period in order to fairly and reasonably estimate what she "would have been able to earn in the labor market in the absence of a work-injury." *Alexander*, 2001 ME 129, ¶ 8, 778 A.2d 343.

Id. ¶ 38.

[¶15] An Appellate Division panel affirmed a different result in *Gushee v. Point Sebago*, Me, W.C.B. No. 13-1 (App. Div. 2013). The employee in *Gushee* worked for a seasonal resort and had been laid off for two of the three winters before he sustained a work injury. *Id.* ¶ 2. The hearing officer determined that the facts of that case did not demonstrate a consistently intermittent relationship with the labor market, and applied paragraph B to determine the average weekly wage. *Id.* ¶ 16. The Appellate Division panel affirmed, distinguishing the case from *Bossie,* which involved a 24-year pattern of the employee choosing not to work during summer school vacations, 1997 ME 233, ¶ 2, and *Alexander,* in which the employee made a deliberate choice to have an intermittent relationship with the labor market, 2009 ME 129, ¶ 13.

[¶16] The ALJ in this case determined that the facts here are closer to those in *Pastula*. The decision, however, was issued before the Law Court's recent decision in *Bosse v. Sargent Corp.*, 2025 ME 74, 340 A.3d 673. The Court in *Bosse* set forth factors for an ALJ to consider when deciding whether to apply paragraph D rather than paragraph B when, as in this case, the employee has worked more than 26 weeks but fewer than 200 days. Those factors include but are not limited to:

> the size of the difference between an employee's actual past wages and the annual award as calculated pursuant to paragraph B; whether an annual lay-off or other period of unemployment was voluntary; whether working fewer than fifty-two weeks each year is a characteristic of the occupation; and whether there was a realistic possibility that the employee's future wages would resemble the AWW calculated under paragraph B.

2025 ME 74, ¶ 21.

[¶17] Eurovia submitted and the ALJ considered wage statements of comparable employees as required by paragraph D, which demonstrated a pattern of winter layoffs that characterize Mr. Ireland's chosen occupation. Mr. Ireland testified that he has operated heavy machinery for his entire career, and that this work generally involved a layoff period over the winter, from late December to April. His long tenure in a profession with consistent annual layoffs suggests that his periods of unemployment were voluntary, and that his future wages would not resemble the average weekly wage calculated under paragraph B. Moreover, the ALJ found that application of paragraph B would result in an inflated average weekly wage.

[¶18] Despite Mr. Ireland's contentions, the ALJ's factual findings are supported by competent evidence in the record, and the ALJ did not err when determining that it was unfair and unreasonable to apply paragraph B, and instead to calculate average weekly wage under paragraph D.

C. Independent Medical Examination under 39-A M.R.S.A § 312.

[¶19] Mr. Ireland asserts that the ALJ violated his statutory right to an independent medical examination under 39-A M.R.S.A § 312 by refusing to continue the hearing so that an examiner could be found to evaluate his alleged toxic exposure injury. We disagree with this contention.

[¶20] The Maine Workers' Compensation Board is required to "create, maintain and periodically validate a list of not more than 50 health care providers that it finds to be the most qualified and to be highly experienced and competent in their specific fields of expertise and in the treatment of work-related injuries to serve as independent medical examiners." 39-A M.R.S.A. § 312(1). Either party can request an independent medical examination on a disputed medical issue, or the board can order such an examination. 39-A M.R.S.A § 312(3). Title 39-A M.R.S.A. § 312(3) states specifically, in relevant part:

> If the parties to a dispute can not agree on an independent medical examiner of their own choosing, the board shall assign an independent medical examiner from the list of qualified examiners to render medical findings in any dispute relating to the medical condition of a claimant.

[¶21] Title 39-A M.R.S.A. § 312(4) authorizes the board to adopt rules pertaining to the procedures relevant to independent medical examinations. Me. W.C.B. Rule, ch. 4, § 2(2) states in relevant part:

> If the parties do not agree on the selection of a particular independent medical examiner, the requesting party shall file a Request for Independent Medical Examination . . . with the Office of Medical/ Rehabilitation Services, [of the] Workers' Compensation Board. . . . The Executive Director or the Executive Director's designee shall assign an examiner from the list of qualified examiners. If the list does not contain a qualified examiner, the Executive Director or the Executive Director's designee may select a qualified medical examiner of his/her choice.

[¶22] The assignment "will be made from a relevant area of specialty for the medical issues in question." Rule ch. 12, § 2(3). The ALJ is required to adopt the medical findings of an independent medical examiner unless there is clear and convincing evidence to the contrary in the record. 39-A M.R.S.A.§ 312(7).

[¶23] The ALJ initially granted Mr. Ireland's request for an independent medical examination by a toxicologist by order dated January 19, 2024. On March 15, 2024, Mr. Ireland requested that the hearing scheduled for April 11, 2024, be continued because an independent toxicologist had not yet been appointed. However, on March 21, 2024, Bernie Bean, the board employee designated to appoint independent medical examiners, advised the parties and the ALJ that the qualified examiner on the board's list was not available to perform the examination and would not be available for the foreseeable future; there were no other section 312 examiners with relevant qualifications available; and he had been unable to find a willing, qualified toxicologist to conduct independent medical examinations for years. The ALJ thus denied the motion to continue, which sought a delay only so that such an examiner could be appointed.

[¶24] We review an ALJ's decisions regarding the conduct of proceedings to determine whether, considering all the circumstances, the ALJ acted beyond the scope of his allowable discretion. *See Estate of Jensen v. S.D. Warren*, Me. W.C.B. No. 20-22, ¶ 19 (App. Div. 2020); *Laursen v. Sapphire Mgmt.*, Me. W.C.B. No. 20-19, ¶¶ 12-13 (App. Div. 2020). We will vacate the ALJ's decision only if, considering all the circumstances, the proceedings were fundamentally unfair. *Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 (Me. 1985).

[¶25] The basis for the motion to continue was to allow time for a section 312 examiner to be appointed. The only qualified examiner on the board's list was unable to perform the exam. In that situation, the board's designee was not required to appoint an examiner but was permitted to "select a qualified medical examiner of his/her choice." Rule, ch. 4, § 2(2). Mr. Bean, however, despite consistent efforts, was unable to locate a toxicologist able and willing to perform the examination and informed the board of his inability to appoint an examiner. It did not violate Mr. Ireland's rights under the Act to allow the proceedings to go forward when the appointment of an independent medical examiner could not happen within a reasonable time frame. *See Boise Cascade Corp. v. Me. Workers' Comp. Bd.*, No. CV-95-120, 1995 Me. Super. LEXIS 119, at *3 (March 21, 1995) (stating "to stay the proceedings in the instant case with no real prospect of the independent medical examiner system being established within a defined or reasonable time frame would serve to deny this employee his opportunity to obtain compensation for his alleged injuries for an indefinite period of time.").

[¶26] Moreover, the record does not disclose that Mr. Ireland requested reconsideration of the denial so that he could obtain his own expert or identify an examiner on which the parties could agree. Under these circumstances, the decision comported with fundamental fairness. *See Laskey v. S.D. Warren Co.*, 2001 ME 103, ¶¶ 14, 30, 774 A.2d 358 (determining that the hearing officer acted within the bounds of discretion when denying the employer's petition for review after disqualifying the independent medical examiner due to a conflict of interest and not appointing another, when the employer was given the option to refile its petition and request appointment of an examiner).

III. CONCLUSION

[¶27] We conclude that the ALJ did not err in applying 39-A M.R.S.A. §102(4)(D) when determining Mr. Ireland's average weekly wage. We further conclude that the ALJ neither violated Mr. Ireland's statutory rights nor exceeded the bounds of his discretion when he declined to continue the scheduled hearing.

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.

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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