LORRI BOSSE
(Appellee)

v.

SARGENT CORPORATION
(Appellant)

and

CROSS INSURANCE TPA, INC.
(Insurer)

Argued: February 7, 2024
Decided: July 10, 2024

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

[¶1] Sargent Corporation appeals from a post-remand decision of a Workers' Compensation Board administrative law judge (*Rooks, ALJ*), granting Lorri Bosse's Petition for Award. Sargent contends the ALJ erred when determining that Ms. Bosse's employment at Sargent contributed to her disability in a significant manner, *see* 39-A M.R.S.A. § 201(4); and that her average weekly wage (AWW) could be fairly and reasonably calculated pursuant to 39-A M.R.S.A. § 102(4)(B). We affirm the decision.

I. BACKGROUND

[¶2] This is the second appeal in this case. The previous appellate panel set forth the facts as follows:

> 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. [Ms. Bosse had also been laid off by Gendron during the winter months.]
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> 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.

Bosse v. Sargent Corp., Me. W.C.B. No. 21-12, ¶¶ 2-3 (App. Div. 2021).

[¶3] In the prior round of litigation, the ALJ (*Goodnough, ALJ*) granted Ms. Bosse's petition and awarded her ongoing partial incapacity benefits based on an AWW calculated pursuant to 39-A M.R.S.A. § 102(4)(B).

[¶4] At issue in the prior appeal was whether the ALJ erred in calculating Ms. Bosse's AWW pursuant to section 102(4)(B) instead of 102(4)(D), and in failing to determine Sargent's liability pursuant to 39-A M.R.S.A. § 201(4) because Ms. Bosse had a preexisting back condition. *Bosse*, Me. W.C.B. No. 21-12, ¶ 1. The appellate panel vacated the decision in part, determining that the ALJ had (1) based his ruling regarding AWW on an unsupported factual finding—that Ms. Bosse had consistently worked on a year-round basis in the years before she was hired at Sargent—and (2) failed to assess whether her low back injury was compensable

pursuant to section 201(4). *Id.* at ¶¶ 11-12, 18. The appellate panel remanded the case for a determination of whether "section 102(4)(B) was the appropriate method to use to calculate the average weekly wage" and "whether her employment contributed to her disability in a significant manner" under section 201(4). *Id.* at ¶ 19.

[¶5] On remand, the ALJ (*Rooks, ALJ*)[1] struck the factual finding that Ms. Bosse had worked year-round in the years before she worked at Sargent, but still proceeded to calculate Ms. Bosse's AWW pursuant to section 102(4)(B). The ALJ further determined that Ms. Bosse's employment at Sargent contributed to her disability in a significant manner, resulting in a compensable injury under section 201(4). The ALJ granted the petition and awarded Ms. Bosse ongoing partial incapacity benefits. Sargent filed a Motion for Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶6] 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*

[1] The case was reassigned to ALJ Rooks after ALJ Goodnough retired.

Aircraft, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). Because Ms. Bosse requested findings of fact and conclusions of law following the decision, the Appellate Division will "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. Title 39-A M.R.S.A. § 201(4)

[¶7] As directed by the Appellate Division, the ALJ on remand applied section 201(4) of the Act, which 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.

[¶8] When a case comes within section 201(4), the ALJ must first determine whether a work-related injury occurred; that is, whether the purported injury arose out of and in the course of employment. *See Celentano v. Dep't of Corr*., 2005 ME 125, ¶ 9, 887 A.2d 512; *Derrig v. Fels Co*., 1999 ME 162, ¶ 6, 747 A.2d 580. If such an injury is found, then the "remaining issue is whether the combination of the work-related injury and [the employee's] preexisting condition resulted in a disability and whether the disability was 'contributed to by the employment in a significant manner.'" *Celentano*, 2005 ME 125, ¶ 15.

[¶9] In the current appeal, Sargent contends the ALJ misinterpreted the independent medical examiner's findings when concluding that her employment at

Sargent contributed to her disability in a significant manner, pointing to inconsistencies in the IME's report and later deposition testimony, and with other medical opinions.[2] We disagree.

[¶10] The ALJ noted that Dr. Bradford's medical findings are "not without some ambiguity." As stated in our prior decision in this case, however, the "the ALJ concluded that the IME had changed his opinion [from that expressed in the original report] and [the ALJ] adopted the findings expressed at the deposition." *Bosse*, No. 21-12, ¶ 15. When there is ambiguity between an independent medical examiner's report and deposition testimony, "it is incumbent on the [ALJ] to consider the larger context in which those statements are offered to construe the intent of the examining physician." *Oriol v. Portland Hous. Auth*., Me. W.C.B. No. 14-35, ¶ 12 (App. Div. 2014). Further, the choice between competing expert medical opinions is a matter soundly within the purview of the ALJ who hears the case. *Berube v. New England Truck Tire Ctrs.*, Me. W.C.B. No. 23-19, ¶ 15 (App. Div. 2023).

[¶11] We find no reversible error. The ALJ properly addressed and resolved any ambiguity between the IME's initial report and deposition testimony by considering the larger context in which the statements were offered. The ALJ credited Dr. Bradford's statements that Ms. Bosse's truck driving activities at

[2] The predicate issue—whether Ms. Bosse sustained a low back injury caused by her employment at Sargent—was addressed and decided in the prior appeal. *Bosse*, No. 21-12, ¶¶ 13-15. That decision is the law of the case, and we do not address it further. *See Blance v. Alley*, 404 A.2d 587, 589 (Me. 1979) ("the decision by an appellate court on a given issue . . . controls in subsequent proceedings in the same court.").

Sargent contributed to her ongoing degenerative disk disease in her lower back; that Ms. Bosse was "doing some 50 hours a week of pretty arduous work which is at high risk for back pain and radiculopathy"; and that her low back pain began in earnest around the time she was hired at Sargent and continued to flare-up thereafter.

[¶12] The ALJ further found that before working at Sargent, Ms. Bosse had often worked multiple jobs simultaneously; and Ms. Bosse's back condition did not affect her ability to work until after she began working at Sargent, when she was taken out of work on October 8, 2015. *See, e.g., Brown v. County of Cumberland*, Me. W.C.B. No. 22-28 ¶ 19 (App. Div. 2022) (comparing the employee's ability to perform work duties before and after the work injury when determining whether the employment contributed to the disability in a significant manner).

[¶13] We find no error in the ALJ's determination that Ms. Bosse's work as a truck driver for Sargent contributed to her disability in a significant manner.

C. Average Weekly Wage

[¶14] The issue is whether, on remand, the ALJ properly calculated Ms. Bosse's AWW by applying 39-A M.R.S.A. § 102(4)(B). As set forth in the previous Appellate Division decision, "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 AWW are set forth in 39-A M.R.S.A. § 102(4)(A)-(D),[3] and the appropriate method is chosen by

[3] 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.
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> (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.

proceeding sequentially through the four alternatives. *Bossie v. S.A.D. No. 24*, 1997 ME 233, ¶ 3, 706 A.2d 578.

[¶15] 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. "[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, 706 A.2d 578. Paragraph D requires the examination of comparable employees' earnings to ascertain what a reasonable AWW for the employee would be, *id*. at ¶ 8, but otherwise does not require strict adherence to an exact mathematical formula, *Alexander*, 2001 ME 129, ¶ 17, 778 A.2d 343.

[¶16] Sargent contends section 102(4)(D) should apply and supported this argument with evidence of comparable employee's earnings. Sargent asserts the AWW as calculated under paragraph B is unduly inflated and does not reflect Ms. Bosse's future ability to earn; and the ALJ applied an incorrect legal standard when determining that it was not "per se unreasonable" to apply paragraph B in the circumstances. We disagree with these contentions.

[¶17] First, stating that that it was not "per se unreasonable" to apply paragraph B does not constitute legal error or create a new legal standard when the

ALJ was merely referring to a resulting AWW that is not, on its face, patently higher than actual wages earned.

[¶18] Further, having struck the finding that Ms. Bosse consistently worked full-time and year-round before working for Sargent, the ALJ determined that section 102(4)(B) could nevertheless fairly and reasonably be applied based on the following findings that are supported in the record: Ms. Bosse worked 30 out of 52 weeks; she was laid off during the winter months when work was slow; lay-offs were based on seniority and performance reviews; not all drivers were laid off; and Ms. Bosse did not choose to be laid off and would have worked year-round if she had been permitted to do so.

[¶19] As the ALJ reasoned, application of paragraph D has been required in circumstances where the facts have demonstrated that an employee has had a voluntary, consistently intermittent relationship with the labor market, and not in circumstances where the employee has been laid off solely due to general business needs of the employer and economic conditions. *Compare Alexander*, 2001 ME 129, ¶¶ 18, 24 (vacating the decision and remanding for recalculation of the AWW pursuant to paragraph D when the employer had submitted evidence of comparable earnings and the employee's project-based employment had been consistently intermittent) and *Bossie*, 1997 ME 233, ¶ 6 (suggesting that paragraph D may have been the best calculation method because the employee had a long-term history of

employment for substantially less than the normal full working year, but concluding it was error to apply paragraph D due to lack of evidence of comparable employee wages) *with Gushee v. Point Sebago*, Me. W.C.B. No. 13-1, ¶¶ 16-17 (App. Div. 2013) (upholding application of paragraph B when the employee had been laid off during the winter seasons due to a slow-down in business and worked less than the full year not by choice but due to the employer's business needs and economic circumstances). The ALJ did not err when determining that it was fair and reasonable to apply paragraph B in the circumstances.

III. CONCLUSION

[¶20] The facts as found by the ALJ are supported by competent evidence, and the ALJ neither misconceived nor misapplied the law in (1) determining under section 201(4) that Ms. Bosse's employment contributed to her disability in a significant manner; and (2) calculating AWW pursuant to section 102(4)(B).

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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