COLLEEN R. FARMER
(Appellant)

v.

WALMART, INC.
(Appellee)

and

WALMART CLAIMS SERVICES, INC.
(Insurer)

Argued: July 12, 2023
Decided: December 22, 2023

PANEL MEMBERS: Administrative Law Judges Hirtle, Rooks, and Stovall
BY: Administrative Law Judge Rooks

[¶1] Colleen Farmer appeals from a decision of a Workers' Compensation Board administrative law judge (*Chabot, ALJ*) granting in part her Petitions for Award of Compensation and for Review of Discontinuance. Ms. Farmer contends that the ALJ erred when determining that her job transfer eighteen weeks before the work injury did not qualify as a change in "employment or occupation," and therefore incorrectly calculated her average weekly wage pursuant to 39-A M.R.S.A. § 102(4)(A). We vacate the decision in part and remand for recalculation of her average weekly wage.

I. BACKGROUND

[¶2] Colleen Farmer held several different positions with Walmart. She began working in June 2016 in the bakery department before moving onto the apparel and housewares department, where her duties involved mostly folding clothing. In May 2018, she made her final move to the receiving department. In this role, she received a $1.00 per hour raise and her job duties involved accepting deliveries and processing claims for damaged goods. Her job responsibilities included assisting the remodel team, where she travelled to other locations to assist in remodeling stores.

[¶3] Ms. Farmer sustained a left lower extremity injury on September 16, 2018, when a section of a wall rolled over her foot during a remodel. She was able to continue working at Walmart in an accommodated position until her employment was terminated in February 2019. Thereafter, she was paid total incapacity benefits until November 2019, when Walmart filed a 21-day discontinuance pursuant to 39-A M.R.S.A. § 205(9)(B)(1). The ALJ granted a provisional order on January 21, 2021, awarding Ms. Farmer total incapacity benefits pending a hearing based upon an average weekly wage of $349.66, calculated by using the method set forth in 39-A M.R.S.A. § 102(4)(A), which included the lower wages she earned before transferring to the receiving department.

[¶4] A hearing was held on January 26, 2022, at which Ms. Farmer testified. Ms. Farmer argued that her average weekly wage should be calculated pursuant to

39-A M.R.S.A. § 102(4)(B), considering only the higher wages earned in her new position, because the transfer to the receiving department less than 200 days before the date of injury amounted to a change in "employment or occupation."

[¶5] Despite finding that Ms. Farmer's duties changed when she transferred into the receiving department, and that her hourly wage increased, the ALJ concluded that the change did not amount to a change in employment or occupation, and therefore declined to adopt the calculation method prescribed in section 102(4)(B). Ms. Farmer filed a motion for further findings of fact and conclusions of law, which the ALJ denied. Ms. Farmer appeals.

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 Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). Because Ms. Farmer 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]."[1] *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446.

B. Average Weekly Wage Calculation

[¶7] Ms. Farmer asserts that the ALJ erred when determining that her job transfer to the receiving department eighteen weeks before the work injury did not qualify as a change in employment or occupation under section 102(4)(B), and incorrectly calculated her average weekly wage by applying section 102(4)(A)—which took into consideration all wages earned in the prior year, instead of considering only the higher wages earned in the new position.

[¶8] The Law Court has held "the purpose of the average weekly wage calculation is to arrive at an estimate of the employee's future earning capacity as fairly as possible." *Frank v. Manpower Temporary Servs.*, 687 A.2d 623, 625 (Me. 1996) (quotation marks omitted). The methods of calculating average weekly wage are set forth in paragraphs A through D of 39-A M.R.S.A. § 102(4) and must be applied in order unless they cannot reasonably or fairly be applied. *Id.* Title 39-A M.R.S.A. § 102(4) provides, in relevant part:

[1] Wal-Mart argues that whether Ms. Farmer began a new occupation before her injury is a conclusion we are to review only for competent evidence and reverse only if the evidence of record compels a different conclusion. We disagree in part with this framing of the issue and urged standard of review. Specifically, the ALJ found that Ms. Farmer remained a part-time employee with her new job duties and pay rate; the factual finding of part-time status is supported by competent evidence cited by the ALJ and we will therefore not disturb it on appeal. However, the ALJ's interpretation of section 102(4) and the Law Court's decision in *Fowler v. First Nat'l Stores, Inc.*, 416 A.2d 1258 (Me. 1980), are not factual findings but legal conclusions; we therefore review them to determine if the decision involved a misconception of applicable law and whether the application of the law to the facts was either arbitrary or without rational foundation.

> **4. Average weekly wages or average weekly wages, earnings or salary.** The term "average weekly wages" or "average weekly wages, earnings or salary" is defined as follows.
>
> > **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 . . . if that employment or occupation had continued on the part of the employer for at least 200 full working days during the year immediately preceding that injury.
> >
> > **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.

[¶9] Ms. Farmer contends her new position in the receiving department constitutes a new employment or occupation, and because her employment or occupation did not continue for 200 full working days during the year immediately preceding the injury, paragraph A does not apply, and the ALJ should have applied paragraph B.

[¶10] There is limited case law in Maine that discusses the definition of "employment or occupation." In *St. Pierre v. St. Regis Paper Co.*, 386 A.2d 714 (Me. 1978), the Law Court construed the phrase "such employment or occupation"

contained in former paragraph B[2] to mean the employment or occupation engaged in by the worker at the time of his injury. *Id.* at 717. At issue in *St. Pierre* was whether wages from employment with a prior employer should be included in average weekly wage. *Id.* at 716. The Court held that in computing the average weekly wage under method B, as with computation under method A, only the employment relation that exists at the time of injury can be considered; wages earned and weeks worked by the employee for a previous employer are excluded from the computation. 386 A.2d at 717 & n.2.

[¶11] The ALJ here relied on *Fowler v. First Nat'l Stores, Inc.*, 416 A.2d 1258 (Me. 1980), when determining that Ms. Farmer had not started a new occupation. In that case, the employee was working as a part-time clerk for a grocery store earning $2.80 per hour when she was promoted to a full-time produce manager earning $6.025 per hour. *Id.* at 1259-60. The promotion occurred one week before she sustained a work injury. *Id.* The employee argued that her one week of higher wages as a produce manager should be used to calculate her average weekly wage under method B. *Id.* at 1261.The Commission disagreed and applied method A, using all 52 weeks of earnings prior to the injury. *Id.* The Law Court reversed and found that

[2] The Law Court in *St. Pierre* applied a prior version of the average weekly wage statute containing substantially similar language, 39 M.R.S.A. § 2(2)(A) & (B).

that the employee's promotion to produce manager was a new "occupation" under section B:

> As a supervisory employee, the worker had responsibilities which were "substantially different" from those she had as a clerk. Apparently, these responsibilities were also significantly more valuable to her employer than those she had previously undertaken.

Id.

[¶12] The ALJ distinguished *Fowler* and determined that Ms. Farmer's transition from the apparel/housewares department to the receiving department did not constitute a change in employment or occupation. The ALJ found that unlike in *Fowler,* Ms. Farmer's hours did not change from part-time to full-time; her change in duties was not of the same significance as in *Fowler* because it did not involve a promotion to a supervisory role; and the increase in salary of $1 per hour was not as great as the higher increase in *Fowler.*

[¶13] The ALJ, however, applied *Fowler* too narrowly. Although the Law Court considered certain factors when determining that there was a change in occupation, those factors are neither exclusive nor mandatory. The ALJ found that Ms. Farmer's duties in the apparel department mostly involved folding clothing. Her new duties in the receiving department "involved accepting deliveries and doing claims for damaged goods," and that "[t]his was a more physical job than working in other departments such as apparel." The ALJ also noted that her new duties included traveling to other stores to assist with remodeling. The "substantially

different" guidance given by the Law Court in *Fowler* is not so narrow as to preclude these qualitative changes in Ms. Farmer's job duties.

[¶14] Further, *Fowler* does not require an employee's pay to "more than double" for the job to qualify as a new occupation under the Act. Instead, the Court in *Fowler* more generally discussed the employee's new pay rate as an indicator of whether the employee's new role is "significantly more valuable" to the employer. We see no reason to conclude that a $1 per hour raise does not indicate a significant increase in the employee's value to the employer.

III. CONCLUSION

[¶15] The ALJ erred when applying the Law Court's holding in *Fowler* to the facts of this case. When considering only the facts as found by the ALJ, we conclude that Ms. Farmer began a new occupation when transferring to the receiving department at Walmart, and the correct determination of average weekly wage under 39-A M.R.S.A. § 102(4) requires application of paragraph B.

The entry is:

> The administrative law judge's decision is vacated in part and remanded for redetermination of Ms. Farmer's average weekly wage.

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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