GUY GENEST
(Appellee)

v.

S.D. WARREN COMPANY
(Appellant)

and

CCMSI

Argued: December 10, 2015
Decided: November 3, 2016

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

[¶1] S.D. Warren Co. appeals from a decision of a Workers' Compensation Board administrative law judge (*Stovall, ALJ*) granting its Petition for Review, but disallowing its unilateral reduction of benefits and ordering ongoing partial benefits at a higher rate than S.D. Warren believes warranted. S.D. Warren argues that the ALJ erred by (1) not allowing it to unilaterally reduce Mr. Genest's benefits pending the outcome of litigation, pursuant to 39-A M.R.S.A. § 205(9)(B)(2) (Supp. 2015); (2) including certain fringe benefits in average weekly wage that it contends "continued," contrary to 39-A M.R.S.A. §102(4)(H) (Supp. 2015); and (3) applying the statutory ceiling on the inclusion of fringe benefits to the compensation rate after reducing benefits for a second injury that

was subject to durational limits. *See id*. We disagree with these contentions, and affirm the ALJ's decision in all respects.

I. BACKGROUND

[¶2] The parties agreed to a set of stipulated facts, which were incorporated into the ALJ's decision. Guy Genest experienced a work-related injury to his neck, left shoulder, and left upper back while working for S.D. Warren on June 6, 1987. On April 10, 1992, Mr. Genest suffered a second work-related injury to his right arm that was not causally related to the 1987 injury. His pre-injury average weekly wage for the 1987 injury was $585.09, plus fringe benefits valued at $164.94 per week. Mr. Genest's fringe benefits included medical insurance, dental insurance, life insurance, accidental death and dismemberment insurance, accident and sickness insurance, and employer pension contributions.

[¶3] Mr. Genest worked a light duty job at S.D. Warren from 1992 to 1996. His employment was terminated in 1997. A September 10, 2002, decision by a hearing officer (*Johnson, HO*) established that the 1987 injury and the 1992 injury each contributed 50% to his ongoing incapacity, and that S.D. Warren was entitled to terminate benefits paid pursuant to 39 M.R.S.A § 55-B for the 1992 injury, because it had paid 520 weeks of partial incapacity benefits. *See* P.L. 1991, ch. 615, § D-7 (effective Oct. 17, 1991), repealed by P.L. 1991, ch. 885, § A-7

(effective January 1, 1993). Thus, the hearing officer reduced Mr. Genest's benefits by 50%.

[¶4] At the time of the 2002 decision, Mr. Genest was working at State Manufactured Homes, Inc. (SMH), where he earned $470.00 per week, plus fringe benefits. Mr. Genest has continued to work at SMH, and now earns $1,216.39 per week. He also receives fringe benefits valued at $108.60 per week, consisting of medical ($81.55), dental ($15.71) and life insurance ($11.34). Unlike S.D. Warren, SMH does not provide accidental death and dismemberment insurance, accident and sickness insurance, or employer pension contributions.

[¶5] As of June 6, 2013, Mr. Genest's adjusted pre-injury average weekly wage with respect to his 1987 work injury was $1,398.79 without fringe benefits. The adjusted cost of his pre-injury fringe benefit package was $394.33 per week, yielding an adjusted average weekly wage of $1,793.12. *See* 39 M.R.S.A. § 55-A, P.L. 1985, ch. 372, § 19 (effective June 30, 1985, repealed and replaced by P.L. 1987, ch. 559, §§ 29, 30) (authorizing benefits for partial incapacity with annual inflation adjustments).

[¶6] Due to the increase in Mr. Genest's earnings since the 2002 decree, S.D. Warren unilaterally reduced incapacity payments and filed its Petition for Review, pursuant to 39-A M.R.S.A. § 205(9)(B)(2). The ALJ concluded that the reduction was improper because section 205(9)(B)(2) applies to payments made

under 39-A M.R.S.A §§ 212 and 213 (Supp. 2015), but not under 39 M.R.S.A § 55-A.

[¶7] The ALJ further determined that Mr. Genest is entitled to $156.05 in weekly benefits. In making this calculation, the ALJ compared Mr. Genest's average weekly wage for his 1987 work injury, including the value of his discontinued S.D. Warren fringe benefits, to his average weekly wage at SMH, including the value of his SMH fringe benefits. He then multiplied the difference by two-thirds pursuant to section 55-A, and reduced the resulting figure by 50% pursuant to the 2002 decree. Because the resulting amount, $156.05, was less than two-thirds of the state average weekly wage at the time of the injury ($195.55), the ALJ concluded pursuant to section 102(4)(H) that it was appropriate to include the full value of Mr. Genest's fringe benefits in the calculation. S.D. Warren filed its Motion for Further Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶8] The Appellate Division's role on appeal is "limited to assuring that the [ALJ's] factual 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." *Pomerleau*

v. United Parcel Serv., 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, "we review only the factual findings actually made and the legal standards actually applied by the [ALJ]." *Daley v. Spinnaker Inds*., 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

[¶9] Additionally, "[w]hen construing provisions of the Workers' Compensation Act, our purpose is to give effect to the Legislature's intent." *Hanson v. S.D. Warren Co.,* 2010 ME 51, ¶ 12, 997 A.2d 730 (quotation marks omitted). "In so doing, we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results." *Id.*

B. Unilateral Reduction under 39-A M.R.S.A. § 205(9)(B)(2)

[¶10] Since the 2002 decree issued, Mr. Genest has continued working at SMH, and his earnings there have increased. Because of these increased earnings, S.D. Warren unilaterally reduced Mr. Genest's partial benefits, relying on 39-A M.R.S.A. § 205(9)(B)(2). Section 205(9)(B)(2) provides, in pertinent part:

> **Discontinuance or reduction of payments.** The employer, insurer or group self-insurer may discontinue or reduce benefits according to this subsection.
>
> …
>
> **B.** In all circumstances other than the return to work or increase in pay of the employee under paragraph A, if the employer, insurer or group self-insurer determines that the employee is not eligible for compensation under this Act, the employer, insurer or group self-insurer may discontinue or reduce benefits only in accordance with

this paragraph.

…

> (2) If an order or award of compensation or compensation scheme has been entered, the employer, insurer or group self-insurer shall petition the board for an order to reduce or discontinue benefits and may not reduce or discontinue benefits until the matter has been resolved by a decree issued by an administrative law judge. The employer, insurer or group self-insurer may reduce or discontinue benefits pursuant to such a decree pending a motion for findings of fact and conclusions of law or pending an appeal from that decree. *Upon the filing of a petition, the employer may discontinue or reduce the weekly benefits being paid pursuant to section 212, subsection 1 or section 213, subsection 1 based on the amount of actual documented earnings paid to the employee after filing the petition.* The employer shall file with the board the documentation or evidence that substantiates the earnings and the employer may discontinue or reduce weekly benefits only for weeks for which the employer possesses evidence of such earnings.

(Emphasis added.)

[¶11] The ALJ found that section 205(9)(B)(2) is inapplicable to Mr. Genest, because he is being paid benefits pursuant to 39 M.R.S.A. § 55-A, not 39-A M.R.S.A. §§ 212 or 213. S. D. Warren asserts that section 205(9)(B)(2) should be applied retroactively to include Title 39, because it involves only procedural rather than substantive rights. We disagree.

[¶12] In *Gifford v. Nelson Freightways*, 645 A.2d 11, 13 (Me. 1994), the Law Court held that 39-A M.R.S.A. § 203, which retroactively denied benefits to employees during periods of incarceration, applied only to benefits paid under sections 212 and 213. A subsequent legislative amendment to section 203 added

the phrase "or under any prior workers' compensation laws." P.L. 1995, ch. 293, § 1, codified at 39-A M.R.S.A § 203 (Supp. 2015). This amendment prevents incarcerated employees from receiving benefits even if those benefits are paid pursuant to the provisions of Title 39, rather than Title 39-A.

[¶13] There is no comparable phrase extending the remedies of section 205(9)(B)(2) to cases in which payments are being made "under any prior workers' compensation laws." Instead, section 205(9)(B)(2) contains the same restrictive language as the original version of section 203, limiting the application of the provision to cases in which payments were being made under sections 212 and 213. Just as in *Gifford*, the plain language of the statute requires application of the provision only to benefits received under sections 212 and 213. Because Mr. Genest receives benefits under a predecessor statute, 39 M.R.S.A. § 55-A, unilateral reduction of benefits under section 205(9)(B)(2) is unavailable to S.D. Warren in this case.

C. Inclusion of Fringe Benefits

[¶14] S.D. Warren asserts that because both it and Mr. Genest's subsequent employer, SMH, provided medical, dental, and life insurance benefits, those benefits "continue" under 39-A M.R.S.A § 102(4)(H) during Mr. Genest's disability and their value should be excluded when calculating partial incapacity benefits. It contends that only those benefits that S.D. Warren provided but SMH

does not provide should be included in the fringe benefit calculation. This argument lacks merit.

[¶15] Title 39-A M.R.S.A. § 102(4)(H) provides, in pertinent part:

> "Average weekly wages, earnings or salary" does not include any fringe or other benefits paid by the employer that continue during the disability. Any fringe or other benefit paid by the employer that does not continue during the disability must be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount that is greater than two-thirds of the state average weekly wage at the time of injury.

[¶16] S.D. Warren stopped providing and paying for Mr. Genest's fringe benefits when he was terminated. These fringe benefits did not "continue" simply because SMH provided Mr. Genest with the same types of insurance benefits. The statutory language in section 102(4)(H), "fringe or other benefits paid by the employer that continue during the disability," plainly refers only to the benefits "paid by" S.D. Warren. The fact that a subsequent employer may provide the same types of benefits has no bearing on whether the fringe benefits paid by the employer of injury "continue." Moreover, post-injury fringe benefits are accounted for by including them in post-injury earnings, capped at the amount of pre-injury fringe benefits. Me. W.C.B. Rule, Ch. 1, § 5(3)(A); *Coulombe v. Anthem Blue Cross/Blue Shield*, 2002 ME 163, ¶ 13, 809 A.2d 613.

[¶17] Because the fringe benefits provided and paid for by S.D. Warren were discontinued after Mr. Genest's termination, the ALJ correctly included the

value of those benefits in Mr. Genest's pre-injury average weekly wage. The ALJ also properly included Mr. Genest's fringe benefits at SMH, $108.60, in his post-injury average weekly wage, before calculating the partial benefit amount.

D. Calculation of Compensation Rate

[¶18] The ALJ calculated Mr. Genest's weekly benefit by taking two-thirds of the difference between his pre- and post-injury average weekly wages, including fringe benefits, reducing the benefit amount by 50% to reflect a reduction for an injury subject to durational limits, and then taking no additional reduction pursuant to section 102(4)(H) because the amount did not exceed two-thirds of the applicable state average weekly wage. S.D. Warren contends it was error to apply the 50% reduction before limiting the benefit amount to two-thirds of the applicable state average weekly wage. According to S.D. Warren, the benefit amount should have been reduced to two-thirds of the state average weekly wage, then reduced by 50%.

[¶19] To support this contention, S.D. Warren cites *Hanson v. S.D. Warren Co.*, 2010 ME 51, 997 A.2d 730, and *Ricci v. Mercy Hospital*, 2002 ME 173, 812 A.2d 250. These cases involved the application of an offset pursuant to 39-A M.R.S.A. § 221 (Supp. 2015), for retirement and Social Security benefits, respectively. The statutory language applicable in *Hanson* stated that "a credit or reduction of benefits otherwise payable for any week may not be taken under this

section until there has been a determination of the benefit amount otherwise payable to the employee." 2010 ME 51, ¶ 9 (quoting 39-A M.R.S.A. § 221(3)(D)). The applicable language in *Ricci* stated: "The employer's obligation to pay or cause to be paid weekly benefits . . . is reduced by the following amounts. . . ." 2002 ME 173, ¶ 8 (quoting 39-A M.R.S.A. § 221(3)(A)). The Law Court, interpreting this language from section 221, concluded in both cases that the weekly benefit amount had to be finally determined before any offset could be taken. *Hanson,* 2010 ME 51, ¶¶ 14-15; *Ricci,* 2002 ME 173, ¶ 9.

[¶20] The present case, however, does not involve an offset under section 221, and there is no statutory language analogous to section 221 prescribing how to take a reduction in benefits due to durational limits. The relevant provision in this case, section 102(4)(H), provides that fringe benefits be included in average weekly wage "to the extent that the inclusion of the fringe or other benefit does not result in a weekly benefit amount that is greater than 2/3 of the state average weekly wage at the time of the injury." In *O'Neal v. City of Augusta,* the Law Court stated that the phrase "weekly benefit amount" used in section 102(4)(H) means the "weekly amount of benefits actually received by the employee." 1998 ME 48A, ¶ 4, 706 A.2d 1042 (holding that the determination whether a partially incapacitated employee's weekly benefit exceeds two-thirds of the state average

weekly wage at the time of the injury must be based on actual, weekly benefit levels).

[¶21] We conclude that the ALJ's method of determining the weekly benefit, including taking the 50% reduction before comparing the benefit to two-thirds of the state average weekly wage, was appropriate because it represents the actual amount to be received by Mr. Genest. Moreover, the particular language: "does not *result in* a weekly benefit amount greater than 2/3 of the state average weekly wage" (emphasis added), plainly indicates that the weekly benefit amount should be calculated before making the comparison.

III. CONCLUSION

[¶22] The ALJ did not err in (1) finding that 39-A M.R.S.A. § 205(9)(B)(2) is not applicable to benefits being paid under 39 M.R.S.A § 55-A, and thus S.D. Warren was not authorized to unilaterally reduce benefit payments; (2) including the value of all discontinued fringe benefits in Mr. Genest's pre-injury average weekly wage; and (3) calculating the weekly benefit by applying the 50% reduction for an injury subject to durational limits before comparing it to two-thirds of the applicable state average weekly wage.

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 (Supp. 2015).

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