JOHN LIEBERMAN
(Appellee)

v.

WAL-MART, INC.
(Appellant)

and

CLAIMS MANAGEMENT, INC.

Argument held: September 23, 2015
Decided: August 12, 2016

PANEL MEMBERS: Administrative Law Judges Goodnough, Hirtle, Pelletier
BY: Administrative Law Judge Hirtle

[¶1] Wal-Mart, Inc., appeals from a decision of a Workers' Compensation Board administrative law judge (*Knopf, ALJ*) granting John Lieberman's Petition for Restoration regarding a January 14, 2009, date of injury. The ALJ awarded Mr. Lieberman ongoing incapacity benefits at the maximum rate after finding that his award of benefits is controlled by 39-A M.R.S.A. § 214(1)(D)(3) (Supp. 2015). Wal-Mart contends that the administrative law judge erred by applying subparagraph (D)(3) instead of conducting the analysis regarding establishment of a new wage earning capacity set out in subparagraph (D)(2). We disagree and affirm the decision.

I. BACKGROUND

[¶2] John Lieberman injured his left knee on January 14, 2009, while employed by Wal-Mart as a moving van driver. His job duties were to pack, transport, and unpack household possessions of Wal-Mart employees who were relocated by the company. He was injured while attempting to move a piece of furniture and went out of work. Wal-Mart abolished the moving van driver position in September of 2009.

[¶3] Mr. Lieberman returned to work in August of 2012 without any work restrictions. He transitioned to another position with Wal-Mart as a truck driver in which he was not responsible for loading and unloading the vehicle's payload. While in this role, he began to suffer complications from his work injury, and became subject to restrictions that Wal-Mart was not able to accommodate. Wal-Mart terminated Mr. Lieberman's employment on August 28, 2013, but continued voluntarily paying him incapacity benefits.

[¶4] Mr. Lieberman's average weekly wage at the time of injury was $2,222.12, with further fringe benefits. At the truck driving job with Wal-Mart, he earned $840.19 per week. After his termination, Mr. Lieberman found work that pays $250.00 per week.

[¶5] In the current litigation, the parties sought a finding regarding Mr. Lieberman's ongoing earning capacity. Mr. Lieberman argued that he should be

paid partial incapacity benefits based on the difference between his pre-injury average weekly wage of $2,222.12 and his post-termination earnings of $250.00, pursuant to 39-A M.R.S.A. § 214(1)(D)(3).[1] Wal-Mart argued that Mr. Lieberman's post-injury work as a truck driver for greater than 100 weeks "established a new wage earning capacity" and therefore ongoing partial incapacity benefits should be based on the difference between $2,222.12 and his post-injury truck driver earnings of $840.19 per week, pursuant to 39-A M.R.S.A. § 214(1)(D)(2).[2]

[¶6] The ALJ rejected Wal-Mart's argument, finding that the facts of Mr. Lieberman's case best fit within the language of section 214(1)(D)(3), and awarded

[1] 39-A M.R.S.A § 214(1)(D)(3) provides:

> If the employee becomes reemployed at any employment, the employee is then entitled to receive partial disability benefits as provided in paragraph B.

39-A M.R.S.A § 214(1)(B) provides:

> If an injured employee's date of injury is prior to January 1, 2013 and the employee is employed at any job and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee is entitled to receive weekly benefits under this Act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury, and the after-tax weekly age that the injured employee is able to earn after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 211.

[2] 39-A M.R.S.A § 214(1)(D)(2) provides:

> If the employee has established a new wage earning capacity, the employee is entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment as determined at the time of termination of the employment of the employee, and the wages paid at the time of the injury. There is a presumption of wage earning capacity established for any employments totaling 250 weeks or more.

ongoing incapacity benefits at the maximum rate because Mr. Lieberman's pre-injury wage, when compared to his present $250.00 per week earning capacity, results in an actual compensation rate above the maximum rate permitted by 39-A M.R.S.A. § 211 (Supp. 2015).

[¶7] Wal-Mart filed a Motion for Additional Findings of Fact and Conclusions of Law, which the ALJ granted but made no substantive changes to her conclusions. This appeal followed.

II. DISCUSSION

[¶8] Wal-Mart argues that once Mr. Lieberman lost his job "through no fault of his own," under 39-A M.R.S.A § 214(1)(D), the ALJ was obligated to analyze the subparagraphs of section 214(1)(D) in order, and apply the first applicable subparagraph to the exclusion of all others when deciding Mr. Lieberman's ongoing earning capacity. Specifically, Wal-Mart argues that it was legal error for the ALJ to apply section 214(1)(D)(3) when section 214(1)(D)(2) comes first in order and fits the facts of this case. Under section 214(1)(D)(2), Wal-Mart contends it was entitled to a determination from the ALJ on whether Mr. Lieberman's post-injury work as a truck driver "established a new wage earning capacity" and it was legal error for the ALJ not to make a determination on that issue.

[¶9] The Law Court has not provided a controlling interpretation of section 214(1)(D). When faced with a question of statutory interpretation, the Appellate Division follows the Law Court's jurisprudence and first turns to the plain language of the statute and "construe[s] that language to avoid absurd, illogical or inconsistent results." *Estate of Joyce v. Commercial Welding Co.*, 2012 ME 62, ¶ 12, 55 A.3d 411. The Appellate Division will look beyond a statute's plain meaning only "if the statutory language is ambiguous;" that is "if it is reasonably susceptible to different interpretations." *Id.*[3] Neither party argues that the language of section 214 is ambiguous, and we do not find it ambiguous. Therefore we do not look beyond the plain language of section 214.

[¶10] Even under a *de novo* standard of review, application of the plain language of section 214(1)(D) to the historical facts of this case requires that we affirm the ALJ's decision. Specifically, after Mr. Lieberman lost his truck driver position with Wal-Mart and before he returned to work with a new employer in 2014, his entitlement to ongoing incapacity benefits was likely governed by section 214(1)(D)(2). However, following his termination from Wal-Mart, once Mr. Lieberman "be[came] reemployed at any employment," the period of possible

[3] The parties dispute the applicable standard of review. At oral argument, Wal-Mart stated that pursuant to *Sullwold v. The Salvation Army*, 2015 ME 4, ¶ 7, 108 A.3d 1265, the Appellate Division should review questions of statutory interpretation *de novo*. In contrast, Mr. Lieberman argues that the Appellate Division should defer to the ALJ's decision unless the plain meaning of the statute compels a different result and cites *Williams v. Tyson's Food, Inc.*, 2006 ME 66, ¶ 20, 900 A.2d 195. Because application of either standard of review leads to the same result in this case, we do not need to adjudicate the dispute between the parties on this issue.

"new wage earning capacity" under section 214(1)(D)(2) ended because his case then fit within section 214(1)(D)(3). Having "become[] reemployed at any employment, [Mr. Lieberman] is then entitled to receive partial disability benefits as provided in paragraph B." 39-A M.R.S.A. § 214(1)(D)(3). The ALJ correctly awarded partial incapacity benefits pursuant to section 214(1)(B) in this case.[4]

[¶11] The only relief requested by either party in this case was a set level of ongoing incapacity benefits; there was no issue of past-due benefits. Because of this timing, there was no legal error when the ALJ applied section 214(1)(D)(3) to set Mr. Lieberman's rate of ongoing incapacity benefits after he had become reemployed. The plain language of the statute directed use of section 214(1)(D)(3)—and not section 214(1)(D)(2)—to resolve the issue of benefits after reemployment. If the claim had instead involved a dispute over a retroactive award during the period after Mr. Lieberman was terminated and before he found his current position, then the ALJ may well have been required to apply section 214(1)(D)(2) in the manner urged by Wal-Mart when deciding what level of incapacity benefits (if any) was appropriate. Because, however, the case presented to the ALJ was only a request regarding benefits after Mr. Lieberman had become

[4] Wal-Mart's argument that the subparagraphs of section 214(1)(D) be applied sequentially has support by analogy in the Workers' Compensation Act. *See Alexander v. Portland Natural Gas Co.*, 2001 ME 129, ¶ 11, 778 A.2d 343 ("We have said that the method in section 102(4) [to determine average weekly wage] should be applied in the order listed whenever possible."). Even if we adopted this analysis, however, the ALJ's decision would be upheld because after Mr. Lieberman became reemployed, the facts no longer fit within section 214(1)(D)(2). We would proceed to apply section 214(1)(D)(3).

reemployed, the ALJ properly relied upon the plain language of section 214(1)(D)(3).

III. CONCLUSION

[¶12] Because the dispute in this case involved incapacity benefits during a period when Mr. Lieberman had "become[] reemployed" within the plain language of 39-A M.R.S.A. § 214(1)(D)(3), the ALJ did not err by applying that section.

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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