JOHN C. WHITE
(Appellee/Cross-Appellant)

v.

MAINE TURNPIKE AUTHORITY
(Appellant/Cross-Appellee)

and

CCMSI

Argument held: June 9, 2016
Decided: April 3, 2017

PANEL MEMBERS: Administrative Law Judges Pelletier, Jerome, and Knopf
BY: Administrative Law Judge Pelletier

[¶1] Maine Turnpike Authority appeals and John C. White cross-appeals from a decision of an administrative law judge (*Stovall, ALJ*) granting Mr. White's Petitions for Award and Order of Payment regarding a January 22, 2010, right shoulder injury, and his Petitions for Award regarding left knee injuries sustained on February 24, 2009, and August 1, 2011. MTA contends that the ALJ erred by concluding that its attempt to discontinue benefits was ineffective, *see* 39-A M.R.S.A § 205(9) (Supp. 2016), and by failing to apply the retirement presumption, *see* 39-A M.R.S.A § 223 (2001). Mr. White contends that the ALJ erred when determining that MTA is entitled to an offset for his pension benefits, and by finding that MTA properly terminated benefits for the 2011 left knee injury pursuant to a mediation agreement. We affirm the ALJ's decision.

I. BACKGROUND

[¶2] John White began working for Maine Turnpike Authority in 1995 performing road maintenance. Mr. White's duties involved snowplowing, operating a front-end loader, digging, lifting cement, and other functions related to road upkeep. It is undisputed by the parties that Mr. White sustained three work-related injuries: (1) a torn left meniscus on February 24, 2009, (2) a torn right rotator cuff on January 22, 2010, and (3) a traumatic re-injury to his left knee on August 1, 2011.

[¶3] In May of 2011, MTA filed a memorandum of payment and began paying Mr. White partial incapacity benefits at varying rates on account of his 2010 right shoulder injury. In July of 2011, Mr. White announced his intention to resign from MTA and accept a retirement pension effective September 30, 2011. After Mr. White suffered his second left knee injury on August 1, 2011, his doctor imposed additional work restrictions on his left knee that MTA was unable to accommodate. Mr. White's last day of work for MTA was August 10, 2011.

[¶4] On August 17, 2011, MTA discontinued the varying partial incapacity payments for the 2010 right shoulder injury effective immediately, pursuant to 39-A M.R.S.A § 205(9)(A), based on an allegation of increased earnings by Mr. White while working for MTA. On September 14, 2011, Mr. White, who was unrepresented at the time, entered into a mediation agreement that called for MTA

to pay total incapacity benefits for the 2011 left knee injury for a closed-end period from August 11, 2011, to September 30, 2011. The agreement did not address the 2010 shoulder injury.

[¶5] Mr. White thereafter filed Petitions for Award on all three dates of injury and for Order of Payment regarding MTA's discontinuance of benefit payments on the 2010 right shoulder injury. The ALJ issued a decision on September 11, 2014, and later, pursuant to Motions for Findings of Fact and Conclusions of Law, modified that decision on September 15, 2015. In that modified decision, the ALJ adopted the medical opinion of Dr. Bradford pursuant to 39-A M.R.S.A § 312 (Supp. 2016), and determined that Mr. White is partially incapacitated and is subject to specific work restrictions relating to his right shoulder and left knee injuries. The ALJ also determined that because Mr. White was not working on the date he retired due to the effects of his August 1, 2011, knee injury, he was not "actively employed" on his last scheduled day of work and therefore was not subject to the retirement presumption.

[¶6] The ALJ found that Mr. White was, in fact, earning about $100.00 per week less than his average weekly wage since the varying rate partial incapacity benefit scheme was instituted in May of 2011. The ALJ thus determined that the discontinuance on the 2010 injury was improper and ordered that the MTA reinstate the varying rate partial incapacity benefit payments for the 2010 injury

until "the employer properly stops those payments." The ALJ further ordered that once the varying rate payments are properly stopped, Mr. White is entitled to partial incapacity benefits based on an imputed earning capacity of $320.00 per week that must be offset on account of his retirement pension. However, because the record did not reveal the proportional contribution each party made to his retirement pension, the exact amount of the offset was left open by the ALJ in the decision. The ALJ also upheld the mediation agreement and determined that MTA properly terminated benefits for the 2011 left knee injury pursuant to the agreement. Both parties appealed.

II. DISCUSSION

A. Standard of Review

[¶7] 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 in this case, "we 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 (quotation marks omitted).

B. Retirement Presumption

[¶8] MTA contends that the ALJ erred by determining that the retirement presumption in 39-A M.R.S.A § 223(1) does not apply to Mr. White's claim for benefits.

[¶9] Section 223(1) provides:

> **Presumption.** An employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program . . . that was paid by or on behalf of an employer from whom weekly benefits under this Act are sought is presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under this Act. This presumption may be rebutted only by a preponderance of evidence that the employee is unable, because of a work-related disability, to perform work suitable to the employee's qualifications, including training or experience.

[¶10] The ALJ concluded that the facts of this case were similar to those in *Cesare v. Great N. Paper, Co.* 1997 ME 170, 697 A.2d 1325. In *Cesare*, the Law Court, relying in part on Michigan law, held:

> Because [Cesare] was not working as a result of a work-related injury, Cesare did not terminate active employment[.] The Board therefore correctly refused to apply the presumption of section 223.

Id. at ¶ 5. Like *Cesare*, Mr. White was out of work because of a work-related injury on his last scheduled day of work for MTA on September 30, 2011.

[¶11] The Appellate Division has recently reviewed the Law Court's retiree presumption precedents and concluded:

> It is apparent that the Court has adopted a pragmatic, bright-line approach to applying the concept of "active employment" in the context of the retirement presumption. If the employee is actually working up to the effective date of retirement, even in a light duty position that is within the worker's customary employment, then the employee is "actively employed" and the retirement presumption may be applied. If the employee is not working up to the effective date of retirement due to the effects of a work injury, even if the employee previously announced an intention to retire, the employee is not considered "actively employed" and is not subject to the retirement presumption.

Wing v. NewPage Paper, Me. W.C.B. No. 16-5, ¶ 12 (App. Div. 2016).

[¶12] Mr. White was out of work due to the effects of a work injury up to the effective date of retirement. Therefore, even though he had previously announced an intention to retire, and applied for retirement, the ALJ did not err in concluding that Mr. White was not "actively employed" and is not subject to the retirement presumption.

C. Discontinuance Pursuant to Section 205(9)(A)

[¶13] MTA contends that because section 205(9)(A) applies, the discontinuance was proper.[1] Mr. White argues that because his earnings were less

[1] Section 205(9) provides, in relevant part:

> **Discontinuance or reduction of payments.** The employer, insurer or group self-insurer may discontinue or reduce benefits according to this subsection.
>
> > **A.** If the employee has returned to work with or has received an increase in pay from an employer that is paying compensation under this Act, that employer or that employer's insurer or group self-insurer may discontinue or reduce payments to the employee.
> >
> > **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

than his average weekly wage, section 205(9)(B)(1) applied, and MTA was required to give 21-days' notice before discontinuing weekly benefits for the 2010 shoulder injury. We agree with Mr. White.

[¶14] MTA filed the section 205(9)(A) discontinuance based upon an "increase in earnings." The ALJ found, however, that Mr. White was earning about $100.00 less per week than his average weekly wage between the filing of the memorandum of payment and the filing of the discontinuance in relation to the 2010 shoulder injury. This factual finding is supported by competent evidence in the record, and demonstrates that the discontinuance was inconsistent with board rules. *See* Me. W.C.B. Rule, ch. 8, § 11(1). Because section 205(9)(B)(1) applies, we find no error in the ALJ's determination that Mr. White was entitled to

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> 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.
>
> > (1) If no order or award of compensation or compensation scheme has been entered, the employer, insurer or group self-insurer may discontinue or reduce benefits by sending a certificate by certified mail to the employee and to the board, together with any information on which the employer, insurer or group self-insurer relied to support the discontinuance or reduction. The employer may discontinue or reduce benefits no earlier than 21 days from the date the certificate was mailed to the employee, except that benefits paid pursuant to section 212, subsection 1 or section 213, subsection 1 may be discontinued or reduced based on the amount of actual documented earnings paid to the employee during the 21-day period if the employer files with the board the documentation or evidence that substantiates the earnings and the employer only reduces or discontinues benefits for any week for which it possesses evidence of such earning. The certificate must advise the employee of the date when the employee's benefits will be discontinued or reduced, as well as other information as prescribed by the board, including the employee's appeal rights.

21-days' notice before his benefits were discontinued. Further, the ALJ did not err when ordering that varying rate partial payments be reinstated until the proper method for discontinuance is utilized.

D. Determination of Pension Offset

[¶15] Mr. White argues that because the MTA failed to submit sufficient information for the ALJ to determine the exact amount of the pension offset, MTA is not entitled to take the offset. Mr. White further contends that it was error by the ALJ to reserve the issue of the amount of offset for later determination.

[¶16] Section 221(3)(A)(5) provides that an employer's obligation to pay weekly partial incapacity benefits "must be reduced" by:

> The proportional amount, based on the ratio of that employer's contributions to the total contributions to the plan or program, of the after-tax amount of the pension or retirement payments received or being received by the employee pursuant to a plan or program established or maintained by the same employer from whom benefits under section 212 or 213 are received, regardless of whether the employee contributed directly to the pension or retirement plan or program.

[¶17] There is no dispute that Mr. White's pension is a product of both his and MTA's monetary contributions. As such, the ALJ determined that MTA is entitled to an offset commensurate with its proportional contribution to Mr. White's retirement pension. However, the ALJ determined that there was insufficient information in the record to determine the exact amount of the pension

offset, and stated "[t]he parties are free to argue at another time what the exact offset should be."

[¶18] Section 221(3)(A)(5) states that the benefits "*must* be reduced" by the proportional share that the employer contributed to the pension. (Emphasis added). The ALJ properly rejected the contention that MTA had waived its right to an offset, and reserved the issue of the exact amount of the pension offset for future litigation if necessary. *See Butler v. Twin Rivers Paper Co., LLC,* Me. W.C.B. No 16-46 (App. Div. 2016) (holding that res judicata principles did not bar the litigation of an issue specifically reserved in previous litigation). We find no error.

E. Agreement Reached at Mediation

[¶19] Mr. White contends that because a formal mediation did not occur and an advocate was not assigned to him, the agreement cannot be considered a mediation agreement. Mr. White further argues that because the mediation agreement is invalid, the ALJ erred by finding that MTA properly terminated benefits on the 2011 injury, because MTA did not provide him with 21-days' notice.

[¶20] The ALJ found that while the mediation process was informal and involved little involvement from the mediator, it also lacked fraud and Mr. White was not under a mistake of fact. Further, there is no prohibition against an unrepresented party entering into such an agreement, even if the party is otherwise

entitled to such legal representation. The ALJ determined that there is neither statutory authority nor rule that gives an ALJ the authority to nullify a mediation agreement under the facts presented in this case. The ALJ did not err by refusing to do so.

[¶21] Unlike a unilateral notice of a 21-day reduction or discontinuance of benefits, the closed-end period of benefits here involved a mutual agreement reached through mediation. The Law Court has repeatedly held that mediated agreements are binding on the parties to the same extent as a board decree. *See Hoglund v. Aaskov Plumbing & Heating,* 2006 ME 42, 895 A. 2d 323 (holding that in light of recognized legislative policy to equate mediated agreements with formal hearing officer decrees, it was not error for the hearing officer to require proof of changed circumstances before altering an agreed upon payment scheme). We find no error in the ALJ's conclusion that the termination of benefits pursuant to the agreement was proper.[2]

III. CONCLUSION

[¶22] The ALJ's decision is supported by competent evidence, involved no misconception of applicable law, and the application of the law to the facts was

[2] Mr. White also argues that the ALJ did not address his argument that the language of the agreement does not authorize a termination of benefits without sending a discontinuance certificate pursuant to section 205(9). The agreement states: "The employer shall pay lost time benefits to the employee from 8/11/11 to 9/30/11 with credit for payments." The ALJ, however, specifically stated: "I find that the employee agreed to a termination of his benefits by way of the mediation agreement dated September 14, 2011." Because the ALJ regarded September 30, 2011, as a termination date, he determined that the agreement authorized the termination of benefits without implicating section 205(9).

neither arbitrary or without rational foundation. *Moore v. Pratt & Whitney Aircraft*, 669 A. 2d 156, 158 (Me. 1995).

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. 2016).

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