GARY HOPKINS
(Appellee)

v.

VERSO PAPER
(Appellant)

and

SEDGWICK CLAIMS MANAGEMENT SERVICES,

and

INTERNATIONAL PAPER
(Appellee/Cross-appellant)

and

SEDGWICK CLAIMS MANAGEMENT SERVICES

Decided: October 29, 2019
Argued: December 6, 2017

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

[¶1] Verso Paper and International Paper appeal from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) granting Gary Hopkins's Petitions for Restoration. The employers contend that the ALJ erred when concluding that Mr. Hopkins had met his burden to establish that he suffers earning incapacity due to his work injuries and not as a result of general economic conditions. We disagree with this contention and affirm the decision.

I. BACKGROUND

[¶2] Mr. Hopkins, a high school graduate, worked at the paper mill in Bucksport from 1977 until it closed in 2014. He sustained work-related injuries to both knees; one to his right knee in 1986 that required several surgeries, and one to his left knee in 2010 that required a total knee replacement. The first occurred while the mill was owned by International Paper, and the second while it was owned by Verso. The mill was able to accommodate Mr. Hopkins's restrictions resulting from the work injuries, and due to his seniority, he was able to continue working by selecting less physically demanding assignments and by getting help from co-workers for some tasks. While still employed at the mill, he received partial incapacity benefits at varying rates.

[¶3] When the mill closed on December 31, 2014, almost all of the roughly 750 mill employees, including Mr. Hopkins, were laid off.

[¶4] In February of 2015, Mr. Hopkins found a job as a sales representative with a marine company, but he quit that job a few months later. On October 21, 2015, the board issued a decision granting the employers' Petitions for Review and permitting the termination of ongoing partial incapacity benefits based upon a finding that Mr. Hopkins had unreasonably refused a *bona fide* offer of employment when he quit the sales job. *See* 39-A M.R.S.A. § 214(A)(1) (Supp. 2018). Thereafter, Mr. Hopkins conducted a work search that led to a new job as

a truck driver for the Maine Department of Transportation (DOT) that paid more than the sales job. He obtained a commercial driver's license and snow plowing certification to qualify for the position, which started on November 16, 2015. Mr. Hopkins then filed his Petitions for Restoration.

[¶5] The ALJ determined that that Mr. Hopkins's new job with DOT constituted a change in economic circumstances sufficient to revisit the prior decree. *See Grubb v. S.D. Warren Co*., 2003 ME 139, ¶ 7, 837 A.2d 117. The employers submitted labor market evidence showing that there is a stable labor market in the geographical area for jobs that paid a lower wage than Mr. Hopkins was earning at DOT, but there are no higher paying jobs due to general economic conditions in the region, caused mainly by the mill closure and the high number of laid-off workers. The ALJ nevertheless granted the petitions and awarded Mr. Hopkins fixed partial incapacity benefits based on his DOT earnings.

[¶6] International Paper and Verso filed motions for findings of fact and conclusions of law, which the ALJ granted without altering the outcome of the case. International Paper and Verso then filed this appeal.

II. DISCUSSION

[¶7] The Appellate Division 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).

[¶8] A claimant's burden on a petition for restoration is to show "that he is either totally or partially incapacitated to earn as a result, in whole or in part, of a work-related injury." *Hardy v. Hardy's Trailer Sales, Inc*., 448 A.2d 895, 898 (Me. 1982). The claimant may do so "by demonstrating a causal relationship between his inability to find work and his work-related . . . limitation." *Id*.; *see also Mathieu v. Bath Iron Works*, 667 A.2d 862, 864 (Me. 1995). In *Hardy*, the Law Court addressed the "basic principles" that apply when an injured worker is laid off for reasons unrelated to the work injury:

> In such a case, precisely what must be shown by the worker on a petition for further compensation depends on whether he returned to work with or without a diminution in earning capacity. If his return to work was without a diminution in his earning capacity, he may establish his entitlement to further compensation by demonstrating a causal relationship between his inability to find work and his work-related physical limitation. On the other hand, where there is competent evidence that the return to work was with diminished earning capacity, such an employee is entitled to compensation for partial loss of earning capacity if he is subsequently laid off. *See Mailman v. Colonial Acres Nursing Home*, 420 A.2d 217 (Me. 1980).

448 A.2d at 898. When an employee's inability to earn is due to factors other than the employee's work-related physical limitations, such as a "general unavailability of jobs" in the community due to economic circumstances, the employee may not be

entitled to an award of partial incapacity benefits. *Coty v. Town of Millinocket*, 393 A.2d 156, 157 (Me. 1978).

[¶9] The ALJ specifically found that Mr. Hopkins "has carried his burden of persuasion and established that his present reduction in earnings is attributable to his work-related knee injuries," based on the following facts: Mr. Hopkins returned to work after both his injuries with restrictions; he was not performing his regular, full-duty work at the time he was laid off; and he remains on work restrictions due to his serious bilateral knee problems.[1] The ALJ also considered that Mr. Hopkins was receiving partial incapacity benefits at time of layoff and had been for several years while back at work at the mill, and that Mr. Hopkins had performed a work search following the layoff and found the sales job. Then, following a second successful work search, Mr. Hopkins obtained the higher-paying DOT driving job. There is competent evidence in the record to support these factual findings.

[¶10] International Paper and Verso contend the ALJ's conclusion was error. They assert that Mr. Hopkins did not meet his burden to establish that he was earning less due to the work injury rather than due to general economic conditions in the area, citing *Coty*, 393 A.2d 156, and *Rugan v. Dole Co.*, 396 A.2d 1003 (Me. 1979).

[1] The record shows that Mr. Hopkins was restricted to ten hours per day with limited stair and ladder climbing and no kneeling, crawling, or squatting.

[¶11] The *Coty* case involved an employee who had injured his knee while working as a laborer for the Town of Millinocket. 393 A.2d at 156. The employee had found post-injury work as a truck driver but was then laid off because that employer did not operate in the winter months. *Id.* Although his knee was still functionally impaired at the time of the layoff, he was able to work as a truck driver without limitation and there was "no evidence that his earning capacity was diminished because he was unable to do construction labor." *Id.* at 157. After the layoff he sought employment as a truck driver with eleven businesses without success because none of the employers were hiring truck drivers at the time. *Id.*

[¶12] The Law Court determined that there was competent evidence in the record to support the denial of further benefits because the work injury did not prevent Mr. Coty from engaging in gainful employment, and he had failed to show a lack of suitable employment opportunities due to his physical incapacity. *Id.* "Rather, [the Court reasoned,] the record strongly suggests that his inability to find employment was the result of a general unavailability of jobs in the Millinocket area, not his own physical limitations." *Id.*

[¶13] In *Rugan*, the injured employee had returned to his pre-injury work as a construction electrician for a total of fifteen months after his injury until he was laid off when the job ended. 396 A.2d at 1006. Mr. Rugan went on his union's "out of work list," and was not permitted to search for nonunion electrician jobs. *Id.* He

looked for work elsewhere without success. *Id.* The Law Court observed that the period of post-injury employment was "uncontroverted evidence of a market for his post-injury capabilities," and that the evidence did not establish that he was unable to find work due to his work injury. *Id.* at 1006. Thus, the Court affirmed the denial of ongoing benefits. *Id.*

[¶14] Mr. Hopkins cites to *Mailman v. Colonial Acres Nursing Home,* 420 A.2d 217 (Me. 1980), as support for the ALJ's decision. In *Mailman,* the employee had injured her back while working at the nursing home. *Id.* at 219. After a period of total incapacity, the employee returned to work in a textile mill. *Id.* She was subsequently laid off by the mill for reasons unrelated to her work injury. *Id.* She undertook an unsuccessful search for employment and filed a petition for further compensation, which a commissioner granted. *Id.* The Law Court affirmed the award, distinguishing *Rugan* and *Coty*. The Court stated: "unlike . . . the workers in *Rugan* and *Coty*, Mailman's post-injury employment at the textile mill did not reflect an undiminished work capacity." *Id.* at 220-21. The Court upheld the commissioner's conclusion that the employee's incapacity resulted from her work injury based on evidence that she had performed her post-injury job under physical discomfort and with accommodations, and medical evidence that her disability resulted from the work injury. *Id.* at 220.

[¶15] We conclude that this case is more analogous to *Mailman* than to *Coty* or *Rugan.* In both *Coty* and *Rugan,* the employee's return to work had demonstrated an undiminished earning capacity, as both employees earned their pre-injury wages and worked full duty for a substantial period post-injury. The record here contains competent evidence to support the ALJ's findings and conclusion that, like the employee in *Mailman,* Mr. Hopkins did not have an undiminished work capacity at the time of his layoff. The ALJ specifically addressed the *Coty* decision and found that these facts distinguished this case from *Coty*: Mr. Hopkins remained on work restrictions from the injury, was not performing his regular, pre-injury work duties when he returned to work, and was receiving partial incapacity benefits at the time of his post-injury layoff

III. CONCLUSION

[¶16] Competent evidence in the record supports the ALJ's factual findings, and the ALJ neither misconstrued nor misapplied the law when determining that Mr. Hopkins is entitled to ongoing partial incapacity benefits.

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. 2018).

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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