THERESE E. MOWRER
(Appellee)

v.

GENESIS HEALTHCARE, LLC/
NEW HAMPSHIRE INSURANCE CO.
(Appellant)

and

GENESIS HEALTHCARE, LLC/
LIBERTY MUTUAL INSURANCE CO.
(Appellee)

Argued: July 20, 2017
Decided: March 25, 2019

PANEL MEMBERS: Administrative Law Judges Stovall, Collier, and Pelletier
BY: Administrative Law Judge Pelletier

[¶1] Genesis Healthcare, LLC, and its insurer, New Hampshire Insurance Co. (AIG), appeal a decision of a Workers' Compensation Board Administrative Law Judge (*Hirtle*, *ALJ*) granting Therese E. Mowrer's Petition for Award and granting in part AIG's Petition for Apportionment against Genesis Healthcare, LLC, and insurer Liberty Mutual Insurance Co. AIG contends that the ALJ erred by ordering it to pay benefits based on Ms. Mowrer's higher average weekly wage earned at the time of the earlier of her two work injuries, covered by Liberty, even after the earlier injury ceased to contribute to her incapacity and without reimbursement from Liberty. Finding no error, we affirm the ALJ's decision.

I. BACKGROUND

[¶2] Therese Mowrer is a certified nursing assistant who suffered two successive work injuries to her left shoulder while working for Genesis: the first on March 5, 2013, while Genesis was insured by Liberty, and the second on July 26, 2014, while Genesis was insured by AIG. After each injury, Ms. Mowrer underwent surgery and returned to work for Genesis in a modified duty capacity. Ms. Mowrer filed a Petition for Review regarding the 2013 injury, and a Petition for Award regarding the 2014 injury. AIG petitioned for apportionment against Liberty.[1]

[¶3] On March 31, 2016, Ms. Mowrer saw Dr. Matthew Donovan for an independent medical examination pursuant to 39-A M.R.S.A. § 312 (Supp. 2018). Dr. Donovan opined that Ms. Mowrer no longer had restrictions on work activities due to the 2013 work injury. With regard to the 2014 injury, Dr. Donovan found that she had "no formal restrictions other than to work within her pain threshold." Dr. Donovan also determined that the 2013 injury was 15% responsible for Ms. Mowrer's condition, and the 2014 injury 85% responsible. Dr. Donovan's opinions are generally consistent with those of Dr. Kimball, who examined Ms. Mowrer pursuant to 39-A M.R.S.A. § 207 (Supp. 2018). The ALJ found that the restriction

[1] Ms. Mowrer also filed a Request for Provisional Order regarding the 2013 date of injury, which was denied, and four Petitions for Transfer to Suitable Work, which were denied. These aspects of the ALJ decision have not been appealed.

to work within her pain threshold was consistent with restrictions set forth in Dr. Kimball's report, which limited her to light duty work.

[¶4] Based on a stipulation of the parties, the ALJ found that Ms. Mowrer's average weekly wage was $542.12 at the time of the 2013 injury, and $292.53 at the time of the 2014 injury. Her residual earning capacity is $335.40. The ALJ based Ms. Mowrer's compensation rate on the 2013 average weekly wage because he found that the 2014 wage was depressed due to the effects of the 2013 injury, and the wage at the time of the earlier injury best reflected her uninjured work capacity, citing *Dunson v. So. Portland Housing Authority*, 2003 ME 16, ¶ 11 n.7, 814 A.2d 972.

[¶5] In response to the insurers' Motions for Additional Findings of Fact and Conclusions of Law, the ALJ issued an amended decision addressing the apportionment question. *See* 39-A M.R.S.A. § 318 (Supp. 2018). The ALJ adopted the independent medical examiner's opinion assigning 15% responsibility to the 2013 injury insured by Liberty, and 85% to the 2014 injury insured by AIG, up until the March 31, 2016, independent medical examination. In addition to his apportionment opinion, the examiner found that the 2013 injury ceased to have effect after the date of the March 2016 examination. Accordingly, the ALJ held that after that date AIG was fully responsible for ongoing partial compensation,

which was to be based on the 2013 average weekly wage of $542.12 and a residual earning capacity of $334.44 per week. AIG appeals.

II. DISCUSSION

[¶6] Our 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).

[¶7] AIG contends that the ALJ erred as a matter of law when ordering it to pay compensation based on the higher, 2013 average weekly wage. AIG further argues that after the 2016 independent medical examination, when the 2013 injury ceased to have effect, the 2013 average weekly wage should have ceased to apply. Finally, AIG contends that if ordered to pay based on the 2013 average weekly wage, Liberty should be required to reimburse it for any amounts over a figure calculated pursuant to the 2014 average weekly wage. These contentions lack merit.

[¶8] In a multiple injury case, workers' compensation benefits are calculated based on a single average weekly wage. *Dunson*, 2003 ME 16, ¶ 11, 814 A.2d 972. The ALJ must use the average weekly wage that best reflects the employee's uninjured earning capacity. 39-A M.R.S.A. § 102(4)(G) (Supp. 2018);

Dunson, 2003 ME 16, ¶ 11 n.7, 814 A.2d 972; *Warren v. H.T. Winters Co*. 537 A.2d 583, 586 (Me. 1988). The most recent insurer initially pays the entire benefit to the employee, then is subrogated to the employee's rights for any amounts for which other employers or insurers are liable. 39-A M.R.S.A. § 354 (Supp. 2018). The employee's rights as against an earlier employer or insurer are determined with reference to the average weekly wage at the time of the prior injury. *Johnson v. S. D. Warren*, 32 A.2d 431, 436 (Me. 1981). However, the most recent insurer's obligation to the employee is determined based on the compensation rate calculated pursuant to the controlling average weekly wage, and the controlling wage may be higher than the average weekly wage earned at the time of the later injury. *See Legassie v. Securitas, Inc*., 2008 ME 43, ¶27, 944 A.2d 495 (overruled by statute on other grounds); *cf. Trottier v. Thomas Messer Builders*, 2007 ME 64, ¶¶ 18-19, 921 A.2d 163 (the apportionment statute gives the later insurer only a potential ability to recover a portion of the benefits it owes). The question of which wage controls in a multiple injury case is a question of fact, *Legassie,* 2008 ME 43, ¶ 27, 944 A.2d 495, and the issue is "separate and distinct from that of apportionment," *Dunson*, 2003 ME 16, ¶ 11, 814 A.2d 972.

[¶9] In this case, the ALJ found as fact that the 2013 average weekly wage best reflects Ms. Mowrer's uninjured earning capacity because Ms. Mowrer's later

wages were depressed by the effects of the earlier injury. This finding has support in the record, and we will not disturb it.

[¶10] Moreover, the ALJ did not err when determining that AIG's obligation to pay based on the 2013 average weekly wage continued after that injury no longer contributed to Ms. Mowrer's incapacity. In *Legassie*, the insurer on the most recent injury had argued that it could not be ordered to pay benefits based on an earlier, higher average weekly wage because the earlier case had been lump-sum settled and was no longer viable. *Legassie*, 2008 ME 43, ¶ 23, 944 A.2d 495. The Law Court held that the insurer for the last injury can be ordered to pay based on the higher average weekly wage for an earlier injury, even though the earlier injury had been settled. *Id.* ¶ 27. The Court stated:

> We find no authority for the proposition that the 1995 average weekly wage cannot apply because the 1995 injury was lump-sum settled. The fact that Legassie has been paid all benefits to which he was entitled for the 1995 injury does not alter his entitlement to benefits for the 2003 injury based on an average weekly wage that best reflects his future, uninjured earning capacity.

Id.

[¶11] Likewise, we find no authority for the proposition that Ms. Mowrer's 2013 average weekly wage cannot apply because the 2013 injury no longer contributes to incapacity. That the 2013 injury resolved as of March 2016 does not

render the use of the earlier average weekly wage erroneous because that figure continues to represent Ms. Mowrer's uninjured earning capacity.

[¶12] AIG also contends that, regardless of which average weekly wage is applied, its liability for Ms. Mowrer's incapacity should at all times be limited to a figure based on her 2014 average weekly wage, and that Liberty should be responsible to reimburse it for any amount it is ordered to pay exceeding that liability. We disagree. Because Ms. Mowrer has no right to wage loss benefits as against Liberty after the 2013 injury ceased to contribute to her incapacity, AIG has no right to reimbursement from Liberty after that date. *See Trottier*, 2007 ME 64, ¶ 18, 921 A.2d 163.

III. CONCLUSION

[¶13] The ALJ's decision involved no misconception of applicable law, the application of the law to the facts was neither arbitrary nor without rational foundation, and the factual findings are supported by competent evidence in the record. The ALJ did not err in choosing the applicable average weekly wage, nor in establishing AIG's sole responsibility for benefit payments after March 31, 2016.

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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