DAVE COLLIN
(Appellant)

v.

JD RAYMOND TRANSPORT, INC.
(Appellee)

and

MAINE EMPLOYERS' MUTUAL INS. CO.
(Insurer)

Conference held: June 13, 2019
Decided: December 18, 2020

PANEL MEMBERS: Administrative Law Judges Pelletier, Elwin, and Jerome
By: Administrative Law Judge Pelletier

[¶1] Dave Collin appeals a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) denying his Petition for Review with respect to the determination of his average weekly wage (AWW). Mr. Collin contends that the ALJ erred when determining that he is a seasonal worker pursuant to 39-A M.R.S.A. § 102(4)(C)(2) (Pamph. 2020). We disagree with this contention and affirm the ALJ's decision.

I. BACKGROUND

[¶2] Mr. Collin worked for JD Raymond Transport, Inc., as a heavy equipment operator. His duties included working in the woods gathering treetops and limbs from freshly cut trees to grind them into woodchips. The woodchips were then loaded on to trucks by coworkers and hauled out of the woods to market

as a biomass fuel product. On January 26, 2015, Mr. Collin was out in the woods operating the grinder, when he slipped and fell on ice, sustaining a low back injury that has required multiple surgeries. The compensability of Mr. Collin's back injury is not in dispute, and JD Raymond paid Mr. Collin total incapacity benefits voluntarily.

[¶3] In September 2017, JD Raymond reduced Mr. Collin's incapacity benefit pursuant to 39-A M.R.S.A. § 205(9)(B)(1) (Pamph. 2020), taking the position that his benefit should be calculated based on the average weekly wage of a "seasonal worker" engaged "in the harvesting or initial hauling of forest products," pursuant to 39-A M.R.S.A. § 102(4)(C). The ALJ issued a provisional order reinstating benefits for total incapacity calculated pursuant to section 102(4)(B), pending a hearing. After a full evidentiary hearing, however, the ALJ determined that Mr. Collin fell within the seasonal worker provision, and accordingly awarded benefits calculated under paragraph C.[1]

[¶4] Mr. Collin filed a Motion for Further Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Pamph. 2020). In response, the ALJ issued an amended decree but did not alter the outcome. Mr. Collin appeals.

[1] Mr. Collin argued that the AWW calculated pursuant to paragraph B is $1246.06. The AWW calculated pursuant to paragraph C is $924.01. The effect of the ALJ's determination that Mr. Collin's employment was seasonal under paragraph C was to reduce the weekly benefit from $804.40 to $616.01.

II. DISCUSSION

[¶5] In general, the role of the Appellate Division "is limited to assuring that the [ALJ's] 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." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). Because Mr. Collin requested findings of fact and conclusions of law following the decision, the Appellate Division may "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).

[¶6] This dispute centers on the ALJ's determination that section 102(4)(C)(2) governs the AWW in this case. "The average weekly wage is intended to provide a fair and reasonable estimate of what the employee in question would have been able to earn in the labor market in the absence of a work-injury." *Alexander v. Portland Natural Gas*, 2001 ME 129, ¶ 8, 778 A.2d 343. The methods of calculating the AWW are set forth in 39-A M.R.S.A. § 102(4)(A)-(D),[2] and the appropriate method is generally chosen by proceeding

[2] Title 39-A M.R.S.A. § 102(4) (Pamph. 2020) provides, in relevant part:

> **A.** "Average weekly wages, earnings or salary" of an injured employee means the amount that the employee was receiving at the time of the injury for the hours and days constituting a regular full working week in the employment or occupation in which the employee was engaged when injured. . . . In the case of piece workers and other employees whose wages during that year have generally varied from week to week,

sequentially through the four alternatives. *Bossie v. S.A.D. No. 24*, 1997 ME 233, ¶ 3, 706 A.2d 578.

[¶7] Mr. Collin first contends that the ALJ erred when he failed to proceed sequentially through the methods set forth in section 102(4) to determine his AWW. Because section 102(4)(B) applies on its face, he argues that the ALJ should not have reached section 102(4)(C), the seasonal worker statute.

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wages are averaged in accordance with the method provided under paragraph B.

B. When the employment or occupation did not continue pursuant to paragraph A for 200 full working days, "average weekly wages, earnings or salary" is determined by dividing the entire amount of wages or salary earned by the injured employee during the immediately preceding year by the total number of weeks, any part of which the employee worked during the same period. The week in which employment began, if it began during the year immediately preceding the injury, and the week in which the injury occurred, together with the amounts earned in those weeks, may not be considered in computations under this paragraph if their inclusion would reduce the average weekly wages, earnings or salary.

C. Notwithstanding paragraphs A and B, the average weekly wage of a seasonal worker is determined by dividing the employee's total wages, earnings or salary for the prior calendar year by 52.

(1) For the purposes of this paragraph, the term "seasonal worker" does not include any employee who is customarily employed, full time or part time, for more than 26 weeks in a calendar year. The employee need not be employed by the same employer during this period to fall within this exclusion.

(2) Notwithstanding subparagraph (1), the term "seasonal worker" includes, but is not limited to, any employee who is employed directly in agriculture or in the harvesting or initial hauling of forest products.

D. When the methods set out in paragraph A, B or C of arriving at the average weekly wages, earnings or salary of the injured employee can not reasonably and fairly be applied, "average weekly wages" means the sum, having regard to the previous wages, earnings or salary of the injured employee and of other employees of the same or most similar class working in the same or most similar employment in the same or a neighboring locality, that reasonably represents the weekly earning capacity of the injured employee in the employment in which the employee at the time of the injury was working.

[¶8] This contention is without merit. The ALJ specifically noted in his decision that neither party argued that section 102(4)(A) applied, and he considered Mr. Collin's argument that paragraph B should apply. The ALJ proceeded to paragraph C, which specifically states that "*notwithstanding paragraphs A and B*, the average weekly wage of a seasonal worker is determined by dividing the employee's total wages, earnings or salary for the prior calendar year by 52." (Emphasis added). Thus, if the facts establish that Mr. Collin is a "seasonal worker," it is irrelevant that paragraph A or B could also apply.

[¶9] Mr. Collin next contends that the ALJ misconstrued the statute when determining he was a seasonal worker. He asserts that he did not fall within the definition of seasonal worker because he was not cutting down trees or transporting cut lumber out of the forest when he was injured, and because operating heavy equipment can be carried out year-round.

[¶10] Under paragraph C(2), '"seasonal worker' includes, but is not limited to, any employee who is employed directly in . . . the harvesting or initial hauling of forest products." Section 102(12-A) defines "forest products" consistently with the definition in title 12 M.R.S.A. § 8881, which defines the term as including "biomass fuel wood." *Id.* § 8881(3). Under paragraph C(2), workers employed in wood harvesting or the first road transportation of harvested wood are considered seasonal workers even if they customarily work more than 26 weeks per year.

[¶11] Focusing on the seasonal nature of the industry in which Mr. Collin worked, the ALJ first determined that Mr. Collin's duties fit within the definition of "initial hauling of forest products" because he worked in a traditionally seasonal industry and at the time of his injury he was producing ground biomass in the woods.

[¶12] The ALJ followed Law Court precedent stating that "[t]he language of Section 102(4)(C) does not require the board to engage in a hypothetical inquiry as to whether every occupation in an admittedly seasonal industry could, in theory, be carried out on a year-round basis." *Harrigan v. Me. Veterans Home*, 1997 ME 224, ¶ 9, 704 A.2d 1215 (determining that a cashier at seasonal carnival was a "seasonal worker" under paragraph C). The Court noted that "[t]he history of the seasonal employment calculation provision demonstrates that the primary legislative focus is on the industry itself, and not on the employee's duties within that industry." *Id*.

[¶13] Although Mr. Collin may have performed work for JD Raymond on more than a strictly seasonal basis, he did not work in the woods in the spring because wet conditions precluded such work. The annual "mud season" lay-off is a quintessential part of the forest products industry in Maine. *See Lilley v. CT Sides, LLC,* Me. W.C.B. No. 18-27, ¶ 14 (App. Div. 2018) (noting the "common annual layoff" in the forest products industry when discussing reasons for treating the industry differently for purposes of calculating average weekly wage). Thus, the

ALJ did not err when considering the seasonal nature of the industry in which Mr. Collin worked.

[¶14] Moreover, in construing provisions of the Act, we look to the plain meaning of statutory language and construe the statute to avoid absurd, illogical or inconsistent results. *Hanson v. S.D. Warren, Co.*, 2010 ME 51, ¶ 12, 997 A.2d 730. The ALJ reasoned that the loggers and the truck drivers who preceded and followed Mr. Collin's task of grinding biomass in the woods fall into the black letter definition of "harvesting or initial hauling of forest products." To exclude an employee who works in the middle of that process would be illogical and result in inconsistent treatment. Accordingly, we find no error in the ALJ's conclusion that Mr. Collin failed to show he was not a seasonal worker engaged in the initial hauling of forest products.

III. CONCLUSION

[¶15] The ALJ's decision involves no misconception of applicable law and his application of the law to the facts was neither arbitrary or without rational foundation.

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 (Pamph. 2020).

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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