EILEEN DULAC
(Appellee)

v.

OPPORTUNITY ENTERPRISES
(Appellant)

and

MAINE EMPLOYERS' MUTUAL INSURACE CO.
(Insurer)

Conference held: October 21, 2020
Decided: May 23, 2022

PANEL MEMBERS: Administrative Law Judges Hirtle, Chabot, and Stovall
BY: Administrative Law Judge Chabot

[¶1] Opportunity Enterprises appeals from a decision of a Workers' Compensation Board administrative law judge (*Knopf, ALJ*) granting Eileen Dulac's Petitions for Award on six dates of injury incurred while she worked first for the State of Maine, and later for Opportunity Enterprises. The ALJ determined that Opportunity Enterprises is responsible for the initial payment of ongoing partial incapacity benefits to Ms. Dulac for injuries incurred in 2017 and 2013, based on her 2013 average weekly wage (earned when she was working for the State), with a contribution of 100% from the State before the 2017 date of injury, and 50% from the State after the 2017 date of injury. Opportunity Enterprises contends this was

error because Ms. Dulac is currently earning at or above the average weekly wages from the relevant injury that occurred at Opportunity Enterprises. Further, Opportunity Enterprises argues that it was error for the ALJ to order that entity to pay retroactive wage loss benefits before the date of any injury with Opportunity Enterprises even when such payments were 100% reimbursed by the earlier employer, the State of Maine. We disagree and affirm the decision.

I. BACKGROUND

[¶2] Eileen Dulac was employed as a mental health worker for the State of Maine from 2010 through September 2016. While working for the State she suffered work-related injuries on May 8, 2013; November 11, 2013; December 11, 2013; and August 8, 2016.

[¶3] In September 2016 Ms. Dulac left employment at the State and began working for Opportunity Enterprises providing home and community support to individuals with disabilities. At the time of her hire, Ms. Dulac had ongoing restrictions from the injuries she sustained while working for the State. While working for Opportunity Enterprises she suffered work-related injuries on May 16, 2017; and September 19, 2017. At the time of the 2017 injuries her respective average weekly wages were $340.74 with additional fringe benefits of $224.71, and $364.79 with additional fringe benefits of $235.93. Ms. Dulac missed approximately a month of work in November/December 2017 because of her injuries, but she

continued to receive wages during that period. After this period of incapacity, she returned to work making the same or more than either of her 2017 average weekly wages, but less than her 2013 average weekly wage from the relevant injury with the State.

[¶4] The ALJ found that Ms. Dulac's post-injury wages after her injury on May 8, 2013, were lower as a result of her injury, and that her uninjured work capacity was best reflected by her earnings at the time of the injury: an average weekly wage of $682.20 with additional fringe benefits of $456.15.

[¶5] The ALJ, based upon medical findings of Dr. Omsburg issued pursuant to 39-A M.R.S.A. § 207, also found as follows:

> The parties agree that with respect to medical causation of Ms. Dulac's neck condition: the State and Opportunity Enterprises share equal responsibility. As to Ms. Dulac's right shoulder, the parties agree that medical causation is 72.5% the responsibility of the State and 27.5% the responsibility of Opportunity Enterprises. Lastly, extrapolating from Dr. Omsberg's opinion, the board finds that each employer is 50% responsible for Ms. Dulac's ongoing physical incapacity.

[¶6] The ALJ initially granted Ms. Dulac's petitions and ordered only the State to pay partial incapacity benefits for the claimed retroactive time periods and ongoing.

[¶7] The State filed a Motion for Further Findings of Fact and Conclusions of Law, which the ALJ granted. The ALJ made additional findings changing her initial decision, concluding that Ms. Dulac was entitled to varying rates partial

incapacity benefits based on the May 2013 average weekly wage from September 17, 2015, through September 9, 2016, and fixed rate partial incapacity benefits from September 10, 2016, through April 14, 2018, based on post-injury earnings of $360.11 a week. The ALJ further found that Ms. Dulac was entitled to fixed partial incapacity benefits from April 15, 2018, to the present and continuing, based on post injury earnings of $409.09. The ALJ ordered Opportunity Enterprises to make the retroactive payment with 100% reimbursement from the State until May 16, 2017, and with 50% reimbursement from the State thereafter. Opportunity Enterprises appeals that decision.

II. DISCUSSION

[¶8] On appeal, 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 the State of Maine requested findings of fact and conclusions of law following the decision, the Appellate Division will "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.

[¶9] When an employee sustains an injury covered by the Maine Workers' Compensation Act, an average weekly wage is assigned to the work injury date and used to measure entitlement to lost wage benefits. 39-A M.R.S.A. §§ 102(4), 212, 213. In a multiple injury case, lost wage benefits are calculated based on a single average weekly wage. *Dunson v. So. Portland Hous. Auth.*, 2003 ME 16, ¶ 11, 814 A.2d 972. To select the correct average weekly wage, an ALJ is directed to find and use the average weekly wage that best reflects the employee's uninjured earning capacity. 39-A M.R.S.A. § 102(4)(G); *see also Warren v. H.T. Winters Co*., 537 A.2d 583, n.7 (Me. 1988).

[¶10] Opportunity Enterprises does not appeal the ALJ's finding that the average weekly wage at the time of the May 8, 2013, injury must be used as the best reflection of Ms. Dulac's uninjured work capacity. Instead, Opportunity Enterprises challenges the finding that it is responsible for payment of ongoing incapacity benefits (albeit with a 50% contribution from the State of Maine) because Ms. Dulac has returned to work and is earning at or above her average weekly wage from the 2017 date of injury. Because in its view it has no liability for wage loss benefits, Opportunity Enterprises contends that apportionment principles do not apply. Opportunity Enterprises also argues that the ALJ erred by ordering it to pay lost wage benefits for periods that pre-date its injuries even though the State was ordered to reimburse Opportunity Enterprises in full for those payments. We disagree.

[¶11] Pursuant to 39-A M.R.S.A. § 354,[1] in a case involving successive injuries, 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. *Johnson v. S. D. Warren*, 32 A.2d 431, 436 (Me. 1981). 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. *Id.*

[¶12] The Law Court has held that because the apportionment rights of an insurer responsible for a later date of injury are coextensive with that of the employee, the later employer has no apportionment rights against an insurer

[1] Title 39-A M.R.S.A. § 354 provides:

> **1. Applicability**. When 2 or more occupational injuries occur, during either a single employment or successive employments, that combine to produce a single incapacitating condition and more than one insurer is responsible for that condition, liability is governed by this section.
>
> **2. Liability to employee**. If an employee has sustained more than one injury while employed by different employers, or if an employee has sustained more than one injury while employed by the same employer and that employer was insured by one insurer when the first injury occurred and insured by another insurer when the subsequent injury or injuries occurred, the insurer providing coverage at the time of the last injury shall initially be responsible to the employee for all benefits payable under this Act.
>
> **3. Subrogation**. Any insurer determined to be liable for benefits under subsection 2 must be subrogated to the employee's rights under this Act for all benefits the insurer has paid and for which another insurer may be liable. Apportionment decisions made under this subsection may not affect an employee's rights and benefits under this Act. There may be no reduction of an employee's entitlement to any benefits under this Act payable by an insurer based on a prior work-related injury that was the subject of a lump sum settlement approved by the board prior to the date of the injury for which the insurer is responsible. The board has jurisdiction over proceedings to determine the apportionment of liability among responsible insurers.

responsible for an earlier injury if the employee is earning more than they did at the time of the earlier injury. *Trottier v. Thomas Messer Builders*, 2007 ME 64, ¶¶ 18-19, 921 A.2d 163. The most recent insurer is subrogated to the employee's rights against other insurers, and an employee has no claim for lost time benefits against an earlier insurer if they are earning more than the average weekly wage applicable to that date of injury. *Id.* ¶ 20.

[¶13] 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).

[¶14] In *Mowrer v. Genesis Health Care*, the Appellate Division affirmed a decision finding that the insurer for the last injury can be ordered to pay benefits based on the higher average weekly wage for an earlier injury. Me. W.C.B. No. 19-9, ¶ 10 (App. Div. 2019). In that case, the employee had sustained two work injuries with the same employer, but with different insurers. *Id.* ¶ 2. The employee's average weekly wage at the time of the later injury was lower than the earlier injury, but the ALJ found the controlling wage to be the higher wage from the earlier date of injury. *Id.* ¶ 4. The insurer covering the later date of injury was found to be responsible for the initial payment of benefits, even though the employee had returned to work

earning more than they earned at the time of the later date of injury, but less than they earned at the time of the earlier date of injury. *Id.* ¶ 11. Moreover, the later insurer was not entitled to reimbursement from the earlier insurer because the earlier date of injury had resolved. *Id*. ¶ 12.

[¶15] The apportionment statute and case law clearly place the responsibility for initial payment based on the controlling wage on the most recent insurer. Specifically, 39-A M.R.S.A. § 354 states that the insurer providing coverage at the time of the last injury shall initially be responsible to the employee for all benefits payable under the Act. The Law Court has consistently stated that in the context of successive injuries, the most recent insurer may be required to pay more than its proportionate share of benefits. *Johnson*, 432 A.2d at 436; *Trottier*, 2007 ME 64, ¶ 18 (stating that the apportionment statute "was designed to encourage prompt payment of benefits while still providing the most recent payor with the *potential ability* to recover a portion of those payments from other responsible employers and insurers." (quotation marks omitted)).

[¶16] In this case, the controlling wage was determined to be the higher May 8, 2013, average weekly wage. The ALJ found that wage is applicable to the 2017 dates of injury and we find no error in that conclusion. Further, as in *Mowrer*, the ALJ found that even though Ms. Dulac returned to work following the later injuries and earned the same or more than her 2017 average weekly wage, Opportunity

Enterprises remains initially responsible for payment of incapacity benefits based upon the higher, 2013 average weekly wage; this outcome is consistent with the statute and case law discussed above and we find no reversible error therein.

[¶17] Finally, we find no reversible error in the ALJ's order that Opportunity Enterprises pay benefits retroactively for a period of time prior to Ms. Dulac's first work injury at Opportunity Enterprises. While the outcome has a degree of complexity on its face, it is consistent with the language of 39-A M.R.S.A. § 354 that the most recent employer under the Act pays the benefits due the injured employee and receives reimbursement from the earlier employer; exactly what occurred in this case with the State - reimbursing Opportunity Enterprises 100% for retroactive benefits incurred prior to Ms. Dulac's first injury at Opportunity Enterprises.

III. CONCLUSION

[¶18] The ALJ's decision involved no misconception of applicable law, is supported by competent evidence, and the application of the law to the facts was neither arbitrary nor 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

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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