JENNESS GUSHEE
(Appellee)

v.

POINT SEBAGO
(Appellant)

and

MEMIC et al.
(Insurer)

Decided: March 25, 2013
Conferenced: February 26, 2013

PANEL MEMBERS: Hearing Officers Collier, Elwin, and Greene
BY: Hearing Officer Elwin

[¶1] Point Sebago appeals from a decision of a hearing officer (*Jerome, HO*) granting Jenness Gushee's Petitions for Award and for Payment of Medical and Related Services. Point Sebago contends that the hearing officer erred when calculating Mr. Gushee's average weekly wage pursuant to 39-A M.R.S.A. § 102(4)(B) (Supp. 2012), because that provision cannot be reasonably and fairly applied when an employee, like Mr. Gushee, is regularly laid off for a period of time each year. We conclude that the hearing officer did not err when applying section 102(4)(B), and affirm the decision.

I. BACKGROUND

[¶2] Jenness Gushee worked at Point Sebago as a maintenance service technician from April 2007 until he was laid off permanently in 2010. Point Sebago, a lakeside resort community, employed Mr. Gushee through the winter of 2007-2008, but laid him off during the winter months in subsequent years. He worked approximately 36 weeks per year at Point Sebago in 2009 and 2010. During the layoff periods Point Sebago continued to maintain Mr. Gushee's health insurance and considered him a full-time employee, but he also received unemployment benefits.

[¶3] Mr. Gushee injured his neck at work in May 2007 when he fell off a ladder.[1] He underwent surgery in 2007 and was able to return to regular duty in 2008, but his symptoms recurred and in July 2010 he was placed back on restrictions until October 2010. Mr. Gushee injured his low back at work on December 10, 2010. Point Sebago laid him off for the winter approximately one week later. Mr. Gushee received treatment for his low back pain and hoped to return to work in the spring, but he remained under medical restrictions and was not able to return to Point Sebago.

[1] L.G. Management/Point Sebago was the employer on the risk for the 2007 date of injury, and Acadia Insurance was its insurer. The hearing officer ordered L.G. Management/Point Sebago to pay an apportioned share of the partial benefit, but it is not participating in this appeal.

[¶4] Mr. Gushee filed Petitions for Award and for Payment of Medical and Related Services. The hearing officer granted the petitions and awarded ongoing partial incapacity benefits based on the 2010 average weekly wage, apportioned equally between the two employers, with an offset for unemployment benefits. The hearing officer applied 39-A M.R.S.A. § 102(4)(B), and determined that Mr. Gushee's 2010 average weekly wage is $536.77,[2] with an additional $62.35 in employer-provided fringe benefits paid through April 1, 2011.

[¶5] Point Sebago filed a motion for additional findings of fact and conclusions of law, which the hearing officer denied. Point Sebago appeals.

II. DISCUSSION

A. Standard of Review

[¶6] The Appellate Division's role on appeal is "limited to assuring that the [hearing officer's] . . . 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). The hearing officer's findings of fact are not subject to appeal. 39-A M.R.S.A. § 321-B(2) (Supp. 2012).

[¶7] When a party requests and proposes additional findings of fact, as in this case, we "review only the factual findings actually made and the legal

[2] There is no dispute that if 39-A M.R.S.A. § 102(4)(B) (Supp. 2012) is applied, this figure is the correct average weekly wage, and that the 2007 average weekly wage applicable to L.G. Management/Point Sebago is $437.58.

standards actually applied by the hearing officer." *Daley v. Spinnaker Inds., Inc*., 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Average Weekly Wage

[¶8] Point Sebago contends the hearing officer misapplied the law to the facts when calculating Mr. Gushee's average weekly wage pursuant to 39-A M.R.S.A. § 102(4)(B). For the reasons that follow, we affirm the hearing officer's decision.

[¶9] Incapacity benefits are determined based on the difference between the employee's average weekly wage at the time of the injury and the employee's post-injury earning capacity. *See* 39-A M.R.S.A. §§ 212, 213, 214 (2001 & Supp. 2012). "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. *See also Nielsen v. Burnham & Morrill, Inc*., 600 A.2d 1111, 1112 (Me. 1991) ("[T]he purpose of calculating an average weekly wage is to arrive at an estimate of the employee's future earning capacity as fairly as possible." (quotation marks omitted)).

[¶10] At issue in this case is how to calculate average weekly wage when the employee is subject to periodic layoffs associated with the nature of the employer's business. The methods of calculating average weekly wage are set

forth in subsections A through D of 39-A M.R.S.A. § 102(4),[3] and the appropriate method is chosen by proceeding sequentially through the four alternatives. *Bossie v. S.A.D. No. 24*, 1997 ME 233, ¶ 3, 706 A.2d 578. Subsection 104(D) is a fallback

[3] Title 39-A M.R.S.A. § 102(4) 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, wages are averaged in accordance with the method provided under paragraph B.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.

provision applicable when none of the preceding methods can be "reasonably and fairly applied." *Alexander*, 2001 ME 129, ¶ 10, 778 A.2d 446. "[T]he party asserting the application of subsection D . . . [bears] the burden of providing evidence to support a determination pursuant to that subsection." *Bossie*, 1997 ME 233, ¶ 6, 706 A.2d 578. Subsection D requires the examination of comparable employees' earnings to ascertain what a reasonable average weekly wage for the employee would be, *Id*. ¶ 5, but otherwise does not require strict adherence to an exact mathematical formula, *Alexander*, 2001 ME 129, ¶ 17, 778 A.2d 343.

[¶11] The hearing officer reasoned that subsection A does not apply because Mr. Gushee's wages generally varied from week to week. *See* 39-A M.R.S.A. § 102(4)(A) ("In the case of piece workers and other employees whose wages during that year have generally varied from week to week, wages are averaged in accordance with the method provided under paragraph B."). And, although his job was arguably "seasonal" in nature, she concluded subsection C does not apply because Mr. Gushee worked more than 26 weeks per year. Determining that subsection B could reasonably and fairly be applied, the hearing officer calculated Mr. Gushee's average weekly wage according to that subsection, which provides in relevant part:

> 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.

39-A M.R.S.A. § 102(4)(B).

[¶12] On appeal, Point Sebago concedes that subsection B applies by its terms, but contends that it cannot reasonably and fairly be applied because it does not factor in the layoff period, and as such, results in an inflated average weekly wage. Having submitted evidence of comparable employees' earnings, Point Sebago asserts, pursuant to the Law Court's decisions in *Bossie* and *Alexander*,[4] that the hearing officer should have applied subsection D to arrive at a figure that more accurately reflects Mr. Gushee's actual work history.

[¶13] In *Bossie*, the employee worked as a cook in a school cafeteria 36 weeks per year, from August to June, for 24 years prior to her work-related injury. 1997 ME 233, ¶ 2, 706 A.2d at 578. Because the employee worked too many weeks to fall within the seasonal worker statute, and because paragraph B would result in an inflated wage, the hearing officer applied the fallback provision. *Id*. ¶¶ 1-4. The Law Court stated that it was error to use subsection D in that case because no evidence of comparable employee earnings had been submitted. *Id*. ¶ 6. The Court nevertheless suggested in *obiter dictum* that paragraph D may have been the best calculation method under the circumstances because the employee had

[4] Point Sebago nevertheless argues that the average weekly wage should have been calculated by dividing Gushee's 2010 earnings by 52, which would appear to follow subsection C.

"a longterm history of employment for substantially less than the normal full working year." *Id.* at ¶ 5. The Court reasoned:

> As Professor Larson states in his treatise, the average weekly wage determination is not based solely on what that employee is theoretically capable of earning, but on the employee's actual work-history, *e.g.*, the employee's willingness to work full-time and the availability of full-time employment in the competitive labor market. 2 A. Larson, *The Law of Workmen's Compensation*, §§ 60.21(c), 60.22(a) (1993). Professor Larson is critical of jurisdictions that determine the earnings of long-term part-time employees based on what those employees might earn in hypothetical full-time employment:
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> > The flaw in this reasoning is that the purpose of the wage calculation is not to arrive at some theoretical concept of loss of earning capacity; rather it is to make a realistic judgment on what the claimant's future loss is in the light of all the factors that are known. One of these factors is the established fact of claimant's choice of a part-time relation to the labor market. If this is clear, *and above all there is no reason to suppose it will change in the future period into which the disability extends*, then it is unrealistic to turn a part-time able-bodied worker into a full-time disabled worker.
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> *Id*. at § 60.21(c).

Id. ¶ 5. Accordingly, the Court agreed that subsection D might have been the best method of determining Bossie's average weekly wage. *Id.* ¶ 6.

[¶14] In *Alexander*, although the employee had worked for a single employer on pipeline construction projects for over 30 years, he decided to take a break and, beginning in 1995, he chose to work only part-time. 2001 ME 129, ¶ 2, 778 A.2d 343. He was injured in 1998 while working on a PNG pipeline project

that was scheduled to last between four and six months. *Id*. ¶ 3. After a voluntary ten-month layoff, he returned to work for a different company in an accommodated position before being laid off again. *Id*.

[¶15] The hearing officer calculated Alexander's average weekly wage pursuant to section 102(4)(B). *Id*. ¶ 5. The Law Court vacated the hearing officer's decision because the facts established that the employee had only a "consistently intermittent" relationship to the labor market, reasoning as follows:

> Alexander's relationship with the labor market, at least since 1995, consisted of a series of discrete, short-term employments which can best be described as "consistently intermittent." See 5 A. Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 93.02[3][c] (2000). It is generally accepted that, in order to fairly and accurately determine the average weekly wage in cases of consistently intermittent employment, the factfinder should consider whether the employee's part-time employment is a matter of choice or due to a temporary industry-wide work slowdown. *Id*. at 93.02[2] [d]. In some cases, when the employee is willing to work fulltime, but the employee's recent work history is consistently intermittent due to a general economic slowdown, it may not be fair to assume that the work slowdown will continue into the indefinite future. In such situations, it may be fairer to treat the employee as a full-time employee for purposes of calculating the average weekly wage. *Id*. When the employee voluntarily limits employment to part-time work, however, it is often appropriate to look to the fall-back method to determine the average weekly wage.

Id. ¶ 13. Because PNG had submitted evidence (1) of comparable earnings, (2) that pipeline projects are generally of limited duration, and (3) that Alexander's relationship to the labor market was consistently intermittent, the Court concluded that subsection B could not reasonably and fairly be applied. *Id*. ¶ 18. The Court

vacated the decision and remanded for recalculation of average weekly wage pursuant to subsection D. *Id*. ¶¶ 18, 24.

[¶16] The hearing officer here determined that Mr. Gushee's employment history with Point Sebago did not reflect a pattern of "consistently intermittent" employment, and that it was not unreasonable or unfair to apply subsection B because: Mr. Gushee had worked for Point Sebago through the 2007-2008 winter season; he had been laid off during the next two winters before his December 10, 2010 work injury; after that injury he again was laid off and was unable to return to work due to his restrictions; he worked approximately 36 weeks per year in 2009 and 2010; Point Sebago maintained his health insurance and other fringe benefits during the lay-off periods; and Point Sebago considered him to be a full-time employee. Neither Mr. Gushee's prior work history nor the nature of his work for Point Sebago suggests that he made a "choice of a part-time relation to the labor market." *Bossie*, 1997 ME 233, ¶ 5, 706 A.2d 578 (quotation marks omitted); *cf. Alexander*, 2009 ME 129, ¶ 13, 778 A.2d 343.

[¶17] We find no error in the hearing officer's calculation of average weekly wage. On the facts as found, it was not unfair or unreasonable to treat Mr. Gushee as a full-time employee for purposes of determining his future earning capacity. *See Neilsen*, 600 A.2d at 1112.

[¶18] Moreover, this case is distinguishable from both *Bossie* and *Alexander*. *Bossie* involved a 24-year pattern in which a school employee chose not to work over summer vacations. 1997 ME 233, ¶ 2, 706 A.2d 578. Mr. Gushee's employment history does not reflect a similar long-term pattern. He worked over the winter in his first year with the employer, and had been laid off for only three winters.

[¶19] *Alexander* likewise does not compel a contrary result. As the hearing officer found, Mr. Gushee was laid off not due to his choice but due to a work slow-down during a few winter seasons. Mr. Gushee's layoffs during three winter seasons were due to his employer's business needs and economic circumstances, rather than the type of work Mr. Gushee performed. Unlike the employee in *Alexander*, Mr. Gushee did not make a deliberate choice to have a "consistently intermittent" relationship with the labor market.

III. CONCLUSION

[¶20] In applying subsection B to calculate Mr. Gushee's average weekly wage, the hearing officer neither misconceived the applicable law nor misapplied the law to the facts.

The entry is:

The hearing officer'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. 2012).

Attorney for Appellant/Employer:
(Point Sebago)
Elizabeth Eddy Griffin, Esq.
MEMIC
261 Commercial Street
P.O. Box 3606
Portland, ME 04104

Attorney for Employer:
(L.G. Management/Point Sebago)
Richard D. Bayer, Esq.
ROBINSON KRIGER & McCALLUM
12 Portland Pier
Portland, ME 04112

Attorney for Appellee/Employee:
Christopher Cotnoir, Esq.
WORKERS'COMPENSATION BD.
EMPLOYEE ADVOCATE DIV.
24 Stone Street, Suite 107
Augusta, ME 04330