DANIEL HALLOCK
(Appellant)

v.

NEWPAGE CORPORATION
(Appellee)

and

SEDGWICK CLAIMS MANAGEMENT SERVICES

Conference held: September 17, 2014
Decided: March 7, 2016

PANEL MEMBERS: Administrative Law Judges[1] Goodnough, Knopf, and Stovall
BY: Administrative Law Judge Goodnough

[¶1] Daniel Hallock appeals from a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) granting his Petitions for Award in part, but denying his request for ongoing benefits due to operation of the retiree presumption in 39-A M.R.S.A. § 223 (2001). Mr. Hallock contends the ALJ erred when (1) determining that he "terminate[d] active employment" pursuant to section 223 when he retired; and by (2) failing to make findings of fact and conclusions of law that are adequate for appellate review. We disagree with Mr. Hallock's contentions and affirm the ALJ's decision.

[1] Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers are now designated administrative law judges.

I. BACKGROUND

[¶2] Daniel Hallock began working at NewPage's paper mill in Rumford (the Mill) as a millwright in 1985. He suffered numerous injuries at the Mill between 2005 and 2011. He was under restrictions during that period as a consequence of the injuries, including limitations on lifting, twisting, bending, and stooping. These limitations made it difficult for him to continue working as a regular-duty millwright. Indeed, Mr. Hallock's supervisor told him during this time-frame that due to the restrictions, there was no work available to him as a millwright. Thereafter, he was assigned to light-duty work that included checking and maintaining eyewash stations throughout the Mill.

[¶3] By March of 2012, Mr. Hallock began considering taking early retirement at age 64 rather than 65, which would have resulted in a 3.3% reduction in benefits, and he filed the appropriate paperwork with the Mill's human resources department. His light duty job ended in May 2012, and Mr. Hallock inquired whether he could return to work as a millwright. A supervisor told Mr. Hallock that he could resume working in his previous department if his restrictions were removed. Mr. Hallock then went to see the Mill's doctor, who evaluated him and ultimately removed most of the low-back restrictions, but maintained some of the restrictions on use of his upper extremities, including overhead work. This allowed Mr. Hallock to return to lighter duty work in his old department. He continued to

perform modified millwright duties until June 28, 2012. Thereafter, he took vacation and holiday time until he retired on August 1, 2012.

[¶4] Before he retired, Mr. Hallock filed his Petitions for Award. The Board appointed Dr. John Bradford as independent medical examiner pursuant to 39-A M.R.S.A. § 312 (Supp. 2015). Dr. Bradford evaluated Mr. Hallock approximately seven weeks after his retirement. He produced a report recommending extensive restrictions relating to most of Mr. Hallock's work injuries, and opined that Mr. Hallock had been, and remained, partially incapacitated. He also expressed the medical judgment that Mr. Hallock's decision to stop working at the Mill was "consistent with his medical restrictions."

[¶5] Mr. Hallock requested ongoing total workers' compensation benefits from the date he stopped working at the Mill. The ALJ awarded Mr. Hallock the protection of the Act but, finding that Mr. Hallock was actively employed at the time of his retirement and that he was receiving a nondisability pension, applied the section 223 retiree presumption and denied his request for incapacity benefits. Mr. Hallock filed a Motion for Additional Findings of Fact and Conclusions of Law. The ALJ granted the motion and issued an amended decision, but did not alter the outcome. Mr. Hallock now appeals.

II. DISCUSSION

A. Standard of Review

[¶6] The Appellate Division's role on appeal is "limited to assuring that the [ALJ's] factual findings are supported by competent evidence, that [the] decision involved no misapplication of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Pomerleau v. United Parcel Service*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, "we review only the factual findings actually made and the legal standards actually applied by the ALJ." *Daley v. Spinnaker Inds.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Retiree Presumption

[¶7] "The retiree presumption is designed to assist fact-finders in determining when an employee who has reached or neared the conclusion of his or her working career will remain eligible to receive workers' compensation benefits." *Downing v. Dep't of Transp.,* 2012 ME 5, ¶ 8, 34 A.3d 1150 (quoting *Costales v. S.D. Warren Co.,* 2003 ME 115, ¶ 7, 832 A.2d 79). "Pursuant to that presumption, an employee who 'terminates active employment' and is receiving nondisability retirement benefits is presumed to have no loss of earnings or earning

incapacity as a result of a compensable injury." *Downing*, 2012 ME 5, ¶ 8; 39-A M.R.S. § 223.

[¶8] Section 223(1) provides:

> **Presumption.** An employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension…that was paid by or on behalf of an employer from whom weekly benefits under this Act are sought is presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under this Act. This presumption may be rebutted only by a preponderance of the evidence that the employee is unable, because of a work-related disability, to perform work suitable to the employee's qualifications, including training or experience.

[¶9] The ALJ determined that this provision applied to Mr. Hallock's situation, and that Mr. Hallock did not rebut the presumption. She therefore declined to award ongoing benefits. Mr. Hallock's appeal focuses only on whether the retiree presumption applies in the first instance. He does not contest the ALJ's determination that, assuming application of the presumption, he failed to present persuasive evidence to rebut it.

1. Active Employment.

[¶10] Because Newpage seeks in the first instance to apply the retiree presumption against Mr. Hallock, NewPage bore the burden to prove by a preponderance of the evidence both prongs of the test for whether the presumption applies: (1) active employment; and (2) receipt of non-disability pension or retirement benefits paid by the employer from whom benefits are sought. There

was no dispute below, nor have the parties made arguments on appeal, regarding the second prong. Mr. Hallock appeals only whether he was actively employed at the time of his termination.

[¶11] Mr. Hallock contends that although he was working in the days preceding his retirement, his employment during that time cannot be viewed as "active" under section 223 because Dr. Bradford, the IME, opined that the work restrictions he recommended were consistent with Mr. Hallock's decision to retire.

[¶12] The ALJ considered Mr. Hallock's argument that the IME's opinion meant that at the time he retired, Mr. Hallock did not terminate active employment, and concluded:

> [T]he section 312 evaluation performed by Dr. Bradford demonstrates that Mr. Hallock's decision to retire from his job was consistent with the effects of his multiple medical conditions. It does not demonstrate, as Mr. Hallock suggests, that he was, in fact, incapable of performing his job during the summer of 2012 in the period prior to his retirement.

[¶13] Although finding that Mr. Hallock's decision to take an early retirement and an associated 3.3% reduction in benefits was "largely influenced by the physical problems he was having performing the requirements of his normal work," the ALJ nevertheless concluded that he was actively employed as of the date of his retirement because:

> Mr. Hallock was performing this customary work when he decided to utilize accrued vacation to get him to his retirement date.
>
> Notably, Mr. Hallock did not take sick leave or otherwise request workers' compensation benefits: he took accrued vacation pay. I conclude that Mr. Hallock was performing the customary work of his job, albeit with some difficulty, as of the date that he left work and took advantage of accrued vacation.

[¶14] The ALJ's factual findings regarding the nature of Mr. Hallock's work as "active" up to the date of retirement are well-supported in the record and we will not disturb them on appeal. *See* 39-A M.R.S.A. § 318 (Supp. 2015). The ALJ found that Mr. Hallock was working in a modified duty position, but that it was within the ambit of work performed by a millwright, i.e., his customary work. The fact that Dr. Bradford's later-in-time opinion regarding work restrictions could possibly have foreclosed work during that period does not detract from the fact that Mr. Hallock *did* work during that period, and, as explicitly found by the ALJ, was capable of such work. Indeed, although Mr. Hallock sought to have all of his restrictions removed so that he could return to work as a millwright, the Mill's on-site physician, after meeting with Mr. Hallock, agreed to lift only those related to the low back. As noted by the ALJ, "Mr. Hallock told the doctor that his low back continued to be troublesome but that it was a little better." In other words, Mr. Hallock was not disabled as a result of the injury to such an extent that he was not able to perform the essential functions of his customary millwright work. He was

not performing unrelated light duty work, such as checking eyewash stations, during the weeks leading up to his vacation and eventual retirement.

[¶15] The ALJ's conclusion regarding the active nature of Mr. Hallock's employment is consistent with Law Court precedents. In *Cesare v. Great Northern Paper Co.*, 1997 ME 170, 697 A.2d 1325, the employee had announced an intention to retire early and was on the cusp of retirement when he sustained a new work injury. *Id.* ¶ 2. He proceeded nevertheless to retire on his earlier-scheduled retirement date, and began receiving non-disability retirement benefits. *Id.* ¶ 3. Due to the effects of the new work injury, he was not working on the day he retired. *Id.* The Court held:

> Because he was not working as a result of a work-related injury, Cesare did not terminate active employment on February 1, 1987. The fact that an employee has announced an intention to retire, or requested the necessary paperwork, or applied for retirement, does not affect the status of the employee as actively employed until the effective date of retirement. The Board therefore correctly refused to apply the presumption of section 223.

Id. ¶ 5. Unlike Mr. Cesare, Mr. Hallock was not absent from work due to his work injuries during the period of his accrued vacation or on the actual day he retired, and had been working in his customary employment at his own behest for weeks prior to the date he took his accrued vacation with the explicit knowledge and consent of the Mill physician.

[¶16] The Court in *Cesare* distinguished *Bowie v. Delta Airlines,* 661 A.2d 1128. In that case, the employee contended that because he was working light duty at the time of his retirement, he was not actively employed for purposes of section 223. *Id.* at 1131. The Court disagreed, holding that the performance of light duty work at the time of retirement constituted "active employment" for purposes of applying the retiree presumption, stating:

> The phrase "active employment" does not imply that the employee must be working at his or her full work capacity at the time of retirement. The phrase "active employment" is usually understood to mean one who is actively on the job and performing the customary work of his job.

Id. Mr. Hallock's work situation in the weeks leading up to his retirement falls within the Court's definition of "active employment."

[¶17] Mr. Hallock was engaged in his customary employment, albeit with restrictions, through the date when his accrued vacation time was taken. There was no change in the employee's work-related medical condition during that vacation period, and he officially retired at the conclusion of his vacation. Although not actually working on the day he retired (due to the intervening vacation), he remained actively employed through that date. We therefore conclude that the ALJ did not err when determining that Mr. Hallock was actively employed at the time he terminated employment.

2. Termination.

[¶18] Mr. Hallock contends that the ALJ erred by constructing an alternative standard to "termination"—by referring to Mr. Hallock "leaving" instead of terminating employment. He contends the ALJ was required to assess whether he had stopped working before the date of his retirement "as a result of his work injuries," *Cesare*, 1997 ME 170, ¶ 5, 697 A.2d 1325. He contends the record shows that he terminated his employment before his retirement date as a result of his work-related injuries when he chose to take his accrued vacation time to extend his period of employment to his elected retirement date. We reject these arguments.

[¶19] First, we find that the decision below supports the finding that Mr. Hallock did, in fact, "terminate" active employment by virtue of his having worked and taken vacation time up to his scheduled retirement date in his customary employment. As the ALJ stated in her decision, "The fact that Mr. Hallock was using vacation time the day before his official retirement is not equivalent to being put out of work by a physician because of total incapacity." Further, the IME's opinion that Mr. Hallock's restrictions were "consistent with" the decision to retire from the Mill does not mean that those restrictions compelled retirement. The IME noted only that "I do not feel it is unreasonable after 27 years that Mr. Hallock

would have difficulty facing work as a millwright with these afflictions. In short, his decision to stop work is consistent with his multiple medical conditions."

[¶20] Moreover, the ALJ's use of the term "leaving work" or that Mr. Hallock "left work" when describing the termination process, does not amount to an error of law. Taken in the context of the decision as a whole, the difference in language between the statute and the ALJ's decision is a distinction without a difference. The ALJ did not err when determining that Mr. Hallock terminated employment when he retired.

3. Duress.

[¶21] Mr. Hallock next contends that he worked under duress in the days preceding his retirement, and therefore his work during that time cannot be considered "active employment." He asserts that no employee may be forced to work beyond their restrictions, citing *Lindsay v. Great N. Paper Co.*, 532 A.2d 151, 153 (Me. 1987). He contends he was faced with the choice of working in excess of his restrictions or going out of work—and it was only under duress that he sought out a change in his restrictions to avoid the economically disadvantageous position of being sent home from work and collecting workers' compensation or "Accident and Sickness" benefits.

[¶22] The ALJ directly addressed the issue of duress her further findings:

> I find, however, that there is no evidence in the record that the Employer either directly or indirectly imposed any such choice or delivered any "ultimatum."
>
> I find it likely that Mr. Hallock felt financial pressure in May of 2012. He did not want to lose income by going out of work and collecting under [Accident & Sickness] or [workers'] compensation benefits. Both choices were available to him, however, if he was suffering symptoms that made continued work in his department untenable.
>
> Financial considerations may have influenced why Mr. Hallock told the mill physician that his back condition was better when he requested that his restrictions be lifted. It appears from that medical record that the physician gave some thought to the request and refused to lift all restrictions. In other words, there was no "rubber stamp" approval of his request. In sum, while Mr. Hallock's choice may have been influenced by his concern about money, there is no evidence that the Employer inappropriately influenced his choice or otherwise created any duress.

[¶23] Mr. Hallock is correct that an employee may not be forced to work beyond his restrictions. We also agree that there are possible scenarios in which "involuntary" work could result in a finding that an employee did not "terminate active employment." Indeed, in *Cesare*, the Court noted that the hearing officer had found that the employee's inability to continue working until the day of his retirement was "involuntary" due to the effects of a new work injury and, accordingly, found that the retiree presumption did not apply. 1997 ME 170, ¶¶ 4-5.

[¶24] That is not the case here. The ALJ's findings regarding a lack of duress are well-supported in the record and will not be disturbed on appeal. *See* 39-A M.R.S.A. § 321-B(2). The fact that Dr. Bradford's retroactive restrictions *could have* foreclosed Mr. Hallock's ability to continue working at the Mill *if* such restrictions had been imposed at the time, and Mr. Hallock had chosen to follow them, does not compel a finding that Mr. Hallock worked under duress. Indeed, the evidence as outlined by the ALJ is to the contrary.

C. Sufficiency of Further Findings of Fact and Conclusions of Law

[¶25] Mr. Hallock next contends the ALJ erred by failing to issue sufficient findings in response to his motion for additional findings. Specifically, he argues that the ALJ's statement in her amended decision that there was "no evidence" to support Mr. Hallock's contention that his supervisor told him he would be put out of work if he did not get his restrictions lifted is unsupported because Mr. Hallock testified to the contrary.[2]

[¶26] We have reviewed the record as a whole in light of the ALJ's additional findings regarding the lack of duress or inappropriate influence. We conclude that there is support in the record for the finding that there was no duress. It is within the province of an ALJ to accept or reject testimony in accord with that

[2] Mr. Hallock testified that he went to the mill doctor and asked to have his restrictions lifted because: "My foreman said he didn't have anything for me to do, so they were going to send me out and I couldn't afford to go out."

ALJ's careful review of the evidence as a whole. *See Bruton v. City of Bath*, 432 A.2d 390, 392 (Me. 1981).

[¶27] Although Mr. Hallock may disagree with the ALJ's assessment and interpretation of the evidence and the weight accorded to certain aspects of that evidence, the ALJ's findings issued in response to Mr. Hallock's Motion were grounded in the record and adequately responded to Mr. Hallock's Motion. And because those findings as a whole provide an adequate basis for appellate review, we find no error. *See Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982).

III. CONCLUSION

[¶28] The ALJ did not err in finding that Mr. Hallock terminated active employment at the time of his retirement, despite the fact that he had used accrued vacation time to take him to the date of his retirement. Dr. Bradford's recommendations regarding restrictions, made after Mr. Hallock's retirement, did not alter the facts that Mr. Hallock accepted modified, but customary, work and remained in that position consistent with restrictions in effect at that time. The ALJ also did not err in finding a lack of duress relative to Mr. Hallock's decision to remain working. Finally, the ALJ issued further findings that were adequate for appellate review.

The entry is:

The Administrative Law Judge's decision is affirmed.

Administrative Law Judge Stovall, dissenting

[¶30] I respectfully disagree with the majority's analysis. First, there is no dispute that the last day that the employee was on the job and performing any work was on June 28, 2012. He never worked a day after June 28, 2012. Therefore, NewPage did not prove that when Mr. Hallock retired on August 1, 2012, he was on the job and engaged in active employment as defined by the Law Court in *Cesare v. Great Northern Paper Co*., 1997 ME 170, 697 A.2d 1325. The Court in *Cesare* stated: "the phrase 'active employment' is usually understood to mean *one who is actively on the job and performing the customary work of his job.*" *Id.* ¶ 5 (emphasis added). "Decisions of this Court and the courts of Michigan have interpreted the term 'active employment' to refer to the employment *at the time* of the employee's original retirement." *Pendexter v. Tilcon of Maine, Inc*., 1999 ME 34, ¶ 8, 724 A.2d 618 (1999) (emphasis added).

[¶31] In this case, the ALJ found that Mr. Hallock planned to take a regular retirement on August 1, 2012, and that he stopped working on June 28, 2012, because of his "worsening physical condition and his inability to continue performing his job." Therefore, I cannot find that this employee was on the job and performing the customary work of his job when he retired on August 1, 2012.[3]

[3] I agree with the majority that Mr. Hallock was actually on the job and performing the customary work of his job before he stopped working on June 28, 2012. However I think the date that he stopped working, June 28, 2012, is being conflated with the date that he actually retired, which was not until August 1, 2012, as the ALJ found.

[¶32] Second, the party attempting to invoke the retirement presumption has the burden to prove the required facts in order to have the presumption apply. The majority wrote:

> Because Newpage seeks in the first instance to apply the retiree presumption against Mr. Hallock, NewPage bore the burden to prove by a preponderance of the evidence both prongs of the test for whether the presumption applies: (1) active employment; and (2) receipt of non-disability pension or retirement benefits paid by the employer from whom benefits are sought.

Supra, ¶ 10. I agree with this statement. However, there is nothing within this two-prong test that requires the employee to prove *why* he was not engaged in active employment at the time of his retirement. If the employer cannot prove that the employee was engaged in active employment at the time of his retirement the presumption does not apply. It is only after the employer proves that the presumption applies that the employee has any burden.[4] If the employer cannot establish the first prong of the two-part test, the presumption under section 223 cannot be applied. Here, the burden was shifted to Mr. Hallock to prove the reason he was not actively on the job and performing the customary work of his job when he retired. Section 223 does not require the employee to produce

[4] It is only after the employer carries its burden of proving that section 223 applies does the employee have a burden to rebut. It is at this stage, in my opinion, that doctor's notes and physical restrictions become relevant. "Under this analytical framework, the retired claimant's burden of rebutting the presumption is twofold: (1) he must establish that he has physical restrictions resulting from a work-related injury or disease, and (2) that these restrictions render him unable to perform work, within or without his field of skill, that is otherwise "suitable to his qualifications." *Bowie v. Delta Airlines, Inc*., 661 A. 2d 1128, 1132 (Me. 1995) (quoting *Peck v. General Motors Corp.*, 417 N.W.2d 547, 552-53 (Mich. App. 1987); *Miles v. Russell Mem. Hosp.*, 507 N.W.2d 784, 788 (Mich. App. 1993); *McDonald v. Holland Motor Express, Inc.*, 506 N.W.2d 234, 236 (Mich. App. 1993)).

a contemporaneous doctor's note excusing him from being actively on the job and performing the customary work of his job.[5]

[¶33] I think NewPage should be held to its burden of proving that Mr. Hallock was actually on the job and performing the customary work of his job at the time of his retirement. In light of the fact that Mr. Hallock had not worked for one month before his retirement, and the ALJ's finding that there is no dispute that Mr. Hallock stopped working on June 28, 2012, I do not see how NewPage can be found to have met its burden.

[¶34] Third, even if there is a third prong at the initial stage, which requires the employee to not only prove that he was not actively on the job and performing the customary work of his job when he retired, but also why he was not actively on the job and performing the customary work of his job when he retired, Mr. Hallock's testimony, credited by the ALJ, meets that burden. He testified that he stopped working on June 28, 2012, because he became disabled due to his work related injuries:

> Q. And could you have, if you wanted to, continued to work up through your date that you were scheduled to get done, which I understand was August 1st of 2012?
> A. No. No I could not.
> Q. Why.

[5] The ALJ wrote "The fact that Mr. Hallock was using vacation time the day before his official retirement is not equivalent to being out of work by a physician because of total physical incapacity." Respectfully, while this is true, I do not believe that is the standard under section 223.

A. Because of the pain.
Q. All right. But outside the pain, if you had wanted to, could you have worked up to that date if you were physically able to?
A. Oh, if I was physically able to? Yeah….
Q. But if you didn't have the problems with your – the physical problems with your knee, your elbow, and your shoulders, would you have stopped working?
A. No.

Hearing Tr., 80: 4-13, 81: 12-16, May 10, 2013.

[¶35] The ALJ found: "He testified that his decision to retire was motivated by his worsening physical condition and his inability to continue performing his job. I credit Mr. Hallock's testimony in this regard." In light of this finding, I cannot agree with the majority's statement that "Unlike Mr. Cesare, Mr. Hallock was not absent from work due to his work injuries during the period of his accrued vacation or on the actual day he retired." *Supra,* ¶ 5.

[¶36] The ALJ noted that in *Cesare*, the Court held that "an employee who had planned to take a regular retirement was not subject to the retirement presumption when he suffered a work injury and was therefore unable to work as of the date of that planned retirement." In this case, the ALJ found that Mr. Hallock planned to take a regular retirement on August 1, 2012, and that he stopped working on June 28, 2012, because of his "worsening physical condition and his inability to continue performing his job." Mr. Hallock's testimony established that he was incapable of and was not performing his job on the date of his retirement. Because of this, I disagree with the majority's finding that "The

ALJ's factual findings regarding the nature of Mr. Hallock's work as 'active' up to the date of retirement are well-supported in the record and we will not disturb them on appeal."[6]

[¶37] In *Cesare* the employee planned to take retirement on February 1, 1987, but went out of work on January 4, 1987, because of his work injury. The date of the employee's retirement was the salient date. The Court held, "Because he was not working as a result of a work-related injury, Cesare did not terminate active employment on February 1, 1987." In this case, no evidence has been produced to establish that Mr. Hallock was engaged in active employment on the date of his retirement, August 1, 2012. To the contrary, the ALJ found that the employee stopped working on June 28, 2012, because of his worsening work injury and physical inability to continue working beyond that point.

[¶38] The only difference, in my opinion, between this case and *Cesare* is that Mr. Hallock chose to use vacation time from the date of his disability on June 28, 2012, and until his retirement date on August 1, 2012. However, the method

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[6] This Appellate Division has recently found:

> It is apparent that the Court has adopted a pragmatic, bright-line approach to applying the concept of "active employment" in the context of the retirement presumption. If the employee is actually working up to the effective date of retirement, even in a light duty position that is within the workers' customary employment, then the employee is "actively employed" and the retirement presumption may be applied. If the employee is not working up to the effective date of retirement due to the effects of a work injury, even if the employee previously announced an intention to retire, the employee is not considered "actively employed" and is not subject to the retirement presumption.

Wing v. NewPage Paper, Me. W.C.B. No. 16, ¶ 12 (App. Div. 2016).

that an employee uses to cover his lost income, be it sick time, short term disability, workers' compensation benefits, or vacation time, appears irrelevant under section 223. The ALJ credited Mr. Hallock's testimony that he was not working at the time of his retirement because of his disability due to his work related injury. That, in my opinion, meets the standards set forth in *Cesare*.

[¶39] I would remand this case to have the ALJ consider whether NewPage carried its burden of proving that Mr. Hallock was actively on the job and performing the customary work of his job on the date of his retirement, August 1, 2012.

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. 2015).

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