ELLEN STELLA
(Appellant)

v.

CINTAS CORPORATION
(Appellee)

and

SEDGWICK CMS

Argued: June 14, 2018
Decided: July 11, 2019

PANEL MEMBERS: Administrative Law Judges Goodnough, Elwin, and Pelletier
BY: Administrative Law Judge Goodnough

[¶1] Ellen Stella appeals from a decision of a Workers' Compensation Board administrative law judge (*Collier, ALJ*) granting in part her Petition for Award[1] related to a gradual neck and upper extremity injury sustained on September 28, 2011, while working for Cintas Corporation. Ms. Stella contends that the ALJ erred (1) by failing to make factual findings regarding her post-injury earning capacity; and (2) by failing to consider evidence of her post-injury earnings as prima facie evidence of her post-injury earning capacity. We agree, and we vacate the decision in part and remand for further findings of fact and conclusions of law regarding Ms. Stella's ongoing post-injury earning capacity.

[1] The ALJ also denied a separate Petition for Award relating to the same injury, granted a second Petition for Award relating to a separate injury, and denied four Petitions to Remedy Discrimination. These decisions have not been appealed.

I. BACKGROUND

[¶2] In 2010, Ellen Stella began working for Cintas Corporation, a commercial laundry company. Her job duties included folding and hanging garments. In 2011, she developed neck and bilateral shoulder pain, which was diagnosed as a work-related aggravation of her preexisting, nonwork-related cervical spondylosis, resulting in impingement and tendinopathy. She was restricted from working above shoulder level and from lifting more than ten pounds.

[¶3] Ms. Stella filed her Petition for Award, dated September 30, 2011. Cintas terminated her employment shortly after the petition was filed.[2] Ms. Stella searched for work, and late into the proceedings she found employment at the Woodlands Senior Living Facility in Cape Elizabeth. Cintas offered into evidence pay stubs reflecting four weeks of work at Ms. Stella's new job, which the ALJ admitted after all testimony had been taken but before the evidence had been closed.

[¶4] The ALJ issued an initial decree on November 19, 2015, granting in part Ms. Stella's Petition for Award for the September 28, 2011, gradual injury, and awarding 100% partial benefits from October 14, 2011—the date of her

[2] About two weeks after she filed her Petition, Cintas terminated Ms. Stella for cause relating to various reported incidents, including, according to the decree, "failure to properly communicate to her supervisor that she was placed on work restrictions" (relating to a separate work injury dated August 31, 2011) and two personal conflicts with coworkers. These circumstances were the basis of Ms. Stella's Petitions to Remedy Discrimination, which were denied and have not been appealed.

termination—through December 2, 2012—the day before she began her new job. The ALJ declined to award benefits beyond December 2, 2012.

[¶5] Ms. Stella filed a Motion for Further Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Supp. 2018), requesting, among other things, a finding that her earnings after December 2, 2012, represented prima facie evidence of her post-injury earning capacity pursuant to *Fecteau v. Rich Vale Constr., Inc.*, 349 A.2d 162 (Me. 1975), *Flanigan v. Ames Dep't. Store*, 652 A.2d 83 (Me. 1995), and *McIntyre v. Great N. Paper*, 743 A.2d 744 (Me. 2000).

[¶6] The ALJ issued an amended decree reaffirming the award of 100% partial benefits from October 14, 2011, through December 2, 2012, based on Ms. Stella's personal characteristics, substantial restrictions, documented evidence of a work search, and the fact that she had obtained new employment. The ALJ noted that the pay stubs "establish the fact of [Ms. Stella's] employment and her earnings," but concluded that there was "no evidence in this record of her duties or other circumstances concerning this employment" due to the short time period. He therefore "ma[de] no findings concerning Ms. Stella's incapacity beyond December 2, 2012, including any potential ongoing incapacity." This appeal followed.

II. DISCUSSION

[¶7] Our role on appeal is limited to assuring that the ALJ'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). Because Ms. Stella requested findings of fact and conclusions of law and submitted proposed findings, we do not assume that the ALJ made all the necessary findings to support the conclusion that she did not establish her post-injury earning capacity. *See Spear v. Town of Wells*, 2007 ME 54, ¶ 10, 922 A.2d 474. "Instead, we review the original findings and any additional findings made in response to a motion for findings to determine if they are sufficient, as a matter of law, to support the result and if they are supported by evidence in the record." *Maietta v. Town of Scarborough*, 2004 ME 97, ¶ 17, 854 A.2d 223. When requested, an ALJ is under an affirmative duty under 39-A M.R.S.A. § 318 to make additional findings to create an adequate basis for appellate review. *See Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982).

[¶8] Ms. Stella requested that the ALJ issue additional findings of fact and conclusions of law regarding her post-injury earning capacity after she resumed work, in accordance with the burden shifting scheme set forth by the Law Court in the *Fecteau*, *Flanigan*, and *McIntyre* cases. She contends that the failure to do so constituted legal error. We agree.

[¶9] The Appellate Division had occasion to apply this burden shifting rule in *Thurlow v. Rite Aid of Maine, Inc.*, Me. W.C.B. No. 16-23 (App. Div. 2016).[3] The employee in *Thurlow*, seeking to establish ongoing partial benefits based upon her earnings, presented evidence of her post-injury earnings reflecting an eighteen-hour work week as compared to her 30-hour, pre-injury work week. *Id.* ¶¶ 4-5. The ALJ concluded that although current wages were "some evidence" of the employee's earning capacity, it was "not self-evident" that she could not work in some other job within her restrictions, or that higher-paying work was not available to her. *Id.* ¶ 19. The ALJ therefore denied the employee's petition, finding that she had failed to prove a work-related earning incapacity. *Id.* ¶ 7.

[¶10] The Appellate Division determined that the ALJ erred by failing to consider the employee's post-injury earnings as prima facie evidence of post-injury earning capacity. *See id.* ¶ 21. Based on *Fecteau*, *Flanigan*, and *McIntyre*, the panel determined that when an employee is working and earning substantial wages post-injury, she initially has only a burden to submit those wages for consideration, and those wages constitute prima facie evidence of earning capacity. *See id*. The panel further stated:

[3] An Appellate Division panel decided *Thurlow* after the initial decree in this case was issued by the ALJ, but prior to the amended decree. Due to the timing, the parties did not have the opportunity to brief *Thurlow* before the ALJ.

> Ms. Thurlow met her initial burden of proof by submitting evidence of substantial post-injury earnings. Those earnings constitute prima facie evidence of her post-injury ability to earn. Once she submitted that evidence, the burden shifted to Rite Aid to come forward with evidence that regular employment paying wages higher than those being earned by Ms. Thurlow, and compatible with her limited physical ability to work, was reasonably available to her.

Id. ¶ 21.[4]

[¶11] Prima facie evidence has been defined by the Law Court as evidence sufficient to meet the moving party's burden of production in the face of a motion for directed verdict. *Mutton Hill Estates, Inc. v. Town of Oakland*, 488 A.2d 151, 153 (Me. 1985) (citing 9 J. Wigmore, *Evidence in Trials at Common Law* § 2494, at 379 (Chadbourn rev. ed. 1981)). In a workers' compensation case, the Court has stated in analogous circumstances that such evidence is "*a quantity of evidence fit to be considered* by the jury, and to form a reasonable basis for the verdict." *Poitras v. R.E. Glidden Body Shop, Inc.*, 430 A.2d 1113, 1119 (Me. 1981) (quoting IX *Wigmore on Evidence* § 2487 at 278-79 (3rd ed.)).

[¶12] The ALJ had evidence before him regarding Ms. Stella's post-injury earnings, and he used that evidence (in part) to support the award of 100% partial benefits for the more than one-year period prior to Ms. Stella's employment with

[4] The *Thurlow* panel also concluded that the ALJ had erred by finding that higher-paying work was likely available to the employee without competent supporting evidence. Me. W.C.B. No. 16-23, ¶ 20. Here, Cintas argues in the alternative that the allocation of burdens established in *Thurlow* should be dismissed as dicta because the true basis for that decision was the ALJ's erroneous unsupported finding. Although we disagree with this contention, we note that in *Thurlow*, the appellate panel merely applied rules established by the Law Court in *McIntyre*, *Fecteau*, and *Flanigan*, which we now determine should have been applied here.

Woodlands. Yet, he declined to consider such earnings in evaluating her ongoing ability to earn. He reasoned that although the pay stubs established the fact of her employment and her earnings from Woodlands Senior Living, there was no other evidence in the record of "her duties or other circumstances" concerning that employment. However, the lack of information regarding the "duties or other circumstances concerning this employment" does not control whether the burden-shifting analysis should be applied.

[¶13] Because the record contains evidence that, as a matter of law, constitutes prima facie evidence of substantial post-injury earnings, the ALJ erred when failing to apply the burden shifting analysis set forth by the panel in *Thurlow.* We therefore remand for additional findings regarding whether the record contains evidence sufficient to meet Cintas's burden to come forward with some evidence that regular employment paying wages higher than those being earned by Ms. Stella, and compatible with her limited physical ability to work, was reasonably available to her. If so, the ALJ should evaluate all the evidence and make findings on the extent of Ms. Stella's earning incapacity based on her work restrictions and the availability of work. *See Thurlow,* Me. W.C.B. No. 16-23, ¶ 22.

III. CONCLUSION

[¶14] Because the record contains evidence of Ms. Stella's substantial post-injury earnings, and because Ms. Stella requested additional findings of fact

regarding her post-injury earning capacity, we remand for additional findings consistent with the burden-shifting scheme set forth in *Thurlow*.

The entry is:

> The administrative law judge's decision is vacated in part and remanded for additional findings of fact and conclusions of law relevant to Ms. Stella's earning capacity after December 2, 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. 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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