DAVID GOTT
(Appellee)

v.

DEPARTMENT OF CORRECTIONS
(Appellant)

and

WORKERS' COMPENSATION DIVISION
(Insurer)

Conference held: May 7, 2020
Decided: August 27, 2021

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

[¶1] The Department of Corrections appeals from a decision of a Workers' Compensation Board administrative law judge (*Goodnough*, *ALJ*) granting David Gott's Petitions for Award involving injury dates of August 3, 2010, and August 24, 2010, and awarding partial incapacity benefits. The department asserts that it was error to award incapacity benefits because any loss of earnings was not caused by Mr. Gott's work injuries but rather by his unrelated termination from employment. We affirm the decision.

I. BACKGROUND

[¶2] David Gott began working for the Department of Corrections in 2003 as a correctional officer. He injured his left knee at work for the department on August

3, 2010, and his right knee at work on August 24, 2010. He was concurrently employed as a driver for Hannaford Bros. at the time of both injuries. He underwent arthroscopic surgery on the left knee in 2010, and on the right knee in 2012. After a recovery period, he continued working for the department as a trade instructor. Mr. Gott underwent an independent medical examination on March 28, 2018. *See* 39-A M.R.S.A. § 312 (Pamph. 2020). The independent medical examiner (IME), Richard Mazzei, M.D., issued a report in which he imposed restrictions that included avoiding prolonged static positioning, frequent kneeling, squatting, climbing stairs, prolonged standing and walking, and heavy lifting. Mr. Gott's post-injury employment with the department as a trade instructor fell within his restrictions.

[¶3] The ALJ adopted Dr. Mazzei's medical findings, including the recommended restrictions, and found that Mr. Gott established the occurrence of both work injuries.

[¶4] In the months leading up to March 2017, Mr. Gott became involved in disciplinary proceedings unrelated to his work injuries. During the proceedings, the parties agreed that Mr. Gott would be demoted and suspended for two-weeks. The department required Mr. Gott to sign a memorandum documenting the agreement. Mr. Gott declined to sign the agreement because it characterized the demotion as voluntary and, in Mr. Gott's view, the demotion was not voluntary. The department terminated Mr. Gott's employment as a result, effective April 4, 2017. Mr. Gott

grieved the termination of his employment but was not reinstated. He continued working for Hannaford.

[¶5] The ALJ found that despite his restrictions, Mr. Gott was able to perform his post-injury instructor job through the termination of his employment in April 2017, accepting Mr. Gott's testimony that he was able to avoid activities that required him to overuse his knees. The ALJ also found that Mr. Gott could not perform his former job as a regular correctional officer. Based on these and other findings, the ALJ concluded that Mr. Gott was partially physically incapacitated at the time of his discharge from employment on April 4, 2017. The ALJ adopted Mr. Gott's post-injury employment with Hannaford as prima facie evidence of his ability to earn $1,250 per week (less than his earnings with the department) and awarded him ongoing partial incapacity benefits.

[¶6] The department had argued that by declining to sign the memorandum of agreement allowing for his suspension and demotion, which resulted in the termination of his employment, Mr. Gott had effectively refused a bona fide offer of reasonable employment without good and reasonable cause and thus is no longer entitled to wage loss benefits. *See* 39-A M.R.S.A. § 214(1)(A) (Pamph. 2020).[1] The

[1] Title 39-A M.R.S.A. § 214(1)(A) provides:

> **A.** If an employee receives a bona fide offer of reasonable employment from the previous employer or another employer or through the Bureau of Employment Services and the employee refuses that employment without good and reasonable cause, the employee is

ALJ disagreed, concluding that Mr. Gott did not refuse employment because he was fully employed at the time the memorandum of agreement was under discussion and was not terminated until after he refused to sign the document. The ALJ found that the department exercised its option to terminate Mr. Gott's employment due to his refusal, but Mr. Gott did not resign and, therefore, 39-A M.R.S.A. § 214(1)(A) did not apply. The ALJ also noted that the department could have argued that Mr. Gott was terminated due to fault, thereby possibly implicating section 39-A M.R.S.A. § 214(1)(D), but did not do so.

[¶7] The department filed a motion for further findings of fact and conclusions of law. The ALJ denied the motion, and the department appeals.

II. DISCUSSION

[¶8] 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). 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

considered to have voluntarily withdrawn from the work force and is no longer entitled to any wage loss benefits under this Act during the period of the refusal.

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

[¶9] The department contends that it was legal error for the ALJ to award Mr. Gott incapacity benefits because he failed to establish that any loss of earnings was caused by the work injuries. The department points out that Mr. Gott was able to do his job as a trade instructor irrespective of his knee injuries, and that he tried to get his job back after his employment was terminated, demonstrating that he could perform the duties of that job and earn the wages generated thereby. As such, the department argues that Mr. Gott's post-injury employment with the department demonstrated what he was "able to earn after the injury" as contemplated 39-A M.R.S.A. § 214, and that any loss of earnings was not caused by the work injuries but was due to his having been terminated for cause.

[¶10] In support of its arguments, the department relies on *O'Leary v. Northern Maine Medical Center*, Me. W.C.B. No. 19-20 (App. Div. 2017). In that case, an injured employee was able to return to her regular job at Northern Maine Medical Center after a work injury. *Id.* ¶ 2. She was subsequently terminated. *Id.* Thereafter, the employee found a job with a different employer where she earned less. *Id.* ¶ 3. The employee filed a petition for review seeking partial incapacity benefits based on her reduced earnings with the new employer. *Id.* ¶ 4. The ALJ found that the employee continued to be under restrictions due to the work injury

and that her post-termination wages with the new employer constituted prima facie evidence of her earning capacity. *Id.* ¶¶ 4, 8. The ALJ also determined, however, that because Ms. O'Leary had worked for a time after her injury, and had been terminated from that employment, it was appropriate to consider the earnings from the job she lost when analyzing her ability to earn in the labor market. *Id.* ¶ 8. Because her pre-termination earnings were consistent with her pre-injury average weekly wage, the ALJ determined that the employee failed to demonstrate that her reduced earnings were caused by the work injury, and concluded that the work injury had not resulted in lost earning incapacity. *Id.*

[¶11] The Appellate Division panel affirmed on appeal, concluding that the ALJ did not commit legal error when considering the employee's pre-termination earnings to establish her earning capacity, and in concluding that she was not entitled to partial incapacity benefits. *Id*. ¶ 14.

[¶12] This case is distinguishable from *O'Leary*. Here, the department mainly contended that Mr. Gott refused a bona fide offer of employment under section 214(1)(A). That argument was not made in *O'Leary.* In *O'Leary*, the ALJ analyzed the facts in light of *Merrill v. Wal-Mart Associates, Inc.*, W.C.B, No. 98-033708 (June 9, 2011), which discussed the legal significance of an injured worker's post-injury termination for fault. Mr. Gott's employment was terminated after he declined to sign a memorandum of agreement. The ALJ in this case specifically noted the

lack of any argument based on 39-A M.R.S.A. § 214(1)(D), which addresses job loss due to an employee's fault. Also in *O'Leary*, the employee had been released to regular duty before being terminated for cause and had undergone only conservative treatment for her injury. *Id*. ¶ 2.

[¶13] Post-injury earning capacity is based on both "(1) the employee's physical capacity to earn wages and (2) the availability of work within the employee's physical limitations." *Dumond v. Aroostook Van Lines*, 670 A.2d 939, 941 (Me. 1996). Administrative law judges are not required to follow any mathematical formula when evaluating an employee's earning capacity. Rather, ALJs may consider a number of relevant factors to arrive at a figure that accurately reflects the employee's ability to earn wages. *See, e.g. Thew v. Saunders of Locke Mills, LLC,* Me. M.C.B. No. 13-4, ¶¶ 10-11 (App. Div. 2013); *see also Hogan v. Great No. Paper, Inc.*, 2001 ME 162, ¶ 9, 784 A.2d 1083

[¶14] The ALJ concluded that Mr. Gott remained partially incapacitated when his employment was terminated because he could no longer perform his preinjury job. *See Cross v. LLP Transport, LLC,* Me. W.C.B. No. 15-23, ¶ 12 (App. Div. 2015) (citing *St. Amand v. Edwards Manufacturing Co., Inc*., 386 A.2d 730, 731 (Me. 1978)). The ALJ also determined that because Mr. Gott's employment was terminated, he did not refuse suitable work. And, due to that termination, employment with the department was no longer available to him.

[¶15] The ALJ established Mr. Gott's earning incapacity based on his actual post-injury employment with other employers. This constituted prima facie evidence of Mr. Gott's ability to earn, which the department did not counter with any labor market evidence other than the pre-termination wage. *See Thurlow v. Rite Aid of Maine, Inc.*, Me. W.C.B. No. 16-23, ¶ 21 (App. Div. 2016). Although the ALJ could have considered Mr. Gott's pre-termination earnings when determining his earning capacity, he was not required to do so. The ALJ was not persuaded that Mr. Gott's earnings at the department reflected his post-injury ability to earn, and on appeal we may not substitute our judgment for that of the ALJ. *See Bruton v. City of Bath*, 432 A.2d 390, 394 (Me. 1981).

III. CONCLUSION

[¶16] The ALJ properly based his decision on Mr. Gott's testimony regarding his post injury employment, his ongoing symptoms and treatment, and Dr. Mazzei's assessment of Mr. Gott's physical capacity, as well as Mr. Gott's post-injury earnings. Given the issues identified by the parties during litigation, the ALJ's analysis was appropriate and is well supported.

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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