BRENDA WHITE
(Appellant)

v.

MAINE DEPARTMENT OF TRANSPORTATION
(Appellee)

and

STATE OF MAINE WORKERS' COMPENSATION
(Insurer)

Argued: October 21, 2020
Decided: May 5, 2022

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

[¶1] Brenda White appeals from a decision of a Workers' Compensation Board administrative law judge (*Knopf, ALJ*) granting in part her Petition for Award and Petition for Payment of Medical and Related Services regarding an April 6, 2010, work injury. Ms. White contends that the ALJ committed legal error when applying 39-A M.R.S.A. § 223, the retirement presumption, to her case and finding that Ms. White terminated active employment when she did not work on her last scheduled day before her retirement became effective. We agree in part, vacate the decision, and remand for further findings.

I. BACKGROUND

[¶2] Brenda White worked as a secretary and contract specialist for the State of Maine's Department of Transportation; she developed a gradual work-related bilateral upper extremity injury as of April 6, 2010. Ms. White went out of work for surgery on her right elbow on June 21, 2010, but returned to work shortly thereafter without restrictions. However, Ms. White testified that she continued to experience severe bilateral upper extremity symptoms that led her to miss work up to 50% of her scheduled shifts.

[¶3] In late 2011, Ms. White was offered and accepted an early retirement opportunity to be effective on November 30, 2011. On her last scheduled day of work, Ms. White called out and did not work; she testified that at the time she felt unable to physically continue doing her job though she was under no restrictions by any medical provider. It would be several years before Ms. White again sought medical treatment for her work injury. Ms. White's then partner and later spouse retired at the same time.

[¶4] After retiring, Ms. White remained out of the workforce for approximately two years before returning to a retail sales and customer service position, which she held until going out of work for another surgery on her upper extremities on February 23, 2018. Thereafter, Ms. White was unsuccessful in an attempted to return to her retail position and again went out of work on June 1, 2018.

[¶5] In the current litigation, Ms. White sought incapacity benefits from the date she stopped working for the Department. The Department voluntarily paid incapacity benefits for Ms. White's recuperation periods after each surgery, but otherwise refused to pay incapacity benefits pursuant to the retirement presumption, 39-A M.R.S.A. § 223, which provides that an employee who "terminates active employment and is receiving nondisability pension or retirement benefits" is presumed not to have a loss of earning capacity. The ALJ found that although at all relevant times in dispute, Ms. White retained a work capacity, she had terminated active employment and was receiving non-disability retirement benefits. The ALJ thus concluded that section 223 applied to the case and created a rebuttable presumption that Ms. White did not have earning incapacity attributable to her work injury. The ALJ then found that Ms. White had not rebutted that presumption and denied the request for incapacity benefits.

[¶6] Ms. White filed a Motion for Additional Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.

II. DISCUSSION

[¶7] 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 Ms. White 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 Inds., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446.

[¶8] The retirement presumption in 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 or retirement program . . . 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.

Ms. White argues that the ALJ erred in her application of section 223 on several grounds which are discussed in turn.

[¶9] First, Ms. White argues that the ALJ committed legal error by analyzing her case using section 223 because the policy goals of that section are not served by barring Ms. White's claims for incapacity benefits. While discussing section 223 in several decisions, the Law Court has noted that section 223 is designed for "an employee who has reached or neared the conclusion of his or her working career[;]"[1]

[1] *Downing v. Dep't of Transportation*, 2012 ME 5, ¶ 8, 34 A.3d 1150.

that retirees cannot "expect to be receiving wages after choosing and seeking retirement and retirement benefits[;]"[2] and finally that section 223 is to cut off incapacity benefits as a wage replacement that should "no longer be payable if the employee would not otherwise have been earning wages."[3]

[¶10] Specifically, Ms. White points out that she was in her mid-40s when she retired, took a substantial penalty on her retirement benefits due to retiring early, and returned to the workforce with a different employer for several years before ceasing work again in 2018. From these facts, Ms. White argues that she had not reached the conclusion of her working career and thus the rationale of the retirement presumption is not served by applying it to her case. Ms. White's policy arguments are better addressed to the Legislature. On appeal, our review of an ALJ's interpretation of a statute must first "look to the plain meaning of the statutory language, and we construe that language to avoid absurd, illogical, or inconsistent results." *Graves v. Brockway-Smith*, 2012 ME 128, ¶ 9, 55 A.3d 456. It is only when the statutory language is ambiguous that an appellate body may "look beyond the plain meaning and consider other indicia of legislative intent, including legislative history." *Id.*

[2] *Bowie v. Delta Airlines, Inc.*, 661 A.2d 1128, 1131 (Me. 1995) (quoting the Michigan state legislature's floor debate that led to passage of language Maine later adopted as section 223).

[3] *Costales v. S.D. Warren*, 2003 ME 115, ¶ 7, 832 A.2d 790.

[¶11] In this case, we find no ambiguity in the plain language of section 223 and therefore decline to adopt the policy arguments relied upon by Ms. White as they are contrary to the plain language of section 223. Within the permitted scope of appellate review, we find no reversible legal error in the ALJ's conclusion that an analysis under section 223 must be applied to the facts of Ms. White's case.

[¶12] Ms. White next argues that it was legal error for the ALJ to find that she terminated active employment when she did not work on her last scheduled day before retiring. To support this argument, Ms. White relies upon the Law Court's holding in *Cesare v. Great N. Paper Co., Inc.*, 1997 ME 170, 697 A.2d 1325, and its application by the Appellate Division in *Wing v. NewPage Paper*, Me. W.C.B. No. 16-5 (App. Div. 2016) and *White v. Maine Turnpike Authority*, Me. W.C.B. No. 17-15 (App. Div. 2017). An Appellate Division panel synthesized the Law Court's holdings with regard to "active employment" as follows:

> 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, Me. W.C.B. No. 16-5, ¶ 12 (emphasis added).

[¶13] Specifically, in *Cesare*, the employee had decided to retire and completed the forms to do so. *Cesare,* 1997 ME 170, ¶ 2, 697 A.2d 1325. Prior to

the effective date of retirement, the employee was injured at work and was not working due to the effects of that injury on the date when retirement benefits began. *Id*. The Law Court held that since Cesare "was not working as a result of a work-related injury, [he] did not terminate active employment on February 1, 1987 [the date his retirement began]." *Id* at ¶ 5. The Court further noted that "[t]he 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." *Id*.

[¶14] In Ms. White's case, the ALJ did not address whether Ms. White was out of work on her retirement date due to the effect of her work-related injury. Instead, the ALJ made two findings that we are unable to reconcile: first, that on Ms. White's "last scheduled day, she did not work at all…" and second, that "[a]lthough she missed sporadic time from work due to her symptoms, she was not out of work at the time she retired." Under the Law Court's holding in *Cesare* and the Appellate Division's decision in *Wing*, the critical factual determination regarding whether an injured employee under the Act "terminated active employment" within the meaning of section 223 is whether the effects of a work-related injury prevent the employee from working at the retirement date. As Ms. White correctly asserts, the Department bore the burden of persuasion on this issue. *Hallock v. NewPage Paper*, Me. W.C.B. No. 16-6, ¶ 10 (App. Div. 2016). We vacate and remand this matter to the ALJ to

determine whether the Department has demonstrated on a more probable than not basis that Ms. White terminated active employment; or restated, whether the Department has demonstrated on a more probable than not basis that Ms. White's absence from work at the time of her retirement was not due to her work injury.

III. CONCLUSION

[¶15] We find no ambiguity in the plain language of section 223, and therefore reject Ms. White's policy arguments regarding the retirement presumption of section 223. However, we agree with Ms. White that the case should be vacated and remanded for the determination of whether the Department has demonstrated on a more probable than not basis that Ms. White terminated active employment when she was not working on the effective date of her retirement.

The entry is:

> The administrative law judge's decision is vacated and remanded.

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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