DANNY S. WING
(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] Knopf, Stovall, and Collier
BY: Administrative Law Judge Knopf

[¶1] Danny Wing appeals from a decision of a Workers' Compensation Board administrative law judge (*Elwin, ALJ*), denying his Petitions for Review and granting NewPage Corporation's Petition for Review. Mr. Wing contends that the ALJ erred when (1) determining that he "terminate[d] active employment" when he retired and thus, that the presumption in 39-A M.R.S.A. § 223 (2001) applies in his case; and (2) failing to make requested findings of fact and conclusions of law that are adequate for appellate review. We disagree with Mr. Wing's contentions and affirm the ALJ's decision in all respects.

[1] Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers are now designated administrative law judges. ALJ Collier has substituted for original panel member, ALJ Goodnough, who presided over an earlier phase of this litigation.

I. BACKGROUND

[¶2] Danny Wing began working at NewPage's Rumford paper mill (the Mill) in 1982. He worked as a millwright, journeyman mechanic, and oiler. While working at the mill, he suffered injuries to his left knee on May 10, 2006, to his low back on March 1, 2007, and to his right shoulder on July 31, 2008. Although Mr. Wing returned to work after each injury, he was restricted from performing certain duties. On April 14, 2011, the parties entered into a Consent Decree, approved by the ALJ (*Goodnough, ALJ*), awarding Mr. Wing varying partial benefits capped at $150.00 per week based on the 2008 average weekly wage. Mr. Wing worked in a modified position on a full-time basis, periodically taking earned vacation time, from the date of the Consent Decree until his nondisability retirement on March 1, 2012. He was receiving a small partial benefit pursuant to the Consent Decree at the time of his retirement.

[¶3] NewPage filed a Petition for Review, seeking to terminate the partial benefit based upon the retirement presumption in section 223 of the Act. Mr. Wing filed Petitions for Review seeking an increase to total incapacity benefits. The ALJ, finding that Mr. Wing was actively employed at the time of his retirement and that he was receiving a nondisability pension, applied the section 223 retirement presumption and granted NewPage's Petition for Review. The ALJ also found, based upon a report from Dr. Bradford, the independent medical examiner

(IME), 39-A M.R.S.A. § 312 (Supp. 2015), that Mr. Wing continued to have a full-time work capacity with restrictions. The ALJ therefore denied Mr. Wing's Petitions for Review. Mr. Wing filed a motion for additional findings of fact and conclusions of law, which the ALJ denied. Mr. Wing appeals.

II. DISCUSSION

A. Standard of Review

[¶4] 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. Retirement Presumption

[¶5] Mr. Wing contends that although he was working at the Mill on a full-time basis up to the date of his retirement, the ALJ erred when determining that he "terminate[d] active employment" pursuant to section 223 when he retired. He asserts that the retirement presumption does not apply because (1) the IME opined

in his deposition that Mr. Wing's decision to retire was compatible with the work restrictions he had recommended; (2) the work that he was actually performing before he retired exceeded his restrictions; and (3) he was essentially "forced" to work beyond those restrictions so that he could work until age 62 when he would become eligible for employer-paid family health insurance. We disagree with these contentions.

[¶6] '"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; (quoting 39-A M.R.S. § 223).

[¶7] 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.

The presumption is designed "to reduce compensation costs to employers generally" and "to limit the ability of employees to collect wage-loss benefits as a supplement to retirement." *Bowie v. Delta Airlines, Inc.*, 661 A.2d 1128, 1131 (Me. 1995).

[¶8] The issue for decision is whether it was error to conclude that Mr. Wing "terminate[d] active employment" under section 223 at the time of his retirement. The ALJ concluded that Mr. Wing was actively employed for the following reasons:

> Despite [his] restrictions, Mr. Wing was able to perform the essential functions of this job. While Mr. Wing now claims that he retired because he was in pain and could no longer do the work, he did not advise any supervisors or medical personnel at the time that he was having any difficulties performing his job. Prior to Mr. Wing's retirement, no doctor had opined that Mr. Wing was physically unable to perform his job. Although Mr. Wing had restrictions due to his work injury, and sometimes may have worked beyond those restrictions, he nevertheless was "actively employed" by the mill.
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> Mr. Wing's ability to perform his regular job prior to retirement, and his subsequent participation in home maintenance and recreational activities, persuade the Board that Mr. Wing is able to perform work that would otherwise be suitable to his qualifications, training and experience. While Mr. Wing's job as an oiler required him to do a lot of walking, the Board does not believe the job was otherwise as physically demanding as Mr. Wing suggests.

[¶9] Mr. Wing contends that because he was working under restrictions, and sometimes above his restrictions, and the IME opined that retirement was compatible with his restrictions, that as a matter of law, he was not actively employed on the date of his retirement, citing *Cesare v. Great N. Paper Co.*, 1997 ME 170, 697 A.2d 1325. We disagree.

[¶10] In *Cesare*, 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. Due to the effects of the new work injury, he went out of work involuntarily before his retirement date, and was not working on the day he retired. *Id.* ¶¶ 3-4. He proceeded nevertheless to retire on his earlier-scheduled retirement date, and began receiving nondisability retirement benefits. *Id.* ¶ 3. The Court, relying in part on Michigan law, 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.

[¶11] The Court in *Cesare* distinguished *Bowie v. Delta Airlines*, 661 A.2d 1128. In *Bowie*, 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 retirement 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.

[¶12] 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.

[¶13] Because Mr. Wing was working at his job when he retired, the ALJ did not err when concluding that he was actively employed and thus, when applying the retirement presumption. The IME's opinion that retirement was compatible with Mr. Wing's restrictions during that pre-retirement period, does not

alter the fact that Mr. Wing did work during that period and, as explicitly found by the ALJ, was capable of performing such work.

[¶14] Mr. Wing also suggests that his financial need to work until age 62 in order to receive certain benefits in retirement constituted force or coercion to work above his restrictions, and that being required to work above restrictions is impermissible under the Act. *See Lindsay v. Great N. Paper Co.*, 532 A.2d 151, 153 (Me. 1987). However, Mr. Wing's decision to continue working for financial reasons despite his injuries is not evidence of force or coercion on the part of NewPage.

C. Adequacy of the Findings of Fact

[¶15] With respect to Mr. Wing's contention that the ALJ's factual findings were inadequate for appellate review, we find no merit. Because Mr. Wing made a request for additional findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (2001), and submitted proposed additional findings, we do not assume that the ALJ made all the necessary findings to support the conclusion that Mr. Wing was actively employed when he terminated employment. *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." *Id.* (quotation marks omitted).

When requested, an ALJ is under an affirmative duty under section 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).

[¶16] The findings in the decree provide an adequate basis for appellate review. The ALJ made specific findings that Mr. Wing was working full time, albeit under restrictions, performing modified duty for NewPage when he retired. These findings have evidentiary support in the record. The ALJ cited to the testimony of Mark Fredette, Mr. Wing's supervisor, who testified that at the relevant time, Mr. Wing primarily took care of an oil route, adding grease and oil to the machinery throughout the plant, and that Mr. Wing never expressed any concerns that he was being asked to do work exceeding his restrictions.

[¶17] Mr. Wing suggests that because the ALJ did not make findings consistent with the evidence and testimony that he presented, particularly the testimony of his two co-workers, that the findings are inadequate as a matter of law. However, conflicting evidence in the record does not render the findings inadequate for appellate review. Moreover, evidence of his required job duties in the form of a job description does not compel a finding that he in-fact performed those duties. Findings of fact must be sustained on appeal if they are supported by competent evidence in the record, even if there is other evidence in the record that

would support a different conclusion. *Bruton v. City of Bath*, 432 A.2d 390, 392 (Me. 1981).

III. CONCLUSION

[¶18] The ALJ did not err in concluding that Mr. Wing terminated active employment on March 1, 2012, and thus, in applying the retirement presumption. Moreover, the ALJ's findings of fact are adequate for appellate review.

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 (Supp. 2015).

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