HEATHER WINSLOW
(Appellee)

v.

THE AROOSTOOK MEDICAL CENTER
(Appellant)

and

CROSS INSURANCE TPA, INC.
(Insurer)

Argument held: September 20, 2017
Decided: October 11, 2017

PANEL MEMBERS: Administrative Law Judges Jerome, Elwin, and Knopf
BY: Administrative Law Judge Elwin

[¶1] The Aroostook Medical Center ("TAMC") appeals from a decision of a Workers' Compensation Board administrative law judge (*Pelletier*, *ALJ*) granting Heather Winslow's Petition for Award. The decision established compensability of Ms. Winslow's August 18, 2014, work-related right shoulder injury, and awarded Ms. Winslow varying rates of partial incapacity benefits for the period between her work injury and her return to full-time work. TAMC contends that the ALJ erred in setting Ms. Winslow's average weekly wage and awarding incapacity benefits.

[¶2] We affirm in part, and remand for reconsideration of issues regarding concurrent employment and earning incapacity.

I. BACKGROUND

[¶3] Heather Winslow has worked as a registered nurse for TAMC since 2000. There is no dispute that she suffered a compensable right shoulder injury on August 18, 2014, or that she had restrictions due to her injury through March 13, 2016.

[¶4] For most of her career, Ms. Winslow worked full-time. However, when she returned to work at TAMC after maternity leave in July 2014, she chose to work part-time (two twelve-hour shifts per week). Her right shoulder injury occurred on August 18, 2014, during this part-time schedule. She resumed full-time work with TAMC on March 13, 2016.

[¶5] The ALJ calculated Ms. Winslow's average weekly wage at TAMC by applying 39-A M.R.S.A. §102(4)(B) (Supp. 2016), dividing Ms. Winslow's 52 weeks of earnings prior to the work injury by the total number of weeks worked during that period.[1]

[¶6] Additionally, the ALJ found that Ms. Winslow had concurrent employment at Cary Medical Center, and added $23.01 per week to the TAMC average weekly wage.

[1] The ALJ excluded the first and last weeks' earnings, because inclusion of these weeks would reduce the average weekly wage. Although Ms. Winslow correctly notes that paragraph B requires exclusion of the first week only if it is "[t]he week in which employment began, if it began during the year immediately preceding the injury" (which is not the case here), *and* if its inclusion would reduce the average weekly wage, this issue was not preserved on appeal and the ALJ's findings on this issue will not be disturbed.

[¶7] Comparing Ms. Winslow's combined average weekly wage to her actual earnings at TAMC for the period between her work injury and her return to full-time, full-duty work, the ALJ ordered payment of varying rates of partial incapacity benefits from August 18, 2014, through March 13, 2016.

[¶8] TAMC appeals the calculation of average weekly wage and the award of partial incapacity benefits.

II. DISCUSSION

A. Standard of Review

[¶9] 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 misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Pomerleau v. United Parcel Serv.*, 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, the Appellate Division reviews "only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnnaker Indus.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Average Weekly Wage Calculation

[¶10] Incapacity benefits are determined based on the difference between the employee's average weekly wage at the time of the injury and her post-injury

earning capacity. *See* 39-A M.R.S.A. §§ 212, 213, 214 (2001 & Supp. 2016). "The average weekly wage is intended to provide a fair and reasonable estimate of what the employee in question would have been able to earn in the labor market in the absence of a work-injury." *Alexander v. Portland Natural Gas*, 2001 ME 129, ¶ 8, 778 A.2d 343. *See also Nielsen v. Burnham & Morrill, Inc*., 600 A.2d 1111, 1112 (Me. 1991) ("[T]he purpose of calculating an average weekly wage is to arrive at an estimate of the employee's future earning capacity as fairly as possible." (quotation marks omitted)).

[¶11] The methods of calculating average weekly wage are set forth in paragraphs A through D of 39-A M.R.S.A. § 102(4),[2] and the appropriate method

[2] Title 39-A M.R.S.A. § 102(4) provides, in relevant part:

> **A.** "Average weekly wages, earnings or salary" of an injured employee means the amount that the employee was receiving at the time of the injury for the hours and days constituting a regular full working week in the employment or occupation in which the employee was engaged when injured. . . . In the case of piece workers and other employees whose wages during that year have generally varied from week to week, wages are averaged in accordance with the method provided under paragraph B.
>
> **B.** When the employment or occupation did not continue pursuant to paragraph A for 200 full working days, "average weekly wages, earnings or salary" is determined by dividing the entire amount of wages or salary earned by the injured employee during the immediately preceding year by the total number of weeks, any part of which the employee worked during the same period. The week in which employment began, if it began during the year immediately preceding the injury, and the week in which the injury occurred, together with the amounts earned in those weeks, may not be considered in computations under this paragraph if their inclusion would reduce the average weekly wages, earnings or salary.
>
> **C.** Notwithstanding paragraphs A and B, the average weekly wage of a seasonal worker is determined by dividing the employee's total wages, earnings or salary for the prior calendar year by 52.
>
> (1) For the purposes of this paragraph, the term "seasonal worker" does not include any employee who is customarily employed, full time or part time, for more than 26 weeks in a calendar year. The employee need not be employed by the same employer during this period to fall within this exclusion.

is chosen by proceeding sequentially through the four alternatives. *Bossie v. S.A.D. No. 24*, 1997 ME 233, ¶ 3, 706 A.2d 578. Paragraph D is a fallback provision applicable when none of the preceding methods can be "reasonably and fairly applied." *Alexander*, 2001 ME 129, ¶ 10, 778 A.2d 446. "[T]he party asserting the application of paragraph D . . . [bears] the burden of providing evidence to support a determination pursuant to that subsection." *Bossie*, 1997 ME 233, ¶ 6, 706 A.2d 578. Paragraph D requires the examination of comparable employees' earnings to ascertain what a reasonable average weekly wage for the employee would be, *id.* ¶ 5, but otherwise does not require strict adherence to an exact mathematical formula, *Alexander*, 2001 ME 129, ¶ 17, 778 A.2d 343.

[¶12] On appeal, TAMC contends that paragraph B cannot reasonably and fairly be applied because Ms. Winslow had returned to work in a part-time position after her maternity leave (prior to the work injury), thereby establishing a new regular wage in a new occupation.

---

(2) Notwithstanding subparagraph (1), the term "seasonal worker" includes, but is not limited to, any employee who is employed directly in agriculture or in the harvesting or initial hauling of forest products.

D. When the methods set out in paragraph A, B or C of arriving at the average weekly wages, earnings or salary of the injured employee cannot reasonably and fairly be applied, "average weekly wages" means the sum, having regard to the previous wages, earnings or salary of the injured employee and of other employees of the same or most similar class working in the same or most similar employment in the same or a neighboring locality, that reasonably represents the weekly earning capacity of the injured employee in the employment in which the employee at the time of the injury was working.

[¶13] Having submitted evidence of comparable employees' earnings, TAMC asserts that the ALJ should have applied paragraph D to arrive at a figure that reflects Ms. Winslow's new occupation as a part-time nurse. *See Bossie,* 1997 ME 223, ¶ 6; *Alexander*, 2001 ME 129, ¶ 17.

[¶14] In support of these contentions, TAMC cites *Fowler v. First National Stores, Inc*., 416 A.2d 1258 (Me. 1980). Ms. Fowler had been promoted from part-time clerk to full-time produce manager one week before she was injured. *Id.* at 1259-60. When calculating her average weekly wage pursuant to the prior version of paragraph B, 39 M.R.S.A. § 2(2)(B), the commissioner included wages earned and weeks worked in the year prior to the injury, including from the lower-paying clerk position. *Id.* at 1260.

[¶15] The Law Court vacated that decision, reasoning that because the promotion to manager constituted a new occupation involving substantially different responsibilities, the commissioner should have excluded wages from the lower-paying, part-time clerk position. *Id.* at 1261. The Court remanded the case for a determination of whether, under the circumstances, former paragraph B could be reasonably and fairly applied. *Id. See also St. Pierre v. St Regis Paper Co.*, 386 A.2d 714 (Me. 1978) (holding that AWW calculation should exclude earnings and weeks worked at a different employer in the year prior to the work injury, despite that the employee worked in the same occupation with the different employer).

[¶16] *Fowler* and *St. Pierre* are distinguishable. There is no evidence in this case that Ms. Winslow took on a new occupation with different responsibilities when she returned from maternity leave; she merely reduced her hours. Moreover, she worked for the same employer for the entire applicable period.

[¶17] The ALJ considered Ms. Winslow's actual earnings in the year prior to her injury, and her history of earnings as a full-time nurse at TAMC before that, in concluding that the average weekly wage of $1049.99, calculated pursuant to 39-A M.R.S.A. § 102(4)(B), was a fair and accurate reflection of her earning capacity.

[¶18] We find no error in the ALJ's calculation of Ms. Winslow's average weekly wage at TAMC. On the facts as found, it was not unfair or unreasonable to treat Ms. Winslow as a full-time employee, consistently engaged in her usual occupation as a registered nurse, for purposes of determining her future earning capacity. *See Neilsen*, 600 A.2d at 1112. And, because paragraph B produced a fair and reasonable result, the ALJ had no reason to utilize the "fallback" provision of §102(4)(D).

C. Concurrent Employment and Incapacity

[¶19] TAMC contends that the ALJ erred when determining that Ms. Winslow's earnings at Cary Medical Center should be included in her average weekly wage because there is no competent evidence demonstrating that they

constituted concurrent earnings pursuant to 39-A M.R.S.A. § 102(4)(E) (Supp. 2016) (providing that earnings from concurrent employment be included in average weekly wage "[w]hen the employee is employed regularly in any week concurrently by 2 or more employers").

[¶20] The ALJ found that Ms. Winslow worked "as a very occasional casual nurse at Cary Medical Center," and added $23.01 per week to Ms. Winslow's average weekly wage. The ALJ made no further findings or conclusions of law to support his determination that Ms. Winslow's activities in the years prior to her work injury constitute concurrent employment as defined in section 102(4)(E).

[¶21] In addition, TAMC contends that the award of partial incapacity benefits for the period from the date of injury until Ms. Winslow returned to work full time was speculative and unsupported in the record. The ALJ ordered payment of partial incapacity benefits because Ms. Winslow earned less than her average weekly wage after she returned to work following her work injury. However, the ALJ made no findings regarding the reason for these reduced earnings. Specifically, there is no finding that Ms. Winslow's post-injury earnings were reduced on account of the effects of her injury, rather than due to her choice to work part-time hours, during the period between her August 18, 2014, injury and March 13, 2016, when she resumed a full-time schedule.

[¶22] Because TAMC requested additional findings on these issues, and we cannot discern the basis for the ALJ's determinations that Ms. Winslow's employment at Cary Medical Center constituted concurrent employment or that her reduction in earnings was due to her work injury, we remand for additional findings. *See* 39-A M.R.S.A. § 318 (Supp. 2016); *Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982) (holding that when requested, a commissioner is under an affirmative duty to make additional findings of fact and conclusions of law in order to create an adequate basis for appellate review).

III. CONCLUSION

[¶23] The ALJ properly applied the appropriate legal standards in determining Ms. Winslow's base average weekly wage. However, further findings are needed to determine (1) whether Ms. Winslow had concurrent employment, and (2) whether her reduced earnings were caused by her work injury, as opposed to her decision to work part time for personal reasons.

The entry is:

> The ALJ's decision is affirmed regarding calculation of Ms. Winslow's average weekly wage at TAMC. The decision is vacated in part and remanded for additional findings of fact and conclusions of law regarding whether Ms. Winslow had concurrent employment and whether her reduced wages at TAMC were caused by her work injury.

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. 2016).

Attorney for Appellant:
Anne-Marie Storey, Esq.
RUDMAN WINCHELL
P.O. Box 1401
Bangor, ME 04402-1401

Attorney for Appellee:
Christopher Cotnoir, Esq.
WCB ADVOCATE DIVISION
24 Stone St., Suite 107
Augusta, ME 04330