ROGER W. PARADIS
(Appellant)

v.

TWIN RIVERS PAPER COMPANY
(Appellee)

and

SEDGEWICK CMS

Conference held: April 6, 2016
Decided: January 23, 2017

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

[¶1] Roger Paradis appeals from a decision of a Workers' Compensation Board administrative law judge (*Pelletier, ALJ*) granting his Petitions for Review of Incapacity and for Payment of Medical and Related Services. The ALJ awarded a closed-end period of total incapacity benefits for an injury that occurred on January 24, 2013, but did not award ongoing partial incapacity benefits based on the application of the retirement presumption in 39-A M.R.S.A § 223 (2001). Mr. Paradis challenges the ALJ's failure to award ongoing partial incapacity benefits, contending that because he was not working at the time of his retirement due to the effects of a work injury, the ALJ erred when determining that he "terminate[d] active employment." We agree with Mr. Paradis's contention that the retirement presumption does not apply in his case.

[¶2] 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 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.

[¶3] The issue for decision is whether it was error to conclude that Mr. Paradis "terminate[d] active employment" under section 223 at the time of his retirement. The ALJ concluded that Mr. Paradis "terminate[d] active employment" because even though he was not working, he had a light duty work capacity from November 2013 until the date of his retirement in January 2014.[1] The ALJ concluded:

> [T]he phrase "employee who terminates active employment" is not limited just to employment from the employer from whom incapacity benefits are being sought. Rather, the language refers to employment of any kind from an employer. Moreover, in *Bowie v. Delta Airlines*, 661 A.2d 1128, (Me. 1995) the Law Court held that the retiree presumption applies to an employee on light-duty due to his work injury at the time of his retirement. The fact that the employee here was restricted to light duty as the result of the work injury when he retired does not render the retiree presumption inapplicable.

[1] Dr. Hallberg released Mr. Paradis to light duty work on November 13. 2013, after surgery in September 2013 to repair a work-related torn meniscus injury. The ALJ stated that ". . . Dr. Hallberg came to the conclusion that [Mr. Paradis] would not be able to resume his job at the paper mill."

[¶4] At the time of his retirement, Mr. Paradis was not working because Twin Rivers did not have any light duty work available. Mr. Paradis contends that because he was not working as a result of a work-related injury, he did not terminate active employment, citing *Cesare v. Great N. Paper Co.*, 1997 ME 170, 697 A.2d 1325.

[¶5] In *Cesare*, the Law Court, relying in part on Michigan law, held:

> Because [Cesare] was not working as a result of a work-related injury, Cesare did not terminate active employment[.] The Board therefore correctly refused to apply the presumption of section 223.

Id. at ¶ 5. 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.

[¶6] The Appellate Division has recently found:

> 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 worker's 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 v. NewPage Paper, Me. W.C.B. No. 16, ¶ 12 (App. Div. 2016).[2]

[¶7] We are persuaded by the rationale set forth in *Wing*. Because Mr. Paradis was not actually working up to the effective date of his retirement due to the effects of a work injury, we conclude that he did not "terminate active employment" under section 223 and the retirement presumption therefore does not apply.

The entry is:

> The administrative law judge's decision is vacated in part, on the issue of the applicability of the retirement presumption. The case is remanded for further findings on the issue of the extent of Mr. Paradis's partial incapacity.

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).

---

[2] The ALJ did not have the benefit of that decision at the time he issued his decision.

Attorney for Appellant:
Daniel R. Lawson, Esq.
WCB ADVOCATE DIVISION
43 Hatch Drive, Suite #140
Caribou, ME 04736

Attorneys for Appellee:
Anne-Marie L. Storey, Esq.
John K. Hamer, Esq.
RUDMAN WINCHELL
P.O. Box 1401
Bangor, ME 04402-1401