STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO.: WCB-24-339

LORRI BOSSE
Appellee/Employee

v.

SARGENT CORPORATION
Employer

&

CROSS INSURANCE TPA, INC.
Appellant/Insurer

WCB #: 15016120
Date of Injury: 08/04/2015

On Appeal of a Decision of the Appellate Division
of the Workers' Compensation Board

REPLY BRIEF ON BEHALF OF THE APPELLANT

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I. The Appellee misstates the standard of review on this Appeal.

The Law Court's standard of review of the Appellate Division decision is as follows:

> We review the Appellate Division's statutory interpretation de novo. *Urrutia v. Interstate Brands Int'l,* 2018 ME 24, ¶ 12, 179 A.3d 312. "Our main objective in statutory interpretation is to give effect to the Legislature's intent." *Id.* (quotation marks omitted). "[W]e look first to the plain meaning of the statutory language in order to determine that intent." *Id.* (quotation marks omitted). In reviewing the plain language of a statute, we "consider the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Id.* (quotation marks omitted).

Charest v. Hydraulic Hose & Assemblies, LLC, 2021 ME 17, ¶10, 247 A.3d 709, 712. Ms. Bosse incorrectly structures her argument assuming the abuse of discretion standard applies, i.e., the ALJ, and then the Appellate Division, had the discretion to apply subsection B in its calculation of her pre-injury average weekly wage. *See* Appellee's Brief, pg. 14. Here, the Appellate Division's unreasonable interpretation of the express language of section 102(4) resulted in an average weekly wage calculation that is neither fair nor reasonable, and this Court should find that she is not entitled to benefits based on a subsection B calculation.

The Appellee also asks the Court to defer to the Appellate Division's interpretation of Law Court precedent. "The appellate panel accurately reviewed the governing statute and the Law Court's precedents on point and found neither an error in the individual ALJ's reasoning nor an unfair result. *Id.*" *See* Appellee's Brief, pg.

13. This suggestion of deference misapprehends the standard of review. As this Court has stated:

> Although we afford appropriate deference to the Appellate Division's reasonable interpretation of the workers' compensation statute, when the ultimate issue is the proper interpretation of judicial precedent, we are not obligated to defer to the Appellate Division's interpretation of that precedent. *See NLRB. v. U.S. Postal Serv.,* 660 F.3rd 65, 68 (1st Cir. 2011) (explaining that an appellate court is not compelled to defer to an agency's interpretation of judicial precedent); *cf. Van Houten v. Harco Const., Inc.,* 655 A.2d 331, 333 (Me. 1995) (reviewing de novo WCB's determination that a party was not collaterally estopped from raising an issue because the question of collateral estoppel did not "involve an interpretation of the [Worker's Compensation] Act" or "fall withing the [WCB's] traditional area of expertise"). Accordingly, we interpret judicial precedent de novo. *See Me. Pub. Serv. Co. v. Fed Power Comm'n,* 579 F.2d 659, 665 (1st Cir. 1978) (stating that a court "may pass judgment independently" of an agency's interpretation of judicial precedent); *cf. Bates v. Dep't of Behav. & Developmental Servs.,* 2004 ME 154, ¶38, 863 A.2d 890 (The trial court's interpretation of its own judgment will be reviewed de novo on questions of law….").

Steve L. Michaud v. Caribou Ford-Mercury, Inc., et al., 2024 ME 74, ¶13, 327 A.3d 38, 43.

There are two key Law Court decisions, *Bossie v. School Admin. Dist.* No. 24, 1997 ME 233 ¶6, 706 A.2d 578 and *Alexander v. Portland Natural Gas*, 2001 ME 129, 778 A.2d 343. The interpretation of these cases is in the exclusive province of this Court. All previous decisions in this case have misapplied those precedents. First, subsection D expressly calls for its application when the use of subsections A-C cannot reasonably and fairly be applied. *See* 39-A M.R.S.A. § 102(4)(D). As explained in the Appellant's original brief, a subsection B application in this case

results in annual compensation benefits that are nearly *double* the earnings that Ms. Bosse earned during any of the four years immediately preceding her date of injury in 2015. *See* Appellant's Brief, pgs. 18-19. Ms. Bosse did not present any evidence to show that she earned anything in addition to the earnings she received from Sargent during the periods she worked in the years leading up to the 2015 injury. Thus, for all intents and purposes, the earnings she received from Sargent made up the entirety of her annual earnings for those years. For the Appellate Division to affirm an award of benefits that far exceed any earnings she has previously received is, on its face, unfair and unreasonable, and runs counter to both *Alexander* and *Bossie*. Further, allowing highly inflated worker's compensation benefits that are neither fair nor reasonable runs contrary to the purpose of the statute's wage determination. *See Roy v. Bath Iron Works*, 2008 ME 94, 952 A.2d 965 (stating workers' compensation benefits are designed to replace wages that would have been earned but for a work-related injury). Looking at Ms. Bosse's historical earnings, a benefit entitlement under subsection B is simply not reflective of what she would have earned but for her injury. It is entirely hypothetical.

Second, once it is determined that an average weekly wage under subsections A-C is unfair and unreasonable, subsection D requires the factfinder to find a wage that *reasonably represents* the weekly earning capacity of the injured employee, having regard for the employee's previous wages, earnings or salary. *See* 39-A M.R.S.A. § 102(4)(D); *see also St. Pierre v. St. Regis Paper Co*., 386 A.2d 714, 719

(Me. 1978) (stating the statute is unambiguous in that due regard must be given to the injured workers previous "wages, earnings or salary") (emphasis added). Here, the Appellate Division neglected to consider or analyze Ms. Bosse's previous wages, earnings or salary and decided to focus solely on subsection D's application as only applicable in situations where an injured employee's relationship with the labor market is intermittent due solely to the general business needs of the employer and economic conditions. (App., p. 22). The Appellate Division's complete disregard for the express language of subsection D was erroneous and a misapplication of the statute. Had the Appellate Division considered the fact that the calculation of Ms. Bosse's pre-injury average weekly wage pursuant to subsection B was in no way reflective of her past earnings, the Appellate Division would have seen that the subsection B calculation was neither fair nor reasonable. In turn, had this analysis occurred, the Appellate Division would have been left with no other alternative but to apply a subsection D calculation to fulfill the statutory intent of section 102(4). Thus, the Appellate Division's disregard for the express language of subsection B was erroneous and this Court should determine that Ms. Bosse's pre-injury average weekly wage should have been calculated under subsection D.

Because the Appellate Division failed to apply the express language of section 102(4), and specifically subsection D, this appeal unquestionably involves a question of statutory interpretation and the interpretation of Law Court precedents. The Appellate Division's ruling is completely at odds with the express language of the

statute and, as a result, their holding resulted in an average weekly wage calculation that is neither fair nor reasonable. Accordingly, this Court should reverse the Appellate Division's decision with respect to its subsection B calculation of Ms. Bosse's pre-injury average weekly wage and apply a subsection D calculation.

II. Even if the Appellate Division disagreed with Sargent's proposed calculation under subsection D, it was still erroneous for the Appellate Division to resort back to a subsection B calculation.

Even if the Appellate Division disagreed with Sargent's proposed subsection D calculation, they should not have resorted back to a subsection B calculation merely out of convenience. Rather, had they construed the statute appropriately and seen that subsection B resulted in an unfair and unreasonable average weekly wage, they should have determined an appropriate method, under subsection D, for calculating Ms. Bosse's average weekly wage such that the resultant amount represented a reasonable estimate of what she would have been able to earn in the labor market in the absence of the injury. *See Alexander v. Portland Natural Gas*, 2001 ME 129, ¶ 8, 778 A.2d 343, 347. Where subsections A-C result in a calculation that is unfair and unreasonable, subsection D supersedes them, "even though by its facial terms standing alone one of them would be the controlling computation." *See Pierre*, 386 A.2d 714, 718 (Me. 1978). Thus, once it is determined that the other subsections result in an unfair and unreasonable average weekly wage, you cannot resort back to one of the foregoing subsections and a subsection D calculation is required.

Application of subsection D "is flexible and does not require rigid adherence to any mathematical formula." *See Alexander*, 2001 ME 139, ¶ 18, 778 A.2d at 350. That is, there is not one way to apply subsection D. Thus, if the Appellate Division refused to apply subsection D because they disagreed with one proposed method of calculation, it is not appropriate to resort back to subsection B without a further analysis. *See Pierre*, 386 A.2d 714, 718 (Me. 1978). Again, the purpose of calculating an injured worker's pre-injury average weekly wage is to arrive at a figure that is a reasonable estimate of what they would have earned but for the work injury. The ALJ or the Appellate Division has great leeway in determining what should be considered and what the calculation should look like under subsection D. There have been instances where the state's minimum wage has been imputed during an injured worker's layoff. *See Phelan v. Crooker Construction, LLC*, 2023 WL 3995706 (ME.Work.Comp.Bd.). There have also been other instances where an ALJ has imputed a lower earning capacity during the layoff period than the injured worker would have earned with their employer based upon evidence submitted during the proceeding. *See Pastula v. Lane Construction Corp.*, 2014 WL 535208 (ME.Work.Comp.Bd.) (finding it unlikely the employee earned anywhere near what she earned while working for the employer). There are many avenues for the factfinder to travel as long as the prevailing intent of subsection D is carried out – that a fair and reasonable calculation is obtained. The fact finder and the Appellate

Division simply abdicated their responsibility to find a fair and reasonable average weekly wage.

The facts are that Ms. Bosse did not work for years during the layoffs immediately preceding her 2015 injury. (ROA p. 1056). While she testified that she collected unemployment during some of her layoff periods, there was no evidence submitted to show what she earned. (ROA p. 1065). Rather, the evidence is what it is, the entirety of Ms. Bosse's earnings during the years preceding her 2015 injury were made up of her earnings with Sargent. There is no other evidence to support the finding that she had additional earnings. What she earned working for Sargent *is* what she earned. The fact finder and the Appellate Division ignored these facts. Accordingly, Sargent's proposed method of calculation under subsection D – applying a 52-week divisor to her earnings for the year immediately preceding the 2015 injury – is appropriate in this case. In applying this calculation, this Court should determine that Ms. Bosse's pre-injury average weekly wage is $664.14.

CONCLUSION

For the reasons discussed in the Appellant's original brief and this Reply Brief, this Court should grant the present appeal and find that the Appellate Division erred in applying a subsection B calculation to its calculation of Ms. Bosse's pre-injury average weekly wage. The Court should order that the pre-injury average weekly wage is $644.14.

Dated at Portland, Maine this 2nd day of April 2025.

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CERTICATE OF SERVICE

I, Robert W. Bower, Jr., Esq., attorney for the Sargent Corporation and Cross Insurance TPA, Inc., have this date made service of the *Reply Brief on Behalf of the Appellant* by placing a conformed copy of the same in the United States mail, postage prepaid, addressed as follows:

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