

**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

BRIEF FOR APPELLANT

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I. INTRODUCTION

In this workers' compensation matter, Sargent Corporation and Cross Insurance TPA, Inc. ("Cross") (collectively referred to as "Sargent") seek a reversal of the Workers' Compensation Board Appellate Division's (the "Appellate Division") July 10, 2024 decision affirming the Administrative Law Judge's ("ALJ") decision to use 39-A M.R.S.A. § 102(4)(B) ("subsection B") as the method of calculating Lorri Bosse's ("Ms. Bosse" or the "Appellee") average weekly wage. Sargent and Cross argue that Ms. Bosse's earnings for the year immediately preceding her 2015 date of injury should be determined under 39-A M.R.S.A. § 102(4)(D) ("subsection D" and/or "the fallback provision"). Specifically, Sargent and Cross argue that, under subsection D, Ms. Bosse's average weekly wage should be determined by applying a 52-week-divisor to her earnings from the year immediately preceding her 2015 date of injury as such a calculation would result in a calculation that is both fair and reasonable. Accordingly, this Court should reverse the Appellate Division's decision with respect to the subsection B calculation and hold that Ms. Bosse's pre-injury average weekly wage is \$664.14. In the alternative, this Court should reverse the Appellate Division's decision and remand the matter to the ALJ to calculate the pre-injury average weekly wage pursuant to subsection D.

The basis for all lost time benefits in the workers' compensation system is the pre-injury average weekly wage. The system compares an employee's pre-injury

earning capacity to their earning capacity post-injury, from which lost time benefits are calculated. There are many facts that make up the post-injury earning capacity. These can include medical evidence of limitations on an employee's capabilities, labor market evidence, work searches, etc. But there is only one fact that constitutes the employee's pre-injury earning capacity, the "average weekly wage." *Alexander v. Portland Natural Gas*, 2001 ME 129, 778 A.2d 343, 347 (Me. 2001). It must estimate the employee's uninjured earning capacity "as fairly as possible." *Id.* Accordingly, this "average weekly wage" issue is a critical issue for the system.

Here, the Appellate Division fixed Ms. Bosse's pre-injury average weekly wage so high that her compensation payments exceeded her gross pre-injury earnings. The Appellate Division ignored or misinterpreted this Court's precept in the context of employees who have an intermittent or inconsistent relationship to the labor market. As this Court has recently noted, "we are not obligated to defer to the Appellate Division's interpretation of [judicial precedent]." *Michaud v. Caribou Ford-Mercury, Inc., et al.*, 2024 ME 74, ¶ 13, 237 A.3d 38, 43 (Me. 2024); *see NLRB v. U.S. Postal Serv.*, 660 F.3d 65, 68 (1st Cir. 2011). Also, when the issue on appeal involves a question of law, including statutory interpretation, the matter is reviewed by this Court de novo. *Robbins v. Chebeague & Cumberland Land Trust*, 2017 ME 17 ¶11, 154 A.3d 1185 (Me. 2017), *Workers' Compensation Board v. Nate Holyoke Builders*, 2015 ME 99 ¶14, 121 A.3d 801, 806 (Me. 2015), *Estate of Sullwold v. Salvation Army*, 2015 ME 4 ¶7, 108 A. 3d 1265, 1268 (Me. 2015), *Construction*

Services Workers' Group v. Stevens, 2010 ME 108 ¶11, 8 A.3d 688, 692 (Me. 2010).

This Court should give explicit instructions to the worker's compensation Board on this important question of statutory construction.

II. PROCEDURAL AND FACTUAL BACKGROUND

Ms. Bosse is a resident of Lisbon, Maine. (ROA p. 1039). Between 2000 and 2009, Ms. Bosse worked as a self-employed truck driver for a trucking company that she co-owned with her husband. (ROA p. 1040). After the closing of her self-employed company in 2009, Ms. Bosse began driving a truck for Gendron & Gendron. (ROA p. 1064). While employed by Gendron & Gendron, Ms. Bosse was regularly laid off during the winter months when work slowed and then rehired the following spring. (Id.) In 2011, Ms. Bosse left Gendron & Gendron and began working for Sargent in a similar capacity – dump truck driver. (ROA p. 1045). Like Gendron & Gendron, while working for Sargent, Ms. Bosse was regularly laid off during the winter months and then rehired again in the spring. (ROA p. 1064). Ms. Bosse continued to work for Sargent until she alleged a gradual work-related injury to her back and hip in August of 2015. On November 18, 2015, Ms. Bosse filed a Petition for Award of Compensation (“Petition”) regarding an alleged gradual injury to her hips. (App., p. 25). Thereafter, the Petition was amended to include an allegation of a work-related injury involving her back as well as hips. (App., p. 26).

A hearing was held on November 10, 2016 before Administrative Law Judge (“ALJ”) Glen Goodnough. (ROA p. 10). On January 26, 2018, ALJ Goodnough

issued the Board's decision on the matter and granted Ms. Bosse's Petition and awarded her incapacity benefits from the date of injury to the present and continuing. (App., p. 35). Ms. Bosse's ongoing benefits were ordered pursuant to 39-A M.R.S.A. § 213(1)(B). (Id.). In calculating the weekly compensation due to Ms. Bosse, ALJ Goodnough used subsection B to determine that her pre-injury average weekly wage was \$1,157.35. (App., p. 32). The effect of this finding was that Ms. Bosse would begin to receive more in workers' compensation benefits on an annual basis than she ever did before she was injured.

Following the issuance of the November 10, 2016, decision, Sargent and Cross appealed ALJ Goodnough's determination that subsection B was the appropriate method to use in calculating Ms. Bosse's pre-injury average weekly wage.¹ On March 24, 2021, the Appellate Division issued its decision. (App., p. 04-13). On the issue of Ms. Bosse's average weekly wage, the Appellate Division found that ALJ Goodnough's decision to apply subsection B was based on a misunderstanding of facts, that Ms. Bosse worked year-round prior to her employment for Sargent, that were unsupported by the evidence with respect to the nature of Ms. Bosse's employment prior to her work for Sargent. (App., p. 09). Accordingly, the Appellate Division sent the issue back to the Board on remand to

¹ Sargent and Cross also appealed issues involving 39-A M.R.S.A. § 201(4) and 39-A M.R.S.A. § 312; however, those issues involved rulings on the medical aspects of the claim that have not been appealed in the present matter.

determine whether subsection B was the appropriate method to use to calculate Ms. Bosse's average weekly wage once the appropriate facts were found. (App., p. 12).

On remand, in a decision issued February 28, 2023, ALJ Katherine Rooks² upheld ALJ Goodnough's decision and found that subsection B was appropriately used to determine Ms. Bosse's average weekly wage. (App., p. 61). The decision to affirm the use of subsection B as the appropriate method of calculating Ms. Bosse's average weekly wage was made despite ALJ Rooks' determination that Ms. Bosse was in fact laid off during the winter months prior to beginning her employment for Sargent. (App., p. 59).

Following the issuance of the February 28, 2023, decision, Sargent and Cross appealed ALJ Rooks' decision with respect to her finding that subsection B was appropriately used to calculate Ms. Bosse's average weekly wage. (ROA p. 1186). On July 10, 2024, the Appellate Division issued its decision. (App., p. 14-24). In its decision, the Appellate Division affirmed ALJ Rooks' determination that subsection B was appropriately used in calculating Ms. Bosse's average weekly wage. (App., p. 23). In large part, the Appellate Division found that subsection B resulted in a fair and reasonable average weekly wage because it was Sargent's decision to lay off Ms. Bosse each winter (as opposed to Ms. Bosse voluntarily being laid off). (App., p. 22-23). The Appellate Division made no mention of or analyzed Sargent's argument that the average weekly wage based on subsection B resulted in a high

² ALJ Goodnough retired prior to this matter being remanded back to the Board.

annualized wage that was not reflective of the earnings which Ms. Bosse had earned in the past. Instead, the Appellate Division relied solely on the fact that the annual layoffs were based on Sargent's decision. (App., p. 22). This appeal followed.

III. ISSUES ON APPEAL

- 2. Whether the Appellate Division committed legal error in ruling Ms. Bosse is entitled to weekly compensation benefits pursuant to subsection B instead of subsection D where application of subsection B results in the calculation of a pre-injury average weekly wage that is both unfair and unreasonable.**

IV. ARGUMENT

- 1. The Appellate Division erred when it affirmed the Administrative Law Judge's use of subsection B to calculate Ms. Bosse's pre-injury average weekly wage.**
 - a. The history of section 102(4) and this Court's analysis of and application of subsection D through the lens of *Alexander* and *Bossie*.**

The Appellate Division erred when it determined that the Administrative Law Judge appropriately applied subsection B to calculate Ms. Bosse's pre-injury average weekly wage. In terms of workers' compensation matters, the average weekly wage is the foundation of all benefits awarded to an injured worker and, thus, a necessary determination that needs to accurately reflect the injured worker's pre-injury earning capacity. Lost time benefits are a percentage of the pre-injury average weekly wage. Clearly, the legislature understood the importance of calculating an accurate average weekly wage as the Worker's Compensation Act for the State of

Maine includes four separate methods for determining an injured worker's average weekly wage. As illustrated by this Court, 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, 347.

In determining an injured workers' average weekly wage, the provisions set forth in 39-A M.R.S.A. § 102(4)(A)-(D) need to be scrutinized in order. In the present matter, both 39-A M.R.S.A. § 102(4)(A) ("subsection A") and 39-A M.R.S.A. § 102(4)(C) ("subsection C") can be ruled out immediately as neither are applicable to the facts at hand. Subsection A 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 subsection B.

39-A M.R.S.A. § 102(4)(A). Since Ms. Bosse's wages varied from week to week, subsection A is inapplicable to the present matter.

In addition, subsection C is inapplicable to the present matter. Subsection C only applies to "seasonal workers." *See* 39-A M.R.S.A. § 102(4)(C). The subsection goes on to state:

1. ... 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.

Id. Here, the evidence shows, and it has remained undisputed, that the Employee worked more than the 26-week threshold under subsection C. Accordingly, subsection C is inapplicable.

Due to the process of elimination, the appropriate method for calculating Ms. Bosse’s average weekly wage will be one of either subsection B or 39-A M.R.S.A. 102(4)(D) (“subsection D”). Subsection B provides, in relevant part:

- B. ... “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...

39-A M.R.S.A. § 102(4)(B). In contrast, subsection D provides, in relevant part:

- 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 *can not* 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.

39-A M.R.S.A. § 102(4)(D) (emphasis added).

This Court has held “[a]s a matter of logic, one of the paragraphs, either A, B, or C, can be applied in all employment cases.” *Alexander*, 2001 ME 129, ¶ 11, 778 A.2d 343, 348. Under this interpretation of subsection A through C, there would never be a need to resort to an analysis under the fallback provision, subsection D. Clearly, it was not the legislature’s intent to enshrine a provision of the statute that would *never* be applicable. In fact, in *Alexander*, this Court reasoned that

[t]he Hearing Officer may not rule out resorting to the fallback provision simply because one of the preceding paragraphs is applicable on its face.

Id., at 348. Instead, this Court enunciated that “Paragraph D applies to all cases in which the ordinary calculation methods would lead to an *unfair or unreasonable result*.” *Id.* (Emphasis added). Accordingly, even if subsection B is applicable to a matter, a calculation under subsection D is appropriate where the subsection B calculation results in an unfair or unreasonable result.

Thus, the question turns to what determines whether a calculation of an injured employee’s pre-injury average weekly wage under subsection B is fair or reasonable. While there is precedent that has sought to distinguish or clarify the “fair” and “reasonable” considerations of subsection B, certain areas of the workforce have not been fully explored or analyzed. For instance, there are situations which have yet to be addressed in a substantive matter by this Court. As is the case in the present matter, there is a large contingent of the population that works for a part of the year, or intermittently, that is more than the 26-week threshold

of subsection C but less than a full calendar year. These situations arise frequently in matters involving injured workers in the construction and trucking industries here in Maine where harsh winters make it difficult for continued year-round operations. Before addressing the matter at hand, it is helpful to have a full understanding of the two pertinent decisions issued by this Court in *Alexander* and *Bossie v. School Administrative District No. 24*, 1997 ME 233, 706 A.2d 578 (Me. 1997), to see how they are similar to and distinguished from the present matter.

i. With respect to the present matter, *Alexander* is instructive, not controlling.

In the underlying decision, the Appellate Division deemed subsection B appropriate to use for calculating Ms. Bosse's pre-injury average weekly wage because it deemed her intermittent relationship with the labor market "involuntary," i.e., Sargent made the decision each year to lay off Ms. Bosse, not the other way around. In support, the Appellate Division relied heavily on this Court's analysis in *Alexander*; however, while instructive, the analysis set forth in *Alexander* is not exclusively controlling and this Court's rationale was specific to the facts present in *Alexander*. It was not intended to be a universal application. As this Court stated in the *Alexander* decision, "[subsection D] is intended to apply to unique employment situations" and its application "is flexible and does not require rigid adherence to any mathematical formula." *See Alexander*, 2001 ME 139, ¶ 18, 778 A.2d at 350.

In *Alexander*, the employee worked as a boom operator on pipeline construction for many years. *Id.* 2001 ME 129, ¶ 2, 778 A.2d at 345. Following a

“falling out” with his employer, the employee voluntarily reduced his workload. *Id.* In 1998, the employee sustained several injuries and, per his own request, was laid off. *Id.* 2001 ME 129, ¶ 3. While he regained employment with another employer following his layoff, the employee worked for approximately a year before being laid off again. *Id.* Thereafter, the employee proceeded to file a workers’ compensation claim for the two injuries sustained in 1998. *Id.* In the Board’s decision, the Hearing Officer calculated the employee’s pre-injury average weekly wage pursuant to subsection B. *Id.* 2001 ME 129, ¶ 4, 778 A.2d at 345. On appeal, this Court vacated the Hearing Officer’s subsection B calculation and remanded the matter for reconsideration. *Id.* 2001 ME 129, ¶ 4, 778 A.2d at 346.

In vacating the Hearing Officer’s decision, this Court reiterated that:

the purpose of calculating an average weekly wage is to arrive at an estimate of the ‘employee’s future earning capacity as fairly as possible.

Id. 2001 ME 129, ¶ 8, 778 A.2d at 347; *Nielsen v. Burnham & Morrill, Inc.*, 600 A.2d 1111, 1112 (Me. 1991) (quoting *Fowler v. First Nat’l Stores, Inc.*, 416 A.2d 1258, 1260 (Me. 1980)). In turning its attention to the text of 39-A M.R.S.A. § 102(4), this Court continued that while one of subsections A-C is arguably applicable in all circumstances, subsection D, the “fallback provision,” *applies* in all cases in which “the ordinary calculation methods would lead to an *unfair or unreasonable result.*” *See Alexander*, 2001 ME 129, ¶ 11, 778 A.2d at 348 (emphasis added).

With respect to the facts present in *Alexander*, this Court agreed with the employer that subsection D was applicable because subsection B looked only at the employee's earnings with the employer, irrespective of both the brevity of his employment as well as his "intermittent" relationship with the labor market. *Id.* 2001 ME 129, ¶ 12, 778 A.2d at 348. In so agreeing, this Court surmised:

[w]hen the employment does not establish a new occupation, however, but reflects part of a pattern of discrete, short-term employments, [subsection B] may result in an inflated average weekly wage.

Id. Because the employee's relationship with the labor market during the years leading up to the work injury consisted of a series of discrete, short-term employments, this Court deemed his employment status as "consistently intermittent." *See id.* 2001 ME 129, ¶ 13, 778 A.2d at 345 (*citing* 5 A. LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 93.02[3][C] (2000)). However, given the facts present in *Alexander*, this Court focused primarily on the "voluntariness" of the employee's relationship with the labor market and whether his employment was the result of personal choice or a temporary industry-wide slowdown. *See Alexander*, 2001 ME 129, ¶ 13, 778 A.2d at 348. In doing so, the Court found that because the employee had *voluntarily* limited his employment, subsection D was the correct method to use in the calculation of his average weekly wage.

While *Alexander* focused much of its analysis on whether the employee's relationship with the labor market was voluntary on his part versus that of his

employer, this Court explained that subsection D may be the appropriate method of calculating an average weekly wage where it is established the employee has a consistently intermittent relationship with the labor market. Aside from the “voluntariness” factor, this Court also addressed other factors to be considered when applying a subsection D analysis including the *express language* of subsection D which calls for the factfinder to give “regard to the previous wages, earnings or salary of the injured employee.” 39-A M.R.S.A. § 102(4)(D) (emphasis added). Voluntariness is *not* mentioned in the statute. In so doing, this Court referred to its previous opinion in *St. Pierre v. St. Regis Paper Co.*, 386 A.2d 714 (Me. 1978) in which it was noted that:

[subsection D] in effect broadly requires regard to be given to *any* factors relevant in determining the injured employee’s earning capacity on his job just prior to the injury... that is, the scope of the search for relevant evidence of the employee’s own earning capacity under [subsection D] extends beyond computing the arithmetic averages of the prior wages he had received from a single employer prescribed by [subsection A and B].

Id., at 719 (emphasis added).

Accordingly, while this Court focused on the “voluntariness” of the Employee’s layoff in *Alexander*, this Court also acknowledged that an appropriate subsection D analysis is by no means limited to one factor. Quite the contrary, this Court has explicitly stated that the factfinder should consider any factors relevant to a determination of a fair and reasonable calculation for an injured employee’s average weekly wage. The “voluntariness” of the layoff is but one of the factors to

be considered. In fact, the statute expressly calls for consideration of the injured employee's *previous* wages, earnings or salary. *See* 39-A M.R.S.A. § 102(4)(D).

Here, the Appellate Division focused solely on Sargent's decision to lay off Ms. Bosse each winter due to winter weather and a slowing of work. In focusing on this sole factor, the Appellate Division found that Ms. Bosse was "involuntarily" laid off. This analysis applied by the Appellate Division is too narrow and it was erroneous to rely solely on this issue without further examination of the other factors which should have been considered, including the express language of subsection D.

First, the Appellate Division should have looked at Ms. Bosse's previous wages, earnings or salary as stated in the express language of subsection D. *See* 39-A M.R.S.A. § 102(4)(D). Sargent submitted evidence of Ms. Bosse's earnings for the Employer dating back to 2011 including her earnings for the year immediately preceding the date of injury. (App., p. 64-69). For the year immediately preceding Ms. Bosse's date of injury, she earned \$34,535.41 from the Employer. (App., p. 64).³ Between 2011 and 2014, Ms. Bosse earned between \$21,997.62 and \$31,299.65 each year. (App., p. 65-68). For the four years immediately preceding the date of injury, Ms. Bosse never earned more than \$34,535.41 in a single year. Under the Appellate Division's subsection B analysis (dividing her earnings for the year preceding the work injury (\$34,535.41) by the weeks actually worked during that

³ Earnings that were comparable to the earnings of comparable employees as evidenced by the wage statements submitted into evidence. (App., p. 70-71).

year (29)), Ms. Bosse's average weekly wage was determined to be \$1,190.87. If extrapolated over a 52-week year, this subsection B average weekly wage would equate to earnings of \$61,925.38 – or nearly double what Ms. Bosse earned during any of the four years prior to her date of injury in 2015.

In contrast, had a subsection D analysis been applied to the calculation of Ms. Bosse's average weekly wage using a 52-week divisor against her earnings from Sargent during the year immediately preceding the injury (\$34,535.41), the resulting average weekly wage would equate to \$664.14, an average weekly wage comparable to her *previous wages or earnings* based on the evidence of her past annualized weekly earnings with Sargent - \$423.03 in 2011; \$503.05 in 2012; \$638.49 in 2013; and \$601.92 in 2014. (App., p. 64-69). Thus, had the Appellate Division considered Ms. Bosse's prior earnings, it would have been clear that a subsection B calculation of her average weekly wage results in a figure that is neither fair nor reasonable. As stated in *Alexander*, where employment does *not* establish a new occupation, but reflects part of a *pattern* of short-term employment, subsection B may result in an inflated average weekly wage. *See Alexander*, 778 A.2d at 348. As is evidenced by the record, the subsection D rate of \$664.14 per week is much more reflective of Ms. Bosse's previous earnings and more in line with the intent of section 102(4) – to arrive at a calculation that is fair and reasonable. Accordingly, it was erroneous for the Appellate Division to disregard Ms. Bosse's prior earnings and apply a subsection B analysis to its calculation of her average weekly wage. The Appellate

Division should have applied subsection D and a 52-week divisor to her earnings for Sargent and determined that her fair and reasonable average weekly wage is \$664.14.

Second, even if “voluntariness” is a relevant factor, the Appellate Division should have examined the full scope of its “voluntariness” argument instead of just focusing on one side of the argument – Sargent’s decision to lay off employees during the winter months. While Sargent may have made the decision to lay off employees during the winter due to lack of work due to weather conditions, Ms. Bosse made the “voluntary” decision to return to her employment at Sargent each spring. She did not have to return. She chose to return. There was limited evidence of other earnings during the lay off period, another voluntary choice by Ms. Bosse. The Appellate Division should have considered Ms. Bosse’s voluntary return to Sargent each spring knowing that winter would inevitably roll around again and she would again be laid off. Ms. Bosse was certain that she would be laid off the following winter after a return in the spring as winter certainly comes around each year and nothing was going to change that fact. It was a pattern of employment that Ms. Bosse voluntarily accepted, knowing that things would not change. It is this fact which distinguishes the present matter from *Alexander* but highlights the similarities to the employment situation in *Bossie*, discussed *infra*. Nevertheless, the Appellate Division’s decision to focus solely on Sargent’s role in Ms. Bosse’s layoff was erroneous as she voluntarily took an active role in her decision to remain in a short-term and intermittent employment.

Third, *Alexander* specifically addresses this Court’s prior analysis in *St. Pierre* with respect to the other factors to be considered in the calculation of a fair and reasonable average weekly wage. *See Alexander*, 2001 ME 129, ¶ 17, 778 A.2d at 350. In *St. Pierre*, this Court noted that

[u]nder appropriate circumstances [subsection D] reference to ‘the previous wages, earnings or salary of the injured employee’ must be extended to wages received from other employers...

St. Pierre, 386 A.2d at 719. *St. Pierre* and *Alexander*, by reference, suggest that under a subsection D analysis, the factfinder is well within their rights to look not only to the employee’s earnings with the employer at the time of injury, but all and any employments they may have had in order to establish a fair and reasonable average weekly wage.

When applying this analysis to the present matter, it is undisputed that Ms. Bosse was laid off from Sargent during the winter months. While she testified that she was trying to find work during her layoffs, Ms. Bosse testified that during some of her layoffs, she worked at a café in Lisbon. (ROA p. 1056). When asked about the scope of the employment, Ms. Bosse testified that “[i]t wasn’t very many hours. It was just something to do.” (Id.) After the café, Ms. Bosse also testified that she would collect unemployment during the layoffs leading up to her date of injury in 2015 (ROA p. 1065). While she looked for work during the periods she would collect unemployment, Ms. Bosse testified that she knew it would be unlikely that she would get a job during those periods because she would “leave as soon as Sargent

calls.” (ROA p. 1066). Further, Ms. Bosse also testified that she knew she could quit Sargent and get a “full year-round job.” (ROA p. 1067). However, each spring, Ms. Bosse made the decision to return to Sargent knowing that she would be laid off the following winter.

When looking at the earnings during her yearly layoffs, Ms. Bosse never produced evidence of what she earned either while working or collecting unemployment benefits. The closest she came to approximating what she may have earned during her periods of layoff came when she testified that she may have received “\$300 or something” from unemployment. (ROA p. 1065). Thus, except for limited evidence of unemployment benefits, Ms. Bosse never established earnings during her layoffs – certainly nothing approaching her earnings for Sargent.

Thus, for all intents and purposes, the entirety of Ms. Bosse’s earnings between 2011 and 2015, certainly between 2014 and 2015, are the earnings she received from Sargent during the three seasons she would work throughout the year, excluding her winter layoffs. Accordingly, under the premise set forth in *St. Pierre* and referenced in *Alexander*, Ms. Bosse’s average weekly wage should be calculated pursuant to subsection D by taking her earnings from Sargent and dividing them by a 52-week divisor as there is no other evidence of earnings for that period. The Appellate Division should have determined that her fair and reasonable average weekly wage is \$664.14.

Because the Appellate Division did not apply the express language of subsection D to the present matter as well as an analysis of the other factors relevant to a determination of an average weekly wage that is fair and reasonable, its use of subsection B was erroneous.

ii. The facts in the present matter are more akin to the facts presented to this Court in *Bossie*.

While the Appellate Division relied heavily on this Court's ruling in *Alexander*, the truth of the matter is that the present matter more closely resembles the facts presented to this Court in *Bossie*, 1997 ME 233, 706 A.2d 578. Undoubtedly, the Appellate Division's decision to rely on *Alexander* was due in large part to the more thorough analysis offered by this Court with respect to the subsection B versus subsection D argument. *Bossie*'s rationale is dictum as the employer failed to properly preserve the issue by offering comparable employee wage statements. However, in the instant case, such evidence was offered and the infirmity in *Bossie* does not exist here. This Court, in *Bossie*, offered substantial insight into how and when subsection D should be applied. Given the similarity of the facts to the present matter, this Court now has an opportunity to expound on its comments which were made in dicta in *Bossie*. *It must do so*.

In *Bossie*, the employee worked as a cook for the employer school district. *Id.* 1997 ME 233, ¶ 2, 706 A.2d at 579. During her many years of employment prior to the work injury, the employee worked approximately 36 weeks per year from August to June. *Id.* She did not work summers when the children were not in school. *Id.* In

January 1993, the employee left her job due to an alleged gradual injury. *Id.* In granting her petition, the Board awarded the employee incapacity benefits pursuant to subsection D. *Id.* The employee appealed on the basis that the employer had not provided the necessary evidence, under subsection D, of the earnings for comparable employees. *Id.* In defense of the employee's appeal, the employer argued that subsection D would be the best method of calculating her average weekly wage because she had a long history of employment for substantially less than a full working year. *Id.* 1997 ME 233, ¶ 4, 706 A.2d at 579.

Despite vacating the Board's decision due to the employer's failure to provide the evidence necessary for a subsection D application, this Court, in dicta, agreed with the employer's argument – that subsection D might have been the best method of determining the employee's average weekly wage. *Id.* 1997 ME 233, ¶ 6, 706 A.2d at 580. In reaching this assessment, this Court relied heavily on the analysis of Professor Larson's treatise dealing with calculation of an injured worker's average weekly wage. *Id.* 1997 ME 233, ¶ 5, 706 A.2d at 580. In his treatise, Professor Larson reasoned that:

The average weekly wage determination is not based solely on what the employee is theoretically capable of earning, but on the employee's actual work history.

Id. (citing 2 A. Larson, *The Law of Workmen's Compensation*, §§ 60.21(c), 60.22(a) (1993)). This Court interpreted Professor Larson's treatise to be critical of jurisdictions that determine earnings of long-term part-time employees based on

what they might earn in a *hypothetical* full-time employment. *Bossie*, 1997 ME 233, ¶ 5, 706 A.2d at 580. (Emphasis added). Despite agreeing to uphold a subsection D calculation of the employee's average weekly wage, this Court was unable to do so on the basis that the employer had failed to satisfy its evidentiary condition precedent. *Id.* 1997 ME 233, ¶ 6, 706 A.2d at 580.

Like the employee in *Bossie*, Ms. Bosse worked for years in a profession that historically slowed down or, in some circumstances, ceased operations for a particular season. In *Bossie*, it was the summer months when children were not in school. Here, it is the winter months when construction work and trucking slowed down due to the elements. In both cases, the employment was short-term, more than a seasonal employee but much less than a year-long employee. Likewise, in both cases, both the employees in *Bossie* and in the instant case chose to return each year following their respective layoffs. They both returned, knowing they would be laid off again when work slowed or ceased operating. Their layoffs occurred each year at the same time. There was no surprise, and both understood the layoffs were inevitable. As such, they both made a voluntary choice to remain in that employment.

Like *Bossie*, the present matter involves a known situation which Ms. Bosse voluntarily engaged in – maintaining an employment that was short-term and not expected to change. In fact, Ms. Bosse testified that she knew that she could quit working for Sargent and likely get a full year-round job. (ROA p. 1067). Despite

knowing this, Ms. Bosse continued to work for Sargent with the full understanding that she would continue to be laid off every winter because she “hoped” that she would eventually be hired year-round by Sargent. (ROA p. 1073). She was never given any guarantee that she would eventually be hired year-round; rather, it was wishful thinking on the part of Ms. Bosse. Thus, to award her with an average weekly wage under subsection B would be premised on a hypothetical “full-time employment” that is neither fair nor reasonable. As Professor Larson explained, the purpose of wage calculation:

... is not to arrive at some theoretical concept of loss earning capacity; rather it is to make a realistic judgment on what the claimant’s future loss is in the light of all the factors that are known. One of these factors is the established fact of claimant’s choice of a part-time relation to the labor market. If this is clear, and above all there is no reason to suppose it will change in the future period into which the disability extends, then it is unrealistic to turn a part-time able-bodied worker into a full-time disabled worker.

See Bossie, 1997 ME 233, ¶ 2, 706 A.2d at 580. (citing 2 A. Larson, *The Law of Workmen’s Compensation*, § 60.21(c)). Here, the Appellate Division’s adoption of subsection B as the method of calculating Ms. Bosse’s average weekly wage was erroneous because it is not reflective of what she earned in the past. It is nothing more than a hypothetical projection that is not based on her historical earnings. Ms. Bosse’s earning capacity, which she chose, was her annual earnings at Sargent. Thus, it is neither fair nor reasonable to calculate Ms. Bosse’s average weekly wage pursuant to subsection B.

b. With *Alexander* and *Bossie* as the only authority from this Court on the matter, the Board has little guidance with how to handle similar cases involving intermittent employment and further guidance is warranted.

Because this Court was unable to fully explore the subsection D analysis in *Bossie*, the Board has fallen into a pattern of focusing solely on the fact of voluntariness that was explored in *Alexander* in cases involving intermittent employment. As such, the Board has been left with little guidance on how to handle intermittent employment like Ms. Bosse's employment in the present matter. While instructive, neither case fully addresses the issue present in this matter – whether subsection D should be used where the employee voluntarily returns to their employment year-after-year following a seasonal layoff. This is a situation that is particularly unique to the State of Maine where many workers are employed in construction or drive trucks for companies that slow down or cease operations during the winter months when weather is too severe to continue working. Because there is little guidance on the issue from this Court, the Board has been left with a lack of guidance on the issue that has resulted in inconsistent rulings.

In some instances, like the present matter, the Appellate Division has adopted the narrow approach provided by *Alexander* and focused solely on the issue of “voluntariness” when dealing with intermittent employments. In *Gushee v. Point Sebago*, WCB App. Div. No. 13-1 (March 25, 2013), the employee worked for the employer from April 2007 until he was permanently laid off in 2010. *Id.*, ¶ 2. During this period, the employee worked through the winter of 2007-2008 but thereafter

was laid off during the winter months in subsequent years. *Id.* In 2009 and 2010, the employee worked approximately 36 weeks per year. *Id.*

In his decision granting the employee's petition and awarding incapacity benefits, the hearing officer applied subsection B for purposes of calculating the employee's average weekly wage. *Id.*, ¶ 4. In reaching his determination, the hearing officer found that the employee's employment for the employer did not reflect a pattern of "consistently intermittent" employment because 1) the employee worked the winter months of 2007-2008 and 2) neither the employee's prior work history nor his employment for the employer suggested that he made a "choice of a part-time relation to the labor market." *Id.*, ¶ 16. On appeal, the Appellate Division affirmed the Board's subsection B calculation of the employee's average weekly wage. *Id.*, ¶ 20. In reaching its decision, the Appellate Division distinguished the matter from both *Bossie* and *Alexander* because of the employee's relatively short employment with the employer and the fact that his layoffs only occurred over the course of two winters. *Id.*, ¶ 18.

Gushee is distinguishable from the present matter for several reasons. First, Ms. Bosse was consistently laid off during the winter months while working for Sargent as well as her prior employer. Second, where the employee in *Gushee* did not have an extensive history of layoffs, Ms. Bosse's employment history shows a consistently intermittent relationship with the labor market as she was laid off every

winter. Finally, Ms. Bosse never worked over a winter layoff while working for Sargent or her prior employer.

Contrast *Gushee* with the Appellate Division's decision in *Pastula v. Lane Construction Corp.*, WCB App. Div. No. 15-17 (June 1, 2015) which affirmed the Board's subsection D calculation of the employee's average weekly wage. *Pastula* is interesting as it illustrates the latitude afforded by a subsection D application to reach a calculation of an average weekly wage that is fair and reasonable. In *Pastula*, the employee began working as a truck driver for the employer in 2002. *Id.*, ¶ 4. Each year, the employer laid off the employee during the winter months when its business slowed down. *Id.* In his decision, the hearing officer granted the employee's petition and awarded incapacity benefits based on a subsection D calculation. *Id.*, ¶ 11.

In utilizing subsection D, the hearing officer imputed earnings during the employee's annual layoff. *Id.*, ¶ 33. Because there was no evidence of earnings of the employee's actual earnings during the yearly layoff periods, the hearing officer imputed to her a \$360.00 per week earning capacity during the yearly layoffs, approximately 24 weeks. *Id.* ¶ 37. For the remaining weeks in which the employee worked for the employer during that year (approximately 28 weeks), the employee had an average weekly wage of \$1,128.39. *See Pastula v. Lane Construction Corp.*, 2014 WL 535208 (ME.Work.Comp.Bd.). In reaching his determination to impute a \$360.00 per week earning capacity during the layoff, the hearing officer reasoned

that it was unlikely that the employee earned anywhere near what she earned while working for the employer. *Id.* Because subsection B did not result in a fair and reasonable calculation of the employee's pre-injury average weekly wage, the Appellate Division affirmed the hearing officer's application of subsection D. *See Pastula v. Lane Construction Corp.*, WCB App. Div. No. 15-17 (June 1, 2015), ¶ 3.

The facts presented in *Pastula* are very similar to the facts in the present matter. Both the employees in *Pastula* and Ms. Bosse drove trucks for construction companies. Both were laid off each year during the winter months when work slowed. Both continued to work in their respective arrangements where they were routinely laid off during the winter months and returned in the spring when the weather improved, and work picked up. However, the Appellate Division appropriately recognized that the employee in *Pastula* earned less, if anything, during her annual layoffs and decided to apply a subsection D calculation of her average weekly wage. The Appellate Division in *Pastula* recognized that it was unfair and unreasonable to impute the same earnings that the employee had with the employer during the period in which she did not actually work for the employer. It is understandable given the fact that imputing the same earnings with the employer for the period of time in which the employee did not actually work for the employer (subsection B) would result in an average weekly wage that is not indicative of the employee's historical earnings.

While there have been many other cases heard at the Board level regarding a dispute over the appropriate method to calculate an injured employee's average weekly wage, typically either subsection B or subsection D, it is unclear why the matter has not been appealed to higher levels more often.⁴ Regardless, the Board and Appellate Division are split, or lack guidance, on how to handle cases such as the one before this Court now. Accordingly, it is important that this Court offers further guidance on how to handle situations involving intermittent or short-term employments moving forward.

V. CONCLUSION

The Appellate Division committed clear legal errors which should be reviewed and corrected. The Appellate Division decision is inconsistent with both this Court's previous interpretations of a subsection D analysis as well as the express language of the statute. It failed to give regard to the previous wages, earnings or salary of Ms. Bosse and, instead, chose to focus solely on one factor – “voluntariness.” While *Alexander* spent a lot of time focusing on “voluntariness,” it was done so in a case specific manner and was not meant to be a general

⁴ See *Phelan v. Crooker Construction, LLC*, 2023 WL 3995706 (ME.Work.Comp.Bd.) (imputing the state minimum average wage for the winter months the employee was laid off from his work as a truck driver under a subsection D analysis); See also *Myers v. Efficient Energy Solutions, Inc.*, 2015 WL 5547700 (ME.Work.Comp.Bd.) (applying subsection D by averaging the employee's earnings from the three years prior to the injury); *Hallett v. CLP*, 2008 WL 4669732 (ME.Work.Comp.Bd.) (applying subsection D after determining that subsection B could not reasonably be applied when due consideration is given to the employee's previous wages, earnings or salary and the earnings of comparable employees is considered); *Munster v. Sargent Corp.*, 2018 WL 2283912 (ME.Work.Comp.Bd.) (applying subsection D for an employee with an intermittent relationship with the labor market as it is unfair to attribute year-long earnings to a job in which the employee was unlikely to work year round).

application to all future matters wherein a subsection D calculation of the injured employee's average weekly wage is raised. Applying strict adherence to *Alexander* in the present matter results in an average weekly wage that is neither fair nor reasonable and contradictory to the statutory purpose of identifying a fair and reasonable average weekly wage.

Sargent therefore respectfully request that this Court reverse the Appellate Division's decision with respect to the subsection B calculation of Ms. Bosse's average weekly wage and apply a subsection D calculation of her average weekly wage by taking her earnings from Sargent during the year immediately preceding the 2015 injury and dividing them by a 52-week divisor. This should be done because upon appropriate consideration of Ms. Bosse's previous wages and earnings, the Law Court should find that the only earnings that Ms. Bosse had established at the time of injury were those earnings she had received from Sargent over the course of the year immediately preceding the 2015 date of injury. This manner of calculating Ms. Bosse's average weekly wage results in a calculation that is both fair and reasonable and reflective of her prior earnings. In applying subsection D in this manner, the Law Court should determine that Ms. Bosse's average weekly wage is \$664.14.

In the alternative, should this Court disagree with the arguments above regarding the manner of calculating Ms. Bosse's average weekly wage under subsection D, we ask that you remand this matter to determine the appropriate

subsection D calculation to be used in calculating Ms. Bosse's average weekly wage in a manner that results in a calculation that is fair and reasonable.

Dated at Portland, Maine this 21st day of March 2025.

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CERTIFICATE 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 *Appendix* by placing a conformed copy of the same in the United States mail, postage prepaid, addressed as follows:

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