

STATE OF MAINE  
CUMBERLAND, SS.

SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT  
CIVIL DOCKET NO. WCB-24-339

LORRI BOSSE,  
Employee/Appellee

Vs.

SARGENT CORPORATION,  
Employer/Appellant

and

CROSS INSURANCE CO.,  
Insurer/Appellant

WCB #15-016120  
Date of Injury: 8/4/15

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

**REPLY BRIEF ON BEHALF OF EMPLOYEE/APPELLEE**

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## **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

The undersigned counsel has reviewed the Appellant's summary of the facts and procedural history, Blue. Br. 7 – 10 and wants to add details. The facts found by ALJs Goodnough and Rooks and reiterated by the Appellate Division include: before her work-related injury the Appellee “often worked 50 – 70 hours per week” from 2011 to 2015, except, of course, during the weeks when she was laid off by the Appellant, A. 15; before working for Sargent Corp. Ms. Bosse had been a self-employed truck driver for nine years, and during busy times then she would work 80 – 100 hours per week, A. 53; and then she worked for two years for a different company from 2009 – 2011, performing comparable trucking work, A. 53, for 40 – 45 hours per week “during busy months,” A. 56.

**ISSUE PRESENTED FOR REVIEW**

**Whether the Workers' Compensation Board abused its discretion or otherwise erred in its choice of method for calculation of the average weekly wage.**

## **SUMMARY OF THE APPELLEE'S ARGUMENT**

The Appellate Division of the Workers' Compensation Board did not abuse its discretion when it affirmed an individual administrative law judge's rejection of the Appellant's proposed method for calculation of the Appellee's average weekly wage. The method proposed by the Appellant was not required in these circumstances, and, furthermore, it could contravene the primary purpose of average weekly wage calculation if the administrative law judge were to use it under the circumstances of this case.

## **APPELLEE’S ARGUMENT**

### **1.1 Standard of Review**

1. The appellate rules unambiguously require parties to include a discussion of the standard of review for each issue in their briefs. M.R. App. P. 7A(a)(1)(G). “The failure to mention an issue in the brief or at argument is construed as either an abandonment or a failure to preserve that issue.” *Holland v. Sebunya*, 2000 ME 160, n. 6, 759 A.2d 205.

2. In her first brief the Appellee (“Ms. Bosse”), through the undersigned counsel, asserted that the governing standard of review for this case should be abuse of discretion. Red Br. pp. 8-9. The Appellant (“Sargent Corp.”) has not clearly articulated an argument for any particular standard of review in its brief, but the brief’s general argument is consistent with the abuse of discretion standard. *See, e.g.*, Blue Br. 32 (requesting Court to order use of subsection (D) calculation). Hence, either the Appellant agrees that the Court should review for abuse of discretion only, or it has forfeited any argument for a less deferential standard by failing to make an explicit argument on this issue in its brief.

3. However, if the Court wants to cut the Appellant a break, Sargent Corp.’s brief does allude to de novo review of statutory interpretation issues in its introduction. Blue Br. 6. But this is not the correct standard of review for matters of statutory interpretation decided by the Appellate Division because it is not



precisely de novo. Rather, the court gives “appropriate deference to the Appellate Division’s reasonable interpretation” of the workers’ compensation law where that interpretation is not clearly erroneous, *Bailey v. City of Lewiston*, 2017 ME 160, ¶ 9, 168 A.3d 762, and “will uphold the Appellate Division’s interpretation unless the plain language of the statute and its legislative history compel a contrary result.” *Huff v. Regional Trans. Program*, 2017 ME 229, ¶ 9, 175 A.3d 98 (quotation marks omitted).

4. Still, this case hinges on an exercise of discretion, not statutory construction, and, thus, regardless of whether the Appellant has forfeited any argument about the standard of review, the Court should review for an abuse of discretion. If the Court substitutes its discretion for that of the ALJ, it would contravene its own precedents about its role as an appellate tribunal, *Bailey* ¶ 9 (Law Court will not vacate a decision of the Appellate Division unless it “violates the Constitution or statutes; exceeds the agency’s authority; is procedurally unlawful; is arbitrary or capricious; constitutes an abuse of discretion; or is affected by bias or an error of law.”), as well as the Maine Legislature’s intent to minimize judicial involvement in workers’ compensation cases, § 151-A.

## **1.2 Scope of Review**

5. Separate from the matter of which standard of review to apply is the *scope* of the Court’s review. The Law Court reviews the Workers’ Compensation

Board's Appellate Division decisions under "established principles of administrative law, except with regard to ... factual findings." *Bailey* ¶ 9. Factual findings made by the Workers' Compensation Board are not subject to an appeal in the Law Court. 39-A M.R.S. § 322(3).

6. The Appellant's brief includes an express request for the Court to "find that the only earnings that Ms. Bosse had established at the time of injury were those earnings she had received from Sargent Corp. over the course of the year immediately preceding the 2015 date of injury." Blue Br. 32. It also requests the Court to arrive at a specific average weekly wage. Such factual findings undoubtedly would exceed the Court's statutory authority for workers' compensation appeals, § 322(3), and, thus, the request should not be granted.

## 2.1 Average Weekly Wage Calculation

7. The Appellant's brief, in its focus on the Board's arrival at a final average weekly wage ("AWW") figure that is higher than the Appellee's pre-injury weekly earnings if they were calculated in the manner that it wants, A. 18 – 19, continues to ignore a fundamental aspect of AWW calculation. The AWW figure is supposed to be based on what the employee would earn if not for the intervention of an incapacitating, work-related injury. *See Fowler v. First Nat'l Stores, Inc.*, 416 A.2d 1258, 1261 (Me. 1980). And in this case, the findings of fact based on competent evidence show that Ms. Bosse worked 50 – 70 hours per week for

Sargent Corp. during the weeks when she was not laid off. A. 15 and 53. That happens to accord with the concept of pre-injury “earning capacity,” *see* § 102(4)(D). This is especially important to keep in mind because during a nearly two-year period of total incapacity, *see* A. 59, she entirely missed out on the opportunity to earn that much income.

8. Sargent Corp. repeatedly emphasizes the difference between Ms. Bosse’s AWW figure as computed by the Board and the figure that would result if her annual earnings for Sargent Corp. were simply divided by 52. *See* Blue Br. 18 – 20. But, as ALJ Rooks noted, the plain text of the statute “requires calculation of an average *weekly* wage, not an average *annual* wage” or an “‘annualized’ wage.” A. 58. ALJ Rooks also described the Appellant as “advocat[ing] for a back-door seasonal worker calculation (i.e., division of all wages by 52) under the rubric of subsection (D).” *Id.* The Appellant’s focus on the Appellee’s winter layoffs, *see, e.g.* Blue Br. 20, is consistent with that theme, and rudimentary mathematics shows that the “seasonal worker” provision simply does not apply because Ms. Bosse was “customarily employed” for more than 26 weeks per year, *see* § 102(4)(D).

9. Nor would the legislative history, if the Court felt the need to go beyond the plain text of the statute, suggest a different legislative intent. For example, it seems that the Board would reach the same AWW figure if it applied Michigan’s statute that was in effect at the time when Title 39-A was being drafted

and debated. *See* State of Michigan Workers' Disability Compensation Act of 1969 § 418.371 (1991). As the Court has long recognized, Maine's legislature used Michigan's workers' compensation law as the basis for Title 39-A in 1991 and 1992, *see Guiggey v. Great Northern Paper, Inc.*, 1997 ME 232, ¶ 9, 704 A.2d 375, and § 102(4)(B) and (D) have remained unchanged since the original enactment of Title 39-A, *see* P.L. 1991, ch. 885, Pt. A, § 8.

### **3.1 Miscellaneous Issues**

10. The Appellant's brief is deficient in a few other ways that merit relatively concise responses.

11. First, it makes factual assertions about a purportedly "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," especially in construction and trucking. Blue Br. 13 – 14. The Appellant's brief makes no citation to either a part of the record or a published source that would support this assertion, which means that the Appellant either, at minimum, has failed to comply with M.R. App. P. 7A(a) or, at worst, has no support for this factual assertion. Regardless, the Appellant's brief in this section expresses the kind of policy concern that may be addressed to the Maine Legislature, but it is not appropriate for the Law Court to, in effect, legislate under the guise of statutory interpretation by requiring the Board follow a novel rule to govern AWW

calculations in specific situations. As ALJ Rooks noted, the state legislature could have enacted the Appellant's proposed rule for calculating AWW in situations like this one "in a special fashion," but it has chosen not to. A. 58 (2023 decree, ¶¶ 16 – 17). Unlike the Court's wide authority to decide matters of common law, its authority over the "uniquely statutory" matters of workers' compensation law is tightly restricted. *Wentzell v. Timberlands, Inc.*, 412 A.2d 1213, 1215 (Me. 1980). *See also* 39-A M.R.S. § 322; M.R. App. P. 23(b)(2).

12. Second, the Appellant asserts that "there is precedent that has sought to distinguish or clarify the 'fair' and 'reasonable' considerations of subsection B [*sic.*]," Blue Br. 13, but it does not follow up with a discussion of any of these precedents.

13. Third, the Appellant describes the employment relationship between the parties as "short-term and intermittent," Blue Br. 20, but that characterization is simply inaccurate. Ms. Bosse had been working thirty weeks per year, A. 22, for 50 – 70 hours per week during the weeks when she was not laid off, A. 15, over the course of four years as an employee for Sargent Corp. before her injury, A. 15. Ms. Bosse should not be penalized for factors beyond her control.

14. Fourth, the Appellant states that "the Appellate Division focused solely on Sargent Corp.'s decision to lay off Ms. Bosse each winter due to winter weather and a slowing of work," Blue Br. 18, but this overlooks the panel's

reference to the individual ALJ's finding that Ms. Bosse "would have worked year-round if she had been permitted to do so." A. 18. This statement also ignores the panel's discussion of the critical distinction between an employee with a history of a "voluntary, consistently intermittent relationship with the labor market," A. 22, and one, like Ms. Bosse, with many years of full-time work for the majority of weeks in each calendar year, A. 22 – 23. *See also* A. 53 and 56 (2023 decree's factual findings about Ms. Bosse's employment history). The Appellant's argument on this point includes an assertion that the Appellate Division erred in failing to consider "Ms. Bosse's previous wages, earnings or salary as stated in the express language of subsection D." Blue Br. 18. But the ALJ who decided the case after remand clearly considered Ms. Bosse's employment history that preceded her employment by Sargent Corp., *see* A. 56 (2023 decree ¶ 11), as well as the calculation that Sargent Corp. is advocating for, *see* A. 58 (2023 decree ¶ 17). The Court has held that "Paragraphs A, B and C ... are to be applied in the order stated, to the facts as they exist in a particular case," *Frank v. Manpower Temporary Services*, 687 A.2d 623, 625 (Me. 1996), and that, in accord with the statute's plain language, paragraph (D) is applied when an employer produces required evidence regarding the earnings of "comparable employees" and the three preceding paragraphs "cannot 'reasonably and fairly be applied,'" *Alexander v. Portland Natural Gas*, 2001 ME 129, ¶ 11, 778 A.2d 343. Neither the statute nor the court's

interpretation of it suggests that paragraph (D) must be applied in the circumstances of this case. At most they imply that the ALJ must *consider* the fallback provision when a party advocates for it (and provides the requisite earnings information) and then provide a rational explanation for any decision on that issue.

15. Hence, any hypothetical error would be a harmless error at most because the Appellate Division, staying within the constraints of its role, would not have substituted its preferred choice where the individual ALJ acted entirely within the discretion provided to her by the statute. *See Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 – 808 (Me. 1985) (concluding that former Appellate Division “acted within its discretion and thus committed no error of law”).

### **CONCLUSION**

16. In summary, Sargent Corp.’s brief has not provided any persuasive argument in favor of its proposed disposition of this appeal. It is asking the Court to legislate from the bench, and the Law Court is not the proper forum to seek the change that the Appellant wants. Neither the individual ALJ nor the Appellate Division erred in interpreting the statute, and the decision of which method of AWW calculation to use fell within the range of choices committed to the ALJ’s discretion. Ms. Bosse again requests that the Court determine that this appeal was improvidently granted.

Dated at Freeport, Maine this 2<sup>nd</sup> day of April, 2025

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### **CERTIFICATE OF SERVICE**

I, James J. MacAdam, Attorney for Lorri Bosse, Employee/Appellee in the above matter, hereby certify that I have made service of the foregoing Reply Brief on Behalf of Employee/Appellee by serving one (1) copy upon Christopher Schlundt, Esq., Norman, Hanson & DeTroy, 2 Canal Plaza, P.O. Box 4600 DTS, Portland, ME 04112-4600 by U.S. Postal Service, postage prepaid, on the 2<sup>nd</sup> day of April, 2025.

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