

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

BRIEF ON BEHALF OF EMPLOYEE/APPELLEE

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TABLE OF CONTENTS

	<u>Page No.</u>
<u>TABLE OF AUTHORITIES</u>	3
<u>STATEMENT OF FACTS AND PROCEDURAL</u>	5
<u>ISSUE PRESENTED FOR REVIEW</u>	6
Whether the Workers' Compensation Board abused its discretion in its choice of method for calculation of the average weekly wage.....	6
<u>SUMMARY OF THE APPELLEE'S ARGUMENT</u>	7
<u>APPELLEE'S ARGUMENT</u>	8
1.1 Standard of Review	8
2.1 Governing Authorities: Average Weekly Wage Calculation	10
2.2 Application to this Case	13
<u>CONCLUSION</u>	17
<u>CERTIFICATE OF SERVICE</u>	18

TABLE OF AUTHORITIES

	<u>Page No.</u>
Cases	
<i>Alexander v. Portland Natural Gas</i> , 2001 ME 129, ¶ 8, 778 A.2d 343	10, 11, 12, 14
<i>Bailey v. City of Lewiston</i> , 2017 ME 160, ¶ 9, 168 A.3d 762	8, 9, 15
<i>Bosse v. Sargent Corp.</i> , Me W.C.B. No. 24-10, ¶¶ 14 – 19 (App. Div. 2024)	12, 13
<i>Bossie v. School Admin. Dist. No. 24</i> , 1997 ME 233, ¶ 6, 706 A.2d 578	12
<i>Forest Ecology Network v. Land Use Reg. Commn.</i> , 2012 ME 36, ¶ 28, 39 A.3d 7474	9, 13
<i>Fowler v. First National Stores, Inc.</i> , 416 A.2d 1258, 1260 – 1261 (Me. 1980)	12
<i>Gushee v. Point Sebago</i> , Me. W.C.B. No. 13-1 (App. Div. 2013)	15
<i>Hallissey v. School Administrative Dist. No. 77</i> , 2000 ME 143, ¶ 14, 755 A.2d 143	9
<i>Kuvaja v. Bethel Savings Bank</i> , 495 A.2d 804, 806 – 808 (Me. 1985)	14
<i>Richards v. S.D. Warren Co.</i> , Mem-06-123 (July 27, 2006), Mem-06-123 (July 27, 2006)	17

Statutes

39-A M.R.S. § 102(4)	10, 11, 12, 15
39-A M.R.S. § 102(4)(B)	11, 13, 14
39-A M.R.S. § 102(4)(A) – (C).....	10, 11
39-A M.R.S. § 102(4)(D)	11, 12, 13, 14
39-A M.R.S. § 102(4)(E)	10
39-A M.R.S. § 102(4)(H)	10
39-A M.R.S. §§ 151 – 153	14
39-A M.R.S. §§ 211 – 215	10
39-A M.R.S. § 322	10
39-A M.R.S. § 322(1)	8
90-351 C.M.R. ch. 1, § 5,.....	10
90-351 C.M.R. ch. 8.....	10

Other Authorities

Larson, Larson & Robinson, <i>Larson’s Workers’ Compensation Desk Edition</i> § 93.01(1) (Dec. 2024 update).....	12
Me. Bureau of Insurance, <i>Annual Report on the Status of the State of Maine</i> <i>Workers’ Compensation System A12</i> (Feb. 2025)	16
Me. Workers’ Comp. Bd., Me. Dept. of Labor, Me. Bureau of Labor Standards, Me. Dept. of Prof. & Financial Regulation	16
<i>Oxford Dictionary of English</i> 84 (3rd ed. 2010).....	11

Rules

M.R. App. P 7A(b)	5
M.R. App. P. 12(c).....	17
M.R. App. P. 23(c)(2)(C)	5
M.R. App. P. 23(c)(4).....	17

STATEMENT OF FACTS AND PROCEDURAL

The appellee is forgoing this section at this time, *see* M.R. App. P 7A(b), and will, if necessary, address any issue with the Appellant's statement of the factual or procedural history in a reply brief, *see* M.R. App. P. 23(c)(2)(C).

ISSUE PRESENTED FOR REVIEW

Whether the Workers' Compensation Board abused its discretion 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 circumstances of this case.

APPELLEE’S ARGUMENT

1.1 Standard of Review

1. As the Appellee (“Ms. Bosse”), through the undersigned counsel, stated in her argument against leave for an appeal, the Appellate Division neither erred in its legal analysis nor abused its discretion in affirming the decision of the Administrative Law Judge (“ALJ”).

2. The Law Court reviews Workers’ Compensation Board’s Appellate Division decisions under “established principles of administrative law, except with regard to ... factual findings.” *Bailey v. City of Lewiston*, 2017 ME 160, ¶ 9, 168 A.3d 762. The Court, when deciding an appeal from the Appellate Division, treats the division’s decision as the operative decision on appeal. *See id.* ¶ 9; 39-A M.R.S. § 322(1). Either of the possible standards of review that will govern the Court’s decision is reasonably deferential to the Appellate Division.

3. This 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.” *Bailey v. City of Lewiston* ¶ 9. The Appellant (“Sargent Corp.”) may argue that the issue on appeal is subject to a *de novo* review because the operative “holding is [based on] a fundamental misunderstanding of the statute,” R. 1480 (petition for leave to appeal), and *de*

novo review generally governs issues of statutory interpretation, *Hallisey v. School Administrative Dist. No. 77*, 2000 ME 143, ¶ 14, 755 A.2d 143. However, the sole issue here is whether the Appellate Division made an incorrect choice among the alternative methods for calculation of the average weekly wage, not whether it erred in its statutory interpretation. *See* R. 1449 – 1450 (notice of appeal). In other words, the issue is whether the administrative “decisionmaker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law.” *Forest Ecology Network v. Land Use Reg. Commn.*, 2012 ME 36, ¶ 28, 39 A.3d 7474 (quotation marks omitted). “If the agency’s decision was committed to the reasonable discretion of the agency, the party appealing has the burden of demonstrating that the agency abused its discretion in reaching the decision.” *Id.* Hence, the standard of review that should govern this appeal is abuse of discretion.

4. Moreover, even if *arguendo* the case were to hinge on statutory interpretation, the Court gives “appropriate deference to the Appellate Division’s reasonable interpretation of the workers’ compensation statute and will uphold the Appellate Division’s interpretation unless the plain language of the statute and its legislative history compel a contrary result.” *Bailey* ¶ 9 (quotation marks and citation omitted).

2.1 Governing Authorities: Average Weekly Wage Calculation

5. The Workers' Compensation Act sets out a framework for computation of an injured employee's "average weekly wages, earnings[,] or salary," 39-A M.R.S. § 102(4), sometimes shortened to "AWW," *see* R. 1436 (*Bosse II* ¶ 1) This figure is critical. If applicable, the monetary value of certain fringe benefits, *see* 39-A M.R.S. § 102(4)(H) and 90-351 C.M.R. ch. 1, § 5, and, also if applicable, the AWW for concurrent employment, 39-A M.R.S. § 102(4)(E), are added to the base AWW. The resulting sum forms the basis for the employee's weekly compensation rate. *See generally* 39-A M.R.S. §§ 211 – 215 and 90-351 C.M.R. ch. 8.

6. The goal of AWW calculation is to "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. The ALJ must initially proceed, "in the order listed whenever possible," *Alexander* ¶ 11, among three detailed formulas found at 39-A M.R.S. § 102(4)(A) – (C) to calculate the AWW.

7. The first alternative, which requires the employee to have been employed by the employer for at least 200 days before the date of injury, simply calls for the average of the weekly earnings for the full weeks worked by the employee in the employment where the injury happened. § 102(4)(A).

Mathematically speaking, this would be the *arithmetic mean*. See *Oxford Dictionary of English* 84 (3rd ed. 2010).

8. The second alternative, which applies when the employment had not continued for at least 200 days before the injury, also calls for the arithmetic mean, but it uses all of the weeks when the employee had any earnings, with a few specific exclusions. § 102(4)(B).

9. The third alternative, which applies regardless of the result of the two preceding methods, governs in the case of a “seasonal worker,” a partially defined term. § 102(4)(C). The AWW under this method is simply the quotient that results when the sum of the employee’s total earnings in the prior year is divided by 52. *Id.*

10. The fourth alternative governs only when the preceding three paragraphs “can not [*sic.*] reasonably and fairly be applied,” § 102(4)(D), and “is a fallback provision,” *Alexander* ¶ 1. This is “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.” § 102(4)(D). This provision, unlike paragraphs (A), (B), and (C), does not simply use basic arithmetic to arrive at an AWW figure,

and instead its plain language refers to “fair” or “reasonable” results (in adverbial terms). *See* § 102(4)(D). In effect, after the appropriate alternative from paragraphs (A), (B), and (C) is located and applied, it is presumed to govern unless (D) overcomes that presumption.

11. Paragraph (D) “does not require rigid adherence to an exact mathematical formula,” *Bossie v. School Admin. Dist. No. 24*, 1997 ME 233, ¶ 6, 706 A.2d 578, and “applies to all cases in which the ordinary calculation methods would lead to an unfair or unreasonable result,” *Alexander* ¶ 11. This alternative provides the means by which, for example, a recently changed income level can be used to establish the lost earning capacity at the date of injury. *See Fowler v. First National Stores, Inc.*, 416 A.2d 1258, 1260 – 1261 (Me. 1980). “The entire objective of wage calculation is to arrive at a fair approximation of claimant’s probable future earning capacity. ... [U]nless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant’s own earnings in some arbitrary past period has been used as a wage basis.” Larson, Larson & Robinson, *Larson’s Workers’ Compensation Desk Edition* § 93.01(1) (Dec. 2024 update).

2.2 Application to this Case

12. The Appellate Division’s decision affirmed an ALJ’s determination that the method from § 102(4)(B) governed calculation of AWW for Ms. Bosse and rejected the Employer’s request to use the “fallback provision” from § 102(4)(D). R. 1441 – 1445 (reproducing *Bosse v. Sargent Corp.*, Me W.C.B. No. 24-10, ¶¶ 14 – 19 (App. Div. 2024)). 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.* Neither the individual ALJ (after remand in 2021, *see* R. 1441) nor the appellate panel acted on a mistaken view of the governing law, and Sargent Corp. has not identified any actual error of law. The Appellant obviously is displeased with this result, but the Court would have to discard decades of precedent and upend the goal of AWW calculation in order to adopt the policy proposed by Sargent Corp.

13. Neither party is advocating for the use of paragraph (A) or (C) in this case, and so the dispositive issue is whether paragraph (B) or (D) provides the appropriate method. Again, the controlling standard of review for this decision is abuse of discretion, and there is simply nothing about the Appellate Division’s decision that would indicate that the panel of ALJs “exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law.” *Forest Ecology Network* ¶ 28. The

Appellant's argument suggests that the individual ALJ arrived at an unjust result and was erroneously affirmed by the intermediate appellate body. *See* R. 1480.

14. The original decision fell within the range of reasonable discretionary choices available to the ALJ under the methods for AWW calculation because § 102(4)(B) applies to Ms. Bosse under its plain text, and § 102(4)(D) is not required in the alternative under these facts. Thus, Sargent Corp., despite its framing of the issue as one of statutory interpretation, is trying to persuade the Court to substitute its discretion for the discretion exercised by the Workers' Compensation Board, *see, e.g.* R. 1486 – 1487. Such an outcome would contravene the Court's own precedents about its role, *see Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 – 808 (Me. 1985) (reviewing for abuse of discretion and concluding that former Appellate Division “acted within its discretion, and thus committed no error of law”), and undermine the Maine Legislature's establishment of a comprehensive, specialized workers' compensation system, *see* §§ 151 – 153, that is subject to limited review by the Law Court, § 322.

15. The Appellant's petition for leave to appeal strained to make Ms. Bosse's situation analogous that of the employee in *Alexander*, arguing that Ms. Bosse “voluntarily chose to continue in a line of work knowing she would be” subject to periodic layoffs while conceding that Alexander had “voluntarily withheld himself from the labor market.” R. 1486. Again, this argument ignores a

critical difference between these situations, *i.e.*, the respective causes of the employees' lack of earnings, and turns the concept of a layoff on its head. Ms. Bosse did not quit her job every winter: she was laid off by her employer. R. 1444. The only other decision from the Appellate Division that is on point does not support the Appellant's proposed rule for AWW calculation, *see generally Gushee v. Point Sebago*, Me. W.C.B. No. 13-1 (App. Div. 2013), and, again, the Law Court generally gives deference to the Appellate Division's construction of ambiguous parts of the workers' compensation law, *Bailey* ¶ 9. Therefore, stare decisis does not support the Appellant's arguments.

16. The Appellant's petition for leave to review also betrayed a fundamental misunderstanding of § 102(4) and the Court's interpretation thereof. The petition argued that "the average weekly wage should not be based on what the employee may theoretically be capable of earning but, instead, [on] what she has actually earned in the past." R. 1485 – 1486. Again, the goal of AWW calculation is to "to provide a fair and reasonable estimate of what the employee in question would have been able to earn in the labor market the absence of a work-injury," *Alexander* ¶ 8, which is not always based solely on prior earnings.

17. The Appellant's petition asked the Court for an appeal so that the Court could provide guidance to the Workers' Compensation Board on the effect of this kind of layoff on AWW calculation. R. 1486 – 1487. But the Appellant seems

to actually want the Court to compel the Board to adopt a new rule because the Appellant has provided almost nothing to substantiate the proposition that the Board, in its adjudicatory capacity, lacks “clear guidance on how to consistently, fairly, and reasonably address this issue moving forward.” R. 1486. The occurrence of possibly contradictory results from two non-precedential decisions, *see* R. 1487, out of several thousand contested decisions issued over the course of a decade, *see* Me. Workers’ Comp. Bd., Me. Dept. of Labor, Me. Bureau of Labor Standards, Me. Dept. of Prof. & Financial Regulation, and Me. Bureau of Insurance, *Annual Report on the Status of the State of Maine Workers’ Compensation System* A12 (Feb. 2025), does not indicate a problem in need of judicial intervention. At worst, these results suggest that in some cases involving this issue § 102(4)(B) can be reasonably and fairly applied, whereas in others § 102(4)(D) must be applied – and that variation reasonably could be expected to occur based on the plain language of § 102(4).

18. Sargent Corp. (or its insurance carrier) is free to petition the Maine Legislature for its desired change to Title 39-A, but the Law Court is not supposed to legislate under the guise of interpretation and is not the forum in which to effect changes to a statute.

CONCLUSION

19. In summary, this Court has no valid reason to vacate the Appellate Division's decision for abusing its discretion or erring in its analysis of the law, and it should issue either a summary order indicating that the appeal was improvidently granted, *see* M.R. App. P. 23(c)(4), or a non-precedential decision under M.R. App. P. 12(c) that briefly affirms the Board's decision, *see, e.g. Richards v. S.D. Warren Co.*, Mem-06-123 (July 27, 2006).

Dated at Freeport, Maine this 19th day of March, 2025

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CERTIFICATE OF SERVICE

I, James J. MacAdam, Attorney for the Employee/Appellee in the above matter, hereby certify that I have made service of the foregoing Brief on Behalf of the 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 19th day of March, 2025.

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