WC Appellate Division Decision issued on May 12, 2017 – Change in Economic Circumstances

It has long been recognized that in filing a Petition for Review, an employer must establish a comparative change in either medical or economic circumstances in order to justify a reduction in the level of entitlement. Comparative medical evidence is not necessary when an employer seeks to establish a change in economic circumstances. *Folsom v. New England Tel. & Tel. Co.*, 606 A.2d 1035 (Me. 1992). In *Cortes v. LePage Bakeries, Inc.,* Me. W.C.B. No. 17-22 (App. Div. 2017), the employee sustained an undisputed occupational injury to her right knee and following surgery returned to work in full-time status with restrictions. However, her earnings were less than the pre-injury average weekly wage and the employer voluntarily paid partial at varying rates. However, the evidence showed that nearly $200.00 of the pre-injury average weekly wage consisted of overtime pay, which was no longer available to the employee following the return to work due to the employer's business decision to reduce or eliminate overtime altogether. The employer argued that compensation should not be based upon this portion of lost income as it resulted from a change in the employer's overtime policy, and was not related to any factor resulting from the injury. The ALJ denied the Petition for Review on the grounds that the employer failed to show a change in economic circumstances. On appeal the Division side-stepped the economic circumstances issue and ruled that the employer was required to establish that employment opportunities were available to the employee in the labor market which paid earnings higher than those currently received by the employee. Relying upon a 1975 decision of the Law Court (*Fecteau v. Richvale Construction, Inc.*, 349 A.2d 162 (Me. 1975)), the Division ruled that the employee's earning capacity was established by her current earnings and that the employer offered no evidence to demonstrate the existence of higher-paying employment. The Division denied the employer's appeal. Comment: It is certainly true that if an employer believes that current earnings do not accurately reflect wage earning capacity, it must introduce evidence to the contrary. However, the Division neglected to address the argument of changed economic circumstances, and that a comparison to pre-injury earnings was no longer justifiable in light of the decision to eliminate overtime for all. The impact of this decision creates some doubt that changed economic circumstances unrelated to an injury can be relied upon, without more, to support a reduction in the level of compensation.

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