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WC Appellate Division Decision issued on May 25, 2017 – Change in Economic Circumstances

When a determination of incapacity has been made by decree, either party may file a Petition for Review to establish a different level of entitlement, but to do so the moving party must show a change of circumstances since the prior decree either through comparative medical evidence or demonstrating a change in economic circumstances. In a recent decision the Appellate Division had an opportunity to comment upon the type of evidence required of an injured worker to sustain his or her burden of proof. In *Belanger v. Miles Memorial Hospital*, Me. W.C.B. No. 17-23 (App. Div. 2017) the employee had sustained a compensable personal injury in 1999, and in a 2003 decree she was awarded ongoing benefits for partial incapacity based upon a presumed earning capacity of $800.00 per week. Several years later the employee filed her first Petition for Review, and in a 2012 decree the Board denied the claim on the grounds that the employee had failed to establish a change in either her medical or economic circumstances. After a few more years had passed the employee tried once again and filed another Petition for Review, and although the ALJ concluded that a change in medical circumstances had not been demonstrated, the employee had nevertheless proven a change in her economic circumstances. As a result, the imputed earning capacity was reduced from $800.00 to $400.00 per week, and ongoing benefits for partial incapacity at a higher rate were ordered. The employer appealed. The Division re-affirmed that the employee bore the burden of proof by showing a change in her economic circumstances in order to overcome the res judicata effect of the previous decree. The Division noted that the ALJ had found as a fact that since the prior decree the employee had performed a work search, had participated in vocational rehabilitation, and had been totally disabled for a closed period of time as the result of surgery. In addition, the ALJ found that the employee had not worked in her customary profession for 10 years, had lost a part-time job, and was now 65 years old. The Division affirmed the ALJ's decision and found that it was adequately supported by the record, was not irrational, and did not misapply the law. It is interesting to note that the mere passage of time (i.e., the employee was now age 65 and had not worked in her usual profession for 10 years) could be considered among other factors as evidence of a change in economic circumstances. Specifically, the Division held that "These types of factors are relevant to an employee's ability to earn, and thus to her economic circumstances". While age and the amount of time out of work may not be sufficient, without more, to carry the burden, they are now recognized as among the considerations to be weighed in assessing changed economic circumstances.

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