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WC Appellate Division Decision issued on October 11, 2017 – Average Weekly Wage and Employment Status

Incapacity benefits are based upon the pre-injury average weekly wage, which in most cases is the average of the employee's earnings received during the 52-week period preceding the injury. In the vast majority of cases earnings received during this period are simply averaged together and the resulting figure is deemed to reflect what the employee's earning capacity would have been if the work-related injury had never occurred. In some instances there may have been changes in the nature or type of an injured worker's employment during this one year period. However, in a recent decision the Appellate Division ruled that not every change in pre-injury employment status will preclude the use of the standard averaging method. In *Winslow v. Aroostook Medical Center*, Me. W.C.B. No. 17-33 (App. Div. 2017), the employee had worked full-time as a registered nurse for the employer for many years prior to an undisputed right shoulder injury occurring on August 18, 2014. At some point in the spring and summer of 2014 the employee took a maternity leave, and when she returned from leave in July 2014 she chose to work on a part-time basis. However, there were no changes in her duties or responsibilities as a registered nurse. Thus, she was working on a part-time basis when injured. In calculating the pre-injury AWW, the ALJ averaged all sums earned during the 52-week period preceding the injury, and awarded benefits for partial at varying rates until the employee ultimately returned to full-time status in March 2016. The employer argued that shortly before the injury the employee had established a new earning capacity when she switched to part-time status, and that earnings of comparable part-time employees should have been considered in arriving at the wage. On appeal the employer relied upon the Law Court's decision in *Fowler v. First National Stores, Inc*., 416 A.2d 1258 (Me. 1980), in which the employee had been promoted from a part-time clerk to a full-time produce manager one week before she was injured, and in which the Court held that because the employee acquired a new occupation no consideration should have been given to her earnings when working as a part-time clerk. The Appellate Division rejected the argument and found that the claimant did not acquire a new occupation with different responsibilities when she returned to work from maternity leave. On the contrary, there had merely been a reduction in hours without a corresponding change of duties or assignments. The Division affirmed the ALJ's finding that averaging all earnings during the one year period preceding the injury was a fair and reasonable means of calculating the employee's future earning capacity, and that the ALJ committed no error in considering all earnings. In summary, the *Winslow* decision holds that, where there has been consistent employment with the same employer for 52 weeks or more, there must be more than a simple switch from full-time to part-time status prior to an injury before an ALJ may resort to earnings of comparable employees to determine the average weekly wage.

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