STATE OF MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No.: WCB-23-313

Steven Michaud
Employee/Appellant

vs.

Caribou Ford Mercury, Inc./Maine Automobile Dealers' Association Workers' Compensation Trust
Employer and Group Self-Insurer/Appellee

Date of Injury: 12/26/14

On Appeal from the Workers' Compensation Board Appellate Division

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BRIEF OF APPELEES, CARIBOU FORD MERCURY, INC., AND THE MAINE AUTOMOBILE DEALERS' ASSOCIATION WORKERS' COMPENSATION TRUST

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INTRODUCTION

On March 22, 2022 Steven Michaud ("Appellant") and the Maine Automobile Dealers Association Workers' Compensation Trust/Caribou Ford-Mercury Maine, Inc. d/b/a Griffeth Ford ("Appellees") entered into a binding Record of Mediation (the "Mediation Agreement") with Appellant to resolve his claim to specific loss benefits. As a result of the Mediation Agreement, the only issue left for the Workers' Compensation Board Administrative Law Judge (the "ALJ") to decide was the amount of interest due, if any, on this payment.

The ALJ appropriately ordered payment of interest from October 14, 2021 to the date of the Mediation Agreement, March 22, 2022, finding the fact of specific loss was not known until a report issued by Michael Mainen, MD, dated October 14, 2021 which, for the first time, provided a numerical assessment of vision loss. The ALJ also found the determination of specific loss could not be made until after Appellant reached a medical endpoint, no sooner than October 14, 2021, relying on this Court's decision in *Tracy v. Hersey Creamery Co*., 1998 ME 247, ¶ 720 A.2d 579, 581. The ALJ's decision was affirmed by the Appellate Division. The Law Court should affirm the Appellate Division's decision which is entirely consistent with this Court's decision in *Tracy*, which holds that an 80% or more loss of vision is not obvious and requires a formal medical assessment *after* one reaches

maximum medical improvement, "when the work-related condition has reached a reasonable medical endpoint." *Tracy,* 1998 ME 247 at ¶ 9.

The Appellate Division properly rejected Appellant's argument raised for the first time before the Appellate Division that the ALJ erred in failing to calculate interest from the date of vision loss where the parties agreed that the Appellees would receive a credit for incapacity benefits paid from 2014 through September 2019. The parties entered the Mediation Agreement to pay a defined amount through the Workers' Compensation Board mediation process, which is a product of the Legislature's intention to replace litigation whenever possible. Appellant cannot sidestep the binding effect of the Mediation Agreement when all issues were resolved except the date interest was payable from. Addressing the merits of this belated argument, the Appellate Division correctly found, "Although the Law Court has held that an offset for lost time benefits cannot be taken before the date of the specific loss, *Scott*, 2013 ME 32, ¶ 13, we do not read the mediation agreement as compelling a finding that the specific loss occurred as of the date of injury." (Appendix at pp. 6-7) (Decision of WCB Appellate Division dated July 31, 2023 at ¶¶ 12-13). This was an interpretation which fell within the special expertise of the Board, which should be affirmed by this Court. The Appellate Division's decision should be affirmed in all respects.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Steven Michaud worked as an auto mechanic for Griffeth Ford. He sustained work-related vision loss on December 26, 2014. (Appendix at p. 3) (Decision of Appellate Division, July 31, 2023 at ¶ 2).

Over the next five years, the Appellant underwent five surgeries to his eye with the goal of improving his vision, the last occurring on August 12, 2019. *Id*.

In a report dated October 14, 2021, Dr. Mainen found Appellant, "does seem to be at a point of maximum medical improvement" regarding the injury. Dr. Mainen found the Appellant sustained more than 80% vision loss at the time of the injury on December 26, 2014. (Appendix at pp. 10-11) (ALJ Decree of December 1, 2022). This was the first assessment of maximum medical improvement ("MMI") and of a numerical percentage of vision loss. (Appendix at pp. 11-12) (ALJ Decree of December 1, 2022);
(Record on Appeal at pages 255-259) (Stipulation of the Parties at ¶ 22).[1]

The Appellant filed a Petition for Award of Compensation and Petition for Specific Loss Benefits on September 23, 2021. The parties entered into a Mediation Agreement on March 22, 2022 which provided, *inter alia* (a) that the Appellees would pay the Appellant 162 weeks of specific loss benefits for loss

[1] The Stipulation was part of the Record on Appeal before the Board's Appellate Division.

of vision to his left eye as a result of the December 26, 2014 injury; and (b) that Appellees will receive a credit for certain lost time payments which had been made against the total specific loss benefits paid.[2] The Appellant was paid specific loss benefits by agreement in the amount of $59,905.33 which the parties agreed was the full amount of specific loss benefits due under the Act.[3] The only issue that remained was the date the specific loss benefits became due, and thus, when interest began to accrue. (Appendix at p. 32) (Mediation Agreement, March 22, 2022).

By Decree Dated December 1, 2022, the ALJ ordered interest payable from October 14, 2021 (the date of Dr. Mainen's report) to March 22, 2022 (the date Appellees paid specific loss benefits pursuant to the Mediation Agreement) (Appendix at p. 12) (ALJ Decree of December 1, 2022 at page 4 ¶ 12). The Appellant filed a Motion for Further Findings of Fact and Conclusions of

[2] In this case, the Mediation Agreement confirms that Appellees agree to pay Appellant, "162 weeks of specific loss benefits for the loss of his left eye." The Mediation Agreement states further, "[t]he Employer has made some lost time payments to the Employee and will receive a credit against the total award of specific loss benefits." The Mediation Agreement also states, "[t]he Employee argues that he is entitled to interest from the date of injury until payment was made: the Employer and Group Self-Insurer contend that interest is not payable. The parties request that the issue of interest he addressed by the Administrative Law Judge." The Record confirms, "[t]he amount of specific loss benefits has been agreed to at $59,905.33" and "[t]he specific loss payment resolves any and all claims to incapacity benefits to the date the Record of Mediation is executed. …" (Appendix at p. 32).

[3] The Appellant received incapacity benefits intermittently from the date of injury through September 8, 2019. (Appendix p. 3) (Decision of Appellate Division dated July 31, 2023 page 2 at fn. 2).

Law, which the ALJ denied. (Appendix pp. 14-16) (Findings of Fact and Conclusion of Law, January 30, 2023).

The Appellate Division rejected Appellant's argument that the Mediation Agreement compels a finding that specific loss occurred on the date of the injury. The Appellate Division found:

> In this case, the ALJ specifically found that: Mr. Michaud underwent the last of five surgeries on August 12, 2019; Dr. Whiting had opined that he was not at MMI ["Maximum Medical Improvement"] on January 8, 2020; and Dr. Mainen determined he had reached MMI on October 14, 2021. Based on these findings, the ALJ's ultimate finding that Mr. Michaud had arrived at a reasonable medical end point on October 14, 2021, is supported by competent evidence. Moreover, the conclusion that the specific loss benefits became due on that date, and thus interest ran from that date, involved no misconception of applicable law.

(Appendix at p. 6) (Decision of Appellate Division, July 31, 2023 at page 5 ¶ 11).

Likewise, the Appellate Division rejected Appellant's new argument that the Mediation Agreement compels a finding that the specific loss occurred prior to the date of MMI because Appellants received an offset for lost time benefits paid before that date. Consistent with longstanding authority on waiver of issues on appeal, the Appellate Division found, "[t]his issue, however, was not presented to the ALJ at the hearing. Because this argument is raised for the first time on appeal, it has not been preserved for appellate review, and is waived." (Appendix at pp. 6-7) (Decision of Appellate Division, July 31, 2023 at page 6 ¶ 13).

Despite finding the argument waived, the Appellate Division addressed this new argument on the merits finding, "Although the Law Court has held that an offset for lost time benefits cannot be taken before the date of the specific loss, *Scott v. Fraser Papers, Inc., et al.*, 2013 ME 32, ¶ 7, 65 A.3d 1191, ***we do not read the mediation agreement as compelling a finding that the specific loss occurred as of the date of injury***." (Appendix at p. 7) (Decision of Appellate Division, July 31, 2023 at page 6 fn. 3) (emphasis added).

The Appellate Division correctly found., "the ALJ's decision involved no misconception of applicable law, is supported by competent evidence, and the application of the law to the facts was neither arbitrary nor without rational foundation." (Appendix at p. 7) (Decision of Appellate Division, July 31, 2023 at page 6 ¶ 14) (emphasis added).

STANDARD OF REVIEW

"[O]nly a decision of the [appellate] division may be reviewed on appeal." 39-A M.R.S. § 322(1). Decisions of the Appellate Division are reviewed according to established principles of administrative law, except with regard to the hearing officer's or ALJ's factual findings. *Bailey v. City of Lewiston*, 2017 ME 160, ¶ 9, 168 A.3d 762, 765-766 (citing *Kroeger v. Dep't of Envtl. Prot.,* 2005 ME 50, ¶ 7, 870 A.2d 566) (explaining that this Court will only vacate an agency's decision where that decision "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 we have consistently done in the past, we will continue to afford 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*, 2017 ME 160, ¶ 9, (citing *Guiggey v. Great N. Paper, Inc.*, 1997 ME 232, ¶ 10, 704 A.2d 375).

ARGUMENT

I. THE APPELLATE DIVISION CORRECTLY FOUND INTEREST DID NOT ACCRUE UNTIL THE FIRST ASSESSMENT OF MAXIMUM MEDICAL IMPROVEMENT AND NUMERICAL VISION LOSS, CONSISTENT WITH *TRACY*.

The Appellate Division correctly affirmed the ALJ's finding that the determination of specific loss could not be made until after Appellant reached a medical endpoint—no sooner than Dr. Mainen's report of October 14, 2021. This was stipulated to by the parties (*see* Record on Appeal at pages 255-259) and the ALJ's factual findings are well-supported. (Appendix p. 11) (ALJ Decree of December 1, 2022 at pages 2-4 ¶¶ 4-5); (Appendix at pp. 5-6) (Decision of Appellate Division, July 31, 2023 at page 4-5) (emphasis added).

"When weekly compensation is paid pursuant to an award, interest on the compensation must be paid at a rate of 10% per annum from the date each payment was due, until paid." 39-A M.R.S.A. § 205(6).

In *Tracy*, this Court addressed the appropriate time to measure actual loss in the context of vision loss under section 212(3).[4] This Court held such a determination, **"*should be made when the work-related condition has reached a reasonable medical endpoint*."** 1998 ME 247 at ¶ 9 (emphasis added). In *Tracy*, this Court found the Board appropriately determined the employee's entitlement to specific loss benefits after the employee had undergone eye implantation surgery. Under *Tracy*, the determination of whether loss of vision exceeds 80% (and therefore constitutes total loss of an eye for purposes of specific loss benefits), is made when the work-related condition has reached a reasonable medical endpoint.

Appellant had several surgeries following the injury with the goal of improving the vison in his left eye, ultimately without success. Dr. Mainen's opinion that Appellant had reached MMI in the October 14, 2021, report was based upon the success or lack thereof of multiple surgeries. The total loss was, "*not withstanding subsequent surgical efforts to restore his vision*." (Record on Appeal page 28) (Report of Dr. Mainen, dated February 17, 2022).

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4 Section 213 of the Maine Workers' Compensation Act provides:

3. Specific loss benefits. In cases included in the following schedule, the incapacity is considered to continue for the period specified, and the compensation due is calculated based on the date of injury subject to the maximum benefit set in section 211. Compensation under this subsection is available only for the actual loss of the following:

…..

Eye, 162 weeks. Eighty percent loss of vision of one eye constitutes the total loss of that eye.

The ALJ explained, "[u]ntil surgical intervention aimed at restoring vision had occurred and progress could be assessed, the degree of permanent loss could not be determined. Dr. Mainen could not have reached the opinion he did before the effect of repeat surgeries was known, i.e., with the benefit of hindsight…." (Appendix p. 11) (ALJ Decree of December 1, 2022 at pages 4 ¶ 5). The ALJ's finding is consistent with *Tracy* because determination as to whether there is a compensable loss must be made when the work-related condition has reached a reasonable medical endpoint. Here, the ALJ correctly found no provider had assigned a percentage of vision loss to the eye, nor had they assessed maximum medical improvement until the time of Dr. Mainen's report.

In *Tracy,* the loss of vision was in excess of 80% at the time of injury. This Court determined in *Tracy* that while the employee initially suffered a 95% loss of vision on his date of injury, he was not entitled to specific loss benefits because his vision had been restored after correction to 60-70% vision loss, and thus, at the reasonable medical endpoint he did not suffer more than 80% loss of vision in one eye. *Id.* ¶ 12. Unlike other categories of specific loss in section 212 (i.e., thumb, finger, phalange, toe, hand, arm, foot, leg), an 80% or more loss of vision is not obvious and requires a formal medical assessment *after* one reaches maximum medical improvement and only, "when the work-related condition has reached a reasonable medical endpoint." *Tracy,* 1998 ME 247 at ¶ 9.

This Court has distinguished cases in which an employee suffered a physical injury that resulted in a subsequent amputation, from cases in which the injury caused immediate amputation. *Compare Scott*, 2013 ME 32, ¶ 7, 65 A.3d 1191 (employee's entitlement to specific loss benefits did not arise until his finger was surgically amputated a year after the injury occurred) *with Boehm v. Am. Falcon Corp.*, 1999 ME 16, ¶ 11, 726 A.2d 692 (employee's right to specific loss benefits arose at the time of immediate amputation of a finger, offset by the amount of incapacity benefits already paid).

Until Dr. Mainen's report of October 14, 2021 issued, there was no obligation—or notice of any obligation—which would cause interest to accrue. There was no notice of a claim to, nor evidence of, specific loss until Dr. Mainen's report issued. Notice or knowledge of an *injury* is much different than notice or knowledge of an injury which constitutes an obligation to pay benefits. *See Carroll v. Gates Formed Fibre Products,* 663 A.2d 23 (Me.1995).

The ALJ's finding affirmed by the Appellate Division is consistent with *Tracy*, which mandates that the determination as to compensability of a specific loss must be made when the work-related condition has reached a reasonable medical endpoint. The Appellate Division's decision affirming the ALJ's finding that Appellant had arrived at a reasonable medical end point on October 14, 2021, is supported by competent evidence. Likewise, the Appellate Division's finding

that the ALJ's conclusion that the specific loss benefits became due on that date, and thus interest ran from that date, involved no misconception of applicable law is correct. The Appellate Division's decision should be affirmed.

II. APPELLANT'S ARGUMENT REGARDING THE TIMING OF THE OFFSET WAS NOT RAISED BEFORE THE ALJ AND IS WAIVED FOR PURPOSES OF APPEAL.

Appellant's argument regarding agreed-upon offset for lost time benefits paid before the date of specific loss has not been preserved for appellate review. By failing to make an argument until after the ALJ issued the underlying decision, Appellant forfeited consideration of the issue.

Issues raised for the first time on appeal are waived. *Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46, ¶ 10 (App. Div. 2017) (explaining the importance of raising a legal argument at a time and manner sufficient to give the ALJ and opposing party a fair opportunity to respond and address it). *See Morey v. Stratton*, 2000 ME 147, ¶¶ 8-10, 756 A.2d 496 (emphasizing "the importance of bringing the specific challenge to the attention of the trial court at a time when the court may consider and react to the challenge"). Parties may not raise issues for the first time before an appellate body. *Fitch v. Doe*, 2005 ME 39, ¶ 27, 869 A.2d 722. *Reville v. Reville*, 289 A.2d 695 (Me. 1972) ("The general rule governing proper appellate procedure is that a party who seeks to raise an issue for the first time at the appellate level is held, in legal effect, to have 'waived' the issue insofar as he

utilizes it to attack a judgment already entered and from which an appeal is taken."). *Teel v. Colson*, 396 A.2d 529, 534 (Me. 1979) ("[P]roper appellate practice will not allow a party to shift his ground on appeal and develop new theories after being unsuccessful on the theory presented in the trial court. It is a well settled universal rule of appellate procedure that a case will not be reviewed by an appellate court on a theory different from that on which it was tried in the court below."). *Morris v. Resolution Trust Corp*., 622 A.2d 708, 714 (Me. 1993) ("It is well established that when a party seeks to raise at issue for the first time on appeal and for the purpose of attacking the judgment from which he appeals, he is held to have waived that issue for appellate review because he failed to submit it for decision at the trial level.").

Before the ALJ, Appellant asserted that he sustained over 80% of vision loss at the time of the injury, arguing interest is payable from the date each payment was due. *See* (Appellant Position Paper to ALJ of October 22, 2022). In Appellant's Motion for Findings of Fact submitted to the ALJ, Appellant, "reiterate[d] the argument as expressed in the position paper…." *See* (Appendix p. 26) (Appellant's Proposed Findings of Fact and Conclusions of Law of December 8, 2022). For the first time, before the Appellate Division, Appellant modified his theory of the case, advancing the new argument that the Board erred in failing to calculate interest from the date of vision loss where the parties stipulated the Appellees are to

receive a credit for incapacity benefits paid. (Appendix at pp. 50-51) (Appellant's Brief before the Appellate Division at pages 6-7). The Appellate Division correctly found this argument is waived. This Honorable Court should also decline to consider this argument on appeal.

Because this argument issue was not presented to the ALJ, it was not preserved for appeal and may not be raised in Appellate proceedings for the first time. Appellant should not be permitted to advance a new argument on appeal after being unsuccessful on the theory presented in the trial court, where neither the Appellees nor the ALJ had an opportunity to address the argument. As a result, the argument is waived and should not be addressed on appeal.

III. THE BOARD PROPERLY FOUND THE MEDIATION AGREEMENT DOES NOT COMPEL A FINDING THAT THE SPECIFIC LOSS OCCURRED AS OF THE DATE OF INJURY.

Even assuming *arguendo*, Appellant's argument was not waived, the Appellate Division squarely addressed and rejected the argument on the merits. The Appellate Division found: "Although the Law Court has held that an offset for lost time benefits cannot be taken before the date of the specific loss, *Scott v. Fraser Papers, Inc., et al.*, 2013 ME 32, ¶ 7, 65 A.3d 1191, ***we do not read the mediation agreement as compelling a finding that the specific loss occurred as of the date of injury***." *Id*. at ¶¶ 12-13) (emphasis added).

Ordinarily, we defer to an administrative agency's interpretation of a statute, particularly if, as in the case of the Workers' Compensation Board, the agency is charged with the responsibility of administering the statute. *See Curtis v. National Sea Prods*., 657 A.2d 320, 322 (Me.1995); *LaRochelle v. Crest Shoe Co*., 655 A.2d 1245, 1248 (Me.1995); *Jordan v. Sears, Roebuck & Co*., 651 A.2d 358, 360 (Me.1994).

In this case, the Mediation Agreement confirms that Appellees agree to pay Appellant, "162 weeks of specific loss benefits for the loss of his left eye." It also generally states, "[t]he Employer has made some lost time payments to the Employee and will receive a credit against the total award of specific loss benefits." The remaining issue was whether interest was due from the date of injury or some point later in time. (Appendix p. 32) (Mediation Agreement).

The Mediation Agreement was a product of an agreement between the partis t to resolve all issues short of the payment of interest without the involvement of the ALJ. Appellant cannot now seek to undo this agreement to which he was a part of and to which he agreed to.

The enactment of mandatory mediation, "was part of a significant change in the workers' compensation law following recommendations of a Blue Ribbon Commission." *Feiereisen v. NewPage Corp*., 2010 ME 98 ¶ 19, 5 A.3d 669 (citing P.L.1991, ch. 885, §§ A-7, A-8 (effective Jan. 1, 1993) (codified at 39-A M.R.S.

§ 313). In enacting title 39-A, the Legislature established a process designed not to "comprehensively address every workers' compensation issue in a detailed and specific way, but to commit some issues to a process in which the participants in the system, labor and management, can work out flexible and realistic solutions." *Feiereisen*, 2010 ME 98 ¶ 19, 5 A.3d 669 (citing *Bridgeman v. S.D. Warren Co*., 2005 ME 38, ¶ 11, 872 A.2d 961, 965 (quotation marks omitted).

"We have previously recognized a legislative intent in title 39-A to encourage mediation. Indeed, we have stated that mediation pursuant to the new Act was intended to 'replace litigation whenever possible."
Hoglund v. Aaskov Plumbing & Heating, 2006 ME 42, ¶ 7, 895 A.2d 323, 325 (citing *Jasch v. Anchorage Inn*, 2002 ME 106, ¶ 17, 799 A.2d 1216, 1220).

Section 313(1) provides that "upon filing of notice of controversy or other indication of controversy, the matter must be referred by the board to mediation." 39-A M.R.S. § 313(1). At the conclusion of the mediation, the mediator is required to file a written report to the Board, containing certain information:

> … If an agreement is reached, the report must state the terms of the agreement and must be signed by the parties and the mediator. If a full agreement is not reached, the report must state the information required by section 305, 2nd paragraph, any terms that are agreed on by the parties and any facts and legal issues in dispute and the report must be signed by the parties and the mediator.

39-A M.R.S. § 313(3).

There is a recognized "legislative policy to equate mediated agreements with formal [ALJ] decrees." *Jasch*, 2002 ME 106, ¶ 18, 799 A.2d 1220. Otherwise, "to require de novo proof of the facts after the parties had foregone a hearing and participated in a process intended to finally resolve most disputes, would create a disincentive to settle." *Hoglund*, 2006 ME 42, ¶ 9, 895 A.2d 323, 325.

The Mediation Agreement was a product of the Board's dispute resolution process, the express terms of which are listed therein, which fully decided and disposed of the amount of specific loss benefits due, leaving only the issue of interest undecided. The Mediation Agreement reflects an agreement to pay 162 weeks of specific loss benefits, with a credit for incapacity benefits paid, and nothing more. The parties reached an agreement by way of a Mediation Agreement to resolve at least a portion of the dispute without the formal hearing process. This is precisely the purpose of mediation, which is intended to replace litigation when possible, and to provide a process in which the parties can compromise and resolve disputes.

In sum, the binding Mediation Agreement offers no support for the outcome urged by Appellant. The Appellate Division should affirm the ALJ's decision in all respects.

CONCLUSION

Accordingly, the Appellees respectfully request that the Court affirm the Appellate Division's decision.

Dated at Portland, Maine this 31st day of January 2024.

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CERTIFICATE OF SERVICE

I, John J. Cronan III, certify that on January 31, 2024, the Brief of Appellees was filed with this Court by hand delivery. On January 31, 2024, I caused to be mailed two copies of the Brief of Appellant to the attorney for the Appellant listed below, by United States Mail, first-class, postage prepaid, addressed as follows:

Norman G. Trask.
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Additionally, on January 31, 2024, I have caused to be mailed two copies of the Brief of Appellee to Richard Hewes, Esq., General Counsel of the Maine Workers' Compensation Board, by United States Mail, first-class, postage prepaid, addressed as follows:

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Dated at Portland, Maine this 31st day of January 2024.

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