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

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ARGUMENT

I. THE APPELLATE DIVISION CORRECTLY APPLIED *TRACY* TO FIND THE DETERMINATION OF SPECIFIC LOSS COULD NOT BE MADE– AND INTEREST DID NOT ACCRUE–UNTIL THE FIRST ASSESSMENT OF MAXIMUM MEDICAL IMPROVEMENT.

In *Tracy*, this Court made clear that the determination of specific loss in the context of vision loss, **"*should be made when the work-related condition has reached a reasonable medical endpoint*."** 1998 ME 247 at ¶ 9, 720 A.2d at 579, 581 (emphasis added). The ALJ's finding, affirmed by the Appellate Division, is fully in accordance with *Tracy* and should be affirmed.

Appellee's efforts to distinguish this case are misplaced. Similar to this case, in *Tracy* the injury resulted in an immediate 95% vision loss, following which the employee underwent various surgeries to correct his vision. *Id.* at ¶ 2. Although the first surgery did not substantially improve his vision, subsequent procedures restored his vision to an approximate 60-70% vision loss. *Id*. This Court declined to award specific loss benefits, concluding "to allow recovery for the 'actual' loss of an eye in circumstances where an employee's vision has been significantly restored would be directly contrary to the Legislature's intent to allow specific loss benefits only in the instance of total, catastrophic loss." *Id*. at ¶ 12. This Court stated "[m]any employees ... suffer extreme and traumatic injuries which never result in the receipt of specific loss benefits because no body part was actually

lost." *Id*. Simply because an individual may have sustained a defined amount of vision loss at the time of an injury does not mean that individual is automatically entitled to specific loss benefits. Under *Tracy,* the critical assessment is when the individual reaches a reasonable medical endpoint.

Appellant claims that despite undergoing four surgeries, "there was never a reasonable likelihood of restoring vison completely; the hope was to achieve some improvement." (Appellant's Brief at p. 5). Again, this is not the test for loss of vision in the context of specific loss. To this point, the ALJ correctly concluded, "[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 p. 4 ¶ 5). The ALJ addressed this and found:

> [b]ased in part upon the maxim that hindsight is 20/20 (pun intended), I disagree with the Appellant's contention…. For five years after the injury, Mr. Michaud had several surgical interventions, with the specific goal of improving the vison in his left eye.

(Appendix pp. 12-13).

The ALJ's finding, affirmed by the Appellate Division, is consistent with *Tracy* because the determination as to whether there is a compensable loss must be made when the work-related condition has reached a reasonable medical endpoint.

The decisions of *Scott v. Fraser Papers, Inc., et al.,* 2013 ME 32, 65 A.3d 1191 and *Boehm v. American Falcon Corp*., 1999 ME 16, 726 A.2d 692 are limited to traumatic physical injuries, not loss of vision. Specific loss to an eye is much different than other categories of specific loss in § 212. 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 should affirm the Board's decision in all respects.

II. THE BOARD APPROPRIATELY LIMITED ITS REVIEW TO THE AMOUNT OF INTEREST DUE; THE OFFSET FOR INCAPACITY BENEFITS PREVIOUSLY PAID WAS AGREED TO BY THE PARTIES AS PART OF THE BOARD'S DISPUTE RESOLUTION PROCESS.

Appellant overlooks the fact that the parties reached an agreement short of the formal hearing process, leaving only the issue of interest to be decided by the ALJ. The Mediation Agreement was a product of the Board's dispute resolution process, 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 a defined period of specific loss benefits, with a credit for incapacity benefits paid, and nothing more. The Mediation Agreement was intended to resolve a portion of the dispute without the formal hearing process.

Mediation is intended to replace litigation when possible, and to provide a process in which the parties can compromise and resolve disputes.

This Court should affirm the Appellate Division's finding that the binding Mediation Agreement offers no support for the outcome urged by Appellant. This Court should affirm the Board's decision in all respects.

III. APPELLANT'S ARGUMENT REGARDING THE TIMING OF THE OFFSET FOR INCAPACITY BENEFITS PREVIOUSLY PAID IS WAIVED FOR PURPOSES OF APPEAL.

The Appellate Division correctly applied the law when it found Appellant's belated argument regarding the offset for lost time benefits previously paid before is waived. This issue was not presented to the ALJ. Rather, it was raised for the first time on appeal, and it has not been preserved for appellate review.

In an effort to overcome this, Appellant contends, "the legislature, and the ALJ are expected to be aware of this Court's precedent and, indeed to the law." (Appellant's Brief at 7). Even if so, a general awareness of the law - when there are numerous cases and statutes - does not substitute for a well-reasoned and focused argument - let alone any argument - before the ALJ. Moreover, the cases cited by Appellants are inapposite. *See* S*tate v. Austin*, 131 A.3d 377, 380 (Me. 2016) (affirming judgment where defendant appealed from a judgment of conviction, asserting that when he purchased a hunting license, he was given a magazine summarizing Maine hunting laws and rules that misstated the law). *See also*

Freeland v. Prince, 41 Me. 105 (1856) ("When depositions are taken within the State, the law requires certain facts to be stated in the caption, and gives the Court no discretionary power by which depositions may be admitted in which the caption is defective. Magistrates living within the State are presumed to know the law, and are expected to conform to its requirements.").

Neither of these cases overcomes the long line of authority issued by this Court, cited in Appellee's Brief, which establishes that where a party fails to make an argument until after the ALJ issues the underlying decision, the party forfeits consideration of the issue. The Appellate Division's decision should be affirmed.

IV. THE BOARD CORRECTLY FOUND THE MEDIATION AGREEMENT DOES NOT COMPEL A FINDING THAT THE SPECIFIC LOSS OCCURRED ON THE DATE OF INJURY.

Putting aside the issue of waiver, the Appellate Division properly addressed and rejected the Appellant's 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***." *Id*. at ¶¶ 12-13) (emphasis added). This Court ordinarily defers 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).

Here, the Appellate Division appropriately found the Record of Mediation does not support a finding that the specific loss occurred on the date of injury, which is fully consistent with this Court's holding in *Tracy*. The Appellate Division's decision affirming the ALJ's decision correctly applies the law and is entitled to deference given the Appellate Division's reasonable interpretation of the workers' compensation statute.

CONCLUSION

Accordingly, for the reasons herein and in Appellee's Brief, the Appellees respectfully request that the Court affirm the Appellate Division's decision.

Dated at Portland, Maine this 14th day of February 2024.

John J. Cronan, III, Esq.
Attorney for the Appellees, Caribou Ford Mercury, Inc. d/b/a Griffeth Ford and the Maine Auto Dealers Association Workers' Compensation Trust

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CERTIFICATE OF SERVICE

I, John J. Cronan III, certify that on February 14, 2024, the Reply Brief of Appellees was filed with this Court by hand delivery. On February 14, 2024, I caused to be mailed two copies of the Reply Brief of Appellees 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 February 14, 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 14th day of February 2024.

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