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WC Appellate Division Decision issued on October 30, 2017 – Work Search and Changed Circumstances

It has long been recognized that when the amount of entitlement to benefits for incapacity has been established by Board decree, that determination may later be revised based upon evidence of a change of economic circumstances. A recent decision of the Appellate Division addressed the issue of whether work search evidence, without more, can be sufficient to permit an ALJ to increase the level of entitlement.

In *Pelletier v. Pelletier, Inc.*, Me. W.C.B. No. 17-34 (App. Div. 2017), the employee sustained an undisputed shoulder injury on January 16, 2012, and was initially awarded ongoing benefits for partial incapacity based upon an imputed earning capacity. Later, the employee filed a Petition for Review seeking an increase in benefits to 100% partial based upon extensive work search evidence. The ALJ ruled that such evidence was inadequate to overcome the res judicata effect to be given to the prior Decree, and ruled that work search evidence alone cannot be sufficient to establish a change of circumstances justifying an increase in the level of benefits.

On appeal the Appellate Division vacated the decision of the ALJ and remanded the matter for further findings. In particular, the Division found that prior case law did not support the proposition that work search evidence alone was insufficient to establish changed circumstances. As the Division held:

> Prohibiting an injured employee who is receiving partial incapacity benefits…from seeking an increase in benefits after engaging in an extensive work search would thwart the purpose of the Act to encourage employees to look for post-injury employment.

Noting that the extent of incapacity is dynamic and subject to change, the employee was entitled to an adjudication of his current disability based upon the results of having searched for work. The Division instructed the ALJ on remand to determine whether the work search evidence offered constituted a significant change in circumstances, thereby justifying an increase in the level of entitlement.

The *Pelletier* decision is significant as it gives an injured worker a second opportunity to establish entitlement to 100% partial based only upon additional and more thorough work search activities even though there has been no other medical or economic change of circumstances.

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