

KAREN JODREY
(Appellee)

v.

HIBBARD SKILLED NURSING CENTER, INC.
(Appellant)

and

MAINE HEALTHCARE ASSOCIATION
WORKERS' COMPENSATION TRUST
(Insurer)

Argued: February 7, 2018
Decided: April 11, 2018

PANEL MEMBERS: Administrative Law Judges Knopf, Jerome, and Stovall
BY: Administrative Law Judge Knopf

[¶1] Hibbard Skilled Nursing Center, Inc., appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*), granting in part Karen Jodrey's Petitions for Award and for Payment of Medical and Related Services for a February 20, 2014, low back injury. Hibbard contends that the ALJ applied an incorrect legal standard when he awarded Ms. Jodrey 50% partial incapacity benefits. We affirm the decision.

I. BACKGROUND

[¶2] Ms. Jodrey worked as a certified nursing assistant (CNA) in the nursing home operated by Hibbard. On February 20, 2014, she suffered an injury

to her low back while transferring a patient. Ms. Jodrey returned to work with restrictions, but her back continued to be problematic. She stopped working on December 4, 2014, after her physician recommended she find less strenuous work. On December 15, 2014, Hibbard sent Ms. Jodrey a letter inviting her to return to work. Ms. Jodrey did not respond. Hibbard denied her request for incapacity benefits.

[¶3] On February 25, 2016, Ms. Jodrey was examined by an independent medical examiner (IME) appointed by the board pursuant to 39-A M.R.S.A. § 312 (Supp. 2017). The IME opined that Ms. Jodrey retained a full-time, light-duty work capacity despite her February 20, 2014, work injury. The ALJ adopted the IME’s opinion regarding Ms. Jodrey’s work capacity.

[¶4] Ms. Jodrey argued that she was entitled to 100% partial incapacity benefits and provided the board with evidence of a work search in support. The ALJ determined that Ms. Jodrey’s physical restrictions precluded her from returning to her former job, but that her work search was insufficient to prove that work in the local labor market was totally unavailable to her. Nevertheless, he awarded her 50% partial incapacity benefits, explaining that “because Ms. Jodrey’s pre-injury wage was modest . . . imputing a full-time minimum wage earning capacity of \$300 per week would amount to a finding that she suffers almost zero dollars of earning incapacity despite restrictions that preclude a return to her career

as a CNA; such a conclusion is not supportable by the present evidence.” He added that his award of incapacity benefits was “based on Ms. Jodrey’s significant physical restrictions, education, and vocational history.”

[¶5] Hibbard filed a Motion for Findings of Fact and Conclusions of Law but did not include proposed findings of fact or conclusions of law. The ALJ denied Hibbard’s motion. This appeal followed.

II. DISCUSSION

[¶6] Hibbard contends that the ALJ erred when failing to determine Ms. Jodrey’s compensation rate by imputing a full-time wage because the ALJ found Ms. Jodrey had the physical ability to work full time but did not conduct a good-faith work search. We disagree with this contention.

[¶7] “Partial incapacity benefits are based on the difference between the employee’s pre-injury average weekly wage and what the employee is able to earn after the injury.” *Tucker v. Associated Grocers of Me., Inc.*, 2008 ME 167, ¶ 11, 959 A.2d 75; *see also* 39-A M.R.S.A. § 213(1)(B) (Supp. 2017). An employee’s ability to earn after a work injury is determined based on both “(1) the employee’s physical capacity to earn wages and (2) the availability of work within the employee’s physical limitations.” *Dumond v. Aroostook Van Lines*, 670 A.2d 939, 941 (Me. 1996). Administrative law judges are not required to follow any mathematical formula when evaluating an employee’s earning capacity. *See, e.g.*,

Thev v. Saunders of Locke Mills, LLC, Me. W.C.B. No. 13-4, ¶¶ 9-11 (App. Div. 2013); *Morneault v. Katahdin Paper Co.*, Me. W.C.B. No. 14-21, ¶¶ 3-6 (App. Div. 2014). Rather, ALJs may consider a number of relevant factors to arrive at a figure that accurately reflects the employee's ability to earn wages. *Id.* A determination of an employee's earning capacity is a factual finding that we will overturn only if it is unsupported by competent evidence in the record. *Id.* ¶ 6.

[¶8] The ALJ identified several factors affecting Ms. Jodrey's ability to earn, including that she could no longer work as a CNA, and that she had significant physical restrictions. He also considered her education level and her vocational history. These factors led him to conclude that imputing full-time wages would not reflect her ability to earn. We find no error in this approach to determining earning capacity. There is competent evidence in the record to support the ALJ's factual findings, and the ALJ neither misconceived nor misapplied the law when taking relevant factors into consideration. *See Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995).

[¶9] Hibbard further argues that the ALJ improperly based his decision on fairness considerations that do not belong in a calculation of partial incapacity benefits. It contends that Ms. Jodrey had an earning capacity close to her pre-injury average weekly wage, and it was error not to impute a full-time earning capacity merely because to do so would yield a low compensation rate. *See Clark v. Int'l*

Paper Co., 638 A.2d 65, 66 (Me. 1994) (“[The Board] has only such authority as is conferred upon it by express legislative grant or such as arises therefrom by implication as incidental to full and complete exercise of the powers granted.”).

[¶10] We discern no error. The ALJ’s findings regarding earning capacity are not based on considerations of fairness alone. As stated above, the ALJ explicitly evaluated relevant factors that support his determination that Ms. Jodrey has a diminished ability to earn. *See Morneault*, No. 14-21, ¶ 3.

III. CONCLUSION

[¶11] The ALJ committed no error of law in awarding Ms. Jodrey partial incapacity benefits without imputing full-time earnings. The ALJ’s findings were supported by competent evidence and the application of the law to those facts was neither arbitrary nor without rational foundation. *See Moore*, 669 A.2d at 158.

The entry is:

The ALJ’s decision is affirmed.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2017).

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

Attorneys for Appellant:
Anne-Marie L. Storey, Esq.
John K. Hamer, Esq.
RUDMAN WINCHELL
P.O. Box 1401
Bangor, ME 04402-1401

Attorney for Appellee:
Christopher Cotnoir
Workers' Compensation Board
Worker Advocate Division
24 Stone Street, Suite # 107
Augusta, ME 04330