CHERYL GALLANT
(Appellant)

v.

MAINE SCHOOL ADMINISTRATIVE DISTRICT No. 49
(Appellee)

and

MAINE SCHOOL MANAGEMENT ASSOCIATION
(Insurer)

Conference held: April 12, 2018
Decided: October 15, 2018

PANEL MEMBERS: Administrative Law Judges Pelletier, Collier, and Hirtle
BY: Administrative Law Judge Hirtle

[¶1] Cheryl Gallant appeals from a decision of a Workers' Compensation Board administrative law judge (*Elwin*, *ALJ*) granting in part her Petition for Award regarding a May 30, 2008, work-related injury.[1] Ms. Gallant contends that the ALJ erred by denying her claim for benefits for the period from April 10, 2010, to January 8, 2015, and by reducing her benefits by an imputed earning capacity of $400.00 per week for the period from March 21, 2015, to the present and ongoing. We find no error, and affirm the decision.

I. BACKGROUND

[¶2] Cheryl Gallant suffered an injury to her left knee, hip, and back on May 30, 2008, when she slipped and fell down a set of stairs at work. At the time, she

[1] The ALJ also granted Ms. Gallant's Petition for Payment of Medical and Related Services. That aspect of the decision has not been appealed.

was the head teacher for the before and after-school program at Maine School Administrative District No. 49 ("the District"). In April of 2010, Ms. Gallant left her position because the District reduced her hours from full to part-time. Thereafter, she worked other jobs periodically, and began a working toward a college decree, initially attending full-time. She underwent knee surgery on January 9, 2015, to repair ACL and meniscal tears.

[¶3] Ms. Gallant filed her petitions on May 5, 2015, seeking compensation for lost wages and medical payments. There is no dispute that Ms. Gallant is entitled to payment of her medical bills resulting from the 2008 work injury, and that she was totally incapacitated from work for the period following her surgery, from January 9, 2015, until March 20, 2015. At issue is compensation for wage loss during the periods before and after her surgery and recovery.

[¶4] The parties submitted conflicting medical evidence concerning Ms. Gallant's earning capacity from the time when she left employment with the District up to her January 2015 knee surgery. Her primary care physician opined that she had no work capacity, while her orthopedic surgeon opined that she could perform regular duty work. During that period she worked briefly as a nanny, and began her bachelor's degree program. She worked two half-time jobs while in college. After finishing her degree in 2014, she worked two days per week as a substitute teacher. Although she was offered work as a substitute on a near daily

basis, she declined due to her knee pain. However, she was under no medical restrictions from work at the time.

[¶5] There were also differing opinions regarding Ms. Gallant's earning capacity for the period following her recovery from surgery. Medical providers disagreed on whether she has been able to work regular duty, work with restrictions, or whether she has no work capacity whatsoever. Her plan at the time of the hearing was to babysit for her two grandchildren, an infant and a toddler.

[¶6] At the hearing, the District submitted a labor market survey produced by a vocational rehabilitation expert, who concluded that someone with Ms. Gallant's vocational background and work restrictions could earn $400.00 per week.

[¶7] The ALJ found that Ms. Gallant had a full-time work capacity after she left employment with the District and up to the time of her knee surgery, and denied Ms. Gallant's request for varying rates of partial incapacity benefits for that period.[2]

[2] The ALJ cited *Tucker v. Associated Grocers of Maine, Inc.*, 2008 ME 167, 959 A.2d 75, as an additional basis to deny partial incapacity benefits. We note that *Tucker* does not create an absolute bar to incapacity benefits while the injured worker participates in a full-time educational program. *Tucker* directs ALJs to impute a full-time earning capacity to such workers who are otherwise unrestricted by their injuries in the number of hours they can work. *Id.* ¶¶ 18–20 (holding, specifically, that an award of 100% partial incapacity benefits is not authorized when an employee with a full-time work capacity searches only for part-time work, even when that employee is also enrolled in a full-time educational program). Because the ALJ found that Ms. Gallant retained an unrestricted earning capacity during this period, the extent to which the decree may suggest that enrollment in a full-time educational program is a bar to receiving partial benefits is not reversible error.

[¶8] The ALJ further found that during the period following her surgery, from March 21, 2015, to the present and ongoing, Ms. Gallant had restrictions related to her work injury, but she also had the capacity to earn $400 per week. This was based on the medical opinion of one of Ms. Gallant's orthopedists, who recommended that she should perform "desk work only." The ALJ also credited Ms. Gallant's testimonial account of her daily activities, and the labor market survey from the District's vocational rehabilitation expert showing that there were jobs available to her within her occupational restrictions. The ALJ thus awarded Ms. Gallant partial incapacity benefits from March 21, 2015, to the present and continuing reduced by an imputed earning capacity of $400.00 per week. Ms. Gallant appeals.

II. DISCUSSION

A. Standard of Review

[¶9] The role of the Appellate Division "is limited to assuring that the [ALJ's] findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). When a party does not request further findings, the Appellate Division will treat the ALJ "as having made whatever factual determination could, in accordance with correct

legal concepts, support [the] ultimate decision, and we inquire whether on the evidence such factual determinations must be held clearly erroneous." *Daley v. Spinnaker Indus.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quoting *Gallant v. Boise Cascade Paper Group*, 427 A.2d 976, 977 (Me. 1981)).

B. Denial of Incapacity Benefits for April 2010 to January 2015

[¶10] Ms. Gallant contends that the evidence shows that from the time she left employment with the District until her knee surgery in January 2015, her earning capacity was very limited on account of her work injury. She therefore asserts that the ALJ erred when denying her benefits for this period.

[¶11] When an employee suffers a partially incapacitating work injury, the employer is responsible for paying weekly incapacity benefits based on the difference between the employee's pre-injury earnings and his or her post-injury ability to earn. *See* 39-A M.R.S.A. § 213(1) (Supp. 2017). Thus, Ms. Gallant's entitlement to partial incapacity benefits depends on the extent that her work-related injury impaired her ability to earn her pre-injury average weekly wage.

[¶12] Although there is medical evidence to support Ms. Gallant's position that her work injury hindered her ability to earn during this time, there is also a contrary medical opinion that she was under no restrictions on her occupational activities. The ALJ credited and adopted the latter opinion. The choice between

competing medical opinions is a matter for the ALJ who hears and decides the case. *See Davis v. Boise Cascade*, Me. W.C.B. No. 17-41, ¶ 21 (App. Div. 2017).

[¶13] We discern no reversible legal error in the ALJ's adoption of one of the competing expert medical opinions over the other. The opinion from Ms. Gallant's orthopedic surgeon provides competent evidence to support the finding that Ms. Gallant's injury did not hinder her ability to earn her pre-injury wages from the time she left her position with the District until her 2015 knee surgery. That finding, in turn, supports the ALJ's denial of her request for incapacity benefits for that time span.

C. Imputed Earning Capacity, March 21, 2015, to the Present and Continuing

[¶14] Ms. Gallant next contends that the ALJ erred when determining that she has been able to earn $400 per week since she recovered from her 2015 knee surgery. She therefore contends it was error to reduce her partial incapacity benefit by that amount. However, competent evidence supports the finding that Ms. Gallant is able to earn $400.00 per week, including: the medical evidence from the orthopedist that Ms. Gallant is capable of full-time, sedentary or light duty work; the labor market survey showing the availability of work within these restrictions, including numerous office and call center jobs; and Ms. Gallant's testimony about her activities during this period. Accordingly, we conclude that the ALJ did not err

when awarding partial incapacity benefits in an amount that includes a $400.00 per week reduction based on imputed income.

III. CONCLUSION

[¶15] The ALJ's findings regarding Ms. Gallant's earning capacity during the two periods in dispute are supported by competent evidence. Moreover, the ALJ neither misapplied nor misconceived applicable law. We therefore discern no reversible legal error.

The entry is:

The administrative law judge'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.

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