KEVIN EATON
(Appellant)

v.

CITY OF BANGOR
(Appellee)

and

MAINE MUNICIPAL ASSOCIATION
(Insurer)

Conference held: July 20, 2022
Decided: December 2, 2022

PANEL MEMBERS: Administrative Law Judges Chabot, Pelletier, and Sands
BY: Administrative Law Judge Sands

[¶1] Kevin Eaton appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) granting his Petition for Review and Request for Provisional Order, in part, and granting his Petition for Payment of Medical and Related Services associated with his work injury sustained on January 19, 2018. On appeal, Mr. Eaton contends that the ALJ erred in imputing an earning capacity of $60.75 given that the ALJ found that he could work only one hour per day, five days per week. We affirm the ALJ's decision.

I. BACKGROUND

[¶2] Kevin Eaton sustained a head and neck injury on January 19, 2018, while working for the City of Bangor's school department as a second shift custodian.

While the injury to his neck resolved within a few weeks, his head injury has caused continued symptomology. He returned to work briefly, ultimately working up to full time hours, but his condition worsened and he has been out of work since September of 2018.

[¶3] In 2019, the City retained private investigators to observe Mr. Eaton's activities. The resulting surveillance evidence was then shared with Dr. Podraza, who had previously performed a section 207 exam; Dr. Mihm, Mr. Eaton's treating psychologist; and Dr. Robinson, Mr. Eaton's provider at Robinson Center of Neuro Visual Rehabilitation. Following review of the surveillance, the providers rendered differing opinions on work capacity and the ongoing effects of the work injury. The ALJ weighed these opinions along with the surveillance evidence and ultimately concluded that Mr. Eaton maintained a work capacity of one hour per day, five days per week, with significant limitations as described by Dr. Mihm and Dr. Robinson.

[¶4] The ALJ then addressed earning capacity stating: "In the absence of other evidence regarding how such limitations may interact with Mr. Eaton's local labor market, I find that someone of his age, education, vocational history, and restrictions would likely be unable to earn more than the current minimum wage and therefore impute a weekly earning capacity of $60.75 reflecting five hours per week multiplied by $12.15 per hour." Accordingly, Mr. Eaton's Petition for Review was granted in part with a finding that he is entitled to partial benefits reduced by an

earning capacity of $60.75. Mr. Eaton requested additional findings of fact and conclusions of law. The ALJ issued additional findings but did not alter the outcome. Mr. Eaton now appeals.

II. DISCUSSION

A. Standard of Review

[¶5] 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 requests and proposes additional findings of fact and conclusions of law, as was done in this case, "we review only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted). In addition, the Appellate Division will not disturb a factual finding made by the ALJ absent a showing that it lacks competent evidence to support it. *Dunkin Donuts of Am., Inc. v. Watson*, 366 A.2d 1121, 1125 (Me. 1976).

B. Earning Capacity Analysis

[¶6] In the instant case, Mr. Eaton does not appeal the findings the ALJ made relative to his work capacity. Rather, he argues that the ALJ erred with respect to the

imputation of any earning capacity as Mr. Eaton asserts that there is no viable labor market containing jobs in which he can be hired to work only one hour per day, five days per week. Therefore, Mr. Eaton argues that it is unreasonable to impute any earning capacity.

[¶7] Post-injury earning capacity is 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. Rather, ALJs may consider a number of relevant factors to arrive at a figure that accurately reflects the employee's ability to earn wages. *See, e.g. Hogan v. Great No. Paper, Inc*., 2001 ME 162, ¶ 9, 784 A.2d 1083, 1085; *see also Thew v. Saunders of Locke Mills, LLC,* Me. W.C.B. No. 13-4, ¶¶ 10-11 (App. Div. 2013). 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." *Jodrey v. Hibbard Skilled Nursing Center, Inc.*, Me. W.C.B. No. 18-16; ¶ 7 (App. Div. 2018).

[¶8] The ALJ reached the conclusion that Mr. Eaton is able to earn minimum wage, five hours per week, based on Mr. Eaton's age, education, vocational history, and restrictions. He also carefully considered surveillance evidence that showed Mr. Eaton performing activities that the ALJ noted "overlaps with some of his pre-injury

work duties." These are all appropriate factors to be considered by an ALJ in the determining an injured worker's earning capacity. Mr. Eaton contends that the conclusion is unreasonable as it should be obvious that no job exists that would allow Mr. Eaton to work only one hour per day, five days per week. Mr. Eaton, however, as the moving party, bears the "ultimate burden of proof to show that work is unavailable as a result of the work injury within [his] local community." *Monaghan v. Jordan's Meats*, 2007 ME 100, ¶ 14, 958 A.2d 791. In this case, no work search or labor market evidence was submitted as Mr. Eaton maintained that he had no work capacity, not even five hours per week. Given the absence of such evidence, the ALJ's imputation of earning capacity is supported by competent evidence.

[¶9] Mr. Eaton also argues that given the severity of his work restrictions, the evidence compels the finding that he is, in fact, totally disabled under 39-A M.R.S.A. § 212, and therefore the ALJ's finding is erroneous as a matter of law. In support of his position, he points to *Levesque v. Shorey*, 286 A2d 606 (Me. 1972). In that case, the Law Court upheld a finding of total incapacity despite evidence that the claimant was able to build a canoe that he planned to sell for $75. *Id.* at 610-611. The Law Court reasoned that the ability to construct one canoe was not necessarily inconsistent with a finding of total incapacity. *Id*.

[¶10] *Levesque* is distinguishable from this case in that here, the ALJ found that Mr. Eaton has a consistent, although limited, work capacity. The ALJ did not

rely on a single occasion but rather on medical opinions along with surveillance evidence showing Mr. Eaton performing tasks similar to some of his pre-injury job duties. As noted, the findings relative to work capacity have not been appealed. Given the uncontested finding of work capacity, the ALJ did not err in determining the existence of an earning capacity as required pursuant to 39-A M.R.S.A. § 213.

III. CONCLUSION

[¶11] There is competent evidence in the record to support the ALJ's factual findings, and the ALJ neither misconceived nor misapplied the law. *See Moore v. Pratt & Whitney Aircraft*, 669 A2d 156, 158 (Me. 1995).

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.

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.

Attorney for Appellant:
Carol G. McMannus, Esq.
McMannus Law, P.C.
56 Chamberlain Street
Brewer, ME 04412

Attorney for Appellee:
Joshua E. Birocco, Esq.
Kayla A. Estes, Esq.
Tucker Law Group
P.O. Box 696
Bangor, ME 04402-0696