

KAREN FULLER
(Appellant)

v.

EDWARD D. JONES & CO.
(Appellee)

and

THE HARTFORD
(Insurer)

Argument held: July 23, 2015
Decided: October 27, 2015

PANEL MEMBERS: Administrative Law Judges¹ Elwin, Collier, and Knopf
BY: Administrative Law Judge Elwin

[¶1] Karen Fuller appeals from a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) granting, in part, her two Petitions for Award and two Petitions for Payment of Medical and Related Services. Ms. Fuller contends that the administrative law judge (ALJ) erred by finding that (1) medical treatment beyond certain dates was no longer caused by Ms. Fuller's work injuries, and (2) Ms. Fuller failed to demonstrate earning incapacity due to the work injuries. Because we conclude that the ALJ did not err with regard to either medical treatment or earning incapacity, we affirm the decision.

¹ Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers are now designated administrative law judges.

I. BACKGROUND

[¶2] Karen Fuller worked as a financial advisor for Edward D. Jones & Co. She worked out of the office in Gray, and visited clients in their homes. On May 11, 2011, she tripped on wires at her work station, falling on her right side and catching herself with her right hand. As a result, she suffered an injury to her left shoulder, upper back, and neck area. Ms. Fuller suffered a second work injury on January 28, 2012, when she slipped and fell on ice at a client's house. This injury caused Ms. Fuller transient left hip pain, as well as pain in her left shoulder, neck and upper back.

[¶3] Ms. Fuller treated primarily with osteopathic manipulations by Dr. Velazquez. She was an active person before the work injuries, and tried to remain as active as possible afterwards.

[¶4] Ms. Fuller filed two Petitions for Payment of Medical and Related Services and two Petitions for Award, seeking payment of medical expenses (primarily for treatment by Dr. Velazquez), and partial incapacity benefits for two periods following her work injuries.

[¶5] The ALJ granted the Petitions for Payment of Medical and Related Services in part, concluding that Ms. Fuller's medical treatment for two finite periods was related to her two work injuries. While the ALJ awarded protection of the Act for both injuries, she denied payment of incapacity benefits, finding that

Ms. Fuller had failed to demonstrate a reduction in earnings during the claimed periods.

[¶6] Ms. Fuller filed a Motion for Additional Findings of Fact and Conclusions of Law, which the ALJ denied. Ms. Fuller appeals.²

II. DISCUSSION

A. Standard of Review

[¶7] The appellate division is “limited to assuring that the [ALJ’s] factual 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.” *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). When a party requests and proposes additional findings of fact and conclusions of law, as 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).

B. Medical Expenses

[¶8] The ALJ concluded that Ms. Fuller’s medical treatment after August, 2011 was not related to the May 11, 2011, work injury. The ALJ cited the following facts to support this conclusion: (1) Ms. Fuller stated to her physical

² Ms. Fuller was represented at the hearing level by one of the Board’s Worker Advocates, but appeared pro se before the appellate division.

therapist on July 28, 2011, that her shoulder “[wa]s feeling pretty good”; (2) Dr. Glass believed this injury had resolved and had discharged Ms. Fuller from care on August 11, 2011; (3) two months had passed before Ms. Fuller sought further treatment; and (4) no clear medical opinion supports ongoing causation after August 2011.

[¶9] The ALJ also found that treatment after May 2012 was not related to the January 28, 2012, work injury. The ALJ cited the following facts to support this conclusion: (1) Dr. Velazquez noted on May 15, 2012, that Ms. Fuller “has been doing well overall although she continues to experience exacerbations depending on her activities”; (2) Ms. Fuller experienced an exacerbation prior to her June 11, 2012, appointment, which she attributed to a more aggressive yoga workout, prolonged sitting, and tennis; and (3) once her condition improved as of May 15, 2012, Ms. Fuller became more active. The ALJ did not find persuasive Dr. Velazquez’s post-June 11, 2012, M-1 forms which continued to check off the “work-related” box, and the record included no other medical opinion to support ongoing causation.

[¶10] Our review of the record demonstrates that the ALJ’s findings are supported by competent evidence. We therefore conclude that the ALJ did not err when determining that the treatment Ms. Fuller received after August 2011 was not caused by her work injuries. *See Pomerleau*, 464 A.2d at 209.

C. Earning Incapacity

[¶11] The ALJ concluded that Ms. Fuller failed to demonstrate a reduction in earnings during the two periods following her work injuries, and thus, she was not entitled to wage loss benefits for those periods. Ms. Fuller contends that it was error for the ALJ to use an average figure when evaluating her post-injury earning capacity, and that the ALJ should have determined either on a week-to-week or month-to-month basis whether her earnings exceeded or fell below her average weekly wage. We disagree with this contention.

[¶12] In general, wage loss benefits are measured as a percentage of the difference between an employee's average weekly wage before the injury and what the employee is able to earn after the date of injury. *See* 39-A M.R.S.A. §§ 213, 214(B) (Supp. 2014). The Workers' Compensation Act does not prescribe a particular method for evaluating an injured employee's post-injury earning capacity. *See Thew v. Saunders of Locke Mills, LLC*, Me. W.C.B. No. 13-4, ¶ 11 (App. Div. 2013) (rejecting the employee's contention that the hearing officer was required to evaluate post-injury earnings by applying statute that specifies methods for calculating average weekly wage, and affirming the decision reached by evaluating several factors relevant to that employee's ability to earn). We have found no authority either requiring Ms. Fuller's suggested method or disallowing

the use of an average figure to determine an employee's post-injury earning capacity.

[¶13] The record shows that it is the nature of Ms. Fuller's business for her earnings to vary widely from week to week. Part of Ms. Fuller's compensation is derived from fees generated by clients' investments. These earnings bear no relationship to Ms. Fuller's work activities for the corresponding week, but instead depend on the amount of money her clients invest, the types of financial instruments they select, market fluctuations, and other variables. The record supports the ALJ's findings that (1) in some weeks Ms. Fuller earned less than her average weekly wage and in some weeks she earned much more; and (2) the average of Ms. Fuller's earnings over the two periods she suffered work-related disability was greater than her average weekly wage. Moreover, Ms. Fuller conceded that she earned more in the years following her work injuries than she had in previous years.

[¶14] The ALJ neither misconceived nor misapplied the law when concluding that Ms. Fuller failed to demonstrate that she suffered reduced earnings due to the effects of her work injuries. *See Pomerleau*, 464 A.2d at 209.

III. CONCLUSION

[¶15] The ALJ did not err when deciding that (1) Ms. Fuller's work injury caused her need for medical treatment for only limited periods of time, and (2) Ms.

Fuller failed to demonstrate that her work injuries caused her to experience reduced earnings.

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. 2014).

Appellant:
Karen Fuller
8 Jessi Lane
Gray, ME 04039

Attorney for Appellee:
Joshua E. Birocco, Esq.
TUCKER LAW GROUP
P.O. Box 696
Bangor, ME 04402