

ROBIN A. HAMILTON
(Appellant/Cross-Appellee)

v.

MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES
(Appellee/Cross-Appellant)

and

STATE OF MAINE WORKERS' COMPENSATION DIVISION
(Insurer)

Argued: October 22, 2020
Decided: January 25, 2022

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

[¶1] Robin Hamilton appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) granting the Maine Department of Health and Human Services' Petition for Review. Ms. Hamilton contends the ALJ erred when determining that a stipend she receives for caring for her disabled sister in her home reflects her current earning capacity. The Department cross-appeals, contending that an additional sum that Ms. Hamilton receives for her sister's room and board should have been included when determining what she is able to earn. We vacate the decision in part, and remand for additional findings of fact and conclusions of law on the issue of Ms. Hamilton's post-injury earning capacity.

I. BACKGROUND

[¶2] Robin Hamilton sustained a work-related psychological stress injury as of December 29, 2010, while working as a case worker for the Department. In a board decision dated May 31, 2016, Ms. Hamilton was awarded ongoing partial incapacity benefits reduced by an imputed earning capacity of \$150.00 per week, representing an ability to work twenty hours per week at the then-prevailing State minimum wage.

[¶3] Thereafter, Ms. Hamilton began to work as a respite caregiver with an agency called Creative Options. She provided care in her home to disabled individuals for periods of time to give respite to the main caregiver. She received a payment of \$90.00 per day, from which she was responsible to pay for her clients' food and beverages. The agency allowed her to select clients who had levels of care compatible with her ability to care for them.

[¶4] As of April of 2019, Ms. Hamilton no longer provided respite care. She entered into a contract with a service agency called Momentum to provide care for her disabled sister in a shared living situation. Momentum pays Ms. Hamilton biweekly payments for her service as a shared living provider that total \$37,000.00 per year to provide care for her sister in her home. Those payments are funded by MaineCare and are classified as a stipend, with guidelines from the State of Maine Office of Aging and Disability Services regarding how that money is to be spent.

[¶5] Angela Wilcox, an administrator for Momentum, testified by deposition.

Ms. Wilcox produced a publication from the State of Maine Office of Aging and Disability Services, which the ALJ summarized:

That office’s publication on the topic describes a shared living provider as self-employed with an obligation to pay for housing, homeowner’s or renter’s insurance, transportation to non-MaineCare locations, vehicle upkeep (including maintenance, registration, inspection, and insurance), certification as a direct support professional, and food and household supplies needed for the disabled individual. Further, the State Office of Aging and Disability states that a shared living provider is not paid wages, but receives a stipend classified by the IRS as a “difficulty of care” payment.

[¶6] In addition, Ms. Hamilton receives \$697.00 per month from her sister’s representative payee to be used for food, utilities, and other home operating costs.

[¶7] The ALJ found that Ms. Hamilton’s new duties as a shared living provider demonstrate a change in economic circumstances since the prior decree sufficient to justify revisiting the existing benefit award. The ALJ further determined that the \$37,000.00 stipend represents Ms. Hamilton’s present wage-earning capacity. The ALJ, however, did not include the \$697.00 payment for room and board in her earning capacity.

[¶8] Both parties filed motions for further findings of fact and conclusion of law pursuant to 39-A M.R.S.A. § 318 (Pamph. 2020). The ALJ issued an amended decree but did not alter the outcome. Ms. Hamilton appeals, and the Department cross appeals.

II. DISCUSSION

A. Post-Injury Earning Capacity

1. Appeal: Difficulty of Care Stipend

[¶9] Ms. Hamilton does not dispute that she retains an earning capacity. She asserts that the ALJ erred when establishing her post-injury earning capacity based on the \$37,000.00 annual stipend she receives for serving as a shared living provider.¹

[¶10] The determination of partial incapacity requires a calculation based on the difference between the employee's pre-injury wage and what the employee is "able to earn" after the injury. 39-A M.R.S.A. § 213 (Pamph. 2020); *Hogan v. Great N. Paper, Inc.*, 2001 ME 162, ¶ 9, 784 A.2d 1083. An *en banc* panel of the Appellate Division recently summarized the ALJ's task when determining what an injured employee is able to earn:

Post-injury earning capacity is based on the employee's physical capacity to earn wages *and* the availability of work within the employee's restrictions. [*Hogan v. Great N. Paper, Inc.*, 2001 ME 162, ¶ 9, 784 A.2d 1083] (citing *Dumond v. Aroostook Van Lines*, 670 A.2d 939, 941 (Me. 1996)). "In all cases involving partial incapacity, including those in which there is no specific job offer or when the employee has failed to conduct a work search, the obligation of the

¹ To the extent that Ms. Hamilton contends that the ALJ erred when determining that her economic circumstances had changed, that contention lacks merit. In the 2016 decree, the ALJ found that Ms. Hamilton was capable of working twenty hours per week at minimum wage. In the current decree, the ALJ found that "the duties assumed by Ms. Hamilton as a shared living provider, seven days a week, are greater than the previously established work capacity of 20 hours per week." This finding has support in the record and is legally sufficient to overcome the *res judicata* effect of the prior decree. See *McIntyre v. Great N. Paper, Inc.*, 2000 ME 6, ¶ 6, 743 A.2d 744.

[ALJ] is to determine what the employee is able to earn.” *Id.* (quotation marks omitted). In carrying out this task, an ALJ must consider not only whether the employee is physically capable of performing the employment, but also whether the employment *is actually open to him*. *Id.* ¶ 10 (citing *Johnson v. Shaw’s Distrib. Ctr.*, 2000 ME 191, ¶¶ 14-17, 760 A.2d 1057).

Moreover, an employee’s post-injury earning capacity is established based on multiple factors. Age, educational background, intelligence, work experience, vocational training, among other factors, are appropriately considered when determining what jobs are available to the employee and thus, what the employee is able to earn after being injured at work. *See Morse v. Fleet Fin. Group*, 2001 ME 142, ¶ 9, 782 A.2d 769.

Martin v. George C. Hall & Sons, Inc., Me. W.C.B. No. 21-27, ¶¶ 8-9 (App. Div. 2021) (footnote omitted). The ultimate objective is “to determine the wage that would have been paid in the open labor market under normal employment conditions to the claimant as injured, taking wage levels, hours of work, and claimant’s age and state of training” into consideration. 7 ARTHUR K. LARSON & LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW, § 81.01 (Matthew Bender, Rev. Ed. 2020).

[¶11] In this case, the Department bore the burden of proof on the issue of Ms. Hamilton’s post-injury earning capacity. *Dumond v. Aroostook Van Lines*, 670 A.2d 939, 941 (Me. 1996). Although evidence of substantial post-injury earnings constitutes *prima facie* evidence of post-injury earning capacity, that evidence can be rebutted. *See Fecteau v. Rich Vale Constr., Inc.*, 349 A.2d 162, 165-66 (Me. 1975); *see also, e.g., Mailman v. Colonial Acres Nursing Home*, 420 A.2d 217, 220

(Me. 1980) (stating that post-injury earnings in the pre-injury job did not establish earning capacity when the employee remains disabled due to the injury and was working in an accommodated position for a sympathetic employer and with the assistance of coworkers).

[¶12] The Department attempted to meet its burden with evidence that Ms. Hamilton is being paid the “difficulty of care” stipend for work that she performs for a family member in her own home, contending that the payment was not proven to represent living or other expenses and therefore represents her current compensation. Ms. Hamilton asserts that the stipend does not fairly or accurately represent what she could earn in the ordinary labor market and therefore cannot establish her earning capacity.

[¶13] The ALJ expressly found that “Ms. Hamilton’s current situation may not be readily replicated.” He nevertheless concluded that “the payment of \$37,000.00 per year on a biweekly basis is analogous to Ms. Hamilton’s present wage earning capacity.” He reasoned:

[C]omplicating the analysis is the nature of Ms. Hamilton’s injury. Unlike an orthopedic injury that would have comparatively little bearing on Ms. Hamilton’s ability to interact with one client or another provided the clients had similar levels of need, I find persuasive Ms. Hamilton’s testimony that with her psychological symptoms due to the work injury, she is able to be a shared living provider to her sister because of their family relationship but likely could not do so for a stranger. Further, that family relationship permits Ms. Hamilton to draw on her mother and daughter for additional support in meeting her sister’s needs. . . .

While Ms. Hamilton's current situation may not be readily replicated, . . . [a]fter reviewing the testimony of Ms. Wilcox and the deposition exhibits regarding the use of funds received by a shared living provider like Ms. Hamilton, I . . . find persuasive the Employer's argument that the payment of \$37,000.00 per year on a biweekly basis is analogous to Ms. Hamilton's present wage earning capacity, while the monthly payment of \$697.00 represents the increased living expenses of having a shared living client in her home and thus is not indicative of further earning capacity.

[¶14] Thus, despite finding that Ms. Hamilton continues to suffer the effects of her work-related mental stress injury, and in essence, that she is working in a unique, accommodated position performed with the help of family members that could not be readily replicated in the ordinary labor market, the ALJ determined that the difficulty of care stipend represents Ms. Hamilton's post-injury earning capacity.

[¶15] We recognize that this case presents a novel question. However, we find the ALJ's ultimate conclusion—that the amount of the stipend represents Ms. Hamilton's current post-injury earning capacity—is inconsistent with the factual findings made by the ALJ. The ALJ's finding that Ms. Hamilton could not likely perform similar services for a stranger suggests that she could not find a comparable job in the ordinary labor market, and that the stipend is not reflective of her earning capacity.

[¶16] Accordingly, we vacate the decision and remand for additional findings of fact and conclusions of law on the issue of what Ms. Hamilton is able to earn, with due consideration paid to her physical (and in this case, psychological) capacity

to earn wages and the availability in the ordinary labor market of work within her restrictions. *Hogan*, 2001 ME 162, ¶ 9, 784 A.2d 1083.

2. Cross-Appeal: Exclusion of Payment from Representative Payee

[¶17] On cross-appeal, the Department contends the ALJ erred when excluding from post-injury earning capacity the \$697.00 per month payment. We disagree. The ALJ determined that payment from the representative payee “represents the increased living expenses of having a shared living client in her home and thus is not indicative of further earning capacity.” This finding is supported by competent evidence in the record, and the ultimate determination neither misconstrues nor misapplies the law. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983).

The entry is:

The administrative law judge’s decision is vacated in part and remanded for additional findings of fact and conclusions of law on the issue of post-injury earning capacity.

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 (Pamph. 2020).

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/cross-appellee:
G. Bradley Snow, Esq.
TANNOUS & SNOW, LLC
P.O. Box 789
Millinocket, ME 04430

Attorney for appellee/cross-appellant:
Anne-Marie Storey, Esq.
John K. Hamer, Esq.
RUDMAN WINCHELL
P.O. Box 1401
Bangor, ME 04402