COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 032903-11**

Jacqueline Lawson	Employee
Brigham and Women's Hospital	Employee
Partners Healthcare System, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabricant and Harpin)

This case was heard by Administrative Judge Sullivan.

APPEARANCES
John Moran, Esq., for the employee
Tamara L. Ricciardone, Esq., for the self-insurer

LONG, J. Employee's appeal notes numerous errors in a decision awarding her § 35 partial disability and §§ 13 and 30 medical benefits for a right knee injury, while finding no causal relationship for a left knee injury. We affirm the decision but adjust the earning capacity.

On November 22, 2011, the employee injured her right knee at work while assisting a patient in her capacity as a registered nurse. (Dec. 7.) The employee went out of work due to her right knee injury on December 21, 2011, underwent arthroscopic surgery to repair a torn lateral meniscus in the right knee on February 28, 2012, and eventually returned to modified transitional duty as a registered nurse on April 29, 2012. (Dec. 8.) Due to chronic symptoms and pain that increased with activity, the employee left work again on June 22, 2012, her last day at work for the employer. The self-insurer accepted liability for the right knee injury and paid § 34 temporary total disability benefits from December 22, 2011 to April 28, 2012, and from June 23, 2012, and continuing. (Dec. 8.) The self-insurer filed a complaint to discontinue the § 34 benefits, which was denied following a § 10A conference before a different administrative judge,

on December 19, 2013.[1] The self-insurer appealed that conference order. Pursuant to § 11A the employee was examined by an impartial physician in April 2014, but only for the right knee. (Dec. 2.) The case was scheduled for a hearing on November 20, 2014, at which time the parties requested, and the administrative judge allowed, a second impartial examination with the same doctor for the purpose of examining both knees and evaluating causation and the extent of disability. [2] (Dec.2.) The second impartial examination took place on April 15, 2015, and the impartial physician was subsequently deposed on October 20, 2015. The hearing resumed on July 9, 2015. The self-insurer asserted § 1(7A) as an affirmative defense to both knee claims, and the employee

---

[1] The Conference Memorandum, Form 140, (Ex. 5), indicates the self-insurer raised G. L. c. 152, § 1(7A) for a left knee injury and for degenerative arthritis for the right knee injury. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161, n.3 (2002) (permissible to take judicial notice of Board file). Section 1(7A) provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[2] The parties agreed to submit a series of questions to the impartial physician addressing the § 1(7A) issue and the left knee, (Ex. 6), pertinent portions of which include:

> Assume the employee suffered a prior non-work-related injury to her left knee that resulted in surgical repair to her medial meniscus.
>
> Whether the employee's underlying pre-existing left knee injury was aggravated by the November 22, 2011 injury?
>
> Did the injury to the employee on November 22, 2011 combine with the pre-existing left knee condition to cause or prolong disability?
>
> Does that aggravation remain a major but not necessarily predominant cause of any ongoing disability?

ultimately stipulated to its applicability. [3] (Dec. 2, Tr. II, 10) The medical evidence submitted at the hearing consisted only of the impartial physician reports dated April 18, 2014 and April 15, 2015, and the impartial physician deposition transcript dated October 20, 2015. (Dec. 2.) Each party presented a vocational expert witness. (Dec. 16.) On November 1, 2016, the judge issued a decision adopting the testimony and reports of the self-insurer's vocational expert, ordering the modification of the employee's benefits from § 34 to § 35, and ordering §§ 13 and 30 medical benefits for the employee's right knee only.[4] (Dec. 18.)

The employee raises three issues on appeal, arguing the judge, 1) committed error when he adopted medical restrictions that were allegedly inconsistent with adopted vocational expert opinion; 2) erroneously used salary information from September 2015 to establish an earning capacity in April 2014; and, 3) failed to utilize the correct legal standard when addressing causal relationship of the left knee. We address the employee's arguments in turn.

Regarding the employee's limitations in physical capacity, the judge found as follows:

> I have adopted the medical opinion offered by Dr. Harris, most directly at his deposition, as to the physical limitations to be observed by Ms. Lawson as a result of her right knee injury and ongoing arthritic condition, both causally-related. Ms. Lawson was unable to return on a permanent basis to her prior position as a High Risk Labor and Delivery Nurse. Dr. Harris did offer the opinion that Ms. Lawson was able to return to light duty work which would allow her to sit or stand at-will, avoid repetitive bending and stooping, or lifting and carrying anything heavier than 10 pounds.

(Dec. 15.)

---

[3] The transcript of the first day of hearing, on November 20, 2014, will be referred to as "Tr. I;" the transcript of the morning session of the second day of hearing, July 9, 2015, will be referred to as "Tr. II."

[4] The judge found no causal relationship of the employee's left knee condition to her work. (Dec. 17.)

The employee argues that the physical restrictions outlined by Dr. Harris (i.e., that the employee be able to sit or stand at will) are inconsistent with the sedentary employment positions identified by the vocational expert, since sedentary work involves sitting most of the time. However, this argument fails to acknowledge that the description of sedentary work offered by the vocational expert and adopted by the administrative judge "involves sitting most of the time, but may involve walking or standing for brief periods of time." (Ex. 23 & Ex. 24).

When deciding ultimate issues in a case, a fact-finder "is permitted to draw such inferences from the evidence and all the circumstances as a reasonable man could draw." Sanderson's Case, 224 Mass 558, 561 (1916). A judge's discretion permits "reasonable inferences" from facts with evidential support, and where evidence does not compel one conclusion or another, a judge does not abuse his discretion in making a decision based on such reasonable inferences. Judkin's Case, 315 Mass 226, 230 (1944). We see no error in the judge's adoption of Dr. Harris' opinion that the employee could perform sedentary work that allows her to sit and stand at will, while also adopting the vocational expert's opinion on sedentary employment positions. The judge drew reasonable inferences when he reconciled the physical restrictions and vocational evidence, and his determination was not arbitrary, capricious or beyond the scope of his authority.

The employee next argues that the judge committed error when he relied on job salary information from September, 2015 to establish an earning capacity in April, 2014.

The judge found:

> Rhonda Jellenik, M.A. testified on behalf of the self-insurer. She had produced two reports entitled Labor Market Survey, dated July 3, 2014 (Exhibit 23) and September 4, 2015 (Exhibit 24). . . . Ms. Jellenik opined that based upon the testimony offered by Ms. Lawson, in the context of the opinions offered by Dr. Harris, the claimant was physically able and qualified to hold several positions including Telephone Triage Nurse at $32.00 per hour, Client Relations Nurse at $28.85 per hour, Staff Development Coordinator at $18.85 per hour and Telephone Triage Nurse at $28.00 per hour. The average available wage among those positions was $29.42 per hour. I adopt the above-referenced opinions offered by Ms. Jellenik and find that Ms. Lawson had an earning capacity of

> $29.42 per hour, $1,176.80 per week, as of April 19, 2014, the day following the original impartial exam and report produced by Dr. Harris.

(Dec. 15-16.)

The employee alleges the jobs the judge found the employee able to perform all came from a September 4, 2015, vocational expert report, (Ex. 24), and therefore, reliance on the average of the hourly wages of those jobs to establish an earning capacity over a year earlier is arbitrary, capricious or contrary to law. (Employee br. 18.) However, a vocational report dated July 3, 2014, (Ex. 23), identifies a client relations nurse position paying $28.85 an hour, the same as in the 2015 report (Ex.24). This is one of the specific jobs listed by the judge in the hearing decision. "A vocational expert's opinion does not stand on the same footing as testimony by a medical expert, in that a judge does not lose his expertise on earning capacity, even in the presence of expert vocational testimony." Martin v. Sunbridge Care and Rehabilitation for Hadley, 22 Mass. Workers' Comp. Rep. 1, 4-5 (2008), citing Coelho v. National Cleaning Contractor, 12 Mass. Workers' Comp. Rep. 518, 521-522 (1998). An administrative judge possesses discretion to use his own judgment and knowledge as to whether vocational expert testimony is helpful in assessing the economic component of an earning capacity. Sylva's Case, 46 Mass. App. Ct. 679, 681-82 (1999). It was thus permissible for the judge to determine the July 2014 vocational report was relevant to establishing the employee's earning capacity three months earlier.

Therefore, the judge would have been within his discretion to assign a rate of $28.85 per hour as an earning capacity, as it is a reasoned explanation supported by a factual source. Eady's Case, 72 Mass. App. Ct. 724, 726 (2008). As this is the only adopted hourly rate common to both vocational reports, we order that the earning capacity assigned by the judge be modified to $28.85 an hour, or $1,154.00 per week.[5]

[5] General Laws, c. 152, § 35D states, in relevant part:

This will result in a § 35 rate of $490.52 as of April 19, 2014, the day following the original impartial examination by Dr. Scott Harris, a date supported by ample evidence in the hearing decision to establish the employee's partial disability and earning capacity.

The employee's final argument on appeal is that § 1(7A) was improperly applied to the employee's claim regarding her left knee condition. However, as noted earlier, the employee concedes the § 1(7A) defense is applicable to both knees. (Dec. 2, Tr. II, 10.) The employee's failure to raise any objection below as to the use of § 1(7A) as the applicable standard is fatal to her argument now advanced for the first time during this appeal. See Bauman v. Faulkner Hospital, 8 Mass. Workers' Comp. Rep. 238, 239 (1994); Philips v. Sylvania Electric Products, 8 Mass. Workers' Comp. Rep. 218, 219 (1994) ("As the issue was not raised at hearing it is waived"). We are satisfied that the judge properly identified and analyzed the left knee condition, which all parties acknowledged was a pre-existing non-work related condition.

Accordingly, we affirm the decision but decrease the employee's earning capacity and order a new § 35 rate of $490.52. Pursuant to G.L. c. 152, §13A(6), the insurer is directed to pay the employee's counsel a fee of $1,613.55.

So ordered.

> For purposes of sections thirty-four, thirty-four and thirty-five, the weekly wage the employee is capable of earning , if any, after the injury, shall be the greatest of the following:-
>
> . . . .
>
> (4) The earnings that the employee is capable of earning.

The greatest amount of earnings listed by the judge is $32.00 per hour; however, the job associated with this rate was only listed in the September 2015 vocational report and an earning capacity based on this figure would not have been a "reasoned explanation supported by a factual source" for the period of April 19, 2014 through September 4, 2015. Additionally, applying the $32.00 per hour figure would benefit the self-insurer who did not appeal the hearing decision. This is impermissible. Brackett v. Modern Continental Constr. Co., 22 Mass. Workers' Comp. Rep. 319, 324 (2008); see Fay v. Federal Nat'l Mtge. Ass'n., 419 Mass. 782, 789 (1995)("failure to take a cross appeal precludes a party from obtaining a judgment more favorable to it than the judgment entered below").

Martin J. Long
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: **September 27, 2017**

William C. Harpin
Administrative Law Judge