COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024722-04**

Mary Jane Doonan (deceased)	Employee
Pointe Group Health Care	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Levine and Harpin)

The case was heard by Administrative Judge McManus.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
George D. Kelly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

CALLIOTTE, J. Both parties appeal from the fourth hearing decision[1] in this case, in which an administrative judge awarded the employee five years of § 35 partial incapacity benefits between 2004 and 2009, in accordance with her finding that the employee[2] was capable of working thirty-two hours per week in a light or sedentary minimum wage job. The employee argues the judge abused her discretion in failing to award her attorney an enhanced fee. We disagree and summarily affirm the decision on

[1] The first hearing decision of January 31, 2007, is hereinafter referred to as Dec. I; the second hearing decision of April 30, 2010, as Dec. II; the third hearing decision of October 29, 2010, as Dec. III; and the fourth hearing decision of August 23, 2013, as Dec. IV.

[2] The employee died on April 9, 2012, prior to the last hearing, which was held on February 1, 2013. (Dec. IV, 3.) Her son, Sean McCurley, testified at that hearing that he is the executor of her estate. Id. Subsequent to the hearing, the insurer agreed to pay Mr. McCurley's § 39 claim for legal services for appointment as legal representative. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of board file). In Decision IV, the judge listed the claimant as "Estate of Mary Jane Doonan," although there had been no formal substitution of the estate or Mr. McCurley as the executor of the estate, as the proper party. Under these circumstances, we think the award may be paid to the estate. Cf. DaSilva v. Palladino Landscaping, 25 Mass. Workers' Comp. Rep. 259, 260 and n.2 (2011).

that issue. Watson v. Rodman Ford Sales, 27 Mass. Workers' Comp. Rep. 23, 25 (2013). The insurer argues that the judge: 1) made credibility findings which are arbitrary and capricious; 2) exceeded the scope of two remand decisions issued by the Appeals Court,[3] by impermissibly reconsidering issues which had previously been decided; and 3) erred by finding the employee could work only thirty-two hours per week. We affirm, discussing the first two issues and summarily affirming as to the third.[4]

The employee, a registered nurse since 1964, worked her entire career in patient care, primarily in nursing home settings; she also had some hospital nursing experience and some experience as a charge nurse. In addition, she operated a tap dancing business, teaching dance classes a few hours a week. (Dec. II, 4-5, 13.) On August 8, 2004, the employee fractured her right ankle while working for the employer, a nursing home. Her ankle improved, but she developed swelling and pain in her left knee. She did not return to her nursing job. However, on September 22, 2004, she returned to teaching dance, which she could do while sitting, if necessary. (Dec. II, 6.)

In the first hearing decision, the judge found the employee had essentially recovered from her ankle fracture, but her left knee problems, which the judge found to be causally related to her industrial injury, continued to restrict the employee to sedentary activities, with limitations on standing, walking, stooping, and lifting over twenty-five pounds. (Dec. I, 9, 11-12.) The judge awarded § 34 benefits, based on an average weekly wage of $952, from the date of injury until September 22, 2004, and § 35 benefits thereafter, assigning two different earning capacities based on the same § 11A opinion. (Dec. I, 18-19.) Without the aid of expert vocational testimony, she found the employee capable of returning to a position such as office nurse or file reviewer. (Dec. I,

[3] Doonan's Case, 81 Mass. App. Ct. 1121 (March 14, 2012)(Memorandum and Order Pursuant to Rule 1:28)("Doonan I"); and Doonan's Case, 82 Mass. App. Ct. 1112 (September 5, 2012)(Memorandum and Order Pursuant to Rule 1:28)("Doonan II").

[4] Regarding the third issue, the court in Doonan I stated the judge had appropriately found the employee had the capacity to work thirty-two hours a week, "based on the employee's past ability to work, the nature of her injury, and the limitations upon her. . . ."

13.) Following cross appeals, the reviewing board recommitted the case for the judge to resolve the inconsistency created by using the impartial disability opinion to support both earning capacity assignments. Doonan v. Pointe Group Health Care and Sr. Ctr, 23 Mass. Workers' Comp. Rep. 53 (2009).

The remainder of the litigation revolved almost exclusively around the employee's earning capacity. In the recommittal decision, the judge again found, without allowing additional evidence, that the employee could return to a nursing position, including that of "office nurse, nurse supervisor, or file reviewer." (Dec. II, 14.) She assigned the employee a $640 weekly earning capacity based on her finding the employee could perform part-time light or sedentary work for thirty-two hours per week, at the rate of $20 per hour. Accordingly, she awarded § 35 benefits from September 22, 2004, and continuing, at the rate of $187.20 per week. (Dec. II, 14, 20.) The case was summarily affirmed by the reviewing board, and the employee appealed to the Appeals Court.

During the pendency of the original claim and appeals, the employee filed a second claim for maximum § 35 benefits at the rate of $428.40 per week, from February 1, 2007, and continuing. (Dec. III, 3.) For the first time, expert vocational testimony was presented at hearing. (Dec. III, 1.) The judge specifically rejected the opinion of the employee's vocational expert, Rhonda Jellenik, that the employee would not be a viable candidate for any nursing position. (Dec. III, 12-13.) The judge recited, without adopting, the testimony of the insurer's vocational expert, Susan Chase, that there are positions for older, experienced nurses where the employer will provide training, as needed, and that the employee could avail herself of computer training at career resource centers. Id. Finding no credible evidence the employee's disability had worsened, (Dec. III, 8, 11), the judge again found the employee continued to be able to work "in a variety of settings as a registered nurse, that include doctor's office or at a desk position for a hospital." (Dec. III, 13.) The employee appealed the third decision; the reviewing board summarily affirmed it; and the employee appealed to the Appeals Court.

The Appeals Court subsequently issued two decisions pursuant to Rule 1:28. In Doonan I, on appeal from the reviewing board's summary affirmation of the second hearing decision, the court found the judge had appropriately addressed the first two elements in the earning capacity analysis--the employee's medical limitations and her employment capabilities-- but had not adequately addressed the third--the market for the employee's skills. Id.; see Eady's Case, 72 Mass. App. Ct. 724, 727 (2008). The court held the judge did not explain how she arrived at the $20 per hour figure, or provide any explanation "linking this amount to the jobs [she] concluded the employee could undertake. Nor did the administrative judge explain precisely what the jobs described would entail." Doonan I, supra, citing Eady's Case, supra, at 728. In addition, the court noted that the judge seemed to conclude the employee could not perform certain other jobs requiring a facility with computers, which the employee testified she did not have. Doonan I, supra n.3. The court vacated the amount of the partial disability award and remanded the case for recommittal to the judge for

> "a reasoned computation of that amount consistent with this [memorandum and order], including a reference to the factual source[s] for the monetary figure. On remand, 'the information already present in the case file, or reliable publications of labor statistics, or additional evidence' may be consulted." [Eady's Case, supra.] In all other respects, the decision of the reviewing board is affirmed.

Doonan I, supra (brackets in original).

The second decision issued pursuant to Rule 1:28, Doonan II, arose from the third hearing decision in which the judge denied the employee's claim for an increased partial incapacity benefit. The court vacated the award and remanded the case for recommittal to the administrative judge "for reconsideration of the amount of the partial disability award in light of our memorandum and order in that previous appeal." Id. Further, "[t]o the extent that the remand in Doonan I may not have resolved *any* question the administrative judge may have with respect to earning capability as it pertains to the present appeal," the judge may consult the same resources or take additional evidence, as indicated in Doonan I. Doonan II, supra (emphasis added).

Pursuant to the two Appeals Court remand decisions, the judge held another hearing at which she took additional evidence. The employee's son, Sean McCurley, testified, as did Ms. Jellenik and Ms. Chase, the employee's and the insurer's vocational experts, respectively. (Dec. IV, 3-4.) After considering the "newly admitted evidence as well that previously admitted," the judge adopted Ms. Jellenik's expert vocational opinion "as provided in her most recent testimony . . . that the Employee is/was not capable of employment following her industrial injury, in the area of administrative nursing . . . , as the Employee lacked the necessary education, experience and computer skills required." (Dec. IV, 5.) The judge also adopted the deceased employee's prior testimony that she did not have computer skills or use a computer in the course of her employment. The judge found the employee "capable of employment in a light duty, sedentary position such as cashier, desk clerk and customer service personnel," earning $8.00 per hour for thirty-two hours per week, and awarded the employee § 35 benefits at the rate of $417.60 per week, based on an earning capacity of $256 per week, from September 22, 2004, to September 22, 2009, when those benefits were exhausted. Id.

On appeal, the insurer first argues the judge's credibility findings adopting Ms. Jellenik's vocational testimony that the employee was not a viable candidate for an administrative nursing position are arbitrary and capricious. The insurer maintains the case should be recommitted for the judge to explain why she adopted essentially the same vocational testimony she had previously rejected in the third decision. We find no error.

Credibility determinations as to witnesses testifying in person before an administrative judge are generally "immune from appellate review, as long as they are based on the evidence and reasonable inferences drawn therefrom." Frechette v. Northeastern Univ., 21 Mass. Workers' Comp. Rep. 105, 110 (2007). See also Brommage's Case, 75 Mass. App. Ct. 825, 828 (2009), quoting from Johnston v. Johnston, 38 Mass. App. Ct. 531, 536 (1995)("judge's credibility determinations 'close to immune from reversal on appeal except on the most compelling of showings' "). Here, the judge heard new testimony from both vocational experts which, although similar to

their prior testimony, was certainly not identical. After considering the old and new evidence, the judge found Ms. Jellenik's opinion, "*as expressed in her most recent testimony*, credible and convincing." (Dec. IV, 5; emphasis added.) In their new testimony, both vocational experts agreed that, without computer experience, the employee would need computer training to prepare for her job search. [5] The judge specifically credited Ms. Jellenik's testimony regarding the necessity for computer skills in administrative nursing positions, and explicitly found that the employee did not have those skills,[6] or the education or experience to perform administrative nursing jobs. Id. Her conclusion is logical and easily understood, and thus is not arbitrary and capricious. Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3 (1993).

The cases cited by the insurer in support of its argument are inapposite. In those cases, findings in a second decision were held to be arbitrary and capricious where *no* additional evidence was admitted between the first and second decisions, and no reason was given for making findings in the second decision which were contrary to those in the first. See e.g., Retirement Bd. of Somerville v. Contributory Retirement Appeal Bd., 38 Mass. App. Ct. 673, 676-679 (1995)(identical record in both cases; no explanation why judge made contrary findings); DeLuca v. Bingay and Son Corp., 9 Mass. Workers' Comp. Rep. 59, 62 (1995)("Issuance of a new decision with orders oppositional to an earlier decision without receipt of additional evidence, argument or even a rational explanation justifying the difference between the two, is clearly arbitrary, capricious and contrary to law"). As we explained in Charles v. Boston Family Shelter, 11 Mass. Workers' Comp. Rep. 203 (1997):

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[5] The judge recited, without adopting, the testimony of Susan Chase, the insurer's vocational expert, that, if the employee had no computer experience, she would have to take some computer training in preparation for her job search. Neither she nor Ms. Jellenik had seen the employee since the prior hearing. (See Tr. 24, 31-32, 35.)

[6] In Decision II, the judge made no findings regarding the employee's computer skills. In Decision III, she found, [t]he employee does not use a computer and has not utilized one in her prior employment." (Dec. III, 6). However, she did not discuss how the employee's inexperience with computers might affect her ability to work as a nurse in a doctor's office or at a desk in a hospital, jobs which she found the employee could perform. (Dec. III, 13.)

> The pivotal issue in *Deluca* was not that the judge issued a second decision with a result different from the first, but that he did so *without any additional evidence* to supplement the record or to justify another outcome. See *DeLuca*, *id*. Here, contrary to the employee's assertion, additional evidence was entered into the record at the second hearing, [] rendering *DeLuca* inapposite to the case at hand.

Id. at 205 (italics in original). The judge did not err in crediting Ms. Jellenik's testimony.

Next, the insurer argues that the judge's decision exceeded the scope of the Appeals Court's remands, which, it claims, limited the judge to determining the amount the employee could earn at the types of administrative nursing jobs she had previously found the employee could perform. We disagree.[7]

The court recommitted the case for "a reasoned computation of [the earning capacity] amount." Doonan I, supra. This computation takes into account the employee's medical limitations, her vocational capabilities (including her age, education work experience, and transferable skills), and the market for those skills. Eady's Case, supra at 727. If any aspect of these factors changes, it will affect the others. The court in Doonan I called into question the judge's findings regarding the duties of the administrative nursing jobs she found the employee could do, stating that the judge did not explain precisely what jobs such as office nurse, nurse supervisor, or file reviewer

[7] Even if the judge's decision had exceeded the scope of the remand orders, the insurer waived its right to make that argument on appeal, by essentially trying the vocational component anew in the fourth hearing. See Lafleur v. Department of Corrections, 28 Mass. Workers' Comp. Rep. ___ (October 23, 2014)(and cases cited). The judge made it clear that she understood the issues "revolve[d] around the vocational analysis and the earning capacity that was assigned in the prior decisions." (Tr. 3.) The parties stipulated they were "limited to [the] vocational analysis and the directions provided by the two Appeal Court [d]ecisions." (Tr. 9.) Both parties again called their vocational experts, who testified *without objection* regarding the types of jobs for which the employee was qualified, with particular emphasis on the necessity of computer skills for administrative nursing positions, and the lack of the employee's training and experience in that area. Not only was the vocational evidence admitted for its full probative value, Nancy P. v. D'Amato, 401 Mass. 516, 524-525 (1988), but, by submitting vocational evidence regarding the particular jobs the employee could perform and by failing to object to the employee's evidence to that effect, or to the judge's statement of the issues, the insurer waived its right to claim on appeal that the issue was limited merely to computing the employee's earning capacity based on the rather vague types of administrative nursing jobs the judge had previously found the employee could perform. See Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001)(objections, issues or claims not raised below are waived on appeal).

would entail. In addition, the court noted that the judge had found the employee could not perform certain jobs requiring a facility with computers, which the employee testified she did not have. Id. n.3. We view these statements, as did the judge, as an invitation for her to specifically consider and make findings on the employee's computer skills and their impact on the employee's ability to perform administrative nursing jobs. Restricting the judge to determining earning capacity based on jobs which required computer skills and experience the employee did not have, as the insurer urges, would result in an arbitrary and capricious conclusion.

The judge's construction of the remand orders is consistent with the court's decision in Eady's Case, supra. There, the court held that the judge's assignment of a specific earning capacity, based on a finding the employee was capable of light duty employment, was not grounded in specific subsidiary findings with any discernible basis. Id. at 727-728. Moreover, "the administrative judge's reference to 'light duty employment' without any explanation of what such a position would entail makes his assignment of a $975 per week earning capacity even more difficult to parse." Id. at 728. The decision contemplates that, on remand, the administrative judge would be free to make more specific findings, based on additional evidence, regarding the types of jobs the employee could perform. As in Eady's Case, the judge in Decisions II and III failed to describe the duties of the administrative nursing jobs she found the employee could do. Once she determined computer training was necessary for those jobs, and clearly addressed the employee's facility (or lack thereof) with computers, she appropriately found the employee unable to perform those administrative nursing jobs. The judge's decision here was reasonable and did not exceed the scope of the remands.

We also find no merit to the insurer's argument that reconsideration of the types of jobs the employee could perform is barred by the law of the case doctrine and principles of res judicata. The law of the case doctrine applies, "probably exclusively, to interlocutory decisions, and gives to them a degree of force not allowed them by the doctrine of *res judicata*." Henry T. Lummus, *The "Law of the Case" in Massachusetts*, 9

B.U. L. Rev. 225 (1929). "[I]t is weaker than *res judicata*, for it is without force beyond the particular case and does not limit the power of the court." Id. at 225; see Peterson v. Hopson, 306 Mass. 597, 601 (1940)("[t]hough there is no duty to reconsider a case, an issue, or a question of fact or law, once decided, the power to do so remains in the court until final judgment or decree"). The primary application of the law of the case doctrine requires that, "after a decision on appeal, the points settled thereby cannot be questioned when they arise upon subsequent proceedings in the lower court, except upon grounds which do not impugn the correctness of the decision on appeal." Lummus, supra, at 226. Here, the duties of the jobs the judge found the employee could do in Decisions II and III were not settled, nor had the judge made explicit findings regarding the employee's lack of computer skills and its impact on her ability to perform administrative nursing jobs. See supra note 6. Thus, the law of the case doctrine does not apply to bar the judge from considering those issues in the fourth hearing decision. More obviously, res judicata does not apply to bar relitigation of the types of jobs the employee could perform, because, as all decisions were interlocutory, there had been no final judgment. See, e.g., Laroche v. G&F Indus., Inc., 27 Mass. Workers' Comp. Rep. 51, 53-54 (2013), and cases cited.

The decision is affirmed. Pursuant to § 13A(6), the insurer shall pay employee's counsel a fee of $1,596.24.

So ordered.

Carol Calliotte
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: ***December 15, 2014***

William C. Harpin
Administrative Law Judge