ROBIN A. HAMILTON
(Appellee/Cross-Appellant)

v.

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

and

STATE OF MAINE WORKERS' COMPENSATION DIVISION
(Insurer)

Argument held: February 8, 2023
Decided: April 11, 2023

PANEL MEMBERS: Administrative Law Judges Sands, Chabot, and Stovall

Majority: Administrative Law Judges Sands and Stovall
Concurrence and dissent: Administrative Law Judge Chabot

BY: Administrative Law Judge Sands

[¶1] The Maine Department of Health and Human Services appeals from a decision (issued after a remand from the Appellate Division) of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) granting the Department's Petition for Review. The Department contends the ALJ erred in concluding that Robin Hamilton is limited to a full-time, minimum wage-earning capacity because she receives a yearly stipend of $37,000.00 for serving as her sister's shared living provider, and an additional sum of $697.00 per month for her sister's room and board. The Department further contends the Appellate Division erred in the previous appeal with respect to its legal conclusions and instructions to

the ALJ on remand. *See Hamilton v. Me. Dep't of Health and Human Servs.*, Me. W.C.B. No. 22-04 (App. Div. 2022) (*Hamilton II*).[1] Ms. Hamilton cross-appeals, arguing that there is insufficient medical evidence to support a finding that she can work full-time in the ordinary labor market. We affirm the decision.

I. BACKGROUND

[¶2] The facts and procedural history of this case are substantially set forth in the prior Appellate Division decision and we will not repeat them herein. The *Hamilton II* panel rendered two key holdings. First, the panel found no error in the ALJ's exclusion of the $697.00 monthly payment from the earning capacity analysis based on the factual findings that the payment represented increased living expenses associated with housing a shared living client. Second, the panel determined the ALJ's conclusion that the stipend represented Ms. Hamilton's earning capacity was inconsistent with the factual findings that (1) in performing her role as shared living provider, Ms. Hamilton received support and assistance from other family members; and (2) she could not likely perform similar services for a stranger. Accordingly, the panel remanded the case "for additional findings of facts and conclusions of law on the issue of what Ms. Hamilton is able to earn, with due consideration paid to her

[1] This is the third occasion on which this case has been appealed to the Appellate Division. The first appellate decision rendered in this case, *Hamilton v. Maine Department of Health and Human Services*, Me. W.C.B. No. 18-4 (App. Div. 2018) (Hamilton I), affirmed an ALJ's award of fixed partial incapacity benefits reduced by an imputed earning capacity of $150.00 per week.

physical (and in this case, psychological) capacity to earn wages and the availability in the ordinary labor market of work within her restrictions."

[¶3] On remand, the ALJ made new findings with respect to Ms. Hamilton's work capacity. The ALJ relied on Dr. James Werrbach, Ms. Hamilton's treating psychologist, in finding that Ms. Hamilton was limited to working within her own home. He further relied on deposition testimony of Dr. Caryle Voss, a psychiatrist who examined Ms. Hamilton at the Department's request pursuant to 39-A M.R.S.A. § 207, in concluding that Ms. Hamilton "demonstrated a full-time capacity for such work from her own home."

[¶4] The ALJ then turned to his analysis of Ms. Hamilton's earning capacity. He acknowledged the absence of any "persuasive evidence in the record upon which to base a finding about 'the availability in the ordinary labor market of work within her restrictions' as directed by the Appellate Division." Specifically, he rejected a labor market report and testimony from vocational rehabilitation specialist Christopher Temple noting that his conclusions discussed "only the [full-time] shared living provider earnings that the Appellate Division stated were not a legally correct measure of Ms. Hamilton's retained earning capacity." As such, the ALJ considered Ms. Hamilton's personal characteristics including age, education, vocational history, work restrictions, and presentation at the hearing. Based on these

factors, the ALJ concluded that Ms. Hamilton retains full-time, minimum-wage earning capacity.

[¶5] Ms. Hamilton filed a motion for further findings of facts and conclusion of law pursuant to 39-A M.R.S.A. § 318. The ALJ granted this motion and issued an amended decree but did not alter the outcome. These appeals followed.[2]

II. DISCUSSION

A. The Department's Appeal

[¶6] The Department reiterates arguments it raised (and that the Appellate Division considered) in the previous appeal.[3] The Department contends that the yearly stipend of $37,000.00, received by Ms. Hamilton in exchange for her services as a shared living provider, constitutes what she is "able to earn" after the injury. 39-A M.R.S.A. § 213. The previous appellate panel found the ALJ's holding that the stipend represented Ms. Hamilton's earning capacity to be inconsistent with his finding that Ms. Hamilton could not find a comparable job in the ordinary labor market. Similarly, the Department argues that the additional monthly payment of $697.00 should be considered as actual earnings or the equivalent to a fringe benefit.

[2] The Department filed a notice of appeal on May 6, 2022, prior to Ms. Hamilton's filing of a motion for further findings and facts and conclusions of law. The Department subsequently requested its appeal be stayed pending the motion for findings of facts and conclusions of law. After the issuance of such further findings on June 27, 2022, Ms. Hamilton filed her notice of appeal. *See* Me. W.C.B. Rule, ch. 13, § 3(1).

[3] We note that the Department states in its brief that it raises these issues for the purpose of preserving them for appellate review by the Law Court. *See Dobson v. Sec'y of State*, 2008 ME 137, ¶ 3, 955 A.2d 265 (stating that the Law Court will not reach issues raised for the first time in that Court).

Again, the appellate panel in *Hamilton II* addressed this argument and found no error with the ALJ's analysis. These arguments are governed by the "law of the case." *Blance v. Alley*, 404 A.2d 587 (Me. 1979).

[¶7] The law of the case doctrine is "an articulation of the wise policy that a judge should not in the same case overrule or reconsider the decision of another judge of coordinate jurisdiction." *Blance*, 404 A.2d at 588. It expresses "the practice of courts generally to refuse to reopen what has been decided[.]" *Id*. The doctrine relates to questions of law and operates only in subsequent proceedings in the same case. *Id.; see also Allarie v. Jolly Gardener Prods.*, Me. W.C.B. No. 16-39, ¶ 8 (App. Div. 2016).

[¶8] In the present context, the law of the case doctrine requires that "absent a showing of essentially different facts, the decision by an appellate court on a given issue is to be followed in the trial court once the case is remanded, and that the decision by the appellate court controls in subsequent proceeding in the same court." *Blance*, 404 A.2d at 589.

> Though the power exists to reopen the points of law already decided, it is a power which will necessarily be exercised sparingly, and only in a clear instance of previous error, to prevent a manifest injustice. The doctrine of the law of the case is normally a salutary one in the interest of economy of effort and of narrowing down the issues in successive stages of litigation. In the absence of exceptional circumstances, it would be unfortunate if on second appeal counsel felt free to argue de novo as a matter of course the points decided on previous appeal.

Id. (quoting *White v. Higgins*, 116 F.2d 312, 317 (1st Cir. 1940)).

[¶9] Here, "it is the Appellate Division's decision, not the ALJ's decision, that serves as law of the case." *Pratt v. S.D. Warren*, Me. W.C.B. No. 23-01, ¶ 36 (citing *Blance*, 404 A.2d at 589). There has been no showing of exceptional circumstances or different facts material to the decision rendered in *Hamilton II*. Therefore, we decline to revisit the arguments made.

[¶10] Accordingly, we review this matter to determine only whether the ALJ's decision in the current litigation is consistent with the law of the case as established in *Hamilton II*. We find no discernable error in the ALJ's analysis relative to the Appellate Division's mandate. The determinations that Ms. Hamilton is able to earn wages consistent with a full-time, minimum-wage employment and that the payment of $697.00 per month should be excluded from consideration when determining her earning capacity are consistent with the law of the case.

[¶11] The Department also argues that the panel's decision in *Hamilton II* itself is erroneous. In addition to being bound by the law of the case, we note that our authority is limited by statute to review of a decision by an administrative law judge. 39-A M.R.S.A. § 321-B. This panel has no authority to review the findings rendered by the appellate panel in *Hamilton II*. As such, we do not address this argument.

B. Ms. Hamilton's Cross-Appeal

[¶12] In her cross-appeal, Ms. Hamilton contends that the factual finding that she is able to work full-time in her home as opposed to part-time only is not supported by competent evidence. We disagree.

[¶13] In making findings relative to Ms. Hamilton's work capacity, the ALJ relied on the opinions expressed by both her treating psychiatrist, Dr. Werrbach, and by Dr. Voss, who examined Ms. Hamilton pursuant to 39-A M.R.S.A. § 207. Dr. Voss initially concluded that it was unlikely Ms. Hamilton could manage employment on a full-time or regular basis. However, when he learned of Ms. Hamilton's role as a shared living provider, he acknowledged that Ms. Hamilton is "doing better than I appreciated" and that her level of activities was "greater than I appreciated" given that "she's working full-time as a direct support person for an impaired individual."

[¶14] It is the province of an ALJ, as fact-finder, to accept or reject expert medical opinions, in whole or in part. *See Leo v. Am. Hoist & Derrick Co*., 438 A.2d 917, 920-21 (Me. 1981); *Rowe v. Bath Iron Works*, 428 A.2d 71, 74 (Me. 1981). The mere presence of contradictory evidence does not render an expert's medical opinion incompetent. *See Rowe*, 428 A.2d at 73 ("It is immaterial that there was also evidence which would have supported a different conclusion."). "The extent of a worker's incapacity is a question of fact. In carrying out his responsibility as fact

finder, the [ALJ] must weigh competing evidence and is not required to accept or reject the whole testimony of particular medical experts." *Leo*, 438 A.2d at 920-21.

[¶15] Dr. Voss's opinion, as expressed in his deposition testimony, constitutes competent evidence to support the ALJ's finding that Ms. Hamilton is capable of full-time work within her home. We find no error with respect to this determination.

III. CONCLUSION

[¶16] The law of the case doctrine and limits on our statutory authority preclude revisiting the arguments raised by the Department on appeal. With respect to the arguments raised by Ms. Hamilton in the cross-appeal, we find that there is competent evidence in the record to support the ALJ's factual findings.

The entry is:

The administrative law judge's decision is affirmed.

Administrative Law Judge Chabot, concurring in part and dissenting in part:

[¶17] I concur with the majority opinion that there is competent evidence in the record to support the ALJ's finding that Ms. Hamilton is capable of full-time work. I also agree that the Appellate Division in *Hamilton v. Me. Dep't of Health and Human Servs.*, Me. W.C.B. No. 22-04 (App. Div. 2022) (*Hamilton II*) addressed whether the additional monthly payment of $697.00 should be considered as

earnings, and the Appellate Division's decision serves as law of the case on that issue.

[¶18] I respectfully dissent, however, from the majority's opinion that the law of the case doctrine prevents us from reaching the Department's argument that the ALJ erred in determining that Ms. Hamilton has full-time, minimum-wage earning capacity. In my view, to determine whether this finding by the ALJ was in error, the panel should remand the case back for a finding of whether the $37,000.00 difficulty of care stipend constitutes earnings, and if so, whether that prima facie evidence of Ms. Hamilton's earning capacity has been rebutted.

[¶19] The ALJ specifically found that the $697.00 monthly payment did not constitute wages, salary or earnings, and the Appellate Division affirmed that finding in *Hamilton II*, thus making it the law of the case. There were in *Hamilton II*, however, no factual findings that Ms. Hamilton is able to earn minimum-wage, or that the $37,000.00 stipend, or any portion of it, constitutes wages, salary, or earnings. Instead, the Appellate Division in *Hamilton II* determined that the ALJ's finding that the stipend was "analogous to her earning capacity" was inconsistent with other findings that the employee could not perform that job in the open competitive labor market. The Appellate Division thus remanded the case "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." Upon remand, the ALJ imputed a full-time minimum-wage earning capacity based on Ms. Hamilton's physical and psychological condition, but he did not determine whether the stipend or any portion of it represents earnings—a necessary first step in the analysis of what the employee's earning capacity is.

[¶20] The Appellate Division in *Hamilton II* correctly states that although evidence of substantial post-injury earnings constitutes prima facie evidence of post-injury earning capacity, that evidence can be rebutted, citing *Fecteau v. Rich Vale Constr., Inc*., 349 A.2d 162, 165-66 (Me. 1975); and *Mailman v. Colonial Acres Nursing Home*, 420 A.2d 217, 220 (Me. 1980). The Law Court has also stated that "evidence of actual wages is a useful indicator [of post-injury earning capacity], not a talisman" and "the mere fact, standing alone, that the employee is earning the same after the injury as before will not bar an award for partial disability." *Severy v. S.D. Warren Co*., 402 A.2d 53, 55 (Me.1979); *see also Hardy v. Hardy's Trailer Sales, Inc*., 448 A.2d 895, 898-99 (Me.1982); *Mailman*, at 220-21 (Me. 1980); *Dufour v. Internal Medicine Associates*, 1998 ME 169, ¶ 5, 713 A.2d 339 (Me. 1998); 7 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 81.03 (2022).

[¶21] Rebuttal of prima facie evidence of earning capacity appears to have been applied in situations where the employer is arguing that an employee can make more than their actual post-injury earnings, or in situations in which an employee is arguing that although they returned to a certain post-injury wage, they are no longer able to earn that wage. Research has disclosed no case authority in which an employee rebutted a post-injury wage that the employee was currently earning.

[¶22] In addition, 39-A M.R.S.A. § 214(1)(C) states,

> If an employee is employed at any job and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this Act for the duration of the employment.

[¶23] This provision seems to conflict with the Law Court's prior holdings that would appear to allow the employee to rebut prima facie evidence of actual earnings, unless that precedent is only applied to situations where the employee establishes a post-injury wage but then loses that employment, as it has been applied to date. In any event, the issue whether an employee can rebut prima facie evidence of earning capacity when they are actually earning that amount presently is not before us in this appeal. The determination whether the $37,000.00 stipend constitutes earnings is a necessary first step in determining earning capacity, and ultimately if the ALJ erred in finding only a minimum-wage earning capacity. Because that determination was not made by either the hearing level ALJ or the

Appellate Division, I would remand this case for a determination of whether all or any portion of the $37,000.00 stipend constitutes wages, salary, or earnings and therefore is prima facie evidence of Ms. Hamilton's earning capacity. Once that determination has been made then the ALJ should determine if that evidence has been rebutted.

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.

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