KENNETH M. WELSCH, SR.
(Appellant)

v.

TIME WARNER CABLE
(Appellee)

and

ESIS, INC.
(Insurer)

Argued: May 21, 2014
Decided: December 29, 2014

PANEL MEMBERS: Hearing Officers Pelletier, Greene, and Knopf
BY: Hearing Officer Greene

[¶1] Kenneth M. Welsch, Sr., appeals from a decision of a Worker's Compensation Board Hearing Officer (*Collier*, *HO*) awarding him a closed-end period of incapacity benefits for a December 20, 2008, work injury to his left knee, but no ongoing benefits for incapacity related to a low-back condition he alleged was a compensable sequela of that injury. Mr. Welsch contends that the hearing officer employed an incorrect standard of proof when evaluating causation. He also contends that the hearing officer erred when failing to evaluate whether the injury was compensable pursuant to 39-A M.R.S.A. § 201(4) (2001). We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Mr. Welsch twisted his left knee on December 20, 2008, when he slipped on ice on Time Warner premises during a break from work. He suffered a left knee strain, but did not immediately lose any time from work. He underwent surgery on the left knee on September 1, 2010, and was out of work as a result until December 22, 2010.

[¶3] Mr. Welsch suffered from significant preexisting conditions in his low back and right knee. On January 5, 2010, he aggravated his preexisting low-back condition while shoveling snow at home.

[¶4] Mr. Welsch filed a Petition for Award, seeking compensation for the left knee injury and the aggravation of his low-back condition. He contended that the left knee injury caused him to alter his body mechanics, resulting in the aggravation of his low back. The hearing officer awarded him the protection of the Act for the left knee injury, but denied the claim for benefits related to the low-back condition.

[¶5] Mr. Welsch filed a motion for additional findings of fact and conclusions of law. The hearing officer issued additional findings, awarding a closed-end period of benefits coinciding with his left knee surgery and recovery period, but did not otherwise change the outcome of the case. Mr. Welsch appeals.

II. DISCUSSION

[¶6] Mr. Welsch contends that the terminology used by the hearing officer in discussing the evidence demonstrates that he erroneously applied a more stringent standard—proof by clear and convincing evidence—than the applicable proof by a preponderance of the evidence standard. Specifically, he asserts that the following language used by the hearing officer demonstrates that the higher standard of proof was applied:

> Given Mr. Welsch's significant right knee difficulties and limitations (which are pre-existing and nonwork-related) *it is not clear to me* that it was his left knee injury that caused him to alter his body mechanics while shoveling snow that day and aggravate his back.

(Emphasis added.) In addition, in response to Mr. Welsch's motion for further findings of fact and conclusions of law, the hearing officer added: "Moreover, given his significant pre-existing low back difficulties, *it is not even clear to me* that his 2010 back injury was caused by an alteration of his body mechanics." (Emphasis added.)

[¶7] We disagree with this contention. The phrase "clear and convincing evidence" is used to describe "an intermediate standard under which the party with the burden of proof may prevail only if he can place in the ultimate factfinder an abiding conviction that the truth of [the] factual assertions are highly probable." *Dubois v. Madison Paper Co.*, 2002 ME 1, ¶ 10, 797 A.2d 696 (quotation marks omitted). It is a higher level of proof than a "preponderance of the evidence,"

which requires proof that an essential fact "more likely than not" is true, and which applies to most issues in workers' compensation cases. *See e.g., Bryant v. Masters Machine Co.*, 444 A.2d 329, 333 (Me. 1982).

[¶8] The hearing officer's use of the phrase "it is not clear to me" in discussing whether Mr. Welsch had aggravated his low-back condition in January 2010 by "altering his body mechanics" does not demonstrate that he applied a "clear and convincing" standard of proof. In describing the evidence regarding whether there had been a medically consequential alteration of body mechanics due to the left knee condition as being unclear, the hearing officer was commenting on one aspect of the evidence, not on the overall proof on the factual issue of medical causation.

[¶9] The hearing officer also pointed to the tentativeness of Dr. Pavlak's supporting medical opinion, and the absence of any opinions from his treating physicians that would support the asserted connection, when concluding that Mr. Welsch "ha[d] not sustained his burden of proving" that his left knee condition from his 2008 work injury had aggravated his low back in 2010.

[¶10] Moreover, in his motion for further findings and conclusions, Mr. Welsch did not seek clarification from the hearing officer on the standard of proof he was applying. Absent such a request for clarification, "we must assume that the [hearing officer] knew the law and applied it correctly," leaving us only to

determine whether the hearing officer "could reasonably have concluded" that Mr. Welsch did not prove medical causation by a preponderance of the evidence. *See Morton v. Greater Portland Transit Dist.*, 440 A.2d 8, 10 (Me. 1982); *see also Smith v. Dexter Oil Co.*, 408 A.2d 1014, 1016 n.3 (Me. 1979) (suggesting that failure to request clarifying findings could result in the resolution of a significant ambiguity against the party seeking reversal of the decree).

[¶11] Finally, because there is competent evidence in the record to support the finding that the work injury to the left knee did not affect Mr. Welsch's preexisting low-back condition, we conclude that the hearing officer did not err when failing to analyze the case pursuant to 39-A M.R.S.A. § 201(4) (Supp. 2013).

The entry is:

The decision of the hearing officer 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. 2013).

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