JAY BOWKER
(Appellant)

v.

NFI NORTH, INC.
(Appellee)

and

BROADSPIRE SERVICES, INC.
(Insurer)

Conferenced: July 23, 2015
Decided: April 13, 2016

PANEL MEMBERS: Administrative Law Judges[1] Elwin, Collier, and Knopf
BY: Administrative Law Judge Knopf

[¶1] Jay Bowker appeals from a decision of an administrative law judge (*Greene, ALJ*) denying his Petition for Award of Compensation and Petition for Payment of Medical and Related Services. Mr. Bowker contends that the administrative law judge (ALJ) erred by, among other things, determining that the work activity that resulted in the aggravation of Mr. Bowker's preexisting back condition was not the legal cause of his current incapacity, and that his employment did not contribute to his disability in a significant manner pursuant to 39-A M.R.S.A. § 201(4) (2001). Because we find these contentions have merit, we vacate the ALJ's decision.

[1] Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers are now designated administrative law judges.

I. BACKGROUND

[¶2] Jay Bowker began working for NFI North, Inc., on April 28, 2008, as a program director administering two mental health residential care facilities in Bangor. Mr. Bowker suffered a back injury on November 8, 2011, when, as part of his work duties, he moved a box from a loading dock to a car while assisting at a food bank. The ALJ found that Mr. Bowker "reached onto a loading dock for a box containing household items and weighing about 8 to 10 pounds and then bent and twisted at the waist as he put the box in the back of the car. As he did this he experienced 'a very uncomfortable feeling' in his lower right back."

[¶3] Prior to this injury, Mr. Bowker suffered from significant back problems. In 2002, following an incident moving railroad ties while landscaping his yard, Mr. Bowker suffered an L5-S1 disc herniation on the left. He underwent surgery to remove fragments of herniated disc material and to decompress the S1 nerve root. Mr. Bowker improved following surgery; however, as of April 8, 2004, he was continuing to report occasional leg pain.

[¶4] In March of 2008, after shoveling snow, Mr. Bowker complained of mid-to-low lumbar back pain, which increased with prolonged sitting. In May of 2011, after helping his significant other move, Mr. Bowker reported to his primary care provider that he was experiencing pain radiating into both legs as far as his calves. A lumbar MRI on June 9, 2011, showed that Mr. Bowker has degenerative

disc disease, most pronounced at L4/5, where there is diffuse disc bulging, particularly on the right side. Subsequently, Mr. Bowker underwent two epidural steroid injections. As of August 2011, he continued to have symptoms, but was feeling better and was able to return to some of his preinjury activity.

[¶5] The box-lifting incident occurred on November 8, 2011. Mr. Bowker saw his primary care provider and complained of problems in his right upper extremity. Further, he reported that at the time of the incident he felt a popping and burning sensation that radiated into his buttocks, calves, and heels. The doctor took Mr. Bowker out of work on November 13, 2011, pending a neurosurgical evaluation.

[¶6] Mr. Bowker underwent another lumbar MRI on November 17, 2011, that showed a herniated disc at L4-5 with severe stenosis, more prominent on the left side than in the previous study. He was seen at Northeast Pain Management on December 7, 2011, and he reported that after lifting the box at work, his pain had worsened, particularly on the right side. After an additional epidural steroid injection, Mr. Bowker underwent a right L4-5 discectomy on January 17, 2012. Although he continued to have symptoms and had not completed physical therapy, his surgeon released him to return to work as of February 27, 2012.

[¶7] Dr. Omsberg, a neurosurgeon, performed a records review on November 18, 2012. Dr. Omsberg indicated that Mr. Bowker had preexisting

issues with his L4-5 lumbar spine that resulted in significant symptoms. As to the box-lifting incident, Dr. Omsberg opined:

> This in no way represents any significant injury or activity that would not have occurred at home, in recreation or other. This is not a specific, acute, significant neurosurgical event. People can herniate a disc from simply sneezing, turning over in bed at night, bending over to tie shoes. This is more likely to happen given prior symptoms and pre-existing documented disc abnormalities as in this particular case. There is no question that given this patient's presentation and history, it was absolutely inevitable that he would have worsening [sic] and come to surgery.

[¶8] On December 18, 2012, Dr. Bradford, an orthopedic surgeon, performed an independent medical evaluation of Mr. Bowker pursuant to 39-A M.R.S.A. § 312 (Supp. 2015). Dr. Bradford noted that Mr. Bowker was much improved although he still had mild symptoms. He described the mechanism of the November 8, 2011, injury and concluded that it was "primarily one of bad posture mechanics in a back that was vulnerable to re-injury. In this case, he sustained a disc herniation above the previous L5-S1 level, and protrusion on the right side versus the left side associated with his 2002 disc herniation." He noted a significant change between the June and November MRI studies. Based largely on these studies, he concluded that although Mr. Bowker did have a preexisting condition, it was significantly aggravated by the November 8, 2011, injury, which resulted in the subsequent surgery.

[¶9] At the formal hearing, NFI North did not dispute that the work activity that Mr. Bowker engaged in on November 8, 2011, was the medical cause of the injury, but argued that the activity was not the legal cause of the injury and that it did not contribute to his current disability in a significant manner. In his initial decree, the ALJ agreed with NFI North. The ALJ reasoned that Mr. Bowker's preexisting low back condition rendered him susceptible to injury, as explained by Dr. Omsberg, and the work activity did not create a risk of injury above the level of risk present in an average person's non-employment life. Alternatively, the ALJ found that even if Mr. Bowker did suffer a work-related injury on November 8, 2011, he was not persuaded that it contributed to Mr. Bowker's disability in a significant manner.

[¶10] Mr. Bowker filed a Motion for Further Findings of Fact and Conclusions of Law. Mr. Bowker argued that because Dr. Omsberg's report of November 18, 2012, had not been timely provided to the independent medical examiner, the ALJ erred when considering it as medical evidence contrary to the IME's medical findings. *See* 39-A M.R.S.A. § 312(7) (Supp. 2015). The ALJ issued additional findings of fact and conclusions of law, stating that although Dr. Omsberg's report had been omitted from the medical records provided to Dr. Bradford, Mr. Bowker had waived any objection to the Board's consideration of the report, and that Dr. Omsberg's opinion was properly considered in relation

to the issue of legal causation rather than medical causation; and was not clearly contrary to any medical findings issued by Dr. Bradford. In all other respects, including on the issues of legal causation and the significance of the employment's contribution to the disability, the original decree was unaltered. Mr. Bowker now appeals.

II. DISCUSSION

A. Standard of Review

[¶11] The Appellate Division's role on appeal is "limited to assuring that the [ALJ's] factual findings are supported by competent evidence, that [the] decision involved no misapplication of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, "we review only the factual findings actually made and the legal standards actually applied by the ALJ." *Daley v. Spinnaker Inds.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Legal Causation

[¶12] At issue is whether the ALJ applied an incorrect legal standard when determining whether the box-lifting incident was the legal cause of Mr. Bowker's injury.

[¶13] This case involves an alleged work injury combined with a preexisting medical condition. Therefore, liability is ultimately determined pursuant to 39-A M.R.S.A. § 201(4). *McAdam v. United Parcel Serv.*, 2001 ME 4, ¶ 11, 763 A.2d 1173. Section 201(4) states:

> If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner.

39-A M.R.S.A. § 201(4). "When a case appears to come within section 201(4), the hearing officer must first determine whether the employee has suffered a work-related injury . . . then [section] 201(4) is applied if the employee has a condition that preceded the injury." *Celentano v. Dep't of Corr.*, 2005 ME 125, ¶ 9, 887 A.2d 512. "In a combined effects case, the 'arising out of and in the course of employment' requirement is satisfied by showing both medical and legal cause." *Id.* at ¶ 12. Medical causation is not at issue in this case.

[¶14] To establish legal causation when "the employee bears with him some 'personal' element of risk because of a pre-existing condition, the employment must be shown to contribute some substantial element to increase the risk, thus

offsetting the personal risk which the employee brings to the employment environment." *Bryant v. Masters Machine Co.*, 444 A.2d 329, 337 (Me. 1982). The comparison of the employment to personal risk is made against an objective standard; thus, an ALJ should compare the risk that arises out of the conditions of employment and the risk present in an average person's non-employment life. *Id*. The element of legal causation distinguishes "situations in which the employee just happened to be at work when the disability arose from those where the disability occurred only because an employment condition increased the risk of disability above the risks that the employee faced in everyday life." *Celentano*, 2005 ME 125, ¶ 12, 887 A.2d at 515.

[¶15] When deciding whether certain work activity is a legal cause of incapacity, the Law Court has long followed the standard set out in *Bryant v. Masters Machine.* In *Bryant*, the employee was operating a drill press while sitting on a stool, when another employee accidentally kicked the stool out from under him. *Bryant*, 444 A.2d. at 331. The fall triggered symptoms of a previously asymptomatic back condition. *Id*. at 333. The Law Court vacated the decision denying compensation, determining that the injury was compensable because the conditions of employment—performing work while sitting on a stool while other employees moved around in the environment—increased the risk that the employee would fall. *Id.* at 342-343. *See also Celentano*, 2005 ME 125, ¶ 14,

887 A.2d at 515 (affirming determination that legal cause had been established when employee's trip over a table leg lit up a preexisting asymptomatic knee condition based on description of the table leg and the fact that another employee had tripped over the table leg); *cf. Barrett v. Herbert Eng'g, Inc*., 371 A.2d 633, 636 (Me.1977) (affirming denial of benefits to employee who, while walking to pick up tools at work, suddenly experienced severe low back pain).

[¶16] The ALJ's interpretation of *Bryant* was informed by the laws of numerous other jurisdictions from which he concluded that minimal exertion is not always compensable. The ALJ compared the risk that arose out of the conditions of Mr. Bowker's employment and the risk present in an average person's non-employment life, and concluded, given Mr. Bowker's symptomatic back condition, that lifting the box did not substantially increase his risk of injury, and thus did not offset the personal risk that Mr. Bowker brought to the employment environment.

[¶17] We disagree. Given the facts as found by the ALJ, we conclude that the ALJ misapplied the law when determining that the conditions of Mr. Bowker's employment did not elevate the risk of the injury he suffered above the risk present in an average person's non-working life. There is no question that the work activity precipitated the onset of Mr. Bowker's increase in symptoms. The work activity of lifting a loaded box, then bending and twisting to put it into the back of a car increased Mr. Bowker's risk of a low back injury, just as working on a stool

surrounded by moving co-workers increased the risk to the risk to the employee in *Bryant*. 444 A.2d at 342-43. The ALJ noted that Mr. Bowker "strained his back while engaging in an isolated postural exertion at work, thereby aggravating an underlying, pre-existing low back condition." Though isolated, it was a task he performed in the course of carrying out his work duties and it enhanced his risk of injury. The independent medical examiner noted that Mr. Bowker's "action involved both reaching and twisting and bending" and stated that the injury "was primarily one of bad posture and mechanics in a back that was vulnerable to reinjury."

[¶18] Whether Mr. Bowker could have injured himself performing the same activity outside of work misses the point, as that is true of many types of work activity that result in injury. This is not a case in which Mr. Bowker was injured because he just happened to be at work when the disability arose. In this case, the disability occurred because he engaged in required, employment-related activity that not only increased his risk of disability, but increased his actual disability.

C. Significant Contribution of the Employment

[¶19] Having concluded that Mr. Bowker's injury arose out of and in the course of employment, we address the second aspect of the inquiry—whether the ALJ erred when determining that the employment did not contribute to Mr. Bowker's disability in a significant manner. *See Celentano*, 2005 ME 125, ¶ 9, 887

A.2d 512. In deciding that the employment did not contribute to Mr. Bowker's disability in a significant manner, the ALJ determined that the Law Court in *Celentano* "did not provide an analytical framework for determining the existence of a significant contribution in other circumstances, such as where the preexisting condition is already symptomatic and vulnerable to worsening with minor exertion." Further, the ALJ determined that "an activity [that] precipitates or increases symptoms from an underlying condition will not always be a significant contributor to the employee's disability indefinitely." The ALJ found that this injury was in the "natural course to be expected from the underlying condition." We conclude that the ALJ misapplied the law.

[¶20] In *Celentano*, the Law Court affirmed a hearing officer's decision that the employment contributed to the employee's disability in a significant manner when the employee merely tripped over a table leg when getting up from a table, thereby lighting up the employee's asymptomatic preexisting condition. The Court reasoned that the combination of the work injury and the preexisting condition resulted in the employee no longer being able to perform his work duties or engage in athletic activities he previously enjoyed; thus he had been rendered disabled. *Id.* at ¶ 17. The Court further considered the act of getting up from the table to be part of the work activity and, although "the incident itself may have been trivial, it

nevertheless constitute[d] employment activity" that contributed to the employee's disability in a manner sufficient to satisfy section 201(4). *Id*. at ¶ 18.

[¶21] Like *Celentano,* this case involves a relatively trivial incident that aggravated the employee's preexisting symptoms and thereby disabled him. The ALJ distinguished *Celentano* on the basis that Mr. Bowker's preexisting condition was already symptomatic at the time of the acute incident and was vulnerable to worsening with minor exertion. The Court's reasoning in *Celentano*, however, is equally applicable in this case and in other preexisting condition cases regardless of whether the pre-existing condition was symptomatic before the work injury. *See, e.g., Briggs v. H & K Stevens, Inc.,* Me. W.C.B. No. 14-24, ¶ 23 (App. Div. 2013) (determining that the reasoning in *Celentano* is applicable in case with a preexisting condition and gradual aggravation injury which became increasingly symptomatic over time due to the conditions of employment).

[¶22] Here, the combination of the preexisting condition and the acute box-lifting incident at work resulted in Mr. Bowker no longer being able to perform his duties for NFI North. Thus, it rendered him disabled. Moreover, moving a box from a loading dock to a car was part of his work activity, and it contributed to his disability in a manner, consistent with *Celentano*, sufficiently significant to put him out of work. Further, the independent medical examiner concluded that the work injury constituted a significant aggravation of Mr. Bowker's preexisting low

back condition that resulted in the subsequent surgery. Thus, it satisfies section 201(4). Accordingly, we vacate the ALJ's decision.[2]

III. CONCLUSION

The entry is:

> The administrative law judge's decision is vacated, and the case remanded for additional proceedings consistent with this decision.

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. 2015).

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[2] Mr. Bowker also contends that it was error for the ALJ to consider Dr. Omsberg's medical findings because they were not timely provided to the independent medical examiner pursuant to 39-A M.R.S.A. § 312(7) (Supp. 2015). Because we find that the ALJ erred as a matter of law when determining legal causation and the significance of the contribution of the employment to the disability, we do not reach the issue.