JAMES ECK
(Appellee)

v.

VERSO PAPER
(Appellant)

and

SEDGEWICK CLAIMS MANAGEMENT SERVICES, INC.

Argued: September 23, 2015
Decided: August 4, 2016

PANEL MEMBERS: Administrative Law Judges Goodnough, Hirtle, and Pelletier
BY: Administrative Law Judge Goodnough

[¶1] Verso Paper appeals from a decision of a Workers' Compensation Board administrative law judge (*Knopf, ALJ*) granting Mr. Eck's Petitions for Award of Compensation and for Payment of Medical and Related Expenses. Verso Paper contends that the administrative law judge (ALJ) misapplied *Derrig v. Fels Co.*, 1999 ME 162, 747 A.2d 580, in finding that Mr. Eck sustained a second, successive, gradual work injury. Verso Paper argues that under *Derrig*, an employee cannot, as a matter of law, sustain two successive gradual injuries to the same body parts. Because we conclude that the ALJ did not err in her application of *Derrig* to the facts of this case, we affirm the decision.

I. BACKGROUND

[¶2] James Eck commenced working for Verso Paper (the Mill) in 1987 as a production winder and continued in that position until 2013 when he was reassigned to operate a super calendar paper machine. Both positions required intensive hand use. Mr. Eck initially complained about bilateral thumb pain to the Mill's medical department in 1999. Mr. Eck was instructed to change his work techniques so as to reduce the pressure on his thumbs. His diagnoses at that time were muscle ligamentous strain, atypical De Quervain's disease, and bilateral thumb pain. The ALJ found that "there is no suggestion at that time his symptoms were caused by anything but his work activity." The change in how Mr. Eck performed his job was partially successful in decreasing his thumb pain, but the pain never completely resolved. Nevertheless, he thereafter worked regular duty and sought no treatment over the ensuing twelve years.

[¶3] Mr. Eck began to experience increased hand, arm, and elbow pain in 2012, accompanied by tingling and numbness. A carpal tunnel syndrome diagnosis was made and Mr. Eck was advised to undergo surgery prompting a claim under the Workers' Compensation Act that the Mill pay for the proposed surgery.

[¶4] An independent medical examination pursuant to 39-A M.R.S.A § 312 (Supp. 2015) was performed by Dr. Alexander Mesrobian. Dr. Mesrobian's findings are not disputed. He concluded that Mr. Eck likely sustained a carpal

tunnel syndrome injury in 1999. He also concluded that although the cause of Mr. Eck's carpal tunnel syndrome was multifactorial, his job at the Mill significantly aggravated his condition. The ALJ, adopting Dr. Mesrobian's findings, specifically noted that by 2012 Mr. Eck was reporting entirely new symptoms of tingling and numbness.

[¶5] After conducting a hearing and receiving written argument from the parties, the ALJ concluded that the Law Court in *Derrig* did not prohibit a finding of two successive gradual injuries to the same body parts when the facts support such a finding. She acknowledged the 1999 injury, consistent with Dr. Mesrobian's findings and then found that Mr. Eck had demonstrated a second gradual injury in 2012. The ALJ applied the risk analysis required by *Bryant v. Masters Machine Co.*, 444 A.2d 329 (Me. 1982) and 39-A M.R.S.A. § 201(4) (2001) to find that Mr. Eck's second injury was compensable despite his preexisting condition. Mr. Eck was accordingly awarded the protection of the Workers' Compensation Act for a 2012 gradual work injury to his hands and wrists, as well as payment of outstanding medical bills, and pre-authorization to proceed with carpal tunnel release surgery. The Mill filed a motion for further findings of fact and conclusions of law, which the ALJ denied. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶6] The Appellate Division is "limited to assuring that the [ALJ's] factual findings are supported by competent evidence, that [the] decision involved no misconception 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 in this case, "we review only the factual findings actually made and the legal standards actually applied by the [ALJ]." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Two Gradual Injuries within One Period of Employment

[¶7] The Mill contends that under *Derrig* an employee cannot, as a matter of law, sustain two successive gradual injuries to the same body parts. To support the conclusion that *Derrig* does not preclude a finding that a second work injury can occur when the severity and nature of symptoms change, the ALJ was guided by language from an earlier decision by an administrative law judge (*Collier, ALJ*) that analyzed the question of whether *Derrig* permits the recognition of two successive gradual injuries involving the same body parts:

> The problem in *Derrig* was that the Board had applied a 201(4) pre-existing condition analysis for each successive period of the

> employment and the court held that was unwarranted. But in the appropriate case there may be successive gradual injuries with a second injury aggravating, accelerating or combining with the first, in which case a 201(4) analysis should be done to determine whether the resulting disability from the second work injury is compensable.

Lewis v. Gagne Concrete, Inc., W.C.B. 06-03-27-67 & 07-01-59-99 (Me. 2008).

[¶8] We agree that nothing in *Derrig* precludes a finding that an employee has sustained two successive gradual injuries where, as here, both the severity and nature of the employee's symptoms changed over time to such an extent as to produce a legitimate second injury. *Derrig* involved three claimed gradual injury dates with multiple employers; here, the ALJ found the presence of two gradual injuries occurring while the employee was working for a single employer.

[¶9] The Court in *Derrig* defined a gradual injury as:

> A single injury caused by repeated, cumulative trauma without any sudden incapacitating event. Treating each period of employment as a separate "injury" is inconsistent with the concept of a gradual injury as a single condition occurring gradually over a long period of time. The employee, however, must establish the date of the injury which is the date the employee is aware of the injury and aware of its compensable nature.

Derrig, 1999 ME 162 at ¶ 7, 747 A.2d 580. This definition does not prohibit or preclude a finding that an employee has sustained two gradual injuries. The *Derrig* decision contained the Court's observation that to treat each period of employment as a separate injury made it very difficult, if not impossible, for employees with

successive employments to prove the occurrence of an injury where an employee with just one employer would have an easier case to prove:

> Requiring an employee, who has suffered a gradual injury, to prove that each separate employment was a "significant" aggravation of the injury would render it virtually impossible for an employee who has worked for several employers to establish liability for a gradual injury. Employees, like the employee in *Ross* [*v. Oxford Paper Co*., 363 A.2d 712 (Me. 1976)], who suffer gradual injuries while employed by a single employer, would be entitled to compensation, but employees who work for several employers would not. We see no evidence of a legislative intent … to support such disparate treatment of employees with work-related conditions.

Id. at ¶ 7, n.3.

[¶10] Mr. Eck, "like the employee in *Ross*," suffered gradual injuries while employed by a single employer. *Ross*, 363 A.2d 712. The Court's footnote suggests that Maine law has never prohibited the occurrence of two successive gradual injuries within a single period of employment, where there is factual support for such a result. The second injury in this case was well-explained, supported, and defined by the ALJ. The ALJ correctly analyzed, pursuant to *Bryant*, whether a second injury had occurred. The ALJ identified, as a factual matter, several changes that had occurred over time to support the finding of a distinct second injury. Those changes included an adjustment that allowed Mr. Eck to perform his physically demanding job on a regular duty, full-time basis subsequent to 1999, a significant worsening of his condition just prior to March

2012 due, in part, to work activities, and the development of some new symptoms that were not present in 1999.

[¶11] Finally, the ALJ's finding below regarding the occurrence of a distinct gradual injury in 2012 is firmly grounded in the opinion of the independent medical examiner appointed pursuant to 39-A M.R.S.A § 312 (Supp. 2015). The ALJ found:

> As of March of 2012 Mr. Eck suffered a second gradual injury due to his ongoing work over the years at the paper mill. That was an aggravation injury of the earlier carpal tunnel syndrome and was caused by multiple factors including Mr. Eck's work (*which Dr. Mesrobian opined played a significant role in the aggravation*)...".

(Emphasis added). The Mill does not argue or allege that the ALJ's finding should be reversed due to the presentation of clear and convincing contrary medical evidence to the opinion proffered by Dr. Mesrobian. We are thus not persuaded that the ALJ misconceived applicable law by finding that a second gradual injury occurred in Mr. Eck's case.

III. CONCLUSION

[¶12] *Derrig* does not preclude a finding of a second, successive, gradual injury within a single period of employment, when the facts support the occurrence of a second injury. Thus, the ALJ correctly applied *Derrig* to the facts of this case when she found the existence of a second gradual injury to Mr. Eck's hands and wrists.

The entry is:

The administrative law judge's decision 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. 2015).

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