STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 15-0045
Decision No.17-08

ESTATE OF J. MICHAEL BOYLE, SR., and FAYE BOYLE
(Appellee)

v.

LAPPIN BROTHERS, INC.,
(Appellant)

ACE INSURANCE COMPANY,
(Insurer)

COMMERCIAL WELDING CO.,
(Appellee)

ARROW POINT CAPITAL,
(Insurer)

EICHLAY CORPORATION,
(Appellee)

MARYLAND CASUALTY (ZURICH NORTH AMERICA),
(Insurer)

WILLETTE WELDING, INC.,
(Appellee)

ONE BEACON INSURANCE GROUP,
(Insurer)

W.W. OSBORNE, INC.,
(Appellee)

FIREMAN'S FUND INSURANCE COMPANY,
(Insurer) and

THE AMERICAN INSURANCE COMPANY
(Insurer)

Argument held: June 9, 2016
Decided: February 28, 2017

PANEL MEMBERS:

Majority: Administrative Law Judges Goodnough and Pelletier
Dissent: Administrative Law Judge Stovall

BY: Administrative Law Judge Pelletier

[¶1] Lappin Brothers, Inc., appeals from a decision of a Workers' Compensation Board administrative law judge (*Greene, ALJ*) granting in part the Estate of J. Michael Boyle, Sr., and Faye Boyle's (collectively, "the Estate") respective Petitions for Award of Compensation and for Award of Compensation-Fatal, brought pursuant to the Occupational Disease Law, 39-A M.R.S.A. §§ 601-615 (2001 & Supp. 2016), and 39-A M.R.S.A. § 215 (Supp. 2016). The ALJ determined in the first stage of the bifurcated proceedings that Mr. Boyle was last injuriously exposed to asbestos while working for Lappin Brothers. At issue is whether: (1) the decision in this case is and appealable final decision, or whether the appeal should be dismissed as interlocutory; (2) a determination regarding where the last injurious exposure occurred establishes medical causation; (3) the Estate carried its burden of proof that Mr. Boyle's exposure to asbestos at Lappin Brothers was injurious; and (4) there is competent evidence in the record to support the finding of injurious exposure. We affirm the ALJ's decision insofar as it addresses the issue of last injurious exposure, but vacate and remand for additional proceedings on the issue of whether the employee contracted and died from an asbestos-related disease.

I. BACKGROUND

[¶2] J. Michael Boyle worked as a union pipefitter from 1970 to 1977. He and Faye Boyle married in 1970 and settled in Old Town. During his time as a union member, Mr. Boyle worked on projects for different employers where he was potentially injuriously exposed to asbestos. He was diagnosed with mesothelioma in 2009, and he passed away in 2010.

[¶3] As personal representative of Mr. Boyle's Estate, Ms. Boyle filed a Petition for Award, and on her own behalf, she filed a Petition for Award-Fatal. Both petitions related to Mr. Boyle's incapacity and death from an asbestos-related disease. *See* 39-A M.R.S.A. § 614. The petitions listed numerous employers as potentially liable. Pursuant to the parties' agreement, the ALJ bifurcated the proceedings to first determine which employer Mr. Boyle was working for when he was "last injuriously exposed to asbestos," pursuant to section 614(4). Section 614(4) provides, in relevant part:

> **Last employer liable; notice.** Notwithstanding section 606, the only employer and insurance carrier liable is the last employer in whose employment the employee was last injuriously exposed to asbestos, and the insurance carrier, if any, on the risk when the employee was last so exposed under that employer.

[¶4] The ALJ found the following facts on a more likely than not basis: Mr. Boyle's last pipefitting job was in 1977 for Lappin Brothers, working on the construction of a hospital in Dover-Foxcroft. Mr. Boyle injured his back on that

job on November 7, 1977, and never returned to pipefitting work. Duriron acid-resistant waste piping with asbestos rope-sealing in bell and spigot joints was used on the Dover-Foxcroft hospital site in 1977. Mr. Boyle was last injuriously exposed to asbestos while working on that job. That exposure contributed to his contracting mesothelioma, an asbestos-related disease.

[¶5] Lappin Brothers filed a motion for additional findings of fact and conclusions of law. The ALJ ruled that the findings and conclusions in the original decree were adequate for appellate review except on the issue of the scope of the first stage of the bifurcated proceeding. Lappin Brothers asserted that the parties agreed that the purpose of the first stage of the proceedings was to decide which employer Mr. Boyle was working for when he was last exposed to asbestos. It contended that the finding that Mr. Boyle worked for Lappin Brothers when last exposed to asbestos was proper, but the additional finding that the exposure "contributed to his later development of an asbestos–related disease, mesothelioma" while working for Lappin Brothers, exceeded the agreed-upon scope of the hearing.

[¶6] The ALJ issued an amended decision in which he addressed the scope of the first stage of the proceedings as follows:

> In the absence of a written agreement otherwise defining the issues to be decided in the first stage of this bifurcated proceeding, the Board concludes that by agreeing to and requesting such a proceeding addressing the question of "last injurious exposure," the employers

> agreed that the employee developed an asbestos-related disease as a result of employment-related exposure to asbestos, leaving the Board to determine only which, if any, of the employments which are the subject of the present petitions is where the last injurious exposure to asbestos, i.e. the one causing or contributing to this disease, occurred. On this question the Board finds that, more likely than not, the last injurious exposure occurred while the employee was working for Lappin Brothers in 1977.

[¶7] The ALJ also indicated that the matter would be set for further proceedings to determine Ms. Boyle and the Estate's entitlement to benefits. Lappin Brothers appeals.

II. DISCUSSION

A. Final Judgment

[¶8] The Workers' Compensation Act and the Rules governing the Appellate Division provide for appeals from administrative law judge or hearing officer "decisions." 39-A M.R.S.A. § 321-B (Supp. 2016); Me. W.C.B. Rule, ch. 13, § 3. The Rules define "decision" as follows:

> For purposes of this chapter, "decision" means a final decision issued by a hearing officer that fully disposes of the matters pending before the hearing officer. "Decision" does not include interlocutory or non-final decisions including, but not limited to, provisional orders.

Board Rule, ch. 13, § 3. This rule embodies the judicially created final judgment rule, which provides, generally, that an appeal may be taken only from a court or administrative action that fully decides and disposes of the matter before it. *State of*

Me. v. Me. State Employees Ass'n, 482 A.2d 461, 464-65 (Me. 1984). The purpose of the final judgment rule is:

> to promote efficiency and reduce costs by: (1) deterring interruption, delay, and duplication in trial court and administrative proceedings; (2) encouraging development of all of the facts and issues necessary for appellate review in a single appeal after the trial court or administrative agency has completed its action on the matter; and (3) avoiding the possibility of waste of appellate court resources by repeatedly hearing matters or by deciding issues that may ultimately be mooted by subsequent actions in the trial court or administrative agency.

DONALD G. ALEXANDER, MAINE APPELLATE PRACTICE at 218 (4th ed. 2013). Exceptions to the final judgment rule have been recognized and applied in those instances in which dismissing the appeal would not further the purpose of the rule. *Morse Bros., Inc. v. Webster*, 2001 ME 70, ¶ 14, 772 A.2d 842. Three well-established exceptions allowing for immediate review of interlocutory orders are the death knell exception, the judicial or administrative economy exception, and the collateral order exception. *State of Me. v. Me. State Employees Ass'n*, 482 A.2d at 464-65.

[¶9] It is undisputed that the order appealed from in this case did not fully dispose of all matters pending before the ALJ, and thus, it is not an appealable order unless the recognized exceptions to the final judgment rule apply, and the case falls within one of those exceptions. Lappin Brothers contends, and the remaining parties agree, that an exception to the final judgment rule should be

applied in these circumstances in order to promote administrative economy. That exception is reserved for those rare cases in which appellate review of a non-final order can establish a final, or practically final, disposition of the entire litigation, and the interests of justice require that immediate review be undertaken. *Id.* In the circumstances of this case, we agree with the parties.

[¶10] An Appellate Division panel previously noted that Board Rule, ch. 13, § 3, does not explicitly contain any exceptions. *Estate of James Cole v. Girl Scouts of Maine*, Me. W.C.B. No. 14-27 (App. Div. 2014) (dismissing appeal based on Board Rule, ch. 13, § 3 from the first stage of a bifurcated proceeding that established the claimant's status as employee before litigating other issues). However, panels of the pre-1992 Appellate Division, in the absence of a rule comparable to section three, allowed for the traditional exceptions to the final judgment rule. *See Martineau v. York County Health Servs.*, No. 92-202 (Me. W.C.C. App. Div. Oct. 2, 1992) (allowing an appeal from an interlocutory order suspending employee's benefits, noting that exceptions to the final judgment rule had been considered in prior cases, and citing FIELD, MCKUSICK & WROTH, MAINE CIVIL PRACTICE at 156, § 73.1, for the proposition that "[f]inality cannot be a rigidly applied standard."); *see also Ouellette v. Pinkham Lumber*, No. 91-111 (Me. W.C.C. App. Div. Sept. 3, 1991) (dismissing appeal as interlocutory but noting that non-final orders may be appealable if they fall within a recognized

exception to the final judgment rule); *Shorette v. Interstate Food Processing*, No. 92-170 (Me. W.C.C. App. Div. Aug. 26, 1992) (same). The Law Court has also previously applied an exception in at least one workers' compensation case. *Palmer v. Bath Iron Works Corp.*, 559 A.2d 340, 341 n.2 (Me. 1989) (applying judicial economy exception).

[¶11] The rules governing the Appellate Division were promulgated in order to "provide a prompt, and inexpensive review of a decision by an administrative law judge." 39-A M.R.S.A. § 321-A(3) (Supp. 2016). We take administrative notice that that the ALJs have had a long-standing practice of bifurcating asbestos-related disease litigation proceedings, based on the practical consideration that multiple employers and insurers not potentially liable can be finally dismissed after the first stage of the proceedings pursuant to section 614(4). Allowing for an exception to section three of the board's appellate rules is consistent with the Legislature's articulated purpose for the rules—prompt review—and promotes administrative economy. To dismiss the appeal at this stage and remand for final determination would unnecessarily prolong the involvement of parties who could potentially be finally relieved of liability after this appeal. Accordingly, we can proceed to evaluate the merits of the appeal.

B. Standard of Review

[¶12] The Appellate Division's role on appeal is "limited to assuring that the [ALJ's] 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." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). The ALJ's findings of fact are not subject to appeal. 39-A M.R.S.A. § 321-B(2) (Supp. 2016).

[¶13] Additionally, "[w]hen construing provisions of the Workers' Compensation Act, our purpose is to give effect to the Legislature's intent." *Hanson v. S.D. Warren Co.*, 2010 ME 51, ¶ 12, 997 A.2d 730. "In so doing, we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results." *Id.* We also consider "the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Davis v. Scott Paper Co.*, 507 A.2d 581, 583 (Me. 1986).

C. Scope of the Bifurcation Agreement

[¶14] A claimant seeking compensation for an asbestos-related disease has a burden (1) to establish the existence of an asbestos-related disease; that is, one caused by exposure to asbestos, 39-A M.R.S.A. § 614(1), (2); and (2) to establish

the employer at which the last injurious exposure occurred, *id.* § 614(4). Lappin Brothers contends that when the parties agreed to bifurcate the proceedings, they agreed that in the first stage, the ALJ's decision would be limited to addressing the last employment at which Mr. Boyle was injuriously exposed to asbestos.

[¶15] Lappin Brothers concedes that there is nothing in the record indicating the particular terms of the parties' agreement to bifurcate. It is apparent from the record, however, including the parties' position papers and the ALJ's decrees, that the parties agreed that the issues for decision in the first stage of the proceedings included "last injurious exposure" under section 614(4). We must therefore address what a determination of last injurious exposure means.

1. Last Injurious Exposure

[¶16] As noted above, section 614(4) provides that "the only employer and insurance carrier liable" for an asbestos-related disease "is the last employer in whose employment the employee was last injuriously exposed to asbestos, and the insurance carrier, if any, on the risk when the employee was last so exposed under that employer." The Law Court addressed the meaning of last injurious exposure in *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056 (Me. 1986).

[¶17] In *Norton*, the employee brought a claim for asbestos-related disease pursuant to 39 M.R.S.A. § 194-B (Supp. 1985), the precursor statute to section 614. The employee had been exposed to asbestos during much of his working life

while employed by a number of different employers. 511 A.2d at 1057. The commissioner determined that the last injurious exposure occurred at C.P. Blouin, and granted the employee's petition as against that employer. *Id.* at 1058. The appellate division reversed, and the employee appealed to the Law Court. *Id.*

[¶18] The commissioner had found that the employee was exposed to asbestos while in Blouin's employ, and that he had lung disease caused by asbestos, which contributed to his ongoing incapacity. *Id.* at 1062. Medical witnesses were unable to pinpoint any particular period of occupational exposure as causing the employee's incapacity. *Id.* The employer argued on appeal that the requirement of legal causation applies in the occupational disease context, and was not shown. *Id.* The Law Court disagreed, stating:

> [L]egal cause is made out by the existence of an occupational disease, that is, one arising from risks or conditions peculiar to the workplace. The assignment of liability to the last injurious exposure reflects a legislative choice to allocate the burden of incapacity resulting from occupational disease. Given the latent nature of asbestosis, it is possible that in many cases, the last exposure, standing alone, may not be causing incapacity at the time of the hearing. Nevertheless, the Legislature has chosen to place liability on the employer responsible for the "last injurious exposure."

Id. at 1063. In response to the employer's argument that the exposure had not been proved to be injurious, the Court construed the phrase "injurious exposure" to mean "exposure to the same work-related hazards responsible for the employee's disease." *Id.* The Court explained that this construction does not render the word

"injurious" superfluous, because "[t]he exposure is injurious in the sense that it contributes to the disease process resulting from the cumulative effect of all exposures." *Id*.

[¶19] Thus, the Court in *Norton* interpreted the precursor to section 614(4) not to require proof that a particular exposure caused the particular disease in issue. Instead, the Legislature has assigned liability to the last employer at which the employee was exposed to the same hazard that caused or contributed to the asbestos-related disease. *See also* ARTHUR LARSON & LEX K. LARSON, 14 LARSON'S WORKERS' COMPENSATION LAW §153.02 (2016 ed.) (stating that the traditional last injurious exposure rule means that "[a]s long as there was some exposure of a kind that could have caused the disease, the last insurer at risk is liable for all disability from that disease."); *Duncan v. Scott Paper Co.*, No. 92-161 (Me. W.C.C. App. Div. Aug. 14, 1992) (interpreting injurious exposure to mean exposure to a hazard capable of producing asbestos-related disease, including exposure to small amounts of asbestos); *Talbot v. American Hoist & Derrick Co.*, No. 88-253 (Me. W.C.C. App. Div. Dec. 30, 1988) (concluding, under Occupational Disease Law, that "injurious noise" means "sound capable of producing occupational hearing loss.").

2. Proof of Last Injurious Exposure

[¶20] The record contains adequate support for the finding that Mr. Boyle received an exposure at Lappin Brothers to a hazard capable of producing an asbestos-related disease. After holding hearings over four days and considering voluminous evidence, much of which was conflicting, the ALJ specifically credited the testimony of Vernon Smith, the general foreman for Lappin Brothers on Mr. Boyle's last job as a pipefitter. The ALJ summarized Mr. Smith's testimony describing the piping process Mr. Boyle used on that job site:

> [F]ive foot lengths of Duriron pipe 3 inches or less in diameter [were] jointed together to cover a total of 200 to 300 feet and 40-60 joints, with turns and bends to avoid obstacles. As the asbestos rope was being unstranded and cut into 16-inch lengths with a hammer or hacksaw, dust and particles were visible in the surrounding air which the employee was breathing. Smith explained that previously he had seen the employee performing Duriron installation at EMMC and, therefore, because of the brittleness of the Duriron pipe, selected the employee to perform this pains-taking job at Dover-Foxcroft.

[¶21] The record supports this characterization of Mr. Smith's testimony. He further testified that Mr. Boyle performed this procedure for about a month to six weeks, for 40 hours per week, and that Mr. Boyle's face was only twelve to sixteen inches from the rope when cutting.

[¶22] Lappin Brothers contends this testimony was insufficient to establish that the hazard that Mr. Boyle was exposed to was the same hazard that caused or contributed to an asbestos-related disease. Lappin asserts that although Mr. Smith

and Mr. Boyle's brother, E. Louis Boyle, testified that there were visible particles and dust generated by the process of un-stranding and cutting the asbestos rope, neither could testify definitively that the dust or particles were asbestos fibers. Lappin adduced evidence that could support a finding of no exposure. Thomas Spence, retired director of materials engineering from the former Duriron Company, testified that the asbestos rope used to seal Duriron acid-resistant waste piping contained only a small percentage of asbestos, and was encased in bentonite clay. Mr. Spence testified that he thought that any dust or residue produced while cutting the asbestos-containing rope would have been bentonite, because bentonite comprised 90-96% of the packing.

[¶23] The ALJ's determination that Mr. Boyle's exposure to asbestos at Lappin Brothers was to the same work-related hazard responsible for an asbestos-related disease is not erroneous and did not exceed the scope of a proceeding to decide "last injurious exposure." The testimony from the industry witness regarding the amount of encapsulated asbestos in the product was heard and evaluated by the ALJ when making the last injurious exposure determination. The ALJ credited Mr. Smith's testimony regarding Mr. Boyle's exposure at the Lappin Brothers job. That testimony established that the process of cutting the asbestos-containing rope into sections generated dust and particles visible in the surrounding air. This is sufficient to meet the Estate's burden on this aspect of the claim. *See*

Gordon v. Aetna Casualty & Surety, 406 A.2d 617 (Me. 1979) ("In a workers' compensation proceeding . . . the [board] is entitled to resolve such factual issues by evaluating the credibility of the witnesses.").

3. Medical Causation/Asbestos-Related Disease

[¶24] Lappin Brothers finally asserts that the Estate did not meet its burden of proof of medical causation. It argues that the assumptions by the ALJ that Mr. Boyle suffered from an asbestos-related disease and that mesothelioma is caused by exposure to asbestos were not supported by a stipulation or competent evidence in the record. We agree.

[¶25] The record, which includes the death certificate and Ms. Boyle's testimony, contains competent evidence supporting the factual finding that Mr. Boyle contracted and died from mesothelioma. It also contains competent evidence supporting the finding Mr. Boyle was exposed to asbestos at several job sites throughout his career as a pipefitter, including at Lappin Brothers.

[¶26] In its response to Lappin Bothers' Motion for Findings, however, the ALJ stated:

> The Board assumed that, in agreeing and requesting to initially present for determination the question of which employment, if any, was the source of the employee's last *injurious* exposure to asbestos, medical causation, i.e., the existence of an asbestos-related disease caused or contributed to by such employment-related exposure(s), was undisputed. Otherwise, the apparent purpose of such a bifurcated approach, to eliminate all of the non-liable employers from the consolidated proceeding, and thereby avoid their protracted further

> involvement, would be thwarted; because those other employers would continue to have a stake in subsequent proceedings addressing an alternative basis for denying the claims against them, lack of medical causation. Moreover, the disease which the Board has understood to be the subject of the present case, mesothelioma, is generally accepted to result only from asbestos exposure.

[¶27] The record does not support the ALJ's assumption that the parties agreed that Mr. Boyle suffered from an asbestos-related disease or the ALJ's understanding that mesothelioma is generally accepted to be caused by exposure to asbestos. These are not matters for administrative notice. The record is devoid of any evidence indicating that the parties stipulated to this aspect of the Estate's burden of proof. We conclude that the ALJ's assumption that the employers agreed Mr. Boyle developed an asbestos-related disease from occupational exposure to asbestos; i.e., medical causation, lacks support from any stipulation of the parties or competent evidence in the record.

III. CONCLUSION

[¶28] The ALJ's determination that the last injurious exposure occurred while Mr. Boyle worked for Lappin Brothers is affirmed. However, because it is unclear from the record what the scope of the first stage of the proceedings was intended to include beyond last injurious exposure, the issue of medical causation should be decided on remand. If the Estate submits proof of medical causation sufficient to persuade the ALJ, and upon a determination regarding the benefits to

which the Estate and Ms. Boyle are entitled, the proceedings will be finally concluded.

The entry is:

> The ALJ's decision is affirmed in part and vacated in part, and remanded for additional proceedings consistent with this decision.

Administrative Law Judge Stovall, dissenting

[¶29] I respectfully dissent. It is my opinion that, in light of Me. W.C.B. Rule, ch. 13, § 3, and *Estate of James Cole v. Girl Scouts of Maine*, Me. W.C.B. No. 14-27 (App. Div. 2014), this appeal should be dismissed because it is not a final 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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