STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
App. Div. Case No. 17-0039
Decision No. 19-39

SHERRY M. KNOX
(Appellee)

v.

IRVING FOREST PRODUCTS, INC.
(Appellant)

and

LIBERTY MUTUAL INSURANCE COMPANY
(Insurer)

Argued: April 11, 2018
Decided: November 22, 2019

PANEL MEMBERS: Administrative Law Judges Elwin, Jerome, and Knopf
BY: Administrative Law Judge Elwin

[¶1] Irving Forest Products and Liberty Mutual Insurance Company appeal from a decision of a Workers' Compensation Board administrative law judge (*Goodnough, ALJ*) granting Sherry Knox's Petitions for Award and for Payment of Medical and Related Services based on a gradual right hip injury dated July 22, 2015. Irving asserts that the ALJ erred by determining that the date of injury was July 22, 2015, and by finding that Ms. Knox provided Irving with timely notice of the injury. Because it is unclear that the ALJ applied the correct legal standard, we vacate the decision and remand for determinations of the date of injury and the date Ms. Knox's notice obligation arose.

I. BACKGROUND

[¶2] Ms. Knox worked for Irving as a lumber handler. Her work duties involved repetitively grabbing boards of wood as they passed, planting her right foot, then lifting or sliding the board while either moving to the right or twisting to stack them on a rack. This activity resulted in a repetitive and significant load on her right hip and lower back.

[¶3] Ms. Knox experienced hip pain in February 2015 and connected that pain to her work activity at that time. However, she did not seek medical treatment or miss work because of her pain until July 2015. In May 2016, she filed Petitions for Award and for Payment of Medical and Related Services alleging a gradual right hip injury dated July 22, 2015, which was her last day of work at Irving. The ALJ granted both petitions, finding that Ms. Knox sustained a gradual right hip injury caused by the repetitive motions she performed as part of her job.

[¶4] During litigation, the parties disputed both the date of injury and the date Ms. Knox provided notice to the employer. Irving asserted that the work injury manifested itself in February 2015, but Ms. Knox did not provide notice until she filed her Petitions in May 2016, well beyond the applicable thirty-day notice period set forth in 39-A M.R.S.A. § 301 (Supp. 2018).[1] Ms. Knox asserted that she had

[1] The relevant text of 39-A M.R.S.A. § 301 reads:

> For claims for which the date of injury is on or after January 1, 2013, proceedings for compensation under this Act, except as provided, may not be maintained unless a notice of

notified her tech trainer/team leader, Shirley Garland, in February 2015, and her shift supervisor/team leader, Michael Ladd, by the end of her last shift of work on July 21-22, 2015.

[¶5] There was conflicting evidence on these points. Ms. Knox testified that Ms. Garland had assisted her in "popping" her hip back into place on three or four occasions in the ladies' room at work, and that she told Ms. Garland at that time that her hip problems were work-related. Ms. Garland testified that although Ms. Knox told her she was experiencing hip pain and had asked for help, Ms. Garland also testified that she declined to do so and that Ms. Knox did not tell her that her injury was work-related.

[¶6] The ALJ weighed the testimony and found Ms. Garland to be more credible on this point. He found as fact that Ms. Knox did not report that her hip issues were caused by work activities in February 2015. The ALJ ultimately found

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> the injury is given within 30 days after the date of injury. The notice must include the time, place, cause and nature of the injury, together with the name and address of the injured employee. The notice must be given by the injured employee or by a person in the employee's behalf, or, in the event of the employee's death, by the employee's legal representatives, or by a dependent or by a person in behalf of either.
>
> The notice must be given to the employer, or to one employer if there are more employers than one; or, if the employer is a corporation, to any official of the corporation; or to any employee designated by the employer as one to whom reports of accidents to employees should be made. It may be given to the general superintendent or to the supervisor in charge of the particular work being done by the employee at the time of the injury. Notice may be given to any doctor, nurse or other emergency medical personnel employed by the employer for the treatment of employee injuries and on duty at the work site. If the employee is self-employed, notice must be given to the insurance carrier or to the insurance carrier's agent or agency with which the employer normally does business.

that Ms. Knox gave notice to Mr. Ladd during her last shift at work on July 21-22, 2015.

[¶7] As to the date of the injury itself, the ALJ found: "[t]he injury manifested itself in a significant manner on or about July 22, 2015." In his further findings of fact and conclusions of law, he added, "[a]lthough I recognize that [Ms. Knox] had experienced pain in the hip as far back as February 2015, and did connect that pain to her work, that pain did not rise to the level of a *compensable* injury until later in July 2015." (emphasis in original).

[¶8] Had the ALJ found that Ms. Knox's gradual injury occurred in February 2015, the July notice would have been too late, barring a mistake of fact. However, because the ALJ found that the date of injury was July 22, 2015, he concluded that notice to Mr. Ladd on that same date was timely.

[¶9] Irving filed a Motion for Further Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Supp. 2018), which the ALJ granted, issuing a revised decision that did not change the result. Irving appeals.

II. DISCUSSION

[¶10] 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). Because Irving requested additional findings of fact and conclusions of law and submitted proposed additional findings, we do not assume that the ALJ made all the necessary findings to support his conclusions. *See Maietta v. Town of Scarborough*, 2004 ME 97, ¶ 17, 854 A.2d 223. "Instead, we review the original findings and any additional findings made in response to a motion for findings to determine if they are sufficient, as a matter of law, to support the result and if they are supported by evidence in the record." *Id*.

[¶11] Irving contends that the ALJ erred as a matter of law when determining that the date of injury was July 22, 2015, rather than February 2015, when the ALJ also found as fact that she had experienced hip symptoms and connected those symptoms to her work activity in February. Irving therefore contends that notice, if provided on July 22, 2015, was untimely.

[¶12] The Law Court has defined a gradual injury as "a single injury caused by repeated, cumulative trauma without any sudden incapacitating event." *Derrig v. Fels Co.*, 1999 ME 162, ¶ 7, 747 A.2d 580. The Court has noted the difficulty in pinning down the date of injury for gradual injuries because of the "indefinite nature of their starting points," *Jensen v. S.D. Warren*, 2009 ME 35, ¶ 14, 968 A.2d 528, and has held variously that the date of injury for a gradual injury is the date on which "the injury manifests itself," *id.* ¶ 27, or the date on which "the disability manifests

itself," *id.* ¶ 26 (quoting *Ross v. Oxford Paper Co.*, 363 A.2d 712, 714 (Me. 1976)).[2] "The notice and limitations periods, however, may begin to run later, depending on the employee's awareness" of the "compensable nature" of the injury. *Jensen*, 2009 ME 35, ¶ 26, 968 A.2d 528. *See* 39-A M.R.S.A. § 302 (Supp. 2018) ("Any time during which the employee . . . fails to [give notice] on account of mistake of fact[] may not be included in the computation of proper notice.").

[¶13] The *Jensen* Court thus established a two-step process: "The [ALJ] should first determine the date of injury, i.e., the date on which the injury manifested itself, and then examine whether the statutory notice and limitations periods commenced on that date or whether they commenced at a later date based on a mistake of fact" as to the cause and nature of the injury. *Id.* ¶ 27.

[¶14] Our task when reviewing an ALJ's finding of a gradual date of injury is "not to determine whether the [ALJ] reached the only correct conclusion but rather, whether [the ALJ's] conclusion is permissible on the record before us." *Marean v. City of Portland*, Me. W.C.B. No. 16-47, ¶ 14 (App. Div. 2016) (citing *Comeau v. Me. Coastal Servs.*, 449 A.2d 362, 369 (Me. 1982)). "[The appellant] can prevail only if legal error is evident in the decree." *Id.*

[2] "The Law Court's decisions do not establish a bright line rule for when a gradual injury manifests itself, but demonstrate that the date should be determined based on multiple considerations and the salient circumstances of each case." *Moscone v. Millinocket Regional Hosp.*, Me. W.C.B. No. 19-27, ¶ 5 (App. Div. 2019). "Common definitions of manifest include 'clearly apparent to the sight or understanding'; and 'to show or demonstrate plainly; reveal.'" *Id.* ¶ 11 (quoting *The American Heritage Dictionary of the English Language* (5th ed. 2019)).

[¶15] In determining Ms. Knox's date of injury, the ALJ assessed whether the injury had manifested itself "in a significant manner" and whether her symptoms had risen "to the level of a compensable injury." Based on these considerations, he determined that date to be her last day of work for Irving, July 22, 2015. However, the standard set forth by the Court in *Jensen* requires only an assessment of when the injury manifests itself, and not when *significant* manifestation or compensability occurs. Awareness of the "compensable nature" of an injury is distinct from whether it has manifested; an injury may be clearly apparent to the employee, thus manifesting, before or at the same time the employee recognizes that the injury may be work-related. Awareness of the "compensable nature" of an injury includes the recognition that the injury may have arisen out of and in the course of employment and triggers the obligation to notify the employer. The ALJ's analysis in this case conflates these concepts.

[¶16] The ALJ's determination that the date of Ms. Knox's gradual injury was the last day that she worked for Irving, July 22, 2015, is supportable only if it is the date on which the injury manifested itself, regardless of significance of the manifestation or the employee's awareness of compensability. Based on the ALJ's decision, however, it is unclear whether that date coincided with her last day of work, or whether it occurred earlier. *See Jensen*, ¶¶ 27-28. We therefore vacate the ALJ's decision and remand for reconsideration of the date of injury. Pursuant to *Jensen*,

the ALJ should first determine the date of injury, i.e., the date on which the injury manifested itself, and then examine whether the statutory notice period commenced on that date or whether it commenced at a later date based on a mistake of fact. As we have noted, the date on which an employee is obligated to provide notice of the gradual injury to the employer may differ from the date of injury, depending on the employee's awareness of the compensable nature of the injury. *Jensen*, 2009 ME 35, ¶ 26, 968 A.2d 528. Because it is not clear that the ALJ separately considered these two issues, we remand for a determination of the date the gradual injury occurred and the date Ms. Knox's notice obligation arose.

The entry is:

> The decision of the ALJ is vacated, and the case is remanded for a determination of when Ms. Knox's gradual right hip injury manifested itself, and when her notice obligation arose, 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. 2018).

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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