VICKI (CARSON) FREEMAN
(Appellee)

v.

MAINE MEDICAL PARTNERS
(Appellant)

and

SYNERNET
(Insurer)

Conference held: May 6, 2020
Decided: August 30, 2021
Corrected: October 5, 2021

PANEL MEMBERS: Administrative Law Judges Chabot, Collier, and Stovall
BY: Administrative Law Judge Collier

[¶1] Maine Medical Partners appeals from a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) granting Vicki (Carson) Freeman's Petitions for Award for carpal tunnel injuries occurring in 2015 and 2017. Maine Medical Partners contends that the ALJ erred by (1) concluding that Ms. Freeman's late notice of the 2017 injury was excused by her mistake of fact; (2) accepting the medical conclusions of an independent medical examiner (IME) appointed pursuant to 39-A M.R.S.A. § 312 (Pamph. 2020) that both injuries were work-related; and (3) by awarding incapacity benefits although Ms. Freeman left work for a nonwork-related condition. We conclude that the decree is inconsistent

on the issue of when Ms. Freeman became aware that her injury was work related and remand this case for clarification. As to the 2015 date of injury, we determine that the ALJ did not err when accepting the IME's medical findings regarding incapacity and causation.

I. BACKGROUND

[¶2] Vickie (Carson) Freeman had an extensive history working in jobs requiring repetitive computer data entry work. In 2008 she began working for Maine Medical Partners (MMP) in a position requiring the use of her hands 90% of the time, entering data and using the mouse. On January 11, 2016, Ms. Freeman went to her primary care practitioner (PCP) complaining of right arm numbness and pain. A nurse practitioner assessed right carpal tunnel syndrome. The next day Ms. Freeman notified MMP of a right arm and hand injury, listing December 29, 2015, as the date of injury.

[¶3] An ergonomic evaluation resulted in some alterations to her workspace and she was given a wrist splint. Ms. Freeman lost no time and continued to perform her usual job duties for MMP, although she continued to experience symptoms in her right upper extremity and occasional numbness in her left hand. Ms. Freeman continued with MMP until July 11, 2017, when she left due to a nonwork-related left hip problem. At that point she was under no medical restrictions as a result of her upper extremity problems.

[¶4] Ms. Freeman returned to her PCP in October of 2017 for several conditions, including right-sided carpal tunnel syndrome that had not improved since she left work in July. The ALJ found that Ms. Freeman also experienced similar but far less frequent problems on the left. EMG testing on January 17, 2018, performed by Douglas Pavlak, M.D., revealed carpal tunnel syndrome in both extremities, moderate to severe on the right and moderate on the left. Ms. Freeman underwent bilateral carpal tunnel release surgeries the following month.

[¶5] On January 10, 2018, Ms. Freeman filed petitions asserting injury dates of December 29, 2015, and July 11, 2017. The petition for the July 2017 injury asserted a gradual, bilateral upper extremity injury. This petition was the first notice of a July 11, 2017, left-sided upper extremity injury provided to the employer. However, the ALJ concluded that the discrepancy between the mild left-sided symptoms and the severity of the EMG test results in her left upper extremity constituted a mistake of fact on Ms. Freeman's part sufficient to excuse her failure to give notice within 30 days of the July 2017 injury date.

[¶6] The ALJ further concluded that Ms. Freeman established a gradual work injury to her right upper extremity as of December 29, 2015, and a gradual work injury to both upper extremities as of her last day of work, July 11, 2017. The ALJ awarded total incapacity benefits from the date Ms. Freeman left work to the date of

the section 312 examination by the IME, and ongoing partial incapacity benefits from that date forward based on an imputed weekly earning capacity of $200.00.

[¶7] Pursuant to MMP's Motion for Findings of Fact and Conclusions of Law, the ALJ issued an amended decree that did not alter the outcome. MMP appeals.

II. DISCUSSION

A. Standard of Review

[¶8] The role of the Appellate Division "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). 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 Indus.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Notice

[¶9] MMP contends that there is no competent evidence to support the finding that Ms. Freeman was under a mistake of fact as to the cause and nature of the July 11, 2017, gradual injury, or that she provided timely notice of that injury.

[¶10] For the 2017 injury date, the claimant must demonstrate that notice was provided to the employer within 30 days of the date of injury. 39-A M.R.S.A. § 301 (Pamph. 2020). However, "[a]ny time during which the employee . . . fails to do so on account of mistake of fact, may not be included in the computation of proper notice." 39-A M.R.S.A. § 302 (Pamph. 2020). Thus, the notice period is tolled under section 302 "when an injury, or its cause, is not recognized due to a mistake of fact." *Jensen v. S.D. Warren Co.*, 2009 ME 35, ¶ 17, 968 A.2d 528; *see also Pino v. Maplewood Packing Co.*, 375 A.2d 534, 537 (Me. 1977). The 30-day period begins to run on the date the compensable nature of the injury becomes apparent to the employee. *Jensen*, 2009 ME 35, ¶ 26.

[¶11] As the petitioning party, the employee generally bears the burden of proof to establish all elements of the claim on a more probable than not basis. *Fernald v. Dexter Shoe Co.*, 670 A.2d 1382, 1385 (Me. 1996). Once the issue of notice is raised as a defense, the employee bears the burden to demonstrate that timely notice was provided. *Boober v. Great N. Paper Co.*, 398 A.2d 371, 373-74 (Me. 1979).

[¶12] In this case, Ms. Freeman had the burden to demonstrate that she was under a mistake of fact sufficient to render timely the notice she provided in mid-January of 2018, informing MMP of the July 11, 2017, injury. The ALJ stated:

> [T]he discrepancy between Ms. Freeman's fairly modest symptoms on the left side and the severity of test results is a mistake of fact . . . I find

> that [her] left-sided hand symptoms were not significant as of the time she left work insofar as they did not interfere with her work nor did those symptoms warrant medical evaluation or treatment. Despite these modest symptoms, Ms. Freeman learned that she suffered from left-sided carpal tunnel that was significant enough to warrant surgery, when she underwent testing with Dr. Pavlak.
>
> For this reason, I find that Ms. Freeman provided notice of her July 11, 2017 work injury to her employer within the timeframe set forth in the Act, allowing for her mistake of fact.

[¶13] Although we conclude that there is competent evidence to support a finding that Ms. Freeman was under a mistake of fact as to the cause and nature of her 2017 bilateral upper extremity injury (she testified that she believed that all of her symptoms related to the 2015 date of injury), the decree is inconsistent regarding when Ms. Freeman became aware that the injury was work related. The ALJ did not specifically make a finding of when Ms. Freeman's mistake of fact ended. Instead she found that "Ms. Freeman learned that she suffered from left-sided carpal tunnel that was significant enough to warrant surgery, when she underwent testing with Dr. Pavlak."

[¶14] A reasonable inference can be drawn to conclude that the ALJ meant that Ms. Freeman remained under a mistake of fact until she underwent EMG testing, which occurred on January 17, 2018. However, this finding is in conflict with the fact that she filed her petitions on January 10, 2018, seven days *before* that date. Accordingly, we cannot determine from the findings whether the ALJ erred when concluding that Ms. Freeman provided timely notice. Because the ALJ's findings on

this issue are inadequate for appellate review, we remand for clarification. *See Spear v. Town of Wells*, 2007 ME 54, ¶ 13, 922 A.2d 474.

B. The 2015 date of Injury and Related Incapacity

[¶15] The ALJ's findings that Ms. Freeman suffered incapacity as a result of the 2015 carpal tunnel injury, and that the 2015 injury is work related (as opposed to having resulted from non-work related activities such as crocheting) are supported by competent evidence, including the IME's medical findings. We find no clear and convincing evidence that would require us to disregard the IME's findings and reverse those determinations. *See* 39-A M.R.S.A. § 312(7) (Pamph. 2020).

[¶16] Further, the ALJ awarded Ms. Freeman total incapacity benefits from July 11, 2017, until December 6, 2018, and ongoing partial incapacity benefits thereafter, due to the combined effects of her preexisting left hip injury and her bilateral carpal tunnel injuries. Because we conclude that the findings relating to notice of the asserted 2017 carpal tunnel injury need clarification, we vacate the decree in part and remand for a determination of when Ms. Freeman's mistake of fact ended and whether that determination changes the level of benefits to which she is entitled.

The entry is:

> The administrative law judge's decision is vacated in part and 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 (Pamph. 2020).

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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