STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 16-0022
Decision No.17-41

MARK S. DAVIS
(Appellee)

v.

BOISE CASCADE
(Appellant)

and

MSIGA
(Insurer)

and

NEWPAGE CORPORATION
(Appellee)

and

SEDGWICK CMS
(TPA)

Argued: March 16, 2017
Decided: December 1, 2017

PANEL MEMBERS: Administrative Law Judges Hirtle, Collier, and Elwin

Majority: Administrative Law Judges Collier and Elwin
Dissent: Administrative Law Judge Hirtle

BY: Administrative Law Judge Collier

[¶1] Boise Cascade appeals from a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) granting petitions filed by Mark Davis and NewPage Corporation for work-related injuries that occurred on May 22, 1989, April 9, 1990, March 15, 2010, and August 11, 2010. Boise Cascade

argues that the ALJ erred (1) when determining that any claims related to Mr. Davis's 1989 and 1990 injuries are not barred by the statute of limitations in effect at that time, and (2) in adopting the findings contained in the independent medical examiner's report rather than that examiner's deposition testimony. We disagree with both contentions and affirm the decision.

I. BACKGROUND

[¶2] Mark Davis worked at the Rumford paper mill from 1981 to 2014. During his tenure, the mill changed ownership from Boise Cascade to NewPage Corporation, although Sedgwick CMS acted as the workers' compensation claims manager for both owners. Mr. Davis suffered two work-related injuries while Boise Cascade owned the mill: a neck injury on May 22, 1989, and a low back injury on April 9, 1990. He received partial incapacity benefits for those injuries until July 22, 2004, when he began earning more than his pre-injury average weekly wage. The last payment of benefits that undisputedly relates to the 1989 and 1990 injuries was made on July 22, 2004.

[¶3] Although he stopped receiving weekly incapacity benefits, Mr. Davis's neck continued to be problematic. He complained of neck pain, continued to have work restrictions, and periodically went to the mill's medical department for neck-related evaluation and treatment, including a visit on December 4, 2007.

[¶4] Mr. Davis's low back condition also continued to bother him. He had work restrictions associated with that condition and periodically sought treatment at the mill's medical department for low back complaints, including a visit on April 30, 2009. During that visit, the mill doctor prescribed physical therapy for an "acute aggravation of chronic low back problems, with increased right sciatic symptoms" and advised Mr. Davis to stay within his existing work restrictions.

[¶5] In 2010, after NewPage took over the mill, Mr. Davis suffered two more work-related injuries. A gradual right hand injury on March 15, 2010, left him unable to use impact tools or heavy wrenches. On August 11, 2010, according to NewPage's medical staff: "[Mr. Davis] feels he aggravated an old injury to his lower back." Mr. Davis also communicated his low back problems to Sedgwick, NewPage's claims administrator. His discussion apparently included mention of both the August 11 incident and a "1990ish" injury. Sedgwick paid Mr. Davis medical benefits, but recorded its payments as relating to the August 11, 2010, injury rather than the 1990 injury.

[¶6] Mr. Davis's injuries led him to stop working on May 1, 2014. In August and September of 2014 (more than ten years after the payment of benefits on July 22, 2004), he filed petitions seeking incapacity benefits from Boise Cascade and NewPage for his four separate injuries as well as payment of certain medical bills. NewPage filed an Apportionment Petition seeking a contribution

from Boise Cascade with respect to Mr. Davis's 1990 low back injury. Boise Cascade filed its Petition Seeking to Establish a Date of Maximum Medical Improvement on the 1989 and 1990 dates of injury and asserted a statute of limitations defense against claims associated with the 1989 and 1990 injuries.

[¶7] At the time of Mr. Davis's 1989 and 1990 injuries, the relevant statute of limitations was 39 M.R.S.A. § 95 (1989). That statute did not contain a provision tolling the time for filing of claims in the event that in-house medical care was provided by an employer for a work related injury. Effective January 1, 1993, as part of the enactment of the Workers' Compensation Act of 1992, the Legislature passed a new statute of limitations codified at 39-A M.R.S.A. § 306. P.L. 1991, ch. 885, § A8. Included in the new Title 39-A was a transition section providing that section 306 was to apply only to dates of injury on or after January 1, 1993, while dates of injury prior to that date were controlled by the analogous provision of Title 39. P.L. 1991, ch. 885, § A-10. In 2001, however, the Legislature amended 39-A M.R.S.A. § 306 to add a new paragraph (A) to subsection (2), tolling the statute of limitations in some cases when the injured worker receives medical care from the employer's in-house medical staff. P.L. 2001, ch. 435 § 2. The application provision of this 2001 amendment expressly states that it "applies to all injuries and illnesses, regardless of when they occurred." *Id.*

[¶8] The ALJ concluded that the 2001 amendment to 39-A M.R.S.A. § 306 applied to Mr. Davis's 1989 and 1990 dates of injury. Applying 39-A M.R.S.A. § 306(2)(A), the ALJ found that medical treatment rendered by NewPage's in-house medical department had tolled the statute of limitations against Boise Cascade, rendering Mr. Davis's petitions timely filed. Further, the ALJ found that payments made by Sedgwick for medical care of Mr. Davis's low back were made with knowledge that the care was caused in part by the 1990 date of injury, providing an alternative mechanism to toll the statute of limitations on that date of injury. *See Klimas v. Great N. Paper Co.*, 582 A.2d 256, 259 (Me. 1990). Finally, the ALJ adopted the written report of Dr. Donovan, rather than his deposition testimony, to find that Mr. Davis was entitled to total incapacity benefits. The parties requested and submitted proposed findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2016), but the ALJ did not alter her substantive decision. This appeal followed.

II. DISCUSSION

A. Applicable Law

[¶9] The primary issue raised in this appeal is whether the petitions associated with Mr. Davis's 1989 and 1990 injuries are time-barred. Because those injuries occurred before the enactment of the current Workers' Compensation Act as contained in Title 39-A, they are governed by the statute of limitations

contained in its predecessor, Title 39.[1] *See* P.L. 1993, ch. 885, § A-10(1); *see also* *Morgan-Leland v. Univ. of Me.*, 632 A.2d 748, 749 (Me. 1993). Under either statute, the limitations period is extended when an employer pays workers' compensation benefits for the injury in question. *See* 39 M.R.S.A. § 95; 39-A M.R.S.A. § 306 (Supp. 2016). The statutes differ, however, in whether they consider in-house medical treatment as a payment of benefits for purposes of tolling the limitations period. The limit in 39 M.R.S.A. § 95, as interpreted by the Law Court's 2000 decision, *Moreau v. S.D. Warren*, does not extend in such cases. 2000 ME 62, ¶ 9, 748 A.2d 1001, *superseded by statute*, P.L. 1993, ch. 885, § A-10, *as recognized by Waite v. NewPage Corp.*, W.C.B. 89-06-09-73 (Me. 2010). On the other hand, in-house medical treatment is considered a payment of benefits under 39-A M.R.S.A. § 306, as amended in 2001, and, therefore, such treatment extends the limitations period. *See* 39-A M.R.S.A. § 306(2)(A).

[¶10] Thus, we must decide (1) whether the 2001 amendment to 39-A M.R.S.A. § 306 applies to claims governed by 39 M.R.S.A. § 95, so as to alter

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[1] Section A-10 of the Workers' Compensation Act of 1993 provides:

> This Part applies to all matters in which an injury occurs on or after January 1, 1993. So as not to alter benefits for injuries incurred before January 1, 1993, for matters in which the injury occurred prior to that date, all the provisions of this Act apply, except that the Maine Revised Statutes, Title 39-A, sections 211, 212, 213, 214, 215, 221, *306*, and 325 do not apply. With regard to matters in which the injury occurred prior to January 1, 1993, the applicable provisions of former Title 39 apply in place of Title 39-A, sections 211, 212, 213, 214, 215, 221, *306* and 325.

P.L. 1993, ch. 885, § A-10(1) (emphasis added).

what constitutes a payment of benefits for those claims; and (2) if it does, whether the ALJ properly applied that amendment to the facts of Mr. Davis's case.

[¶11] 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). Because the parties requested findings of fact and conclusions of law following the decision, the Appellate Division will "review only the factual findings actually made and the legal standards actually applied by the [ALJ]." *Daley v. Spinnaker Inds., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

[¶12] The interpretation of a statute is an issue of law that we review de novo. *State v. Palmer*, 2017 ME 183, ¶ 7, 169 A.3d 425. When construing provisions of the Workers' Compensation Act,

> our purpose is to give effect to the Legislature's intent. 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. 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. If the statutory language is ambiguous, we then look beyond the plain meaning and consider other indicia of legislative intent, including legislative history.

Johnson v. Home Depot USA, Inc., Me. W.C.B. 14-2, ¶ 11 (App. Div. 2014) (quoting *Graves v. Brockway-Smith Co.*, 2012 ME 128, ¶ 9, 55 A.3d 456).

B. Application of the 2001 Amendments to 39-A M.R.S.A. § 306

[¶13] In 2001, the Legislature added paragraph (2)(A) to the limitations provision contained in 39-A M.R.S.A. § 306, specifying that certain in-house medical treatment would be considered payment of workers' compensation benefits and toll the limitations period.[2] *See* P.L. 2001, ch. 435, § 1. By its terms, that amendment "applies to all injuries and illnesses, regardless of when they occurred." P.L. 2001, ch. 435, § 2, *reprinted in* 39-A M.R.S.A. § 306 (Supp. 2016). Thus, the plain language of the 2001 amendment to 39-A M.R.S.A. § 306 indicates that it applies to Mr. Davis's 1989 and 1990 injuries, even though those injuries are otherwise governed by Title 39's statute of limitations.

[¶14] Because we conclude that the plain meaning of the amendment controls, we need not resort to evidence of legislative intent, such as legislative

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[2] Title 39-A section 306(2)(A) provides:

> **2. Payment of benefits.** If an employer or insurer pays benefits under this Act, with or without prejudice, within the period provided in subsection 1, the period during which an employee or other interested party must file a petition is 6 years from the date of the most recent payment.
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> A. The provision of medical care for an injury or illness by or under the supervision of a health care provider employed by, or under contract with, the employer is a payment of benefits with respect to that injury or illness if:
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> (1) Care was provided for that injury or illness on 6 or more occasions in the 12-month period after the initial treatment; and
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> (2) The employer or the health care provider knew or should have known that the injury or illness was work-related.
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> For the purposes of this paragraph, "health care provider" has the same meaning as provided in rules of the board.

history. We note, however, that the Legislature enacted 39-A M.R.S.A. § 306(2)(A) soon after the Law Court decided *Moreau v. S.D. Warren*. In that case, the Law Court held that in-house medical treatment does not extend Title 39's limitations period. 2000 ME 62, ¶ 9. Prior to the closely-divided decision in *Moreau*, the question was unsettled by the Law Court (although, as the dissent in *Moreau* pointed out, two decisions from the Appellate Division of the former Workers' Compensation Commission had interpreted in-house medical treatment as extending the limitations period in 39 M.R.S.A. § 95). *Id.* at ¶ 10 n.9 (Alexander, Clifford, and Dana, JJ., dissenting); *see Klimas v. Great N. Paper Co.*, 582 A.2d 256, 258 n.2 (Me. 1990) ("We have not yet determined whether first aid is a payment under the Act for purposes of tolling either of the section 95 statutes of limitations."); *Pottle v. Bath Iron Works Corp.*, 551 A.2d 112, 112 (Me. 1988) ("We do not reach the ultimate question whether the treatment an employee receives at an employer's first aid facility for a single work-related injury will toll a workers' compensation statute of limitations on that injury."). Title 39-A M.R.S.A. § 306(2)(A) not only directly modified the statute of limitations contained in Title 39-A, but also reversed the outcome in factual situations like that presented in *Moreau*.[3]

[3] The dissent cites *Caron v. Me. Sch. Admin. Dist. No. 27*, 594 A.2d 560, 563 (Me. 1991) for the proposition that legislation will not be interpreted to effect a modification of case law absent "clear and explicit statutory language showing" such an intent. But that same decision also reiterates the instruction that the "plain, common and ordinary meaning of statutory language controls the interpretation of

[¶15] The ALJ interpreted the amendment adding paragraph 306(2)(A) as applying to all injuries regardless of when they occurred, including Mr. Davis's 1989 and 1990 injuries at Boise Cascade. In that respect, her decision was a reasonable construction of the amendment's application provision and involved no misconception of applicable law.[4]

C. Contemporaneous Notice

[¶16] Having concluded that 39-A M.R.S.A. § 306(2)(A) applies to injuries regardless of date, we must next determine whether the ALJ properly applied that provision to the facts of Mr. Davis's case. Under section 306(2)(A) the provision of in-house medical treatment will only toll the limitations period if "[t]he

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a statute, unless the statute itself reveals a contrary intent." *Id.* at 562 (citing *State v. Edward C.*, 531 A.2d 672, 673 (Me. 1987)). It is difficult to draft a more straightforward application provision than that used by the Legislature here, just one year following the *Moreau* decision: "This Act applies to all injuries and illnesses, regardless of when they occurred." P.L. 2001, ch. 435, § 2. Also, although one would ordinarily expect the Legislature to modify 39 M.R.S.A. 95 by amending that section directly, Title 39 had already been repealed in its entirety by 2001. Thus, the Legislature's failure to amend Title 39 directly does not reflect a legislative intent for the 2001 amendment to apply only to Title 39-A.

[4] Boise Cascade contends that the ALJ's statutory interpretation is an unconstitutional retroactive application of section 306(2)(A). We disagree for two reasons.

First, unlike amendments that shorten an existing statute of limitations, those that extend a statute of limitations are not "retroactive" if they (1) do not change the legal consequences of acts or events that precede the effective date of the amendment, and (2) the claims have not yet been barred by the previous statute of limitations. *See Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816 (Me. 1980). In this case, interpreting 39-A M.R.S.A. § 306(2)(A) as extending the limitations period contained in 39 M.R.S.A. § 95 does not change the legal consequences of acts that precede the effective date of that amendment, only those after it. Mr. Davis's receipt of in-house medical treatment after July 22, 2004 occurred after the 2001 amendment. Up to that point, the statute of limitations on Mr. Davis's 1989 and 1990 injuries had not expired.

Second, even if the amendment of 39 M.R.S.A. § 95 were "retroactive legislation," it would only be unconstitutional if "its implementation impairs vested rights or imposes liabilities that would result from conduct predating the legislation." *See Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n.7 (Me. 1981). A retroactive extension of Title 39's limitations period would not impair any vested right belonging to Boise Cascade because "[n]o one has a vested right in the running of a statute of limitations until the prescribed time has completely run and barred the action." *Dobson*, 415 A.2d at 816.

employer or the health care provider knew or should have known that the injury or illness was work-related."[5] Thus, when an employer or insurer pays benefits for one date of injury, its payments may toll the statute of limitations applicable to a previous date of injury if the employee can prove that "the employer or insurer had contemporaneous notice that payments made within the limitations period but after a subsequent injury related in part to the prior injury." *See Leighton v. S.D. Warren*, 2005 ME 111, ¶ 16, 883 A.2d 906; *Klimas v. Great N. Paper Co.*, 582 A.2d 256, 258 (Me. 1990). This rule applies even when an employer changes insurance carriers. *See Lister v. Roland's Serv., Inc.*, 1997 ME 23, ¶ 7, 690 A.2d 491.

[¶17] Boise Cascade argues that the in-house medical treatment that Mr. Davis received at the mill after 2004 cannot toll the statute of limitations because the evidence was insufficient to support the ALJ's finding that it had contemporaneous notice that the treatment related, in part, to his 1989 and 1990 work injures. We disagree.

[¶18] Competent evidence supports the ALJ's findings. Her decision cited NewPage's medical department records from which one could reasonably infer that NewPage knew that Mr. Davis's need for care was due to his 1989 and 1990 dates of injury.

[5] Section 306(2)(A) also requires that, for in-house medical treatment to count as a payment of benefits, an employer must provide care for an injury or illness for six or more times in the twelve-month period following the injury. The parties do not dispute that this requirement has been met in this case.

[¶19] Further, we find no legal error in using notice given to NewPage's medical department to toll the statute of limitations against Boise Cascade given the Law Court's statement that, in cases such as these, "an employee is not required to separately notify each insurer, past or present, that may potentially have liability for a work-related injury, or condition." *Id.* ¶ 7; *cf.* 11 Arthur Larson, Lex K. Larson, Larson's Workers' Compensation Law § 126.07[5] (2017) ("If compensation is paid by one of two potentially liable employers, this payment has been held to toll the statute against the other.").

[¶20] Finally, we are not persuaded by Boise Cascade's argument that the statute of limitations in 39 M.R.S.A. § 95 is tolled only when benefits are paid "pursuant to section 51-B or 52" and that, therefore, Mr. Davis's in-house medical treatment, provided pursuant to 39-A M.R.S.A. § 206, would not toll the statute of limitations. Payments under the former and current Workers' Compensation Acts are essentially equivalent. Therefore, a payment under the latter may operate to toll the limitations period in the former. *Cf. Stockford v. Bath Iron Works Corp.*, 482 A.2d 843, 845 (Me. 1984) ("[P]ayments under the Longshoreman's Act are essentially equivalent to [Workers' Compensation] payments and as such constitute 'benefits otherwise required by this Act' and operate to toll the limitation period.").

D. Choice of Medical Opinions

[¶21] Boise Cascade also argues that the ALJ erred when she rejected a medical opinion provided by the independent medical examiner at his deposition and instead adopted that examiner's medical opinion as contained in his written report. The choice between competing expert medical opinions is a matter within the purview of the ALJ who hears the case. *See Traussi v. B & G Foods, Inc.*, Me. W.C.B. 15-10, ¶ 17 (App. Div. 2015) ("After considering both the written report and his deposition testimony, [the hearing officer] adopted the findings that [the independent medical examiner] expressed in his written report, concluding that his deposition testimony did not fundamentally alter those conclusions."); *see also Oriol v. Portland Hous. Auth.*, Me. W.C.B. 14-35, ¶ 12 (App. Div. 2014). We find no legal error in the reasoning or outcome of the ALJ in this case on this subject.

III. CONCLUSION

[¶22] The ALJ did not err in applying 39-A M.R.S.A. § 306(2)(A) to this case, given the plain language of the 2001 amendment that applies that provision to "all injuries and illnesses, regardless of when they occurred." Further, the ALJ's findings regarding contemporaneous notice and tolling of the statute of limitations are supported by competent evidence and her legal conclusions involve no misconception of the applicable law. Finally, the ALJ was within her discretion and neither misconceived nor misapplied the law when she adopted the written

opinion of the independent medical examiner over that examiner's deposition testimony.

The entry is:

The Administrative Law Judge's decision is affirmed.

Administrative Law Judge Hirtle, dissenting

[¶23] I respectfully dissent in part from sections B and C of the majority decision and would conclude that the 2001 amendments to 39-A M.R.S.A. § 306 do not apply to Mr. Davis's 1989 and 1990 dates of injury.[6] Accordingly, I would conclude that Mr. Davis's claim for the May 22, 1989 date of injury is barred by the statute of limitations at 39 M.R.S.A. § 95.

[¶24] The scope of Title 39-A, including section 306, is set forth in section A-10 of The Workers' Compensation Act of 1993. *See* P.L. 1993, ch. 885, § A-10(1). Section A-10 provides that "[s]o as not to alter benefits for injuries incurred before January 1, 1993[,]" 39-A M.R.S.A. § 306 does not apply to dates of injury prior to January 1, 1993, and the "applicable provisions of former Title 39 apply in place of Title 39-A" for injuries that occurred prior to January 1, 1993.

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[6] Because the ALJ made an adequately supported finding in the alternative that monetary payments made by Sedgwick were sufficient to toll the statute of limitations regarding the 1990 date of injury under 39 M.R.S.A. § 95, my proposed holding would bar only Mr. Davis's claim for the 1989 date of injury. As it concerns the 1990 low back injury, I join the majority's analysis of *Klimas v. Great Northern Paper Co.*, 582 A.2d 256 (Me. 1990) and *Lister v. Roland's Service, Inc.*, 1997 ME 23, 690 A.2d 491, and its resulting determination that payments made by Sedgwick are legally sufficient to toll the statute of limitations against Boise Cascade.

[¶25] To interpret the 2001 amendments to 39-A M.R.S.A. § 306 as altering the statute of limitations in 39 M.R.S.A. § 95 is inconsistent with the plain language of section A-10. The majority's interpretation transforms the 2001 amendment of one provision—39-A M.R.S.A. § 306—into an amendment of a separate provision—39 M.R.S.A. § 95—even though the Legislature expressly stated that those two sections have separate and distinct application. In my view, such a reading of the law is illogical. *See Caron v. Me. Sch. Admin. Dist. No. 27*, 594 A.2d 560, 563 (Me. 1991) ("In the absence of clear and explicit statutory language showing that the legislature intended a statute to modify case law, we will not interpret a statute to effect such a modification."); *see also Graves v. Brockway-Smith*, 2012 ME 128, ¶ 9, 55 A.3d 456 ("[W]e first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results.").

[¶26] Accordingly, I would hold that 39-A M.R.S.A. § 306(2)(A) does not apply to dates of injury before January 1, 1993. Even if its plain language were ambiguous I would interpret the 2001 amendment of 39-A M.R.S.A. § 306 to mean that subsection 306(2)(A) applies to all dates of injury on or after January 1, 1993, but not to prior dates of injury. Such a reading is necessary to avoid an absurd or illogical result. If the Legislature wished the new standard to apply to earlier cases, then it would have had to amend section A-10 of the Workers' Compensation Act

of 1991 as well to avoid conflicting language or state that the *Moreau* decision was being legislatively overruled.

[¶27] I join in the majority's analysis of the incapacity issue above in section D, but would instead apportion Mr. Davis's award of benefits among his remaining three viable claims: April 9, 1990, March 15, 2010, and August 11, 2010, because in my view, his claim for the May 22, 1989, date of injury is barred by the statute of limitations contained in 39 M.R.S.A. § 95.

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. 2016).

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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