PETER A. DiFIORE
(Appellant)

v.

MAINE MEDICAL CENTER
(Appellee)

and

SYNERNET

Argued: May 17, 2017
Decided: October 23, 2018

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

[¶1] Peter DiFiore appeals from a decision of an Administrative Law Judge (*Collier, ALJ*) that denied his Petition for Award of Compensation and Petition for Payment of Medical and Related Services. Mr. DiFiore contends that the administrative law judge erred by determining that the work activity that resulted in the aggravation of Mr. DiFiore's preexisting back condition was not the legal cause of his current incapacity. We affirm the decision.

I. BACKGROUND

[¶2] Peter DiFiore had experienced chronic lower back pain for years, which he attributed to working out at the gym and weightlifting. He began treating

for back pain in 2008. The treatments included MRIs, a surgical consult, numerous epidural steroid injections, and narcotic pain medication.

[¶3] Mr. DiFiore began working for Maine Medical Center in 1997 as a security manager. In June 2002, he became a utility worker in the electrical department, changing light bulbs and switches, maintaining fire extinguishers and testing smoke detectors. He had no problems doing this job, which was within his physical capabilities despite his back problems.

[¶4] In 2014, Maine Medical Center began requiring electrical department employees to become accredited. Mr. DiFiore did not obtain the proper certification. He therefore switched to a mailroom clerk/copy operator position, which paid less but required less physical exertion than his work in the electrical department.

[¶5] Mr. DiFiore's mailroom job, which began September 2, 2014, included carrying, sorting, processing and delivering mail; making copies and filling the copy machines; and looking up information on the computer. He had no difficulty performing these duties until October 9, 2014.

[¶6] On that day, Mr. DiFiore began helping to sort the mail, using two plastic totes—one on the counter and one on the floor. As Mr. DiFiore bent down to pick up an envelope from the tote on the floor, he felt intense lower back pain,

which made him stop and sit down. He knew immediately that his back "went out," and he was unable to continue working.

[¶7] After being out of work for a few days, Mr. DiFiore returned to a sedentary position, operating the postage machine two hours per day, but he was unable to tolerate even that limited amount of work. Mr. DiFiore's doctor took him out of work on January 15, 2015. An MRI showed a recurrent disc herniation at L4-5, and Mr. DiFiore had surgery on June 19, 2015. The surgery relieved Mr. DiFiore's radicular pain, but he continues to have lower back pain, and had not been released to work as of the date of the hearing.

[¶8] Maine Medical Center does not dispute the ALJ's finding that the bending incident at work on October 9, 2014, was the medical cause of Mr. DiFiore's injury. The primary disputed issue is whether that activity was the legal cause of the injury. The ALJ found that Mr. DiFiore's preexisting lower back condition rendered him susceptible to injury, and determined that the work activity did not create a risk of injury above the level of risk present in an average person's non-employment life. Specifically, the ALJ found that Mr. DiFiore's pain occurred when he bent over to pick up mail from a tote on the floor, and that this was not the sort of movement or activity that is unusual in the ordinary life of most people outside of the employment context.

[¶9] In response to Mr. DiFiore's Motion for Further Findings of Fact and Conclusions of Law, the ALJ issued a revised decision distinguishing this case from a recent Appellate Division decision, *Bowker v. NFI North, Inc.*, Me. W.C.B. No. 16-10 (App. Div. 2016), but otherwise leaving the original decree unaltered. Mr. DiFiore now appeals.

II. DISCUSSION

A. Standard of Review

[¶10] The Appellate Division's role on appeal 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 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. Legal Causation

[¶11] At issue is whether the ALJ applied an incorrect legal standard when determining whether the bending incident was the legal cause of Mr. DiFiore's injury.

[¶12] Title 39-A M.R.S.A. § 201(4) (Supp. 2017)[1] governs liability in cases involving an alleged work injury that has combined with a preexisting medical condition. *McAdam v. United Parcel Serv.*, 2001 ME 4, ¶ 11, 763 A.2d 1173; *Bowker*, Me. W.C.B. No. 16-10, ¶ 13. "When a case appears to come within section 201(4), the [ALJ] must first determine whether the employee has suffered a work-related injury . . . then [section] 201(4) is applied if the employee has a condition that preceded the injury." *Celentano v. Dep't of Corr.*, 2005 ME 125, ¶ 9, 887 A.2d 512. In a combined effects case, the "arising out of and in the course of employment" requirement is satisfied by showing both medical and legal cause. *Bryant v. Masters Mach. Co.*, 444 A.2d 329, 336 (Me. 1982). Medical causation is not at issue in this case.

[¶13] To establish legal causation when "the employee bears with him some 'personal' element of risk because of a pre-existing condition, the employment must be shown to contribute some substantial element to increase the risk, thus offsetting the personal risk which the employee brings to the employment environment." *Id.* at 337. The comparison of the employment to personal risk is made against an objective standard; thus, an ALJ should compare the risk that

[1] Title 39-A M.R.S.A. § 201(4) provides:

> If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner.

arises out of the conditions of employment and the risk present in an average person's non-employment life. *Id*. The element of legal causation distinguishes "situations in which the employee just happened to be at work when the disability arose from those where the disability occurred only because an employment condition increased the risk of disability above the risks that the employee faced in everyday life." *Celentano*, 2005 ME 125, ¶ 12, 887 A.2d 512.

[¶14] The Law Court established the standard for legal causation in *Bryant v. Masters Machine.* In *Bryant*, the employee was operating a drill press while sitting on a stool, when another employee accidentally kicked the stool out from under him. *Bryant*, 444 A.2d. at 331. The fall triggered symptoms of a previously asymptomatic back condition. *Id*. at 333. The Law Court vacated the decision denying compensation, determining that the injury was compensable because the conditions of employment—performing work while sitting on a stool while other employees moved around in the environment—increased the risk that the employee would fall. *Id.* at 342-343. *See also Celentano*, 2005 ME 125, ¶ 14, (affirming determination that legal cause had been established when employee's trip over a table leg lit up a preexisting asymptomatic knee condition based on description of the table leg and the fact that another employee had tripped over the table leg); *cf. Barrett v. Herbert Eng'g, Inc*., 371 A.2d 633, 636 (Me. 1977)

(affirming denial of benefits to employee who, while walking to pick up tools at work, suddenly experienced severe low back pain).

[¶15] In this case, the ALJ compared the risk that arose out of the conditions of Mr. DiFiore's employment and the risk present in an average person's non-employment life. He concluded that, given Mr. DiFiore's symptomatic back condition, bending to reach for a piece of mail did not substantially increase the employee's risk of injury, and thus did not offset the personal risk that Mr. DiFiore brought to the employment environment.

[¶16] Mr. DiFiore contends this analysis is legally erroneous because the ALJ focused on the physical action that caused the injury—bending down—and not the work-relatedness of the action—bending down in order to sort the employer's mail—as the element that increased the risk of injury. He asserts that under the *Bryant* standard, his injury should be compensable because it occurred both while he was at work and *because of* his work. *See Bryant*, 444 A.2d at 336.

[¶17] Mr. DiFiore asserts that this case should be governed by *Bowker v. NFI North, Inc.* Mr. Bowker experienced an aggravation of a preexisting back condition when, as part of his work duties, he reached for a box weighing eight to ten pounds, and then bent and twisted at the waist to put the box into the back of his car. Me. W.C.B. No. 16-10, ¶ 2. The ALJ concluded that lifting the box did not substantially increase his risk of injury and thus did not offset the personal risk

brought by Mr. Bowker to the work environment due to his preexisting condition. *Id.* ¶ 9. An Appellate Division panel vacated the ALJ's decision, reasoning that "the disability occurred because [Mr. Bowker] engaged in required, employment-related activity that not only increased his risk of disability, but increased his actual disability." *Id.* ¶ 18. *See also Haskell v. Katahdin Paper Co.*, Me. W.C.B. No. 13-3, ¶ 16 (App. Div. 2013) (determining that the hearing officer erred when concluding that there was no legal causation when the employee, while handling a heavy piece of equipment in an industrial setting, turned his head abruptly in response to a loud noise from above and activated a dormant preexisting neck injury); *Briggs v. H & K Stevens, Inc.*, Me. W.C.B. No. 14-24, ¶ 19 (App. Div. 2014) (vacating a hearing officer decision that denied benefits for an aggravated preexisting foot condition for lack of legal causation; reasoning that standing on concrete floors for prolonged periods at work objectively increased risk of foot injury above that in everyday life).

[¶18] After briefing was complete in this case, an Appellate Division panel decided *Fuller v. Hannaford Brothers Co.*, Me. W.C.B. No. 17-7 (App. Div. 2017). Ms. Fuller, a cashier, aggravated a preexisting back condition when she reached and twisted to her right side to put a discarded receipt in the trash. *Id.* ¶ 2. The ALJ determined that Ms. Fuller's work was not the legal cause of

her injury because the employment conditions under which she was injured did not increase her risk of injury above that of everyday life. *Id.* ¶ 5.

[¶19] In *Fuller*, the Appellate Division panel found no misapplication or misconception of the *Bryant* standard for legal cause. *Id.* ¶ 7. The panel distinguished *Bowker* on the basis that the work activity in *Fuller* was less demanding, as it involved only slight twisting and bending. *Id.* ¶ 6. The panel cited *Barrett*, 371 A.2d at 636, in which the Law Court affirmed a determination of no legal causation when "the petitioner's lumbo-sacral strain did not spring into activity by reason of any work that he was doing, but occurred while he was walking at his normal gait to fetch some tools." *Id.*

[¶20] Having reviewed these precedents, we conclude that this case is more akin to *Fuller* and *Barrett* than *Bowker*, *Haskell*, or *Briggs*. *Haskell* is distinguishable because it involved circumstances and risks not likely to occur in the average person's non-employment life: the employee reacted to a loud noise from above in an industrial environment while holding a heavy piece of equipment. *Briggs* involved standing on concrete floors for an entire shift, also more likely to raise the risk of injury. And unlike *Bowker*, this case does not involve bending and twisting while lifting an eight to ten pound box into a car.

[¶21] Bending over to pick up mail from a tote on the floor is more analogous to the action in *Fuller* of bending and twisting to dispose of a receipt.

Although work activity, it is not the sort of movement or activity that, viewed objectively, would raise the risk of injury above that present in the average person's non-employment life. The ALJ's conclusion that Mr. DiFiore injured his back *while* at work—but not *because* of work—is supportable.

III. CONCLUSION

[¶22] We conclude that the ALJ did not err when determining that Mr. DiFiore failed to establish legal causation. The ALJ neither misconceived nor misapplied the law, and the application of the law to the facts was neither arbitrary nor without rational foundation.

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. 2017).

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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