DEBORAH L. PELLETIER
(Appellant)

v.

TOWN OF ACTON
(Appellee)

and

MAINE MUNICIPAL ASSOCIATION
(Insurer)

Argued: September 12, 2019
Decided: August 13, 2020

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

[¶1] Deborah Pelletier appeals from a decision of a Workers' Compensation Board administrative law judge (*Stovall, ALJ*) denying her Petitions for Award and for Payment of Medical and Related Services, alleging a July 22, 2014, date of injury. Ms. Pelletier contends that the ALJ erred in determining that: the date of her gradual, right, upper-extremity injury was in fact November 30, 2013; notice given on August 21, 2014, was untimely pursuant to 39-A M.R.S.A. § 301 (Pamph. 2020); and Ms. Pelletier was not operating under a mistake of fact that tolled the notice period. She also contends the ALJ failed to provide adequate findings of fact and conclusions of law on the mistake of fact issue. Finding no error, we affirm the decision.

I. BACKGROUND

[¶2] Ms. Pelletier began working as a special education teacher for the Town of Acton on July 22, 2009. That same year, she experienced nonwork-related wrist problems and underwent release surgery for carpal tunnel syndrome (CTS), which had substantially resolved by 2013. After her workload increased in the fall of 2013, Ms. Pelletier began noticing numbness and tingling in her right hand and pain in her elbow. She consulted the school's occupational therapist who gave her some tools to use to assist with writing. She associated the increased symptoms with overuse due to activities such as writing, laminating, and completing the paperwork demands of a special education teacher.

[¶3] Ms. Pelletier went out of work for unrelated reasons in April of 2014. At that time, she saw her primary care physician, who referred her to Dr. David Markellos. Dr. Markellos evaluated her on July 22, 2014. He diagnosed right ulnar neuropathy and told Ms. Pelletier that her right arm problems could be related to her work.

[¶4] On August 21, 2014, Ms. Pelletier informed the School that she believed her right arm problems were work-related and that she would be pursuing a workers' compensation claim. She was further referred to a neurologist, Dr. John Dolan, who performed additional testing. Ms. Pelletier underwent surgery in August 2014.

[¶5] Dr. Dolan testified in a deposition in June 2015 (in an unrelated matter) that Ms. Pelletier's condition was work related. Shortly thereafter, Ms. Pelletier filed her petitions. The Town asserted a notice defense pursuant to 39-A M.R.S.A. § 301 (Pamph. 2020), contending that Ms. Pelletier provided notice of her injury to the Town more than 30 days after the date of injury.

[¶6] In a decree issued July 27, 2018, the ALJ determined Ms. Pelletier's symptoms had manifested as of November 30, 2013, and that Ms. Pelletier understood that her symptoms were caused by overuse at work and her preexisting CTS at that time. Thus, he established the date of injury as November 30, 2013, and determined that the 30-day notice period had begun to run as of that date. Accordingly, he determined that notice to the Town on August 21, 2014, was untimely.

[¶7] Ms. Pelletier requested further findings of facts and conclusion of law. The ALJ declined to make further findings in an order dated January 16, 2019. This appeal followed.

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). Because Ms. Pelletier made a request for additional findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Pamph. 2020), and submitted proposed additional findings, we do not assume that the ALJ made all the necessary findings to support the conclusion that Ms. Pelletier provided the Town with timely notice of her injury. *See Spear v. Town of Wells*, 2007 ME 54, ¶ 10, 922 A.2d 474. "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*. (quotation marks omitted). When requested, an ALJ is under an affirmative duty under section 318 to make additional findings to create an adequate basis for appellate review. *See Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982); *Malpass v. Phillip J. Gibbons*, Me. W.C.B. No. 14-19, ¶ 18 (App. Div. 2014).

B. Date of Gradual Injury

[¶9] Ms. Pelletier first contends that the ALJ erred in establishing the date of gradual injury in this case. 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, 582. 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 Co.*, 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)).

[¶10] In *Moscone v. Millinocket Regional Hospital,* Me. W.C.B. No. 19-27, ¶ 5 (App. Div. 2019), an appellate Division panel reviewed Law Court precedent on this issue and observed that there is no bright line rule for when a gradual injury manifests itself, but rather "the date should be determined based on multiple considerations and the salient circumstances of each case." *See Ross v. Oxford Paper*, 363 A.2d at 714 (affirming the commissioner's decision that a gradual injury had manifested when the employee became disabled, even though the employee had experienced symptoms and sought treatment earlier); *Farrow v. Carr Brothers Co.,* 393 A.2d 1341, 1344 (Me. 1978) (affirming that the employee's gradual knee injury had manifested when the employee experienced symptoms, not the later date when the employee became disabled from work); *Jensen,* 2009 ME 35, ¶ 27, 968 A.2d 528 (remanding for redetermination of the date of injury because it was unclear whether the injury had manifested on the date of disability, as the hearing officer had found, or whether it had manifested earlier). *See also Marean v. City of Portland,* Me. W.C.B. No. 16-47, ¶ 14 (App. Div. 2016) (affirming the ALJ's decision that the

date of the employee's gradual mental stress injury was the date his doctor concluded that the employee could no longer perform his work duties, even though he had previously received treatment for his mental health condition; finding that the "onset of Mr. Marean's disability was the salient point in determining the date of injury.").

[¶11] Thus, the panel in *Moscone* concluded that a gradual injury may become manifest, that is, "become clearly apparent or plainly demonstrated[,]" "at various points, including the time of the onset of symptoms, the time medical care is sought or a medical diagnosis is provided, or the date the employee goes out of work or loses time due to the injury." Me. W.C.B. No. 19-27, ¶ 11.

[¶12] Ms. Pelletier contends that the evidence compels the finding that her gradual injury had not manifested as of November 30, 2013, because at that time, Ms. Pelletier incorrectly associated her symptoms with her preexisting CTS and she continued to perform her full duties as a special education teacher until well after that time. She also asserts that the record compels the finding that she did not associate her symptoms with work until July 22, 2014, when Dr. Markellos told her that her symptoms might be work-related. We disagree.

[¶13] We have recognized the difficulty in ascertaining the point of manifestation and we afford some degree of deference to the conclusion reached by an ALJ when deciding the date of a gradual injury. *Id.* ¶ 12. "'Our task 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. [The appellant] can prevail only if legal error is evident in the decree.'" *Marean*, Me. W.C.B. No. 16-47, ¶ 14 (quoting *Comeau v. Me. Coastal Servs.*, 449 A. 2d 362, 369 (Me. 1982)).

[¶14] The ALJ found that the date of the gradual injury is November 30, 2013, because at that time Ms. Pelletier believed that her pain was the result of overuse at work and her CTS. He supported that finding with citations to Ms. Pelletier's testimony that she suffered the onset of symptoms in November of 2013, after which she sought help from the school's occupational therapist who gave her certain tools to work with to alleviate her symptoms while writing. She also testified that she believed the symptoms were provoked by her work activities. This finding is permissible on the record before us, and accordingly, we find no error.

C. Notice and Mistake of Fact

[¶15] Title 39-A M.R.S.A. § 301 provides, in relevant part:

> For claims for which the date of injury is on or after January 1, 2013 and prior to January 1, 2020, proceedings for compensation under this Act, except as provided, may not be maintained unless a notice of the injury is given within 30 days after the date of injury.

[¶16] As established, the date of a gradual injury is the date on which the injury manifests itself. "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 also* 39-A M.R.S.A. § 302 (Pamph. 2020) ("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."). Thus, "[t]he [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." *Jensen*, 2009 ME 35, ¶ 27.

[¶17] Ms. Pelletier contends the ALJ erred when determining that the notice period began to run on November 30, 2013. She contends she was operating under a mistake of fact as to the cause and nature of the injury until she was told by Dr. Markellos on July 22, 2014, that her right arm condition may be work-related. Thus, she contends, the notice given on August 21, 2014, complies with the Act. She also contends the ALJ failed to issue factual findings on this issue that are adequate for appellate review.

[¶18] The ALJ found as fact that Ms. Pelletier "was aware of the work relatedness of her injury in November of 2013 but did not provide her employer with notice until August 21, 2014." This finding is based on Ms. Pelletier's testimony, referred to above, in which she stated that she had related her symptoms to her increased workload in November 2013. This finding provides the factual predicate for the determination that notice was untimely, and thus is adequate for appellate review. And, because the finding is supported by competent evidence in the record, we do not disturb it.

III. CONCLUSION

[¶19] The ALJ's findings that (1) Ms. Pelletier's gradual right upper extremity injury manifested itself on November 30, 2013, and (2) she was aware that the injury was work related as of that date, are supported by competent evidence in the record and provide an adequate basis for appellate review. Moreover, the decision involved no misconception or misapplication of the law. Accordingly, we affirm the decision.

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 (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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