JAIME TORREY
(Appellee)

v.

ISLAND NURSING HOME
(Appellant)

and

MHCA WORKERS' COMPENSATION FUND
(Insurer)

Argument held: August 30, 2016
Decided: October 28, 2016

EN BANC PANEL MEMBERS: Administrative Law Judges Collier, Elwin, Goodnough, Jerome, Knopf, Pelletier, and Stovall

BY: Administrative Law Judge Knopf

[¶1] Island Nursing Home appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) granting Jaime Torrey's Petition for Award and awarding her a closed-end period of total incapacity benefits and ongoing partial incapacity benefits for an injury that resulted from a non-mandatory, hepatitis B vaccination provided by Island Nursing Home. On appeal, the nursing home contends that the administrative law judge (ALJ) erred when determining that Ms. Torrey's injury arose out of her employment. We disagree, and affirm the ALJ's decision.

I. BACKGROUND

[¶2] Jaime Torrey began pursuing a career as certified nursing assistant (CNA) in 2014. She enrolled in a training course that, although held at the Island Nursing Home facility, was provided by another entity and was not otherwise affiliated with the nursing home. It was recommended during training that as a CNA, Ms. Torrey should be vaccinated against the hepatitis B virus, which involves a series of three injections generally recommended to take place within a six-month period. Ms. Torrey received the first injection from her primary care provider on March 7, 2014. She concluded her training and began working for Island Nursing home as a CNA on April 4, 2014.

[¶3] Ms. Torrey did not receive any remaining injections in the hepatitis B series until, on February 23, 2015, her supervisor informed her that the employer was making injections available to employees that afternoon and she could receive a free injection, which would be administered on site by a nurse employed by the nursing home during her shift. The supervisor encouraged Ms. Torrey to get the injection, which is recommended by the Centers for Disease Control (CDC) for all healthcare workers. If she had refused, he would have segregated her from working with any residents who had contracted hepatitis B. Her employment would have otherwise been unaffected by her refusal.

[¶4] Ms. Torrey received the injection that day in her upper right arm. Soon afterwards, her arm became stiff and painful, but she was able to finish her shift. When her symptoms continued, she sought treatment from her primary care provider, who took her out of work on February 25, 2015. Her symptoms increased over time, and her primary care provider diagnosed her with Complex Regional Pain Syndrome (CRPS). She received a diagnosis of Parsonage-Turner syndrome from another provider. Ms. Torrey has not worked since that time.

[¶5] Ms. Torrey filed Petitions for Award and for Payment of Medical and Related Services. In the course of litigation, she was referred for examination to Dr. Carl Robinson, who was acting as an independent medical examiner pursuant to 39-A M.R.S.A. § 312 (Supp. 2015). Dr. Robinson diagnosed Ms. Torrey with CRPS caused by the hepatitis B vaccine she received at work, and found that she retained a sedentary work capacity.

[¶6] At issue was whether Ms. Torrey's CRPS arose out of her employment at Island Nursing Home. The ALJ found that it did, and awarded her total incapacity benefits from February 24, 2015, through May 27, 2015, and partial incapacity benefits from May 28, 2015, to the present and continuing. After the ALJ denied the nursing home's Motion for Additional Findings of Fact and Conclusions of Law, the nursing home filed this appeal. The board's executive

director determined that the issues on appeal warranted consideration by the Appellate Division en banc.

A. Standard of Review

[¶7] The role of the Appellate Division 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). Appeals from administrative law judges' decisions are governed by 39-A M.R.S.A. §§ 321-B, 322 (Supp. 2015). Section 321-B(2) provides that "[a] finding of fact by an administrative law judge is not subject to appeal under this section."

B. Arising Out of and In the Course of Employment

[¶8] The issue in this case is whether the ALJ erred in determining that Ms. Torrey's injury was compensable. In order to be compensable, an injury must "aris[e] out of and in the course of employment." 39-A M.R.S.A. § 201(1) (2001). The purpose of this requirement is '"to compensate employees for injuries suffered *while* and *because* they were at work."' *Comeau v. Me. Coastal Servs.*, 449 A.2d 362, 365 (Me. 1982) (quoting *Bryant v. Masters Machine Co.*, 444 A.2d 329, 333 (Me. 1982)).

[¶9] "An injury arises out of and in the course of employment when there is a sufficient connection between the injury and the employment." *Celentano v. Dep't of Corr.*, 2005 ME 125, ¶ 9, 887 A.2d 512 (citing *Comeau*, 449 A.2d at 366-67). An injury occurs "in the course of employment when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in something incidental thereto." *Comeau*, 449 A.2d at 365 (quoting *Fournier's Case*, 120 Me. 236, 240, 113 A. 270, 272 (1921)); *see also* 2 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW, § 12.02 at 12-2 (Matthew Bender, Rev. Ed. 2016). An injury "arises out of" employment when there is "some causal connection between the conditions under which the employee worked and the injury which arose, or that the injury, in some proximate way, had its origin, its source, its cause in the employment." *Comeau*, 449 A.2d at 365 (quoting *Barrett v. Herbert Eng'g, Inc.*, 371 A.2d 633, 636 (Me. 1977)).

[¶10] There is no dispute in this case that the injury arose in the course of employment. The nursing home contends that the injury did not arise out of the employment. When determining whether the injury arose out of employment, the ALJ applied the factors set forth by the Law Court in *Comeau,* 449 A.2d at 367. These non-exclusive factors are to be considered when determining whether a particular injury arises out of and in the course of employment "when the fact

pattern does not fall snugly within the arising out of and in the course of requirement." *Id.* at 366. Those factors are:

> (1) Whether at the time of the injury the employee was promoting an interest of the employer or the activity of the employee directly or indirectly benefited the employer.
> (2) Whether the activities of the employee work to the benefit or accommodate the needs of the employer.
> (3) Whether the activities were within the terms, conditions or customs of the employment, or acquiesced in or permitted by the employer.
> (4) Whether the activity of the employee serves both a business and personal purpose, or represents an insubstantial deviation from the employment.
> (5) Whether the hazard or causative condition can be viewed as employer or employee created.
> (6) Whether the actions of the employee were unreasonably reckless or created excessive risks or perils.
> (7) Whether the activities of the employee incidental to the employment were prohibited by the employer either expressly or implicitly.
> (8) Whether the injury occurred on the premises of the employer.

Id. at 367 (citations omitted).

[¶11] Island Nursing Home contends that the ALJ erred when determining that the factors were met. Regarding the first factor, it asserts that Ms. Torrey was not promoting an interest of the employer because she was continuing a process that she had initiated for her own purposes before being hired, and would have completed for her own safety through her own health care provider had she not been hired by the nursing home. Moreover, the vaccination was not required and

was of no value to the nursing home until the three-injection series was completed. Ms. Torrey had received only two injections at the time of the injury.

[¶12] As to the second factor, the nursing home contends the vaccination did not benefit it or accommodate its needs because it could have segregated Ms. Torrey from any hepatitis B patients; her work had not been affected due to lack of vaccination prior to the injection; and Ms. Torrey had started the series for her own benefit before employment.

[¶13] The nursing home further argues that the vaccination was not a condition of employment, but was merely incidental to employment, and served mainly a personal purpose as reflected by Ms. Torrey's commencement of the series before she started working. Thus, it contends that the third factor weighs in its favor. Additionally, the nursing home asserts that Ms. Torrey's injury was a consequence of life in general rather than her employment, again noting that she had begun the series of injections before being hired.

[¶14] The nursing home's arguments do not rise to the level of reversible error. On appeal, we give significant deference to an ALJ's application of the *Comeau* factors. *See Fournier v. Aetna, Inc.*, 2006 ME 71, ¶ 18, 899 A.2d 787. The administrative law judge "need not reach the 'correct' conclusion, but a conclusion that is 'neither arbitrary nor without rational foundation.'" *Id*. (quoting *Comeau*, 449 A.2d at 366). When applying the factors listed in *Comeau*, the ALJ considered

that receiving the vaccination at the place of employment (1) promoted the nursing home's interests because it would permit Ms. Torrey to work with hepatitis B patients and thus increase her utility as an employee, and would protect the nursing home from potential medical costs should she have contracted the infection; (2) accommodated the nursing home's needs because it immediately brought Ms. Torrey closer to compliance with the CDC's recommended policy and increased her utility as an employee; (3) was within the terms, conditions, or customs of employment and was acquiesced in by the nursing home because it was offered during work hours free of charge in a health care business; (4) served both a business and personal purpose because the vaccination's protection extended beyond the workplace; and (5) presented neither an employer nor employee-created risk. The ALJ further concluded that Ms. Torrey's actions were neither unreasonably reckless nor excessively risky, nor were they prohibited by the employer. He noted that the injury occurred on the employer's premises, while also observing that the vaccination was not a mandatory condition of her employment.

[¶15] The ALJ gave due consideration to the *Comeau* factors, and reached the conclusion that the injury arose out of and in the course of employment. We cannot say that the decision misconceives the law, is arbitrary or lacks a rational foundation. *See Goyette v. York Hospital*, W.C.B. No. 03-019327 (Me. 2011)

(holding that nurse's illness resulting from non-mandatory flu vaccine administered at hospital arose out of and in the course of employment but denying petition for failure of proof on the issue of medical causation)[1]; *see also* 3 ARTHUR LARSON, LEX K. LARSON & THOMAS A. ROBINSON, LARSON'S WORKERS' COMPENSATION LAW § 27.03 at 27-26.

III. CONCLUSION

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. 2015).

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[1] In this case, the ALJ determined that Ms. Torrey established that the injection was the medical cause of her symptoms, and that determination is not at issue on appeal.