CITY OF PORTLAND
(Appellant)

v.

PHILIP MOSES
(Appellee)

and

TOWN OF RAYMOND
(Appellee)

and

TOWN OF CASCO
(Appellee)

and

MEMIC
(Insurer)

Argued: September 17, 2014
Decided: February 22, 2016

PANEL MEMBERS: Administrative Law Judges[1] Goodnough, Knopf, and Stovall
BY: Administrative Law Judge Stovall

[¶1] The City of Portland appeals from a decision of a Workers' Compensation Board Administrative Law Judge (*Jerome, ALJ*) denying its Petitions for Award and Apportionment filed against the Town of Raymond and the Town of Casco for compensation the City of Portland owes to the employee,

[1] Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers are now designated administrative law judges.

Philip Moses.[2] The City of Portland contends that because Mr. Moses was exposed to traumatic stressors in the course of his employment with the Towns of Raymond and Casco that contributed to his gradual injury claim for post-traumatic stress disorder (PTSD), that the towns should bear a portion of the liability. *See* 39-A M.R.S.A. § 354 (Supp. 2015). We disagree, and affirm the ALJ's decision.

I. BACKGROUND

[¶2] Philip Moses is a forty-two year old firefighter and emergency medical technician (EMT). From 2002 until 2010, he worked as a full-time firefighter and EMT for the City of Portland. In addition, Mr. Moses received a stipend as a volunteer firefighter for the Town of Casco beginning in early 2004. In 2007, Mr. Moses also began volunteering and working per diem shifts for the Town of Raymond. Mr. Moses continued working for these three municipalities concurrently until 2009, when he ended his work with the Towns of Raymond and Casco and continued working only for the City of Portland.

[¶3] In the course of his service as a first responder with the City of Portland and Towns of Raymond and Casco, Mr. Moses was exposed to various traumatic events that had the potential for harm or death to himself or others. Around July 10, 2010, while he was addressing other medical conditions, Mr. Moses began experiencing symptoms of PTSD relating to the traumatic events he

[2] Because the issue of apportionment "may not affect an employee's rights and benefits under this Act," 39-A M.R.S. § 354(3), the employee has not filed a brief with the Appellate Division.

experienced during his employment as a firefighter and EMT. The City of Portland accepted Mr. Moses's PTSD as a gradual work-related injury. Mr. Moses and the City of Portland entered into a Consent Decree dated November 10, 2011, in which they agreed that "[o]n or about July 10, 2010, Philip Moses sustained a gradual work-related injury in the nature of PTSD." As part of this Decree, Mr. Moses was deemed totally incapacitated.

[¶4] On December 20, 2011, the City of Portland filed Petitions for Award and for Apportionment against the Towns of Raymond and Casco. By decree dated December 23, 2013, the ALJ denied the City of Portland's Petitions. The City of Portland filed this timely appeal.

II. DISCUSSION

[¶5] 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).

[¶6] The City of Portland filed its Petitions for Award and Apportionment pursuant to title 39-A section 354(3). Section 354 governs liability among multiple

employers and insurers "[w]hen 2 or more occupational injuries occur . . . that combine to produce a single incapacitating condition."[3]

[¶7] In denying the City's Petitions, the ALJ stated:

> I find that the City has failed to establish that Mr. Moses suffered any work injury during his employments with the towns of Casco and Raymond.
>
> . . . .
>
> The City has established that events that occurred before [July 10, 2010] with the towns of Raymond and Casco contributed to the *gradual* development of PTSD that occurred as of July 10, 2010.
>
> The City has not established, however, that Mr. Moses suffered any *unique* work injury during his employment with the towns of Raymond and Casco. Apportionment of liability is premised upon the occurrence of two or more occupational injuries. Unless there is more than one injury, there is no basis for apportionment.

[¶8] In her decision, the ALJ relied on the opinion of Dr. Barkin, the independent medical examiner, *see* 39-A M.R.S.A. § 312 (Supp. 2015), that trauma suffered while working for the City of Portland on or about July 10, 2010, was the predominant stressor leading to Mr. Moses's symptoms. Dr. Barkin also

[3] Title 39-A M.R.S.A. § 354 further provides in relevant part:

> **2. Liability to employee.** If an employee has sustained more than one injury while employed by different employers, or if an employee has sustained more than one injury while employed by the same employer and that employer was insured by one insurer when the first injury occurred and insured by another insurer when the subsequent injury or injuries occurred, the insurer providing coverage at the time of the last injury shall initially be responsible to the employee for all benefits payable under this Act.
>
> **3. Subrogation.** Any insurer determined to be liable for benefits under subsection 2 must be subrogated to the employee's rights under this Act for all benefits the insurer has paid and for which another insurer may be liable. Apportionment decisions made under this subsection may not affect an employee's rights and benefits under this Act.

noted in his reports that prior to working for the City of Portland, Mr. Moses had "no prior history of mental, emotional, or behavioral disorders or treatment," and "remained in excellent psychiatric health until 2010."

[¶9] The City of Portland sets forth two main arguments in support of apportioning liability to the Towns of Casco and Raymond: (1) apportionment can be awarded without multiple injuries in gradual injury cases, and (2) there is record evidence of multiple injuries in this case. We disagree with the City's contentions.

A. Apportionment in the Absence of Multiple Injuries

[¶10] The City contends that apportionment could be awarded without multiple injuries because the nature of Mr. Moses's work during an earlier part of his career, although not causing "unique injuries," made significant contributions to his ultimate PTSD diagnosis. In support of its contention that there should be liability for former employment that contributed substantially to the employee's incapacity, the City relies upon language drawn from *Derrig v. Fels Co.*, 1999 ME 162, 747 A.2d 580. The *Derrig* Court stated: "If the injury is aggravated, accelerated, or combined with the preexisting condition, the resulting disability is compensable if the employment contributed to it in a significant manner." *Id.* ¶ 6. Although Mr. Moses's employment at the Towns of Casco and Raymond contributed to his PTSD diagnosis, this language from *Derrig* is in reference to preexisting conditions under 39-A M.R.S.A. § 201(4), and is inapplicable to the

issue of apportionment. The plain language of section 354(3) expressly states that there can be apportionment "[w]hen 2 or more occupational injuries occur." Accordingly, we hold that the application of apportionment requires more than one injury.

B. Evidence of Multiple Injuries

[¶11] If the ALJ erred when finding that there was a single, gradual injury, then there could be apportionment pursuant to 39-A M.R.S. § 354(3). To that end, the City contends that there was record evidence establishing that Mr. Moses sustained a work-related injury during his employment with the Towns of Casco and Raymond under two theories.

[¶12] First, the City asserts that each traumatic event that Mr. Moses experienced during his employment with the Towns of Casco and Raymond constitutes an injury. However, "the date of injury for a gradual injury is the date on which the injury manifests itself." *Jensen v. S.D. Warren Co.*, 2009 ME 35, ¶ 26, 968 A.2d 528. On this record, there is no evidence to support that at any time prior to 2010, Mr. Moses manifested symptoms as a result of his exposure to traumatic events. Moreover, the City's assertion is inconsistent with *Derrig*, 1999 ME 162, ¶ 7, 747 A.2d 580, which held that "[t]reating each period of employment as a separate 'injury' is inconsistent with the concept of a gradual injury as a single condition occurring gradually over a long period of time."

[¶13] Second, the City contends that Mr. Moses suffered an injury during the time he was employed by the Towns of Casco and Raymond pursuant to the legal causation standard set forth in *Celentano v. Dep't of Corrections*, 2005 ME 125, ¶¶ 9, 12, 887 A.2d 512. *Celantano*, however, is inapposite to the present case, because it sets forth the standard for determining legal causation when an employee has experienced an aggravation of a preexisting condition. *See* 39-A M.R.S.A. § 201(4). The ALJ here properly concluded that Mr. Moses suffered a single, gradual injury.

III. CONCLUSION

[¶14] The ALJ's finding that Mr. Moses sustained a single, gradual injury is supported by competent evidence in the record. Therefore, apportionment is not permissible under the Act. The ALJ neither misconceived nor misapplied the law when denying the City of Portland's Petitions for Award and Apportionment.

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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