STEPHEN B. MAREAN
(Appellee/Cross-Appellant)

v.

CITY OF PORTLAND
(Appellant/Cross-Appellee)

and

MAINE MUNICIPAL ASSOCIATION
(Insurer)

Conference held: December 10, 2015
Decided: December 9, 2016

PANEL MEMBERS: Administrative Law Judges Stovall, Collier, and Elwin
BY: Administrative Law Judge Stovall

[¶1] The City of Portland appeals and Stephen Marean cross-appeals from a decision of an administrative law judge (*Jerome, ALJ*), in which, among other things, the ALJ granted Mr. Marean's Petition for Award for a September 6, 2012, gradual injury in the nature of post-traumatic stress disorder, and denied Mr. Marean's Petition for Award alleging a September 2012 gradual physical work injury. The City of Portland contends that the ALJ misconceived the law in determining that the date of the gradual mental stress injury was September 6, 2012. Mr. Marean contends that the ALJ misapplied 39-A M.R.S.A §§ 301, 302

(Supp. 2015) with regard to the September 2012 gradual physical injury. We affirm the ALJ's decision.[1]

I. BACKGROUND

[¶2] Stephen Marean began working as an EMT for the City of Portland in 1992. Mr. Marean was exposed to several instances involving the threat of death or actual death during the course of his work as an EMT for the City of Portland. He continued working for the City of Portland in that role until he left work on September 13, 2012, due to both physical and emotional problems. Mr. Marean sought psychological treatment for his symptoms relating to depression and PTSD through the years. He received treatment at Maine Medical Center in 2008 for stress and in 2009 for depression and anxiety. Mr. Marean also treated with Alison Gorman, M.D., his primary care physician, on June 6, 2012, for depression due to his job-related stress, and on August 30, 2012, when Dr. Gorman talked to Mr. Marean about taking time off from work because of his increasingly significant psychological symptoms.

[¶3] Prior to leaving his position at the City of Portland, on September 6, 2012, Mr. Marean completed the paperwork for FMLA leave. This paperwork included a form filled out by Dr. Gorman that indicated that Mr. Marean suffers

[1] Mr. Marean filed additional Petitions for Award related to several other alleged dates of injury. The ALJ granted the petition regarding a February 10, 2012, acute low back injury, and denied the remaining petitions. Neither party appeals the ALJ's decision as it pertains to these petitions. In addition, neither party raises any issue regarding the dismissal of a petition the City brought against a concurrent employer, Sabcor, regarding the 2012 gradual physical injury. These petitions will not be discussed further.

from PTSD, anxiety, and depression. Dr. Gorman stated on the form that Mr. Marean could no longer do EMT work, but might be able to perform non-patient care duties.[2] On December 1, 2012, Mr. Marean provided written notice of a work-related PTSD condition to the City of Portland Fire Chief.

[¶4] On March 19, 2013, Mr. Marean filed a petition alleging a gradual mental injury that occurred on September 13, 2012. On June 11, 2013, Mr. Marean amended his petition to include an alleged gradual physical injury to his neck, bilateral arms, back, and bilateral legs also occurring on September 13, 2012.

[¶5] In a February 6, 2015, decree, based upon medical evidence, the ALJ found that Mr. Marean had met his burden of proving both the gradual mental injury pursuant to 39-A M.R.S.A § 201(3) and the gradual physical injury, and that both injuries manifested on September 6, 2012.

[¶6] The ALJ assigned September 6, 2012, as the date of the gradual mental injury based on when Mr. Marean first knew that he was disabled by his symptoms of PTSD and depression. The ALJ found that as of August 30, 2012, Mr. Marean was having a hard time doing his work, but was not disabled from doing work, and was advised to think about taking time off. Because September 6, 2012, was the

[2] The ALJ also found as fact that Mr. Marean had a conversation with EMS lieutenant, John Kooistra, on September 6, 2012, in which he told Lt. Kooistra that he was getting burned out and needed to take some time off and get help. The ALJ determined, however, that Lt. Kooistra was not in a supervisory position with the City Fire Department, and had not been since 2008. She also found that Mr. Marean was aware that Lt. Kooistra held no supervisory role at that time. Mr. Marean does not challenge these findings on appeal, and they are supported in the record. Accordingly, the ALJ did not err when determining that any notice given to Lt. Kooistra was not adequate to satisfy the requirements of 39-A M.R.S.A. § 301.

date when Dr. Gorman advised that Mr. Marean should discontinue working, the ALJ found that it was the date that the disability manifested itself. And, because Mr. Marean gave notice on December 1, 2012, within 90 days of September 6, 2012, the ALJ found that 39-A M.R.S.A §§ 301 and 302 did not bar the gradual mental stress injury claim.

[¶7] With respect to the gradual physical injury, although the ALJ determined that Mr. Marean did experience such an injury as of September 6, 2012, she also determined that the claim was barred pursuant to section 301 because notice was not given to the City of Portland until the date of the amended petition on June 11, 2013. The ALJ further found that even though Mr. Marean did not have the intent to mislead the employer by failing to include the gradual physical injury claim in his written notice to the City regarding the gradual mental stress injury, this did not relieve him of his statutory obligation to provide notice of the separate, gradual physical injury to the City of Portland.

[¶8] Mr. Marean filed a motion for further findings of fact and conclusions of law. The ALJ granted the motion and issued additional findings, but did not alter the outcome. The City of Portland filed this appeal, and Mr. Marean cross-appealed.

II. DISCUSSION

A. Standard of Review

[¶9] 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 Mr. Marean requested further 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 [administrative law judge]." *Daley v. Spinnaker Inds., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted). The ALJ's findings of fact are not subject to appeal. 39-A M.R.S.A § 321-B(2) (Supp. 2015).

B. Date of Gradual Mental Injury

[¶10] The City of Portland contends that the ALJ misconceived the law when determining Mr. Marean's date of gradual mental injury because she used a different standard than that established by the Law Court in *Jensen v. S.D. Warren Co.*, 2009 ME 35, ¶ 26, 968 A.2d 528 (stating "the date of injury for a gradual injury is the date on which the injury manifests itself"). The ALJ stated that, "the relevant question in this case is when Mr. Marean first knew that he was *disabled*

by his symptoms of PTSD and depression." She then determined that date to be September 6, 2012, when his doctor unequivocally stated that he should no longer perform EMT work. The City of Portland asserts that August 30, 2012, was the proper date of injury under *Jensen* because that is the date that Dr. Gorman discussed the possibility of taking time off from work due to his significant psychological issues, indicating that his PTSD had manifested.

[¶11] Because of the indefinite nature of its starting point, establishing a specific date of injury for a gradual injury presents special problems. *Id.* at ¶ 13. The Law Court addressed the date of a gradual injury in *Ross v. Oxford Paper Co*., 363 A.2d 712 (Me. 1976). The employee in *Ross* worked for twenty-five years as a roll handler in a paper mill where he manually manipulated heavy rolls of paper. *Id*. at 713. He experienced numbness in his hands for a number of years and received treatment in the mill's first aid department several times before he had to stop working on March 17, 1974, due to carpal tunnel syndrome. *Id*.

[¶12] The Court noted in *Ross* that the "practical problem of fixing a specific date for a gradual injury is generally handled by using the date on which the disability manifests itself." *Id*. at 714. The Court concluded that March 17, 1974, was the date of injury, because "it [was] undisputed that [on that date] the claimant was finally prevented from working inasmuch as the disability had fully manifested itself." *Id*.

[¶13] In *Jensen,* the Law Court addressed an argument that tolling the limitations or notice period for mistake of fact is incompatible with the concept of a gradual injury because the date of gradual injury had been defined in case law, subsequent to *Ross,* as the date the employee became aware of both the injury and its compensable nature. 2009 ME 35, ¶ 19. The Court decided to return to its reasoning in *Ross* in order to distinguish, in gradual injury cases, the date of injury from the date the notice or limitations period begins to run. The Court stated:

> Reexamining our decisions, we conclude that *Ross* established the date of injury for the purpose of the application of the amendment allowing recovery for gradual injuries "by using the date on which the disability manifests itself." *Ross*, 363 A.2d at 714. *Ross* also established that the date an employee is required to give notice of the gradual injury is the date the "compensable injury becomes apparent." *Id*. at 716. Awareness of the compensable nature of the injury, therefore, was required only with respect to triggering the notice and limitations periods, and not to set a date of injury. It is in later cases that we merged the two concepts for the purpose of deciding the date of a gradual injury for all purposes. *Wilson*, 2008 ME 47, ¶ 4 n.2, 942 A.2d at 1238; *Derrig*, 1999 ME 162, ¶ 6, 747 A.2d at 582; *Upham*, 420 A.2d at 1232. To avoid confusion of the two concepts, we return to our original holding, found in *Ross,* that the date of injury for 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.

Jensen, 2009 ME 35, ¶ 26.

[¶14] The *Jensen* decision referred interchangeably to the date of a gradual injury as the date the *disability* manifests itself and the date the *injury* manifests itself. In this case the ALJ determined that the date of injury was the date the

disability manifested itself. Although the City's contention that the date of the injury's manifestation is, at times, independent of disability finds some support in *Jensen*, we find no error in the ALJ's determination that onset of Mr. Marean's disability was the salient point in determining the date of injury. "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." *Comeau v. Me. Coastal Servs.*, 449 A.2d 362, 369 (Me. 1982) (quotation marks omitted). We conclude that the City of Portland has shown no such legal error.

[¶15] Moreover, although the ALJ may have merged the two step process prescribed in *Jensen*, any possible error in that regard was harmless. Her task in this case was to determine the date of injury for the purpose of determining whether notice was timely. Even if the date of injury were determined to be August 30, 2012, as the City of Portland urges, the notice period did not begin to run until Mr. Marean became aware of the compensable nature of the injury. *Jensen*, 2009 ME 35, ¶ 22. The ALJ found that it was not until September 6, 2012, when his physician advised that he could no longer do his job, that Mr. Marean became aware of the compensable nature of the injury.[3] Thus, regardless of the date of

[3] The ALJ specifically stated: "I conclude that Dr. Gorman's advice that Mr. Marean stop working on September 6, 2012 is akin to the physician advising the employee in *Farrow* [*v. Carr Brothers*, 393 A.2d 1341 (Me. 1978)] to avoid work. I find that Mr. Marean was aware of his injury/disability as of September 6, 2012 and that the injury was thus 'manifest.'"

injury, the conclusion that the notice period did not begin to run until September 6, 2012, does not reflect a misconception or misapplication of law.

C. Notice of Physical Gradual Injury

[¶16] Mr. Marean contends that the ALJ erred in finding that the notice of his mental injury was insufficient to provide notice of his physical problems, because pursuant to 39-A M.R.S.A § 302, notice given to an employer cannot be held insufficient because of any inaccuracy, unless the employee intended to mislead the employer by the inaccuracy and the employer was so misled.[4] Excusing well-intended inaccuracy does not equate to excusing failure to give notice at all. Mr. Marean's claim that he suffered a gradual physical injury in September 2012 is separate and apart from his claim of PTSD; and he gave no notice of that injury until he filed his amended petition on June 11, 2013. Thus, the ALJ correctly found that section 302 did not remove Mr. Marean's statutory obligation under section 301 to provide notice of his gradual physical injury to the City of Portland.

[4] Title 39-A M.R.S.A § 302 provides:

> A notice given under section 301 may not be held invalid or insufficient by reason of any inaccuracy in stating any of the facts required for proper notice, unless it is shown that it was the intention to mislead and that the employer was in fact misled by the notice. Want of notice is not a bar to proceedings under this Act if it is shown that the employer or the employer's agent had knowledge of the injury. Any time during which the employee is unable by reason of physical or mental incapacity to give the notice, or fails to do so on account of mistake of fact, may not be included in the computation of proper notice. In case of the death of the employee within that period, there is allowed for giving the notice 3 months after the death.

[¶17] Mr. Marean further argues that because he was totally disabled by PTSD, he was unable to give notice under section 301, and it was only after meeting with counsel that he was able to give notice. In support of his argument, Mr. Marean alleges that his testimony that he did not wish to face more adversarial events and he was unable to "deal with it" was evidence that in his state of mind he was unable to give notice. The ALJ found this argument unpersuasive because Mr. Marean was able to give notice of his mental injury claim while totally disabled by PTSD. Further, the ALJ cites to competent evidence in the record to support the finding that Mr. Marean was not under a mistake of fact with respect to the nature of his gradual physical injury after September 6, 2012.

III. CONCLUSION

[¶18] We conclude 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.

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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