STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 17-0026
Decision No.19-25

ELIZABETH FLESHER
(Appellee)

v.

INLAND HOSPITAL
(Appellant)

and

CROSS INSURANCE, T.P.A.
(Claims Administrator)

Argued: February 8, 2018
Decided: July 26, 2019

PANEL MEMBERS: Administrative Law Judges Hirtle, Collier, and Goodnough
BY: Administrative Law Judge Collier

[¶1] Inland Hospital appeals from a Workers' Compensation Board administrative law judge (*Elwin, ALJ*) decision granting Elizabeth Flesher's Petitions for Award and for Payment of Medical and Related Services, and awarding benefits. The Hospital contends that the ALJ erred when determining that Ms. Flesher established that the Hospital had adequate notice of her injury, pursuant to 39-A M.R.S.A. § 301 (Supp. 2018).[1] We remand the case for additional findings of fact and conclusions of law.

[1] The Hospital also contends that the ALJ committed reversible error in adopting the medical opinion of an independent medical expert appointed pursuant to 39-A M.R.S.A. § 312 (Supp. 2018), to find that Ms. Flesher's low back condition was work related. We find no merit in this argument. *See Dubois v. Madison Paper Co.*, 2002 ME 1, ¶ 14, 795 A.2d 696 (stating that when the ALJ rejects the IME's medical findings "we determine whether the [ALJ] could have been reasonably persuaded by the contrary medical evidence that it was highly probable that the record did not support the IME's medical findings"); *Dillingham v. Great N. Paper,* Me. W.C.B. No. 15-7, ¶ 3 (App. Div. 2015) (stating that when the ALJ adopts the IME's

I. BACKGROUND

[¶2] Elizabeth Flesher worked as a sleep lab technician for Inland Hospital. She had a longstanding back condition but had always been able to work. In June of 2012, the sleep lab was closed for a time due to the absence of a supervising physician. Ms. Flesher was then assigned to work in the records room. Her duties involved retrieving files, which required turning cranks to move file cabinets. Her back pain increased after just two or three days in that assignment. She requested a different assignment and was given a seated job entering data into a computer. Her back pain worsened after one shift performing this work, due to prolonged sitting.

[¶3] On August 30, 2012, Ms. Flesher's back pain further intensified after she hand-carried a stack of charts from the basement. She needed assistance to get out of her car when she got home. She then called the supervisor of the records room to say she would not be coming in the next day. On August 31, 2012, Ms. Flesher spoke with Beth Clifford, whose job was to handle human resource issues and workers' compensation claims for the Hospital. Ms. Clifford called to ask Ms. Flesher if this was a workers' compensation issue. The ALJ found that Ms. Flesher responded "no because I had a prior existing condition with my back anyway." At that time, Ms.

findings, we will reverse only if those findings are not supported by any competent evidence, or the record discloses no reasonable basis to support the decision).

Flesher did not understand that an aggravation of a preexisting condition could be compensable.

[¶4] Ms. Flesher did not return to work at Inland Hospital. She took leave pursuant to the Family and Medical Leave Act. On October 4, 2012, while seated at home, she reached to hand her husband an item and felt "a complete burst" in her back. She was taken to the hospital by ambulance where she was diagnosed with cauda equina syndrome and immediately underwent surgery. On February 21, 2013, her attorney wrote a letter to the hospital asserting a workers' compensation claim and seeking incapacity benefits. Ms. Flesher subsequently filed her petitions.

[¶5] Following a hearing at which Ms. Flesher was the only witness, the ALJ initially concluded that her claims were barred for failure to provide adequate notice to the employer pursuant to 39-A M.R.S.A. § 301. Ms. Flesher filed a Motion for Findings of Fact and Conclusions of Law, and both parties submitted proposed findings.

[¶6] The ALJ granted the Motion and issued an amended decision, altering the outcome. The ALJ found that Ms. Flesher (1) "had told her supervisor in the records room that the file retrieval work was causing her increased back pain," which caused her to request a different assignment; and (2) that while "Ms. Flesher mistakenly believed that her preexisting back condition would prevent her from making a workers' compensation claim, Ms. Clifford, whose job was to handle

human resource issues and workers' compensation claims for Employer's hospital, presumably understood that this was not the case." Therefore, the ALJ concluded, the Hospital had knowledge of Ms. Flesher's work injury sufficient to satisfy Ms. Flesher's burden under 39-A M.R.S.A. §§ 301 and 302 (Supp. 2018). The ALJ granted the petitions and awarded benefits, and the Hospital filed this appeal.

II. DISCUSSION

[¶7] The Hospital contends that the ALJ erred when determining that Ms. Flesher gave adequate notice of her injury because the ALJ's factual findings supporting the adequacy of that notice are unsupported by competent evidence.

[¶8] Ms. Flesher made a request for additional findings of fact and conclusions of law and submitted proposed additional findings. We therefore do not assume that the ALJ made all the necessary findings to support her conclusions. *See Maietta v. Town of Scarborough*, 2004 ME 97, ¶ 17, 854 A.2d 223. "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.*

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

> For claims for which the date of injury is prior to January 1, 2013, proceedings for compensation under this Act, except as provided, may not be maintained unless a notice of the injury is given within 90 days after the date of injury. . . . The notice must include the time, place, cause and nature of the injury, together with the name and address of the injured employee.

Title 39-A M.R.S.A. § 302 provides that "[w]ant 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."

[¶10] Specifically, the Hospital argues that the ALJ's findings regarding Ms. Clifford's understanding of workers' compensation law, in which the ALJ "presumed" that Ms. Clifford knew that an aggravation of a preexisting condition is compensable, is unsupported by competent evidence. We agree with this contention. Ms. Clifford did not testify at the hearing. The ALJ attributed to the Hospital specific knowledge concerning workers' compensation law that she presumed Ms. Clifford knew. Without evidence on the point, this was unwarranted speculation. *Grant v. Georgia-Pacific Corp*., 394 A.2d 289, 290 (Me. 1978) ("[A]lthough slender evidence may be sufficient [to meet a burden of proof], it must be evidence, not speculation, surmise or conjecture."); *see also Bradbury v. General Foods*, 218 A.2d 673, 674 (Me. 1966) (holding that a commissioner's decision must "rest[] on some legally competent and probative evidence and is not merely the result of speculation, conjecture or guesswork"); *Wickett v. Univ. of Me. System,* Me. W.C.B. No. 17-27, ¶ 10 (App. Div. 2017) (same).

[¶11] The Hospital also contends that the ALJ's second relevant finding, that Ms. Flesher "had told her supervisor in the records room that the file retrieval work was causing her increased back pain," is unsupported by competent evidence in the

record. Although this finding may have been inferred from Ms. Flesher's testimony that she requested a different assignment after a day or two working in the records room, *see Dumont v. AT & T Mobility Servs*., Me. W.C.B. No. 19-11, ¶ 14 (App. Div. 2019), it is unclear whether the ALJ would determine that this finding, standing alone, provides an adequate basis for the conclusion that the requirements of sections 301 and 302 had been satisfied. Consequently, we remand for clarification of the basis for the ALJ's finding that the Hospital had knowledge of Ms. Flesher's work injury within 90 days thereof. *See Spear v. Town of Wells*, 2007 ME 54, ¶ 13, 922 A.2d 474 (remanding for clarification of findings of fact); *Derrig v. Fels Co*., 1999 ME 162, ¶¶ 1, 8, 747 A.2d 580 (same).

[¶12] On remand, the ALJ should consider whether the Law Court's decision in *Farrow v. Carr Bros. Co., Inc*., 393 A.2d 1341 (Me. 1978) applies to this case. In *Farrow*, the employee began to experience symptoms in his right knee while working as a carpenter. *Id.* at 1342. He approached his supervisor and explained that he was having problems with his knee and needed to take part of the next day off to see a doctor, but he did not inform the supervisor that he considered the injury to be work related. *Id.* The Law Court affirmed the Commissioner's decision that notice was inadequate, reasoning that the notice provision of the Act requires a claimant to state the cause of the disability and that "[t]his requirement is not met simply by informing the employer of the mere fact of an injury; the employer must also receive

some indication that the injury might be *work related* and therefore compensable." *Id*. at 1344 (emphasis in original).[2]

The entry is:

> The administrative law judge's decision is remanded for additional findings of fact and conclusions of law, and for any additional proceedings that may be made necessary thereby.

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. 2018).

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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[2] The Court in *Farrow* distinguished cases in which an employer "observes an employee suffer an obviously compensable injury," citing *Blue Bird Mining Co. v. Litteral*, 314 Ky. 709, 236 S.W.2d 936 (1951), or in which an employee relates the circumstances of the injury to the employer, citing *Ross v. Oxford Paper Co.*, 363 A.2d 712 (Me. 1976). *Id.*