ROBERTA A. DONAHUE
(Appellee)

v.

ND PAPER, INC.
(Appellant)

and

SENTRY CASUALTY CO.
(Insurer)

and

SYNERNET
(Insurer)

and

BOISE CASCADE PAPER
(Appellee)

and

MEAD PAPER
(Appellee)

and

MAINE SELF INS. GUARANTY ASSOCIATION

Argument held: April 25, 2023
Decided: July 6, 2023, 2023

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

[¶1] ND Paper appeals from a decision of a Workers' Compensation Board administrative law judge (*Chabot, ALJ*) granting Ms. Donahue's Petitions for Award

and for Payment of Medical and Related Services for six injuries spanning 1983 to 2019. ND Paper asserts the ALJ erred by (1) concluding notice of an acute injury was sufficient notice for a gradual injury; (2) adopting the independent medical examiner (IME)'s opinion on apportionment and medical causation, which ND Paper contends is speculative, not supported by competent evidence, and based on an inaccurate history, *see* 39-A M.R.S.A. § 312; and (3) failing to properly analyze the petitions and evidence under 39-A M.R.S.A. § 201(4). We disagree and affirm the decision.

I. BACKGROUND

[¶2] Roberta Donahue was employed at ND Paper and its predecessor companies, including Catalyst Paper Co., NewPage, Mead Westvaco, Mead, and Boise Cascade, from 1980 to 2022. She worked in several different departments and began working as a repair coordinator in 1992. In that position Ms. Donahue spent four to five hours working at a desk and the rest of her workday on her feet on cement or wooden floors. She was frequently required to lift up to 150 pounds from the floor to waist level and sometimes overhead.

[¶3] This is not the first round of litigation in this case. Low back injuries in 1983 and 1988 were established in a 1992 decree. In 2000, Ms. Donahue suffered a work-related neck and back injury when she was in a car crash traveling in a company vehicle. On January 22, 2019, Ms. Donahue sustained a neck and back

injury while lifting a 30 pound drive off a shelf. She was unaware that one end was heavier than the other, causing the drive to fall as she held it. She reported the injury the next day.

[¶4] Ms. Donahue continued working until March 5, 2019, when she went out of work for a nonwork-related surgery. She returned to work in June but was unable to perform her job duties and went home. Thereafter, Ms. Donahue was taken out of work by Dr. Deluca until she could be evaluated by a neurologist. After seeing a neurologist, Ms. Donahue underwent neck surgery on July 29, 2019. Initially, Ms. Donahue's neck condition improved after surgery, but progress has plateaued; she still experiences burning, numbness, and tingling in her left arm and neck. She also continues to have low back and leg pain. She has not returned to work.

[¶5] Ms. Donahue filed a Petition for Award related to the October 3,1983, injury, Petitions for Payment of Medical and Related Services related to the January 1,1987, and March 16, 1988, injuries, and Petitions for Award and Petitions for Payment of Medical and Related Services related to the November 14, 2000, injury and the January 22, 2019, acute and gradual injuries. Ms. Donahue was seen by Dr. Bradford, an IME appointed pursuant to 39-A M.R.S.A. § 312.

[¶6] The ALJ determined Ms. Donahue failed to prove she has ongoing incapacity related to the 2000 back injury because although Dr. Bradford testified that she had returned to baseline, her baseline condition included some intermittent

low back problems. The ALJ determined there was no clear and convincing contrary evidence.

[¶7] The ALJ did find Ms. Donahue suffered both an acute and a gradual neck injury on January 22, 2019. The parties do not dispute she gave timely notice of the acute injury. The ALJ determined failure to identify a gradual injury of the same date did not bar the gradual 2019 injury, finding that notice of the acute injury also served as notice for the gradual injury.

[¶8] Regarding apportionment, the ALJ largely adopted Dr. Bradford's findings as stated at his deposition. The ALJ found Ms. Donahue's neck injuries are responsible for 80% of her incapacity and her back, 20% responsible. Of the 80% incapacity from the neck, 20% is due to the 2000 work injury and 80% is due to the 2019 acute and gradual injuries. The ALJ found the 1983 injury 10% responsible for incapacity due to her back condition, and the 1988 injury, 90% responsible. This resulted in a finding that 64% of her incapacity was due to the 2019 injuries.

[¶9] Ms. Donahue was awarded total incapacity benefits from June 27, 2019, to October 21, 2019, due to her neck injury. From October 22, 2019, to the present and continuing she was awarded 75% partial incapacity benefits. ND Paper requested Further Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶10] 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 ND Paper requested 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 [ALJ]." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446.

B. Notice Regarding the January 22, 2019, Gradual Injury

[¶11] ND Paper argues the ALJ erred in concluding notice of an acute injury was sufficient notice for a gradual injury of the same date. Specifically, it asserts that the ALJ's reliance on *Clark v. DeCoster Egg Farms*, 421 A.2d 939 (Me. 1980) and 39-A M.R.S.A § 302[1] is misplaced because separate notice for a gradual injury

[1] 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

is required under the plain language of section 301. ND Paper further asserts that if this aspect of the decision is affirmed employees will simply tack on a gradual injury claim to every acute injury claim.[2] We disagree.

[¶12] In *Clark*, the employee was butted by a "mischievous ram." 421 A.2d at 940. He reported the injury as a chipped tooth. *Id.* When he later reported a back injury, the employer argued that he did not give proper notice. *Id.* at 941. The Law Court disagreed, and found that the employee gave proper notice, reasoning:

> [I]t is necessary to remember that when an accident has occurred, the employee who makes his report of what seems to be a relatively minor injury usually does so without guidance of counsel. In complete good faith, through lack of education or sophistication, he may describe his "injury" in less than full detail, not recognizing that his description may later become crucial for obtaining benefits under the Act. Indeed, in this case it was the employer's own initial report of injury that specified an important fact not wholly obvious from Clark's own report: namely, that Clark had been hit "in the rear." Employees who are injured in accidents may not specify every resulting pain or discomfort they may suffer at the time of reporting, having a reasonable expectation that most of those pains and discomforts will soon disappear. Furthermore, an employee who has given in good faith an adequate report of the time, place, cause, and obviously injurious consequences of an accident may not recognize the need to supplement his initial report at a later date if a condition thought unimportant at the time of reporting eventually proves to be serious.

Id. at 941-43.

> case of the death of the employee within that period, there is allowed for giving the notice 3 months after the death.

[2] We do not find this argument persuasive. All cases require a causation opinion and medical evidence regarding whether a gradual injury occurred. Here, the ALJ specifically relied on and adopted the IME's opinion, which he found consistent with Ms. Donahue's testimony, that a gradual injury manifested at the same time the acute injury occurred.

[¶13] Although ND Paper is correct that *Clark* involved a single incident affecting multiple body parts and the sufficiency of notice rather than the lack thereof, the ALJ found the Court's reasoning instructive in analyzing the instant case. We find no error.

[¶14] ND Paper also raises an argument regarding the plain language of 39-A M.R.S.A. § 301, which provides:

> 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. 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. For claims for which the date of injury is on or after 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 60 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. The notice must be given by the injured employee or by a person in the employee's behalf, or, in the event of the employee's death, by the employee's legal representatives, or by a dependent or by a person in behalf of either.

[¶15] Contrary to ND Paper's contention, the language "cause and nature of the injury" does not plainly require an employee to specify that they are claiming both an acute and gradual injury. We find no error in the ALJ's rejection of ND Paper's interpretation of that phrase.

[¶16] Further, as the ALJ noted, 39-A M.R.S.A § 302 does not require an employee to identify to the employer every possible or potential injury sustained

from a work-related cause, and ND Paper presented no evidence that Ms. Donahue was intentionally trying to mislead it regarding notice.

[¶17] As the Law Court has stated, "the purpose of the . . . notice requirement is to enable the employer to provide prompt medical treatment to minimize the employee's injuries or disability and the employer's liability, to make a prompt investigation of the circumstances of the accident, and to take prompt action to prevent similar injuries to other workers." *Desgrosseilliers v. Auburn Sheet Metal,* 2021 ME 63, ¶ 9, 264 A.3d 1237. Because Ms. Donahue's acute and gradual injuries involved the same body part and a similar mechanism of injury (lifting), the purposes of the notice requirement were not frustrated by Ms. Donahue's failure, having given notice of the acute injury, to give additional notice of the gradual injury. Therefore, we do not disturb the ALJ's conclusion on this issue under the circumstances of this case.

C. Adoption of the IME's Findings on Apportionment and Medical Causation

[¶18] ND Paper asserts the ALJ erred by adopting the IME's opinion regarding apportionment and medical causation, pursuant to 39-A M.R.S.A. § 312, because it was speculative, not supported by competent evidence, and based on an inaccurate history. It further contends the record contains clear and convincing evidence contrary to the IME's apportionment findings. Lastly, it argues that the

record supports an equal apportionment of liability between the employers. We disagree with these contentions.

[¶19] When "more than one employer is responsible for an employee's disability, fixing of liability for compensation upon each employer in proportion to its responsibility is not only logical and equitable, but consistent with the general purpose of our compensation Act." *Kidder v. Coastal Constr. Co.*, 342 A.2d 729, 734 (Me. 1975). "In any case in which the causative contribution to the single indivisible injury by each respective employer may be ascertained, liability should be fixed in proportion to that contribution." *Id.*

[¶20] Although ND Paper correctly points out that the IME acknowledged using some degree of speculation in apportioning incapacity between the neck or the back, the ALJ did not err in adopting his opinion. First, an IME is particularly capable of determining apportionment because of the training and experience required for appointment to the board's panel. *See* 39-A M.R.S.A. § 312(1). Further, competing views were thoroughly vetted at deposition. It is apparent that Dr. Bradford's acknowledgment that apportionment requires some speculation is a recognition of the difficulty of the task, not an indication that his conclusions are without adequate foundation or mere conjecture. Moreover, there is no clear and convincing evidence to the contrary in the record.

[¶21] In addition, although ND Paper argues the IME relied on an inaccurate history because he understood Ms. Donahue's 2019 injury involved repetitive lifting instead of lifting a 30-pound item once, the ALJ pointed out that at deposition, Dr. Bradford testified that the difference in the exact mechanism of injury was unimportant because he based his opinion on the change in Ms. Donahue's condition after the date of injury. And, although ND Paper argues that Dr. Bradford misunderstood the change in Ms. Donahue's post-injury condition, the ALJ was satisfied that Dr. Bradford understood the nature of that change overall. The ALJ also found the IME's findings consistent with Ms. Donahue's testimony regarding her condition following the 2019 injury, which he found credible.

[¶22] ND Paper's argument that liability should be apportioned equally fails because the IME was able to ascertain the relative contributions of each injury and provided an opinion regarding apportionment based on the evidence. The equal apportionment finding ND Paper seeks is appropriate when apportionment is impossible to determine. *See Kidder*, 342 A.2d at 734 ("In any case in which the causative contribution to the single indivisible injury by each respective employer may be ascertained, liability should be fixed in proportion to such contribution. Where . . . such apportionment is impossible, liability for compensation payments may properly be divided equally.").

[¶23] Because the IME was able to ascertain the causative contributions of each employer and the ALJ's apportionment finding is supported by competent evidence, we find no error.

D. Application of Section 201(4)

[¶24] ND Paper argues the ALJ failed to properly analyze the petitions and evidence under section 201(4), which provides: "If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner."

[¶25] The first part of the analysis under section 201(4) is whether a compensable injury exists. *Celentano v. Dep't of Corr.,* 2005 ME 125, ¶ 9, 887 A.2d 512. Based on the IME's opinion and Ms. Donahue's testimony, the ALJ concluded that Ms. Donahue sustained an acute and a gradual neck injury in 2019. This satisfies the first part of the analysis under section 201(4).

[¶26] "The remaining issue is whether the combination of the work-related injury and [the employee's] preexisting condition resulted in a disability and whether the disability was 'contributed to by the employment in a significant manner.'" *Id.* ¶ 15 (quoting 39-A M.R.S.A. § 201(4)). ND Paper argues that the ALJ did not use the correct standard in evaluating this case under section 201(4) and did not analyze the 2019 neck injuries under section 201(4) at all. In his decision, the ALJ determined

that the 2000 injury "aggravated the employee's pre-existing lumbar and cervical conditions in a significant manner." As to the 2019 gradual low back injury, the ALJ concluded "I find that the employee has failed to meet her burden of proof that she sustained a January 22, 2019 gradual low back injury, as it is unclear if work activities aggravated her back in a significant manner." Neither of these statements tracks the language of the section 201(4) precisely. Nor did the ALJ specifically discuss the application of 201(4) to the 2019 neck injuries.

[¶27] These shortcomings are similar to those in *Celentano* in which the employer contended "the hearing officer's finding that [the employee's] 'work injury contributed to his disability in a significant manner' is not the same as a finding that the *employment* contributed to the disability in a significant manner." 2005 ME 125, ¶ 18. The Court agreed "that the appropriate analysis is whether the employment, rather than the injury, contributed significantly to the employee's disability." *Id.* The Court concluded that notwithstanding misstating the correct standard, the hearing officer's findings demonstrated she was aware the employment, and not the injury, had to contribute to the disability in a significant manner and she therefore had applied the correct standard. *Id.*

[¶28] As in *Celentano*, here, the ALJ's overall analysis demonstrates that he based his conclusions on the correct standard. For example, the ALJ recited Dr. Bradford's opinion that "The work injury of 1/22/19 certainly aggravated [Ms.

Donahue's] cervical condition…." He expressly rejected Ms. Donahue's claim that the 2019 injury included her low back, finding she had failed to demonstrate compensability of that aspect of the injury under section 201(4). The award of benefits based on the acute and gradual injuries of the same date indicates the ALJ found those aspects of the 2019 injury were compensable under section 201(4). This is clear from his finding that 80% of Ms. Donahue's neck condition and 64% of her incapacity are due to the 2019 injuries. These facts support the ALJ's conclusions by showing Ms. Donahue's work injuries aggravated her underlying neck condition, which caused disability, and the employment activity (lifting) contributed to that disability in a significant manner.

III. CONCLUSION

[¶29] The ALJ did not err by concluding that notice of an acute injury was sufficient notice of a gradual injury under the circumstances presented, nor by adopting the IME's opinion regarding apportionment and medical causation. Further, to the extent the ALJ misstated the appropriate standard under 39-A M.R.S.A. § 201(4), his conclusions comport with the legal standard and are supported in the record.

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.

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.

Attorney for Appellant:
Richard Tucker, Esq.
Tucker Law Group
81 Main Street, Suite 3
P.O. Box 696
Bangor, ME 04402-0696

Attorneys for Appellees:
James J. MacAdam, Esq.
MacAdam Law Offices
45 Mallett Drive
Freeport, ME 04032

Robert W. Bower, Jr., Esq.
Christopher Schlundt, Esq.
Norman Hanson DeTroy
Two Canal Plaza
P.O. Box 4600
Portland, ME 04112-4600