ROBERT F. FERGOLA
(Appellee)

v.

ND PAPER, INC.
(Appellant)

and

LIBERTY MUTUAL INSURANCE CO.
(Insurer)

Conference held: December 22, 2023
Decided: February 8, 2024

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

[¶1] ND Paper, Inc., appeals from a decision of a Workers' Compensation Board administrative law judge (*Sands, ALJ*) granting Robert Fergola's Petition for Award related to a May 1, 2021, low back injury.[1] ND Paper contends the ALJ erred when determining Mr. Fergola met his burden to prove that he sustained a work-related gradual injury as of that date, and in applying 39-A M.R.S.A. § 201(4) in the initial determination of whether a work injury occurred. We affirm the decision.

I. BACKGROUND

[¶2] Robert Fergola began working at the Rumford paper mill in 1985 and has continued to work there through numerous changes in ownership. At the relevant

[1] Mr. Fergola filed two Petitions for Award alleging different dates of injury—May 1, 2021, and August 12, 2021. The ALJ found that the injury occurred on May 1, 2021, and denied the Petition regarding the August 12, 2021, date. That determination has not been appealed.

time, the mill was owned by ND Paper. Since 1989, Mr. Fergola has worked in the maintenance department at the mill, installing, dismantling, and repairing machines. The ALJ credited Mr. Fergola's testimony regarding the highly physical nature of his job, which involved being on his feet seven to eight hours per day on steel-grated floors, climbing up to 400 stairs per day, kneeling or bending over, working in tight spaces, using tools and equipment weighing up to 96 pounds, and manipulating valves weighing up to 600 pounds.

[¶3] Mr. Fergola sustained an acute injury to his back while working at the mill in 1993. He underwent conservative treatment and was able to return to his full work duties. His back pain flared up periodically over the years after he engaged in physical activities in and out of work.

[¶4] In May 2021, Mr. Fergola experienced a change in symptoms including pain on the outer side of his right leg, numbness in his right calf, and tingling in his right foot. He was unable to walk more than 100 yards and had to sit after standing or walking for too long. Mr. Fergola testified that the increase in symptoms coincided with an increase in his workload due to a reduction in force in the maintenance staff.

[¶5] Mr. Fergola sought treatment in May 2021. He was prescribed medication and attempted physical therapy. He ultimately underwent surgery with

Dr. Agren, who performed an L5/S1 fusion on May 16, 2022. He was out of work following the surgery until August 22, 2022.

[¶6] A hearing was held on September 21, 2022, at which Mr. Fergola testified. Dr. Agren's deposition testimony was subsequently admitted. The ALJ granted the Petition for Award, determining Mr. Fergola sustained a gradual, work-related low back injury as of May 1, 2021, and the injury is compensable pursuant to 39-A M.R.S.A. § 201(4). ND Paper filed a Motion for Further Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶7] On appeal, 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. Fergola 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. Gradual Work-Related Injury

[¶8] Title 39-A M.R.S.A. § 201(4) applies in cases involving a preexisting condition. It 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.

[¶9] When a case appears to come within section 201(4), the ALJ must first determine whether a work-related injury occurred; that is, whether the purported injury arose out of and in the course of employment. *See Celentano v. Dep't of Corr*., 2005 ME 125, ¶ 9, 887 A.2d 512. "'If the employee is found to have an injury, then subsection 201(4) is applied.'" *Id.* (quoting *Derrig v. Fels Co*., 1999 ME 162, ¶ 6, 747 A.2d 580). "[I]n a combined effects case the 'arising out of and in the course of' requirement is satisfied by a showing of both medical and legal cause," *Celentano,* 2005 ME 125, ¶ 12, and medical causation must be established by expert medical testimony, *Smith v. Me. Coast Healthcare Corp.,* Me. W.C.B. No. 20-02, ¶ 10 (App. Div. 2020).

[¶10] ND Paper contends Mr. Fergola did not meet his burden of proof on the issue of medical causation, and that the ALJ conflated the analysis of whether a work injury occurred with whether the injury is compensable under section 201(4). We disagree.

[¶11] Dr. Agren provided the only expert medical opinion regarding medical causation. He testified as follows:

> Q: . . . Based on that history, do you have an opinion that's more probable than not whether or not the work activity that I described to you that he did as a maintenance worker contributed to his low back and right leg symptoms and the need for the surgery that you performed?
>
> A: What someone – the story you're telling me is someone who has an issue that then was aggravated by a lot of – a lot of mechanical activities.
>
> Q: That's correct.
>
> A: Yes, what you're describing to me is someone who has an aggravation of a condition, given his story over the years.

[¶12] ND Paper contends this opinion was inadequate to meet Mr. Fergola's burden to establish that a work injury occurred because (1) Dr. Agren did not review medical records from Mr. Fergola's other providers and therefore had no basis on which to compare Mr. Fergola's condition in 2021 with his condition following the 1993 injury; (2) Dr. Agren's testimony establishes only that the employment aggravated Mr. Fergola's condition, not that he sustained a new injury; and (3) Dr. Agren's opinion was based only on Mr. Fergola's testimony, as presented in hypothetical form by counsel.

[¶13] The ALJ determined that Dr. Agren's testimony established that Mr. Fergola sustained a gradual work injury occurring in May 2021 because:

> Dr. Agren's conclusion that the mechanical activities associated with Mr. Fergola's employment aggravated and contributed to his symptomology and need for surgery is consistent with the definition of a gradual injury. *See Derrig v. Fels Co.*, 1999 ME 162, ¶ 7, 747 A.2d 580 (defining a gradual injury as "[a single injury caused by] repeated, cumulative trauma without any sudden incapacitating event.").

[¶14] In *Derrig v. Fels Co.*, the board concluded that Mr. Derrig was not entitled to benefits under section 201(4) without first finding that he had sustained a gradual work injury. 1999 ME 162, ¶ 2. The board, however, had made factual findings that the work Mr. Derrig had done over the years had "affected his back perceptibly" and "contributed to his degenerative spine condition" requiring surgery earlier than otherwise would have been necessary. *Id.* at ¶ 5. The Law Court noted that these findings may have been inconsistent with the finding that he had not established a gradual injury. *Id.* at ¶ 8. The Court thus remanded the case for a determination of whether a gradual injury had occurred and if so, whether the Mr. Derrig's disability was compensable under section 201(4). *Id.*

[¶15] Like in *Derrig*, Dr. Agren's medical opinion that Mr. Fergola's ongoing work activities aggravated and contributed to his symptomology and need for surgery is consistent with the finding that Mr. Fergola sustained a gradual injury due to his work duties. Moreover, Dr. Agren was Mr. Fergola's treating surgeon, and the ALJ specifically credited Mr. Fergola's testimony regarding the physical nature of his job, change in symptoms, and increase in incapacity. There is competent

evidence supporting the finding that Mr. Fergola sustained a gradual work injury in May of 2021; therefore, we do not disturb that finding.

B. Title 39-A M.R.S.A. § 201(4)

[¶16] ND Paper next contends that the ALJ erred in applying section 201(4) in the initial determination of whether an injury occurred. It asserts that the ALJ erred by using the same testimony from Dr. Agren, quoted above, to support the finding that Mr. Fergola sustained an injury and that he met the requirements of section 201(4). We find no error.

[¶17] ND Paper argues that *Levesque v. Daigle Oil Co*., Me. W.C.B. No. 17-21 (App. Div. 2017) applies. In that case, Ms. Levesque worked for two employers concurrently. *Id.* at ¶ 2. She sustained a knee injury in 2011 and filed a petition for award against the first employer, and the first employer filed a petition for apportionment against the second employer. *Id.* at ¶ 5. The Independent Medical Examiner (IME) opined that the work at the second employer did not aggravate, accelerate, or combine with the 2011 injury in a significant manner. *Id.* at ¶ 6. The IME later testified at deposition that the second employment made a minor contribution to the disability that could be viewed as significant. *Id.* at ¶ 7. The ALJ concluded that the second employment did not contribute to Ms. Levesque's disability in a significant manner and denied the apportionment petition. *Id.* at ¶ 8.

[¶18] The Appellate Division panel affirmed, finding that although the IME testified that Ms. Levesque experienced a minor increase in symptoms while working for the second employer, the IME "never went so far as to suggest that, from a medical causation perspective, the work caused a gradual injury in 2012." *Id.* at ¶ 12.

[¶19] ND Paper contends Dr. Agren, like the IME in *Levesque*, merely testified that the work aggravated Mr. Fergola's condition and did not testify that he sustained an injury. However, Dr. Agren's testimony that the employment aggravated and contributed to Mr. Fergola's symptomology is sufficient, competent evidence to establish the occurrence of a gradual injury. As the ALJ correctly reasoned, "[t]he fact that the same testimony may be relevant to any section 201(4) analysis does not render the testimony irrelevant to the initial determination of whether a gradual injury occurred."

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.

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