STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 12-0013
Decision No. 13-5

RAYMOND SAVAGE
(Appellee)

v.

GEORGIA PACIFIC CORPORATION
(Appellant)

and

ESIS
(Insurer)

v.

DOMTAR INDUSTRIES
(Appellee)

and

LIBERTY MUTUAL INS. CO.
(Insurer)

Decided: June 26, 2013
Conferenced: May 21, 2013

PANEL MEMBERS: Hearing Officers Greene, Jerome, and Knopf
BY: Hearing Officer Greene

[¶1] Georgia Pacific Corporation appeals from a decision of a Workers' Compensation Board hearing officer (*Pelletier, HO*) determining that Raymond Savage, who suffered work-related injuries in 1982, did not also suffer a gradual injury manifesting itself in 2010 when Domtar Industries was the employer. Georgia Pacific contends that the hearing officer erred as a matter of law when

concluding that Georgia Pacific did not establish, on a more likely than not basis, that the employee suffered a gradual injury during the time he worked for Domtar. We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Mr. Savage began working at the paper mill in Baileyville in the 1970s, when it was owned by Georgia Pacific. In 1982, while working as a spare on a crew assisting the liquor operator at the mill, Mr. Savage was severely injured when a valve exploded. He sustained severe burns to his face, back, and right arm from scalding liquor, and injured his right knee and ankle when jumping from a platform. He underwent right knee surgery for a partially torn meniscus and anterior cruciate ligament, and ankle surgery to remove a reactive bone spur. Mr. Savage was totally incapacitated from work for fourteen months, until January 9, 1984, due to his physical injuries. He went out of work again from November 27, 1984, to December 14, 1986, as a result of psychological consequences of the work injuries. All of these injuries were found to be compensable in a prior Board decree. Over the years, he developed left knee and low back problems, which he contended resulted from favoring the injured right knee.

[¶3] After returning to work in 1986, Mr. Savage performed a number of different jobs for Georgia Pacific, including turbine evaporator. He worked in essentially the same job at the mill after Domtar took over in 2001. The hearing

officer found that "from 1987 to 2010, employee's job required lots of walking on cement floors, pavement and grated catwalks. It required lots of climbing stairs and ladders, carrying and lifting." He also credited Mr. Savage's testimony that, although he continued to work without restrictions, his right knee, left knee, and back conditions worsened while he continued to work for Georgia Pacific as well while working for Domtar after 2001. He took himself out of work on March 28, 2010, primarily due to the deterioration of his right knee condition.

[¶4] Mr. Savage filed petitions for restoration and for payment of medical and related services for the 1982 Georgia Pacific knee injury. Georgia Pacific then filed a petition for award against Domtar pursuant to 39-A M.R.S.A. § 354 (Supp. 2012), alleging that in 2010, Mr. Savage sustained a gradual injury to both knees and his back that aggravated, accelerated, and combined with preexisting conditions resulting from his 1982 work injury, and seeking an equal apportionment of liability.

[¶5] The hearing officer granted Mr. Savage's petitions for restoration and for medical and related services against Georgia Pacific, but denied Georgia Pacific's apportionment petition against Domtar. He attributed Mr. Savage's current knee problems entirely to the 1982 injury. The hearing officer specifically determined that Georgia Pacific did "not establish[] by medical evidence that it is more probable than not that this employee suffered a new gradual injury" after

2001, when Domtar took over, that is "separate and distinct from his 1982 work injury." Georgia Pacific filed a motion for further findings of fact and conclusions of law, which the hearing officer denied. Georgia Pacific now appeals.

II. DISCUSSION

[¶6] Georgia Pacific frames the issue as follows: "whether Georgia Pacific Corporation carried its burden of proof on its Petition for Award of Compensation alleging a Domtar March 27, 2010 gradual injury."

[¶7] "A finding of fact by a hearing officer is not subject to appeal[.]" 39-A M.R.S.A § 321-B (Supp. 2012). However, a determination "that any party has or has not sustained the party's burden of proof . . . is considered a conclusion of law and is reviewable[.]" 39-A M.R.S.A. § 318 (2001).[1] Because Georgia Pacific had the burden of proof, and the hearing officer found that it failed to meet its burden, Georgia Pacific can prevail on appeal only if it can demonstrate that the facts as found by the hearing officer legally compelled the conclusion that Mr. Savage suffered a gradual injury in 2010. *See Anderson v. Me. Pub. Employees' Ret. Sys.*, 2009 ME 134, ¶ 28, 985 A.2d 501; *see also Kelley v. Me. Pub. Employees' Ret. Sys.*, 2009 ME 27, ¶ 16, 967 A.2d 676. It is within the exclusive province of the

[1] This language in 39-A M.R.S.A. § 318 (2001) refers to review "in accordance with section 322," which governs discretionary appellate review by the Law Court. *See* 39-A M.R.S.A. § 322 (Supp. 2012). Because the role of the Appellate Division on appeal is consistent with that of the Law Court, *see Pomerlau v. United Parcel Serv.*, 464 A.2d 206, 208-09 (Me. 1983), we see no reason not to apply this rule in appeals taken to the Appellate Division pursuant to P.L. 2011, ch. 647, § 20 (codified at 39-A M.R.S.A. § 321-B (Supp. 2012) (effective Aug. 30, 2012) (subsequently amended by P.L. 2013, ch. 63, § 13)).

hearing officer, as fact-finder, to determine the existence or nonexistence of facts necessary to meet a party's burden of proof. When, upon conflicting evidence, the hearing officer has not found such facts to exist, we cannot substitute our judgment for that of the hearing officer. *See Bruton v. City of Bath*, 432 A.2d 390, 394 (Me. 1981).

[¶8] Georgia Pacific argues that the evidence, namely Mr. Savage's testimony coupled with the deposition testimony of Dr. Walsh, his treating physician, compels the conclusion that the physical work performed by Mr. Savage after 2001 caused a new, gradual injury that manifested when Mr. Savage went out of work in 2010. To address this argument, we examine the legal principles applicable to distinguishing between a new compensable injury and a recurrence or natural progression of a prior injury, and how those principles apply when the second alleged injury is gradual in nature. Based on our analysis of these principles, we conclude that the hearing officer was not compelled to find that Mr. Savage suffered a second, gradual work injury as of 2010.

[¶9] Prior to the enactment of the 1992 Act, when successive injuries occurred in the course of and arising out of two successive employments or a single employment during the coverage periods of different carriers, and they combined to produce a single disabling condition, liability was apportioned between the two carriers in proportion to the contribution of each injury to the

disabling condition. *Pottle v. Brown,* 408 A.2d 1011, 1013 (Me. 1979). "On the other hand, if a second injury [was] a 'mere recurrence' of a prior injury and the second incident [*did*] *not contribute even slightly* to the causation of the disabling condition, then the insurer at the time of the original injury [was] solely liable for compensation benefits." *Id.*; *see also Willette v. Statler Tissue Corp*., 331 A.2d 365, 367 (Me. 1975) (applying "Massachusetts-Michigan rule" for apportionment in successive injury cases); *Kidder v. Coastal Constr. Co., Inc.*, 342 A.2d 729, 731 n.1 (Me.1975) (same); *Poole v. Statler Tissue Corp*., 400 A.2d 1067, 1069 (Me. 1979) ("If a disability of an employee is the direct result of a previously suffered injury and a second injury does not operate as a separate intervening contributing cause of the disability, the insurer at the time of the original injury remains liable for the employee's continuing disability."); 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §153.02[4], at 153-10 (2012).

[¶10] Since the 1992 Act was passed, however, an employer or insurer's responsibility for a disability due to an injury aggravating a preexisting condition, including one resulting from a prior work injury, is determined pursuant to 39-A M.R.S.A. § 201(4) (2001). *McAdam v. United Parcel Serv.,* 2001 ME 4, ¶ 11, 763 A.2d 1173. Section 201(4) 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.

[¶11] In *Derrig v. Fels Co.*, 1999 ME 162, 747 A.2d 580, the Law Court explained the analysis for determining whether a gradual injury that allegedly aggravates, accerlerates, or combines with a preexisting condition is compensable pursuant to section 201(4). In that case, the employee, a twenty-year union pipefitter who had worked for numerous employers, allegedly suffered a series of gradual injuries that aggravated a preexisting spine condition. *Id.* ¶ 2. He asserted claims for gradual injuries in 1984 and 1987 when he worked for one employer, and in 1993 when he worked for a different employer. *Id.* The hearing officer looked at the periods of employment with each employer separately, and concluded that the employee's work activities during those discrete periods had not "made significant contributions to the disability which ultimately resulted when he needed surgery in the fall of 1993." *Id.* However, the hearing officer also found as fact that "the heavy work this man had done from 1973 on affected his back perceptibly by 1984" and "the heavy work he did as a pipe fitter between 1973 and 1993 contributed to his degenerative spine condition[,] requiring surgery much earlier than might otherwise have been the case." *Id.* ¶ 3.

[¶12] The Law Court vacated the hearing officer's decision and remanded the case for two reasons: (1) the hearing officer's findings with respect to whether a gradual injury occurred were inconsistent; and (2) the hearing officer incorrectly applied the "significant contribution" analysis of section 201(4) to determine

whether the alleged gradual injuries had occurred, rather than applying that provision solely to to determine whether the disability resulting from the gradual injuries was compensable. *Id.* ¶ 8. The Court reasoned:

> Subsection 201(4) is not applicable in the initial determination of whether an employee has suffered a work-related injury. *If the employee is found to have an injury,* then subsection 201(4) is applied if the employee has a condition that preceded the injury. If the injury aggravated, accelerated or combined with the preexisting condition, the resulting disability is compensable if the employment contributed to it in a significant manner. *See* § 201(4). This analysis is utilized whether the injury is the result of a single event or whether the injury is a gradual one.

Id. ¶ 6 (emphasis added).

[¶13] *McAdam v. United Parcel Service*, 2001 ME 4, ¶ 1, 763 A.2d 1173, like the present case**,** involved a claim by an earlier employer for apportionment against a more recent employer due to an alleged gradual aggravation injury. The Law Court determined that the hearing officer had erred in denying the apportionment claim based upon his finding that the second employment did not "independently cause" the employee's current shoulder problems, and expressly disavowed that analysis from *Poole*, 400 A.2d at 1069, on the ground that it predated section 201(4). 2001 ME 4, ¶ 12 & n.4. The Court reasoned:

> When apportionment issues arise in the context of consecutive employment, if the second employment results in a "work-related injury," there exists no requirement that the second injury constitute an "independent cause" of the employee's disability in order for the second employer to be responsible for a portion of the benefits to the employee.

Id. ¶ 12. The Court remanded the case with instructions that the hearing officer "determine (1) whether [the employee] suffered any work-related injury while working for [the second employer], and if so, (2) whether that injury contributed to the preexisting shoulder condition in a significant manner." *Id.* ¶ 12.

[¶14] Although *Celentano v. Department of Corrections,* 2005 ME 125, 887 A.2d 512, did not involve a subsequent *gradual* injury, it is nevertheless instructive. The employee asserted a claim for benefits after he aggravated a preexisting, asymptomatic spine condition when he tripped on a table leg at work. *Id.* ¶¶ 3-5. The Law Court applied the two-step *Derrig* analysis to determine (1) whether a work injury had occurred, and (2) whether the injury was compensable. *Id.* ¶ 9.

[¶15] The Court stated that the first step, determining whether a work-related injury occurred, requires an assessment of whether the purported injury "arose out of and in the course of employment." *Id.* The Court further stated that in a combined effects case that requirement is satisfied by a showing of both medical and legal causation. *Id*. (citing *Bryant v. Masters Machine Co*., 444 A.2d 329, 336 (Me. 1982)). Medical causation can be shown when the work activity or incident does in fact produce the onset of symptoms. *See Celentano*, 2005 ME 125, ¶ 13; *see also Bryant* 444 A.2d at 338-39. It can also be demonstrated where the work increases the disabling effects of an already symptomatic preexisting condition.

See id. at 339-341 & n.11. '"[T]o meet the test of legal cause where the employee bears with him some 'personal' element of risk because of a preexisting condition, the employment must be shown to contribute some substantial element to increase the risk, thus offsetting the personal risk which the employee brings to the employment environment."' *Celentano*, 2005 ME 25, ¶ 12 (quoting *Bryant*, 444 A.2d at 337).[2]

[¶16] Thus, when an employer or insurer seeks to apportion responsibility for an employee's disability due to a condition resulting from what is alleged to be a gradual aggravation injury with a subsequent employer or insurer, in order to fulfill the preliminary step in the section 201(4) analysis—deciding whether such a gradual work injury has occurred—a hearing officer must determine whether the employee suffered an injury that arose out of and in the course of the employment, i.e. whether the work activity or event was both a medical and legal cause of the employee's disability.

[¶17] In the present case, the hearing officer found that Georgia Pacific had not proven that Mr. Savage suffered a gradual injury as a result of his work activities at Domtar from 2001 to 2010. Although the hearing officer may have

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[2] Medical causation was not at issue in *Celentano*. The Court held that the hearing officer did not err in determining that legal causation was met because the table leg contributed a substantial element to increase the risk of injury over the employee's personal element of risk from his preexisting condition. 2005 ME 125, ¶ 14. The Court then proceeded to analyze whether the disability was compensable pursuant to section 201(4). *Id.* ¶¶ 15-18.

taken the analysis a step too far when assessing whether the employee suffered a "separate and distinct" injury, *see McAdam,* 2001 ME 4, ¶ 12, 763 A.2d 1173 (eschewing any requirement that such a new injury "independently cause" the disability), he nevertheless expressly found Mr. Savage's work activities after 2001 were not a medical cause of a 2010 gradual injury and, thus, did not contribute to his current medical condition.

[¶18] The hearing officer credited and adopted the medical opinions of Dr. Walsh, Mr. Savage's treating physician, and Dr. Curtis, who performed a medical evaluation of Mr. Savage at the request of his attorney in July of 2011, that Mr. Savage's current level of disability was caused exclusively by his injury at Georgia Pacific in 1982. Although Dr. Walsh may have made some statements during his deposition suggesting that the type of work Mr. Savage performed both before and after 2001 could have aggravated the knee injury, the essence of his medical opinion, as found by the hearing officer, was that Mr. Savage's knee condition would have progressed to its current state of disability regardless of the work activity he performed for Domtar. Dr. Curtis concurred. His report states:

> It is my medical opinion, and more probable than not, that Mr. Savage's current knee and ankle complaints relate to his injury from his employment at Georgia-Pacific Corporation and from the injury of November 20, 1982. It is also my medical opinion, and more probable than not, that his tenure with the Domtar employer did not significantly aggravate or contribute to a hastening of the degenerative knee and ankle problems currently being seen.

[¶19] Accordingly, the hearing officer was not compelled to find that Mr. Savage suffered a gradual injury as a result of his work activities for Domtar from 2001 to 2010.

III. CONCLUSION

The entry is:

The decision of the hearing officer 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. 2012).

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