STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 14-0007
Decision No.15-24

DENISE J. DUNN
(Appellant)

v.

SUNRISE SENIOR LIVING
(Appellee)

and

SEDGWICK CMS
(Insurer)

Argument held: July 24, 2014
Decided: September 28, 2015

PANEL MEMBERS: Hearing Officers Elwin, Collier, and Jerome
BY: Hearing Officer Collier

[¶1] Denise Dunn appeals from a decision of a Workers' Compensation Board hearing officer (*Stovall, HO*) denying her Petition for Award. Ms. Dunn contends that the hearing officer erred when (1) finding no legal causation; and (2) failing to consider her work activity over her entire career when assessing whether she suffered a gradual injury, as required by *Derrig v. Fels Co.*, 1999 ME 162, 747 A.2d 580. We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Denise Dunn worked as a nurse in various capacities, from patient care to management, for several different employers over twenty-two years. She sustained injuries to her back in 1993, 1996, and 2005, and to her right arm in

2007. She was out of work from October 2008 through September 2010 due to her injuries.

[¶3] Ms. Dunn began working for Sunrise Senior Living on May 16, 2011, as a Health Care Coordinator. This was primarily an executive nursing job, in which she assessed the residents' proper level of care, evaluated potential residents, oversaw the staffing needs of the facility, and insured compliance with state laws and regulations. She was always on call, and sometimes had to fill in for staff to help dispense medication to residents. She testified that she periodically had to move patients or lift them if they fell. Assessing patients required her to adjust their position. Most of her job, however, required her to sit at a desk.

[¶4] Ms. Dunn began to experience low back and leg pain, particularly in her left leg. She sought treatment for this condition from Dr. Pavlak beginning on September 12, 2011. Ms. Dunn also saw Dr. Pavlak for an unrelated shoulder and neck problem (reflex sympathetic dystrophy). On December 22, 2011, Dr. Pavlak restricted her to working forty hours per week with no on-call hours due to the shoulder condition. Sunrise could not accommodate this restriction and terminated her employment on January 2, 2012.

[¶5] Ms. Dunn filed Petitions for Award and for Payment of Medical and Related Services. She contended that she suffered a new, gradual, low back,

bilateral hip, and leg injury as of January 2, 2012, and sought compensation pursuant to 39-A M.R.S.A. § 201(4) (2001).

[¶6] The hearing officer denied the petitions, concluding that Ms. Dunn did not establish that she suffered a new gradual injury as of January 2, 2012; and even if she had established such an injury, she did not establish that her employment at Sunrise was the legal cause of that injury.

[¶7] Ms. Dunn filed a Motion for Additional Findings of Fact and Conclusions of Law, which the hearing officer denied. Ms. Dunn appeals.

II. DISCUSSION

A. Standard of Review

[¶8] The Appellate Division is "limited to assuring that the [hearing officer's] factual 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." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983). When a party requests and proposes additional findings of fact and conclusions of law, as in this case, "we review only the factual findings actually made and the legal standards actually applied by the hearing officer." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Compensability

[¶9] When an alleged gradual work injury combines with a preexisting physical condition, liability is ultimately determined pursuant to 39-A M.R.S.A. § 201(4) (2001).[1] *McAdam v. United Parcel Serv.,* 2001 ME 4, ¶ 11, 763 A.2d 1173. "When a case appears to come within section 201(4), the hearing officer must first determine whether the employee has suffered a work-related injury . . . then [section] 201(4) is applied if the employee has a condition that preceded the injury." *Celentano v. Dep't of Corr.*, 2005 ME 125, ¶ 9, 887 A.2d 512 (quotation marks omitted). "This analysis is utilized whether the injury is the result of a single event or whether the injury is a gradual one." *Derrig v. Fels Co.*, 1999 ME 162, ¶ 6, 747 A.2d 580.

[¶10] In addition to determining whether a gradual injury occurred, the hearing officer must determine whether that injury arose out of and in the course of employment, i.e., whether the work activity or event was both a medical and legal cause of the employee's disability. *Savage v. Georgia Pacific Corp.*, Me. W.C.B. No. 13-5, ¶ 16 (App. Div. 2013); *see also Bryant v. Masters Mach. Co.*, 444 A.2d 329, 336 (Me. 1982).

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[1] Section 201(4) states:

> 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.

C. Legal Causation

[¶11] Ms. Dunn contends the hearing officer erred when finding that her employment was not the legal cause of the deterioration of her low back condition. To establish legal causation when "the employee bears with [her] some 'personal' element of risk because of a pre-existing 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." *Bryant* at 337.

[¶12] The comparison of the employment to personal risk is made against an objective standard; thus, a hearing officer should compare the risk that arises out of the conditions of employment and the risk present in an average person's nonemployment life. *Id*. The element of legal causation distinguishes "situations in which the employee just happened to be at work when the disability arose from those where the disability occurred only because an employment condition increased the risk of disability above the risks that the employee faced in everyday life." *Celentano*, 2005 ME 125, ¶ 12, 887 A.2d at 515.

[¶13] The hearing officer recited the appropriate standard for legal causation in the decree. When considering the factual conditions of employment in light of

this standard, the hearing officer determined that Ms. Dunn did not establish legal cause as follows:

> Multiple witnesses testified that Ms. Dunn's job was primarily sedentary; with little physical activity beyond sitting at her desk to do the paperwork for which she was responsible. The employee's statement to her doctor; that her job required a "fair amount" of sitting and was *rarely physical,* strengthens the persuasiveness of the employer's witnesses' testimony. [Emphasis added.]

[¶14] Moreover, the hearing officer also explicitly credited Dr. Pavlak's statement in his report of September 12, 2011, that her current back condition "is just the natural history of her problem over time."

[¶15] Ms. Dunn contends that it was error to determine that her current condition was not causally related to her work merely because her work was mainly sedentary. However, Ms. Dunn does not address the comparative risk component of the analysis. The hearing officer's finding that Ms. Dunn's job tasks were mostly sedentary is relevant to the *Bryant* standard, as is Dr. Pavlak's conclusion regarding the natural progression of her low back problem. The hearing officer properly considered these factors in assessing comparative risk and in concluding that Ms. Dunn had not established legal causation.

III. CONCLUSION

[¶16] The hearing officer did not err when determining that Ms. Dunn did not establish that the alleged gradual injury arose out of and in the course of

employment due to lack of legal causation. Because this issue is dispositive, we do not reach the other issue raised by Ms. Dunn.

The entry is:

The hearing officer'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. 2014).

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