EVELYN DUMONT
(Appellee)

v.

AT&T MOBILITY SERVICES
(Appellant)

and

SEDGWICK CLAIMS MANAGEMENT SERVICES

Argued: August 28, 2018
Decided: April 18, 2019

EN BANC PANEL MEMBERS: Administrative Law Judges: Collier, Elwin, Goodnough, Hirtle, Jerome, Knopf, and Pelletier

BY: Administrative Law Judge Collier

[¶1] AT&T Mobility Services appeals from a decision of a Workers' Compensation Board administrative law judge (*Stovall, ALJ*) granting Evelyn Dumont's Petition for Review of Incapacity. AT&T contends that the ALJ erred by (1) determining that the employee provided sufficient notice of her injury pursuant to 39-A M.R.S.A. § 301 (Supp. 2018); (2) concluding that there was sufficient clear and convincing contrary evidence to reject an independent medical opinion under 39-A M.R.S.A. § 312 (Supp. 2018); and (3) failing to evaluate whether the employment contributed to the disability in a significant manner pursuant to 39-A M.R.S.A. § 201(4) (Supp. 2018). We affirm the decision in part but remand for clarification of inconsistent findings on one point.

I. BACKGROUND

[¶2] Evelyn Dumont worked as a sales consultant for AT&T for many years. Her job involved replacing phone batteries and sim cards, opening phone cases, and helping customers resolve technical problems with their phones or tablets. These tasks involved repeated pinching and gripping throughout the day. In 2013, Ms. Dumont was given a tablet computer to use in her work. She began to experience pain in both of her hands and was eventually diagnosed with bilateral carpometacarpal (CMC) synovitis, bilateral DeQuervain's tenosynovitis, and left medial epicondylitis with ulnar neuritis. She underwent surgery for the DeQuervain's in her left hand in 2015, and surgery on her left CMC joint in 2016, both performed by Sacha Matthews, M.D. She continued to experience pain in both hands, and filed a Petition for Review.

[¶3] Ms. Dumont underwent an independent medical examination with Matthew Donovan, M.D., pursuant to 39-A M.R.S.A. § 312. Dr. Donovan found that Ms. Dumont's CMC synovitis resulted from a degenerative condition and was not caused by her work activities. He also found that her work activities had aggravated her DeQuervain's condition, but that injury had resolved by the date of his examination. Dr. Donovan further opined that Ms. Dumont presented "with chronic pain disproportionate to injury/surgery," and that her "complaints are subjectively such that functional overlay of her condition is strongly suspected." When deposed,

Dr. Donovan questioned "whether there's an element of secondary gain or something else that would be contributing to the prolongation or magnification of symptoms." However, Ms. Dumont's surgeon, Dr. Matthews, and two other treating physicians, Drs. Schwemm and Labotz, opined that Ms. Dumont's upper extremity injuries were work-related.

[¶4] The ALJ granted Ms. Dumont's petition, finding that she had established a gradual work injury to her upper extremities that had manifested as of October 1, 2013, and that she had notified her employer of her injury within 30 days, as required by 39-A M.R.S.A. § 301. Although Dr. Donovan doubted Ms. Dumont's credibility, the ALJ found her testimony to be credible. The ALJ relied mainly on Dr. Matthews's deposition testimony to support his conclusion that the record contains clear and convincing evidence contrary to Dr. Donovan's medical findings, pursuant to section 312(7). Thus, the ALJ found that Ms. Dumont's upper extremity injuries are work-related.

[¶5] AT&T filed a Motion for Findings of Fact and Conclusions of Law arguing, among other things, that it was error under section 312(7) to consider Dr. Matthews's deposition testimony as contrary evidence to Dr. Donovan's medical findings, because Dr. Donovan had not been provided with that testimony before

rendering his opinion.[1] The ALJ amended his decision, but did not alter the outcome. He removed any reliance on Dr. Matthews's deposition, instead relying on a written opinion from Dr. Matthews (which had been made available to Dr. Donovan), the opinions of Drs. Schwemm and Labotz, and Ms. Dumont's testimony, as clear and convincing evidence contrary to Dr. Donovan's medical findings. Based on this evidence, the ALJ found that Ms. Dumont's injuries are work-related and totally incapacitating. AT&T appeals.

II. DISCUSSION

A. Standard of Review

[¶6] The role of the Appellate Division is "limited to assuring that the [ALJ'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." *Comeau v. Me. Coastal Servs.*, 449 A.2d 362, 368 (Me. 1982) (quoting *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982)). Because AT&T requested findings of fact and conclusions of law following the decision, the Appellate Division should "review only the factual

[1] Title 39-A M.R.S.A. § 312(7) provides:

> **Weight.** The board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings. Contrary evidence does not include medical evidence not considered by the independent medical examiner. The board shall state in writing the reasons for not accepting the medical findings of the independent medical examiner.

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. Although we are bound by the ALJ's factual findings unless they are clearly erroneous, and we have no right to substitute our own appraisal of the facts from the record below, the law does permit a review of factual findings based on inference. *See Sargent v. Raymond F. Sargent, Inc.*, 295 A.2d 35, 38 (Me. 1972). "[W]here the [ALJ] has relied upon an inference to reach a conclusion we are obligated to review his reasoning to determine whether the evidence permits such an inference to be drawn." *Murray v. T.W. Dick Co.*, 398 A.2d 390, 392 (Me. 1979).[2]

B. Notice

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

> For claims for which the date of injury is on or after 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 30 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.

[2] The Law Court defines "inference" as:

> a deduction as to the existence of a fact which human experience teaches us can reasonably and logically be drawn from proof of other facts. An inference must be based on probability and not on mere possibilities or on surmise or conjecture and must be drawn reasonably and supported by the facts upon which it rests.

Murray, 398 A.2d at 392 (quoting *Manchester v. Dugan*, 247 A.2d 827, 829 (Me. 1968)).

Although the date of injury assigned to a gradual injury is the date on which the injury manifests itself, the notice period may begin to run at a later date, when the employee becomes aware of the compensable nature of the injury. *Jensen v. S.D. Warren Co.*, 2009 ME 35, ¶ 26, 968 A.2d 528.

[¶8] The ALJ found that Ms. Dumont "notified her employer of this injury within thirty days of the injury." Specifically, he found that she notified her boss upon realizing in 2013 that the activities of her job were causing her pain.[3] AT&T's initial argument is that there is no evidence to support the ALJ's finding that Ms. Dumont provided notice of her bilateral hand injury in 2013.[4] We disagree.

[¶9] The ALJ first quoted testimony in which Ms. Dumont confirmed that she thought it was six months prior to April of 2014 that she began experiencing pain in both hands after using the tablets for a while. The ALJ also cited to this specific testimony from Ms. Dumont to support the finding:

> ADMINISTRATIVE LAW JUDGE: I'm asking you what you told [your boss].
>
> WITNESS: I don't remember the exact words I told him specifically. I know I told – mentioned to him that the tablet was bothering me, using it and stuff.

[3] The ALJ also concluded that the date of this gradual injury was the date that the injury manifested itself, which he found was October 1, 2013. He also noted the Law Court's observation that "establishing a specific date of injury for a gradual injury may be a medical fiction," but one that is important because it triggers the running of the notice period and the statute of limitations. *Jensen*, 2009 ME 35, ¶ 13, 968 A.2d 528.

[4] AT&T argues that the evidence shows that Ms. Dumont did not provide notice until May of 2014.

> ADMINISTRATIVE LAW JUDGE: Do you know when you did this, roughly, approximately?
>
> WITNESS: Probably about a month after using it something like that. I was telling him, you know, arm extensions and stuff was bothering me.

[¶10] AT&T argues that the ALJ misconstrued this testimony and that it concerned generalized ergonomic complaints regarding Ms. Dumont's neck and shoulders rather than any claimed injury to her hands, thumbs, and wrists. The answer to this question is not evident from the quoted passage itself. In order to assess AT&T's contention and understand this exchange in context, it is necessary to review the portion of the hearing transcript beyond that quoted by the ALJ in his decision. *See Sargent*, 295 A.2d at 38 ("[T]he inferences which the commissioner draws from proved or admitted circumstances must needs be weighed and tested by this court. Otherwise it cannot determine whether the decree is based upon evidence or conjecture.") (quoting *Stanley v. Petroleum Tank Serv., Inc.*, 284 A.2d 280, 281 (Me. 1971)); *see also* Donald G. Alexander, *Maine Appellate Practice,* § 416(b)(1) at 269 (4th ed. 2013) (stating that review for competent evidence on appeal by party not having the burden of proof requires review of the record and reasonable inferences drawn therefrom to determine if factual findings are supportable).

[¶11] The hearing transcript does not support AT&T's contention. The testimony immediately before the passage quoted by the ALJ includes this exchange:

> ADMINISTRATIVE LAW JUDGE: Ma'am, what did you tell your boss? You said you had spoken to him. What did you tell him about your . . . about your hands?
> . . .
>
> THE WITNESS: In general?
>
> ADMINISTRATIVE LAW JUDGE: About your hands, what did you tell him?

[¶12] This record shows that the testimony relied upon by the ALJ consisted of comments that Ms. Dumont made to her boss about her hand problems, not about ergonomics concerning her neck and shoulders. There is no reference to ergonomic conditions or to Ms. Dumont's neck or shoulders in this portion of the testimony. Instead, the testimony supports the finding that she told her boss that the tablets were causing pain in her hands within "about a month" of when AT&T required Ms. Dumont to use the tablets for work.

[¶13] AT&T further contends that the time frame provided by the employee of "about a month" is not competent evidence to support a finding that notice was provided within 30 days of the date of injury. This assumes that the ALJ relied upon Ms. Dumont's use of the phrase "about a month" as the sole basis for his conclusion that notice was provided to the employer within 30 days of the injury. But that, by itself, was not the basis for the ALJ's decision on notice. The ALJ first noted that Ms. Dumont had testified that it took some time after she was assigned the tablet computer before she started having hand problems, quoting her statement that: "my

pain got really bad after the tablets and stuff came out after using them for a while. It wasn't right up front it was bad, it was a period of using it." Then the ALJ considered that she also testified that she told her boss "that the tablet was bothering me, using it and stuff." Finally, the ALJ noted that when he asked Ms. Dumont when she told her boss that the tablet was bothering her, she responded: "Probably about a month *after using it*, something like that." (Emphasis added.) Thus, Ms. Dumont's use of the phrase "about a month" refers to the time between getting the tablet and notifying AT&T that the use of the tablet was bothering her hands, and not to the period between realizing that her job activities were causing her pain and notifying her employer.

[¶14] The ALJ's conclusion that Ms. Dumont provided timely notice to AT&T of her injury was based on the two findings that (1) it took some time after getting the tablet for her pain to become noticeable, and (2) she notified her boss that the tablet was bothering her hands "about a month" after she started using it. The ALJ made the following specific finding: "Based upon the employee's credible testimony, I find that the employer had notice of the employee's work injury in close proximity of the time that the employee noticed that her work was causing her pain." Ms. Dumont's testimony provides competent evidence to support these findings. Moreover, the ALJ's ultimate finding "that she notified her employer of this injury within thirty days of the injury" is a reasonable and logical inference, more than

mere surmise or conjecture, derived from the evidence. *Cf. Murray*, 398 A.2d at 392 (vacating Commissioner's decision, based on an inference that notice was timely given, because the inference was not based on reason and logic but on surmise and conjecture).

[¶15] AT&T also contends that the ALJ erred when determining that the notice was sufficient to satisfy the requirements of section 301. We disagree. Ms. Dumont's testimony that she told her boss that using the tablet was bothering her, and that "arm extensions and stuff was bothering me," was sufficient to provide AT&T with notice of a work injury under section 301. *See Pearson v. Freeport School Dep't*, 2006 ME 78, ¶¶ 16-18, 900 A.2d. 728 (noting that the hearing officer had found that telling the employer that work-related stress had aggravated the employee's depression while not expressly asserting a workers' compensation claim provided adequate notice under section 301). The quoted testimony supported the ultimate finding on the sufficiency of notice and was based on "the employee's credible testimony." The fact that the record also contains testimony from which he could have reached a different finding does not render this finding unsupported. *See St. Pierre v. Morin Brick Co.*, 427 A.2d 492, 493-94 (Me. 1981) ("The possibility that an inference could be drawn that the employer knew that the employee's condition arose out of his employment does not bar the factfinder from drawing the contrary inference from other evidence.").

[¶16] Moreover, that the ALJ failed to state expressly that he was making a factual finding based on the testimony he cited does not render it unsound. He quoted testimony from the employee to support his conclusion and explained that his conclusion was based on "the employee's credible testimony." That was a reasonable and logical deduction based on facts, and is sufficient to withstand our review. *See Murray*, 398 A.2d at 392; Alexander, *Maine Appellate Practice*, § 416(b)(1); *see also id*. § 458(c) at 325 (stating that upon review of an agency's findings of fact, when the appellant did not have the burden of proof, the reviewing body must examine "the entire record to determine whether, on the basis of all the testimony and exhibits before it, the agency could fairly and reasonably find the facts as it did." (quoting *Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, ¶ 13, 989 A.2d 1128)).

C. Evidence to Contradict the Independent Medical Examiner's Findings

[¶17] AT&T argues that the ALJ improperly rejected the medical findings of the independent medical examiner because the IME based those findings on a negative credibility assessment of Ms. Dumont, when the ALJ determined that Ms. Dumont was a credible witness. Pursuant to section 312(7), the ALJ "shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings."

[¶18] It is appropriate, however, for an ALJ to consider credibility or other non-medical factors in evaluating all of the evidence pursuant to Section 312. "Giving due deference to the ALJ's findings with regard to credibility and factual medical issues, the panel must 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 findings.'" *Dunn-Morrell v. Viking Motors,* Me. W.C.B. No. 17-17, ¶ 12 (App. Div. 2017) (quoting *Dubois v. Madison Paper Co.,* 2002 ME 1, ¶ 14, 795 A.2d 696); *see also Bean v. Charles A. Dean Mem'l Hosp*., Me. W.C.B. No. 13-6, ¶ 14 (App. Div. 2013); *Gallant v. Webber Oil Co*., Me. W.C.B. No. 15-11, ¶ 5 (App. Div. 2015).

[¶19] In the amended decision, the ALJ fully explained his reasons for rejecting the findings of the independent medical examiner, as required by section 312(7). Ms. Dumont's testimony, considered with the medical opinions of Drs. Schwemm, Labotz, and Matthews, could reasonably have persuaded the ALJ that it was highly probable that the record did not support the IME's findings. We find no error in this determination.

D. Section 201(4)

[¶20] AT&T contends that the ALJ erred by failing to analyze Ms. Dumont's claim pursuant to 39-A M.R.S.A. § 201(4). Specifically, because Ms. Dumont's symptoms progressed over many years, it argues that it was incumbent on her to

establish that her employment contributed to her disability in a significant manner. However, such a progression does not mandate an analysis of her claim as an aggravation of a preexisting condition under 201(4). The claim was for a gradual work injury, and the ALJ found that the medical record supports that claim. The ALJ particularly credited the opinion of Dr. Matthews, Ms. Dumont's treating surgeon, who stated that her diagnoses are related to her work activities, including repetitive, forceful pinching. Specifically, Dr. Matthews stated: "I do believe based on her verbal history and the type of work that she did that this has been related to her work at AT&T and Cingular Wireless." This opinion is competent evidence on the issue of causation of a gradual injury, and the decision is neither arbitrary nor without a rational basis on this point.

E. Inconsistent Findings

[¶21] The ALJ's decision is internally inconsistent in one respect. The ALJ relies on the opinion of Dr. Matthews to support the findings regarding causation of Ms. Dumont's work injury, which the ALJ found consisted of three components: (1) bilateral carpometacarpal (CMC) synovitis, (2) bilateral DeQuervain's tenosynovitis, and (3) left medial epicondylitis with ulnar neuritis. Dr. Matthews stated, in a passage quoted in the decree, that Ms. Dumont's DeQuervain's condition was continuing to cause her problems but that her CMC condition had resolved:

> [S]he failed conservative measures for her left DeQuervain's and underwent a left DeQuervains's release. Unfortunately she has

> struggled to improve after surgery currently having some radial sensory neuritis. She has had recurrent right-sided DeQuervain's symptoms. Fortunately, her bilateral CMC synovitis has resolved.

[¶22] The ALJ ultimately found, however, that the "employee's DeQuervain's injury has resolved" and that her "other injuries continue to cause her disability." Because that conclusion does not appear to be consistent with the remainder of the decision, we vacate the decision in part and remand for further clarification on that point. *See Spear v. Town of Wells*, 2007 ME 54, ¶ 13, 922 A.2d 474 (remanding for clarification of inconsistent findings); *Derrig v. Fels Co*., 1999 ME 162, ¶¶ 1, 8, 747 A.2d 580 (same).

III. CONCLUSION

[¶23] The ALJ's factual finding that Ms. Dumont provided notice within 30 days of the date of her injury is supported by competent evidence, and all inferences drawn from that evidence are reasonable and logical. The ALJ did not err when rejecting the IME's medical findings; the ALJ properly listed the contrary evidence that could reasonably have persuaded him that it was highly probable that the record did not support the IME's findings. Additionally, competent evidence supports the finding that Ms. Dumont suffered a gradual injury to her bilateral upper extremities; thus, the ALJ did not err by failing to apply section 201(4). Finally, however, the ALJ's findings regarding medical causation are inconsistent and require a remand for clarification.

The entry is:

> The administrative law judge's decision is affirmed in part and remanded in part for clarification, consistent with this decision.

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.

Attorney for Appellant:
Joshua E. Birocco, Esq.
Chelsea Suvlu, Esq.
TUCKER LAW GROUP
P.O. Box 696
Bangor, ME 04401

Attorney for Appellee:
Douglas R. Lotane, Esq.
Margaret Bratten, Esq.
WCB Advocate Division
1037 Forest Avenue, Suite 11
Portland, ME 04103-3382