GARY HEWES
(Appellee)

v.

HANNAFORD BROTHERS CO.
(Appellant/Self-Insured)

and

MARDEN'S, INC.,
(Appellee)

and

MAINE EMPLOYERS' MUTUAL INS. CO.
(Insurer)

and

GREAT NORTHERN PAPER, INC.
(Appellee)

and

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.
(Administrator)

Argued: September 12, 2019
Decided: December 11, 2020

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

[¶1] Hannaford Brothers Company appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) granting in part Gary Hewes's Petitions for Award, granting his Petitions for Payment of Medical and Related Services, and granting in part Great Northern Paper Inc.'s (GNP's) Petition

for Apportionment.[1] Hannaford contends that the ALJ erred in determining that Mr. Hewes provided timely notice to Hannaford of his March 25, 2015, injury, and that the ALJ was compelled to reject the independent medical examiner's findings based on clear and convincing contrary evidence. *See* 39-A M.R.S.A. § 312 (Pamph. 2020). We affirm the decision.

I. BACKGROUND

[¶2] Gary Hewes began working at GNP's Millinocket paper mill in 1979. He slipped and fell at work in 1997, injuring his left shoulder. He underwent three surgeries to repair recurrent tears of his rotator cuff, returning to work after each surgery. He worked for GNP until it went out of business, then worked for its successor company until 2008. Thereafter, he found seasonal work overseeing a blueberry processing line.

[¶3] Mr. Hewes found full-time work at a Marden's retail store in 2010, where he priced product, stocked shelves, and moved pallets. The job involved some reaching over shoulder height to stock shelves and lifting items overhead that weighed 20 to 25 pounds.

[¶4] In 2012, Mr. Hewes took a second job working part-time for Hannaford in the seafood department, where he lifted cases of product, brought

[1] GNP filed a cross appeal, challenging certain rulings related to the apportionment petition. GNP withdrew the cross appeal on the day of oral argument.

them to the display area, stocked the display case, and sold product to customers. He moved cases weighing up to 40 pounds, sometimes lifting them to eye level.

[¶5] After working two jobs for a few years, Mr. Hewes began to feel pain and experience weakness in his left shoulder. He was diagnosed with a large recurrent tear in his left rotator cuff. He underwent surgery on March 26, 2015, to repair his left rotator cuff and debride labral tears.

[¶6] Mr. Hewes was out of work for seven months after the surgery. GNP paid him workers' compensation benefits during that time. Mr. Hewes was able to return to full-time accommodated work at Marden's, but Hannaford was not able to accommodate his restrictions. Mr. Hewes was frustrated by the restrictions on his activity level and has been treating with a counselor.

[¶7] On June 28, 2016, Mr. Hewes underwent a medical examination by Dr. Craig Curtis at the request of GNP, pursuant to 39-A M.R.S.A. § 207 (Pamph. 2020). Dr. Curtis opined that Mr. Hewes's work at Marden's and Hannaford contributed significantly to the worsening of his left shoulder condition and resulted in the need for surgery in 2015. Dr. Curtis apportioned responsibility for Mr. Hewes's current left shoulder condition 50% to GNP and 25% each to Marden's and Hannaford.

[¶8] Dr. Curtis issued his report on July 28, 2016, and Mr. Hewes filed his original petitions against Marden's and Hannaford on August 26, 2016. He later filed amended petitions.

[¶9] At Marden's request, Dr. Peter Esponnette reviewed Mr. Hewes's medical records. Dr. Esponnette opined that Mr. Hewes was still experiencing the effects of his 1997 shoulder injury at GNP, and that his employment at Marden's and Hannaford did not significantly contribute to his current shoulder problems. Mr. Hewes also underwent an independent medical examination by Dr. Matthew Donovan on June 22, 2017. *See* 39-A M.R.S.A. § 312 (Pamph. 2020). Dr. Donovan found that Mr. Hewes's employment at both Marden's and Hannaford accelerated Mr. Hewes's preexisting shoulder condition and contributed to his disability. Dr Donovan apportioned responsibility 60% to GNP, and 20% each to Marden's and Hannaford.

[¶10] Despite Hannaford's contentions, the ALJ determined that Mr. Hewes provided timely notice of his injury to the employers, finding that Mr. Hewes was under a mistake of fact—believing that his shoulder condition was caused solely by his prior injury at GNP—until at the earliest, July 28, 2016, when Dr. Curtis issued his report.

[¶11] After considering the evidence, the ALJ awarded the protection of the Act for the March 25, 2015, left shoulder injury (declining to award additional

incapacity benefits) as against Hannaford and Marden's,[2] and granted the Petitions for Payment of Medical and Related Services against all three employers. Further, the ALJ allocated responsibility 60% to GNP and 20% each to Marden's and Hannaford.

[¶12] The ALJ issued additional findings of fact and conclusions of law but did not alter the outcome. Hannaford appeals.

II. DISCUSSION

A. Notice

[¶13] Hannaford first contends that the ALJ erred when determining that Mr. Hewes met his burden of proof on the issue of timely notice pursuant to 39-A M.R.S.A. § 301 (Pamph. 2020). Section 301 provides, in relevant part:

> 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.

[¶14] The notice period may begin to run on the date of injury, or it "may begin to run later, depending on the employee's awareness" of the compensable nature of the injury. *See Jensen v. S.D. Warren Co.*, 2009 ME 35, ¶ 26, 968 A.2d 528. "Any time during which the employee . . . fails to [give notice] on account of mistake of fact[] may not be included in the computation of proper notice." 39-A M.R.S.A. § 302 (Pamph. 2020). The "mistake of fact" provision in section 302

[2] Mr. Hewes asserted a July 28, 2015, date of injury as against Marden's.

contemplates "those situations where the injury is latent or its relation to the accident unperceived." *Pino v. Maplewood Packing Co.*, 375 A.2d 534, 537 (Me. 1977) (quotation marks omitted).

[¶15] Hannaford contends the record does not support the ALJ's finding that the notice period began to run at the earliest on July 26, 2016, when Dr. Curtis's report was received, because there are notations in earlier medical records showing that Mr. Hewes associated his shoulder pain with his work at Hannaford and Marden's. We disagree.

[¶16] The ALJ found as fact that at least until Mr. Hewes received Dr. Curtis's report, he believed that his worsening shoulder symptoms resulted from the injury sustained while working for GNP.[3] This finding is based on Mr. Hewes's testimony that he attributed his shoulder problems to the GNP injury until a doctor told him otherwise. The ALJ expressly found Mr. Hewes to be a highly credible witness. Because the ALJ's factual finding regarding notice is supported in the record, we will not disturb it. *See, e.g. Dunton v. E. Fine Paper Co.*, 423 A.2d 512, 518 (Me. 1980) (affirming factual finding regarding a mistake of fact that was supported by competent evidence).

[3] Mr. Hewes testified that he did not read Dr. Curtis's report and that he attributed all of his shoulder problems to the GNP injury until he met with Dr. Donovan, nearly a year later. However, the petitions were filed in proximity to the issuance of Dr. Curtis's report. It is a fair inference from the evidence that Mr. Hewes began to understand the cause and nature of the March 25, 2015, aggravation injury, at the earliest, when Dr. Curtis issued his report, and came to a full understanding later.

B. The Independent Medical Examiner's Opinion

[¶17] Hannaford contends that the ALJ was compelled to reject the IME's findings that Mr. Hewes's employment at Hannaford contributed to his current shoulder condition and that Hannaford bears 20% responsibility for that condition. We disagree.

[¶18] An ALJ must adopt an IME's medical findings unless there is clear and convincing contrary evidence in the record. 39-A M.R.S.A. §312(7). In considering whether contrary evidence permits a rejection of the IME's findings, we 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 medical findings." *DuBois v. Madison Paper Co.*, 2002 ME 1, ¶ 14, 795 A.2d 696. When, as in this case, the ALJ adopts the IME's medical findings, we will reverse only when those findings are not supported by competent evidence, or the record discloses no reasonable basis to support the decision. *Dillingham v. Great N. Paper*, Me. W.C.B. No. 15-17, ¶ 3 (App. Div. 2015); *see also Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983).

[¶19] Hannaford asserts that Dr. Donovan's medical findings were based on an incorrect factual record that assumed Mr. Hewes was under restrictions on lifting while working at Hannaford, and that Mr. Hewes's job at Hannaford

involved overhead lifting when Mr. Hewes testified that he was responsible for overhead lifting only at Marden's.

[¶20] In a "close reading" of the medical records, the ALJ found evidence that might contradict Dr. Donovan's apportionment findings. However, the ALJ carefully weighed that evidence and found that it did not rise to the level of clear and convincing contrary evidence. The ALJ noted that Dr. Curtis reached the same conclusion on the issue of causation as Dr. Donovan, and that Dr. Curtis also apportioned responsibility equally to Hannaford and Marden's. Moreover, Hannaford overstates the emphasis that Dr. Donovan placed on overhead lifting at Hannaford and the timeline of when restrictions were imposed.

[¶21] Because the record supports Dr. Donovan's findings, and there is a rational basis to support the adoption of those findings, we do not disturb the decision.

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 (Pamph. 2020).

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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