STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 21-0018
Decision No. 22-36

LEROY CASS
(Appellant)

v.

NEW BALANCE ATHLETIC SHOE, INC.
(Appellee)

and

THE HARTFORD
(Insurer)

Conference held: July 20, 2022
Decided: November 9, 2022

PANEL MEMBERS: Administrative Law Judges Chabot, Pelletier, and Sands
BY: Administrative Law Judge Chabot

[¶1] Leroy Cass appeals from a decision of a Workers' Compensation Board administrative law judge (*Knopf, ALJ*) denying his Petitions for Award of Compensation and for Payment of Medical and Related Services. Mr. Cass argues that the ALJ's conclusion that he did not meet his burden of proof that he provided timely notice was in error. We disagree and affirm the decision.

I. BACKGROUND

[¶2] Mr. Cass started working at New Balance in 2013 as a leather cutter. His work was repetitive and required him to use his arms and shoulders extensively. Mr. Cass has a preexisting condition that caused withering of his left arm and hand. In

addition, he "popped" his right shoulder in his teens playing football, and he has bone spurs in his shoulders.

[¶3] New Balance has an annual July 4th shutdown. Mr. Cass began to experience right shoulder pain prior to New Balance's July 4, 2017, shutdown. During the shutdown, Mr. Cass landed on his right shoulder when he fell from a mechanical bull, but he testified that this didn't cause any injury. He returned to work, after the shutdown, on July 10, 2017. By July 12, 2017, his shoulder pain had intensified. Mr. Cass testified that he reported the injury to his team leader John Poulin that day, and when nothing was done, he reported it to Donald Lightbody, his supervisor, two days later. Mr. Poulin and Mr. Lightbody both denied being told by Mr. Cass that he had suffered a work-related injury, and both testified that they believed his symptoms were a result of his preexisting injuries.

[¶4] On July 31, 2017, Mr. Cass began treating with Donna Lewis at On-Site, a provider that has a physical presence at New Balance. On-Site's notes indicate that the cause of his pain is unknown. Treatment at On-Site is available to employees regardless of whether the injury is work-related, but an employee must be referred by his team leader or supervisor and a form must be filled out. The form requires information including the employee's name, job, complaint, and has check boxes to indicate when the employee was having pain. The options included pain all day

every day, at the end of the day, at the end of the week, when performing certain tasks, and at night. All the boxes on Mr. Cass's form were checked.

[¶5] On August 4, 2017, an evaluation of Mr. Cass's workstation was performed to determine if it played a role in his shoulder problems. No deficiencies were found. Ms. Lewis testified that this evaluation is performed after a complaint regardless of whether the employee's symptoms are work-related.

[¶6] The ALJ found that July 12, 2017, was the date of the gradual injury. However, she further found that Mr. Cass did not meet his burden of proving on a more probable than not basis that he provided notice of his injury to New Balance, or that New Balance had knowledge of his work-related injury, within thirty days of the date of injury pursuant to 39-A M.R.S.A. §§ 301, 302. The ALJ thus denied his petitions. Mr. Cass filed a Motion for Further Findings of Fact and Conclusions of Law, which the ALJ granted. The ALJ issued an amended decision with additional findings but did not change the outcome. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶7] The Appellate Division's role on appeal 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." *Moore v. Pratt*

& Whitney Aircraft, 669 A.2d 156, 158 (Me. 1995). When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, the Appellate Division reviews "only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted). In cases in which an ALJ concludes that the party with the burden of proof failed to meet that burden, we will reverse that determination only if the record compels a contrary conclusion. *Dunlop v. Town of Westport Island*, 2012 ME 22, ¶ 13, 37 A.3d 300.

B. Notice

[¶8] Mr. Cass argues that the ALJ was compelled to make an inference that New Balance had knowledge of the injury because Mr. Cass's work involved repetitive use of his shoulders, he complained of shoulder pain to his supervisors, and his supervisors referred him for On-Site treatment that required a form to be filled out listing Mr. Cass's job and when he had pain. Further, New Balance completed an evaluation of his workstation that was done to determine if it was aggravating his shoulder condition. We disagree.

[¶9] Pursuant to 39-A M.R.S.A. § 301, Mr. Cass was required to provide notice of his work injury to New Balance within 30 days of the date of injury. However, "[w]ant of notice is not a bar to proceedings under this Act if it is shown that the employer or the employer's agent had knowledge of the injury." 39-A

M.R.S.A. § 302. Mr. Cass, as the petitioning party, bore the burden of proof on the issue of notice. *Boober v. Great N. Paper Co*., 398 A.2d 371, 373 (Me. 1979). "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 v. T.W. Dick Co.,* 398 A.2d 390, 392 (Me. 1979) (quotation marks omitted).

[¶10] In *Farrrow v. Carr Bros. Co*., 393 A.2d 1341 (Me. 1978), the Law Court stated that the notice provision requires the injured employee to state the cause of disability, and this requirement means more than "informing the employer of the mere fact of an injury; the employer must also receive some indication that the injury might be work related and therefore compensable." *Id.* at 1344. An employer may acquire knowledge of an injury through proof of facts connecting the injury with the employment, indicating to a reasonably conscientious manager that the case might involve a potential compensation claim. *Id.* at 1344 n.6.

[¶11] For example, in *Gelinas v. Cent. Me. Power*, Me. W.C.B. No. 19-26 (App. Div. 2019), the Appellate Division affirmed a decision by an ALJ finding that the employee gave notice of his back injury when he had informed the employer of his back problems when reporting a faulty seat. The panel reasoned that the inferred factual findings were "logically . . . drawn from proof of other facts." *Id*. ¶ 9.

[¶12] In *Flesher v. Inland Hospital*, Me. W.C.B. No. 22-7 (App. Div. 2022), the Appellate Division affirmed an ALJ's decision finding that the employee did not meet her burden of proving notice when the ALJ found that it was just as likely that the employee simply told her supervisor her back was bothering her when she asked for a new assignment, and told her human resource director that she was not pursuing a workers' compensation claim because she had a preexisting condition. *Id*. ¶ 2.

[¶13] Although in some circumstances a work-related cause may be inferred from proof of facts connecting the injury with the employment, like in *Flesher*, we cannot say the evidence compels such an inference in this case. There is competent evidence in the record that supports the ALJ's factual findings that New Balance knew about Mr. Cass's preexisting shoulder problems, treatment at On-Site was available for work and non-work-related problems, the form for On-Site treatment did not list work as the cause of Mr. Cass's symptoms, and evaluations of workstations were done regardless of the work-relatedness of problems. Based on those findings, the ALJ was not persuaded that New Balance had knowledge of the work injury. Although a different ALJ may have made a different inference, the evidence does not compel a contrary conclusion.

[¶14] We also disagree with Mr. Cass that the ALJ did not directly address his testimony that he reported the work-related injury. In the amended opinion the ALJ states, "While Mr. Cass alleges that he gave timely notice of his claimed work

injury, on this record, I find that he has failed to establish that it is more likely than not that he did." The record includes the testimony of Mr. Cass and the contradictory testimony of Mr. Lightbody and Mr. Poulin. The ALJ is the exclusive judge of witness credibility. *Gilbert v. S.D. Warren*, Me. W.C.B. No. 16-12, ¶ 11 (App. Div. 2016). It is within the province of the ALJ as fact finder to decide the weight of the evidence and to make reasonable inferences therefrom. *Boober*, 398 A.2d at 375 n.10.

III. CONCLUSION

[¶15] The ALJ neither misconceived nor misapplied the law when determining that Mr. Cass did not establish that he provided timely notice. The factual findings are supported by competent evidence and the evidence does not compel a contrary conclusion. Accordingly, we affirm the decision.

The entry is:

The ALJ'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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