STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
App. Div. Case No. 17-0025
Decision No. 19-7

ESTATE OF MICHAEL DEYONE
(Appellant)

v.

ITG BRANDS, LLC
(Appellee)

and

LIBERTY MUTUAL INSURANCE CO.
(Insurer)

Argued: December 6, 2017
Decided: March 14, 2019

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

[¶1] The Estate of Michael Deyone appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) denying the Estate's Petition for Award—Fatal on grounds of untimely notice. The Estate argues that the ALJ misconstrued the law in determining that a mistake of fact did not excuse the want of timely notice. We vacate the decision, and remand for further proceedings.

I. BACKGROUND

[¶2] Michael Deyone worked as a route salesman for ITG Brands, LLC, a tobacco company.[1] In that capacity, he drove an employer-provided car throughout a large sales territory in Maine, visiting stores that sell tobacco products

[1] Mr. Deyone's original employer was Lorillard, but ITG became his employer after changes to the corporate structure in the year before Mr. Deyone's death.

to discuss products, rotate stock, make contracts, and set up displays. According to Michelle Deyone, his widow, Mr. Deyone found his work very stressful.

[¶3] Mr. Deyone died after a day of sales calls on February 8, 2016. Ms. Deyone found him in their driveway at 5:30 p.m., unresponsive and oddly positioned in his company car. On February 17, 2016, Mr. Deyone's primary care doctor signed his death certificate, listing myocardial infarction as the cause of death, with contributing causes of diabetes and tobacco abuse. On November 2, 2016, a physician retained by the Estate reported that Mr. Deyone's death was most likely the result of a cardiac event precipitated by, among other things, his longstanding work-related stress and job dissatisfaction.

[¶4] Ms. Deyone asserted that she was not initially aware that the cause and nature of Mr. Deyone's death were work-related. She submitted evidence that she learned the cause of death when she received the death certificate on February 17, 2016. She also submitted evidence that on an unspecified date, a friend encouraged her to see a lawyer, and that at some time in May of 2016 she met with a lawyer. The Estate did not give ITG notice that Mr. Deyone's death was work-related until it filed its Petition for Award—Fatal dated May 16, 2016, which was received by the board on May 18, 2016.

[¶5] The ALJ concluded that the Estate had failed to provide ITG with timely notice of Mr. Deyone's injury as required by 39-A M.R.S.A. §§ 301–302

(Supp. 2018), and denied the petition. The Estate filed a Motion for Further Findings of Fact and Conclusions of Law, asking for a finding that the notice period had been tolled due to a mistake of fact. In response, the ALJ amended his decree, finding that Ms. Deyone had operated under a mistake of fact for some period, but concluding that the Estate did not meet its burden to establish that the mistake of fact lasted long enough to render the notice timely. The ALJ thus denied the Estate's petition.

[¶6] The Estate filed a Motion to Reopen the Evidence and to Take Additional Testimony, seeking an opportunity to present further evidence relevant to precisely when Ms. Deyone became aware that Mr. Deyone's death may have been work-related and thus, when she was no longer operating under a mistake of fact. The ALJ denied that motion. 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] 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) (quotation marks omitted). When a party requests and proposes additional findings of fact and conclusions of law, "we

review only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnaker Indus.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Presumed Notice and Mistake of Fact

[¶8] The Estate contends that the ALJ erred when determining that it did not provide timely notice because (1) the evidence compels the conclusion that Ms. Deyone was under a mistake of fact until, at the earliest, February 17, 2016—the date on the death certificate; or (2) it was entitled to a presumption of timely notice pursuant to 39-A M.R.S.A. §327 (2001), which shifts the ultimate burden of persuasion on the issue of notice, including on the issue of mistake of fact, to the employer. We agree with the second contention.

[¶9] In general, workers' compensation claims are barred unless the injured employee notifies his or her employer of the work injury within thirty days. 39-A M.R.S.A. § 301. However, when an employee dies during that thirty-day period, the notice period is extended to three months after the employee's death. 39-A M.R.S.A. § 302.[2] Ordinarily, the burden of proving adequate notice falls on the

[2] Title 39-A M.R.S.A. § 302 provides, in relevant part:

> Want 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. Any time during which the employee is unable by reason of physical or mental incapacity to give the notice, or fails to do so on account of mistake of fact, may not be included in the computation of proper notice. In case of the death of the employee within that period, there is allowed for giving the notice 3 months after the death.

employee. *Boober v. Great N. Paper Co.*, 398 A.2d 371, 373–74 (Me. 1979). However, when it appears that a work-related injury may have caused an employee's death, there is a rebuttable presumption that, among other things, "sufficient notice of the injury has been given." 39-A M.R.S.A. § 327 (2001);[3] *Toomey v. City of Portland*, 391 A.2d 325, 330 (Me. 1978).

[¶10] We have construed section 327 to shift the burden to the employer to disprove the presumed facts, including adequate notice. *Lavalle v. Town of Bridgton*, Me. W.C.B. No. 15-13, ¶ 13 (App. Div. 2015) (citing as persuasive authority *Estate of Sullwold v. Salvation Army*, Me. W.C.B. 13-13, ¶ 21 (App. Div. 2013) (en banc), *aff'd on other grounds*, 2015 ME 4, ¶ 18, 108 A.3d 1265; *see also Axelsen v. Interstate Brands Corp.*, Me. W.C.B. No. 15-27, ¶ 18 (App. Div. 2015). However, we have not had occasion to address a situation in which a claimant alleges a mistake of fact pursuant to section 302 when notice is presumed under section 327.

[¶11] In this case, the ALJ found as fact that ITG did not receive notice that Mr. Deyone's death may have been work-related until, at the earliest, May 16, 2016, the date stated on the Estate's petition, and that the Estate did not establish

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[3] There is no issue in this appeal that 39-A M.R.S.A. § 327 applies. Section 327 provides:

> In any claim for compensation, when the employee has been killed or is physically or mentally unable to testify, there is a rebuttable presumption that the employee received a personal injury arising out of and in the course of employment, that sufficient notice of the injury has been given and that the injury or death was not occasioned by the willful intention of the employee to injure or kill the employee or another.

that it operated under a mistake of fact within the three-month period before notice was provided.[4] Thus, the ALJ concluded that notice was untimely.

[¶12] The Estate argues that the ALJ should have concluded that a mistake of fact tolled the three-month period, thereby rendering its notice timely under section 302. Specifically, the Estate contends that Ms. Deyone did not know that Mr. Deyone's death was work-related when it occurred, and she presented proof of several alternative events that could have ended her mistake of fact: the issuance of Mr. Deyone's death certificate on February 17, 2016; Ms. Deyone's conversation with her friend; her consultation with an attorney some time in May 2016; and the November 2, 2016, report from the Estate's physician. Although we express no opinion on the evidence, we conclude that the ALJ misallocated the burden of proof on the issue of mistake of fact.

[¶13] ITG bore the burden to persuade the ALJ that notice was untimely. *Lavalle*, No. 15-27, ¶ 13 (holding that under section 327, the employer has the burden to negate the presumed facts, including notice). Following analogous Law Court precedent, we conclude that the Estate, as the party raising the issue of mistake of fact, bore a burden of production on that issue; however, the ultimate burden of proof that notice was untimely remained with ITG. *See Ibbitson v. Sheridan Corp.*, 422 A.2d 1005, 1009 (Me. 1980) (holding that on an employer's

[4] The ALJ interpreted "three months," as used in section 302, to mean three calendar months. The parties do not challenge that interpretation on appeal.

petition for review, the employee has a burden of production to show that work is unavailable as a result of the work injury, and the employer has a "never shifting" burden of proof to show that it is more probable than not that there is available work within the employee's physical ability); *see also Farris v. Georgia Pacific Corp.*, 2004 ME 14, ¶ 16, 844 A.2d 1143, (holding that on employer's petition for review seeking termination of partial benefits, the employee has a burden of production to raise the issue that permanent impairment is above the statutory threshold, and the employer bears the ultimate burden of proof to establish that permanent impairment is below the threshold).

[¶14] Accordingly, in this case, once the Estate produced evidence sufficient to demonstrate a genuine issue regarding whether it was operating under a mistake of fact, it fell upon ITG to present evidence sufficient to prove that even if the notice period was tolled by a mistake of fact for a period of time, the mistake of fact ended more than three months prior to the Estate giving notice to ITG. *Id.*

[¶15] The ALJ evaluated the evidence submitted by the parties and found that Ms. Deyone operated under a mistake of fact for some time. However, he assigned the Estate the burden of proving that the mistake lasted for a period long enough to render the Estate's notice to ITG timely. In so doing, the ALJ misapplied the law.

III. CONCLUSION

[¶16] The ALJ erred when placing the burden of proof on the issue of mistake of fact, and thus notice, on the Estate. Accordingly, we vacate the decision and remand the case for re-evaluation of the evidence in light of the proper allocation of a burden of production on the issue of mistake of fact to the Estate, and the ultimate burden of persuasion on the issue of untimely notice to ITG.[5]

The entry is:

> The administrative law judge's decision is vacated and the case is remanded for additional proceedings consistent with this decision.

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[5] We note that the ALJ determined that the issue of whether the Estate was operating under a mistake of fact had been fairly raised and developed by the Estate in advance of its Motion for Findings of Fact and Conclusions of Law, and that the issue had not been waived. The ALJ also denied a Motion to Reopen the Evidence to allow the Estate to develop evidence on the mistake of fact issue. In light of this decision clarifying the allocation of burdens when mistake of fact is raised in a case in which the section 327 presumption applies, on remand the ALJ may, in his discretion, revisit the Motion to Reopen the Evidence to address this issue. *See Farris*, 2004 ME 14, ¶ 18.

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.

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