RONALD FLANAGIN
(Appellant)

v.

STATE OF MAINE
DEPARTMENT OF INLAND FISHERIES & WILDLIFE
(Appellee)

SELF-INSURED

Argued: March 19, 2014
Decided: July 31, 2014

PANEL MEMBERS: Hearing Officers: Goodnough, Collier, and Knopf
BY: Hearing Officer Goodnough

[¶1] Ronald Flanagin appeals from a decision of a Workers' Compensation Board hearing officer (*Jerome,* HO) denying his Petition for Restoration related to a 1975 injury, and Petitions for Award and to Determine Extent of Permanent Impairment related to the 1975 injury and a 1978 injury, which occurred while working for the State of Maine Department of Inland Fisheries and Wildlife. The hearing officer denied the petitions on the ground that the claims were barred by the applicable statute of limitations. 39 M.R.S.A. § 95 (Supp. 1982).[1] Mr. Flanagin asserts that the hearing officer applied an incorrect legal standard when determining that the statute had not been tolled by payments made on a later date of injury that were also related to the 1975 and 1978 injuries. We affirm the

[1] Title 39 M.R.S.A. § 95 has been repealed and replaced by P.L. 1991, ch. 885, §§ A-7, A-8 (effective January 1, 1993) (codified at 39-A M.R.S.A. § 306 (Supp. 2013)).

hearing officer's decision as it pertains to the 1978 date of injury, but vacate the decision as it pertains to the 1975 injury, and we remand for additional proceedings relative to that date.

I. BACKGROUND

[¶2] Ronald Flanagin sustained work-related, low-back injuries in 1975, 1978, and 1979 while working at a fish hatchery owned and operated by the State of Maine. He underwent surgery in 1981, after which the State paid him workers' compensation benefits with reference to the 1979 date of injury. He underwent a second back surgery in 1985. Mr. Flanagin returned to work in 1997 in a different position with the State, and he continued to collect partial benefits until 2001, when increased low-back pain forced him out of work once again. He underwent a third back surgery in October 2001, and returned to work shortly thereafter.

[¶3] The hearing officer in a 2002 decree denied Mr. Flanagin's Petition for Review, by which he had alleged that he continued to suffer from the effects of the 1979 injury. The hearing officer found that the effects the 1979 injury had ended, and granted the State's request to terminate benefits. The hearing officer also found, based upon a report from Dr. Mesrobian issued pursuant to 39-A M.R.S.A. § 312 (2001), that 25% of Mr. Flanagin's ongoing low-back issues were likely related to the 1975 injury. Mr. Flanagin, however, had not filed a petition in

connection with the 1975 date of injury. Mr. Flanagin does not challenge any aspect of the 2002 decree in this appeal.

[¶4] Mr. Flanagin continued working for the State until May 2011, when he went out of work for several reasons, including increased low-back pain. He has not returned to work since that time. His treating neurosurgeon has opined that he is not able to return to work due to the ongoing effects of his low-back problems. Mr. Flanagin then filed the current petitions.

[¶5] The State asserted a statute of limitations defense. Mr. Flanagin, citing *Pottle v. Bath Iron Works Corp.*, 551 A.2d 112, 114-15 (Me. 1988) and *Klimas v. Great Northern Paper Co.*, 582 A.2d 256 (Me. 1990), contended that payments made by the State as late as 2002 for the 1979 injury tolled the ten-year limitations period on the 1975 and 1978 injuries because the State had "contemporaneous notice" that those payments were made in part for the earlier injuries. The hearing officer determined that the State did not pay benefits after 1982 on the 1975 and 1978 dates of injury, and, although the State paid benefits between 1982 and 2002 on the 1979 date of injury, the State did not have contemporaneous notice within the relevant period that any portion of the later payments were for the earlier injuries. Therefore, she concluded that the claims were barred.

[¶6] Mr. Flanagin timely requested further findings of fact and conclusions of law, but no further findings were issued. Mr. Flanagin now appeals, focusing narrowly on the "contemporaneous notice" issue.

II. DISCUSSION

A. Standard of Review

[¶7] Our role on appeal is limited to assuring that the hearing officer's 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). Because Mr. Flanagin requested findings of fact and conclusions of law, we will "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). Finally, a hearing officer's ruling "that any party has or has not sustained the party's burden of proof . . . is considered a conclusion of law and is reviewable[.]" 39-A M.R.S.A. § 318 (Supp. 2013); *see also Savage v. Georgia Pacific Corp.,* Me. W.C.B. No. 13-5, ¶ 7 & n.1 (App. Div. 2013). The hearing officer's determination as to whether or not Mr. Flanagin met his burden to prove contemporaneous notice pursuant to the correct legal standard is therefore reviewable as a question of law.

B. Contemporaneous Notice

[¶8] Mr. Flanagin contends that the hearing officer applied an incorrect legal standard when evaluating whether he met his burden to establish that the State had contemporaneous notice that payments were being made, at least in part, for the 1975 and 1978 injuries.

[¶9] The applicable statute in this case is 39 M.R.S.A. § 95, which provided, in relevant part:

> Any employee's claim for compensation under this Act shall be barred unless an agreement or a petition . . . shall be filed within 2 years after the date of the injury[.] . . . No petition of any kind may be filed more than 10 years following the date of the latest payment made under this Act.

[¶10] However, "the limitations period for a claim is tolled if payments made by the employer or insurer for a subsequent injury were made with 'contemporaneous notice' that the payments 'were for treatment that was in part necessitated by' the earlier injury." *Leighton v. S.D. Warren Co.*, 2005 ME 111, ¶ 10, 883 A.2d 906 (quoting *Klimas*, 582 A.2d at 258). The "contemporaneous notice" issue arises from a concern that an employer may not have exclusive control, through its claims handling practices, over the assignment of dates of injury to a claim that may eventually have an impact upon the tolling or application of the statute of limitations in successive injury cases.

[¶11] The Law Court first articulated the contemporaneous notice rule in *Pottle*, 551 A.2d at 114, although that case concerned section 95's two-year limitation period, *id.* at 113.[2] The employee in *Pottle* injured his left knee first in 1980, and again in 1982. *Id*. He filed petitions in 1985, requesting benefits related to both the 1980 and 1982 injuries. *Id*. The Commissioner ruled that medical treatment and payments made after the 1982 injury had tolled operation of the statute for the 1980 injury. *Id*. The Law Court vacated the decision, reasoning that tolling could not result from compensation payments made for the 1982 injury because there was nothing in the record to indicate that the subsequent payments had been made on account of the 1980 injury. *Id*. at 114. That the earlier injury was later determined to have "contributed in part" to the permanent impairment was not relevant because a "subsequently determined causative connection does not provide the notice at the time of treatment that is required to toll the statute of limitations." *Id*. at 114-15.

[¶12] The Law Court next addressed the issue in *Klimas*, 582 A.2d 256. Klimas had injured his right knee at work in 1974, and again in 1982. *Id*. at 257. In 1986, he filed a petition for benefits. *Id*. The insurer on the 1974 injury asserted the ten-year statute of limitations defense. *Id*. The Law Court interpreted *Pottle* to hold that the limitations period would be tolled only if payments made after the 1982

[2] The ten-year period applies here because the State made payments to Mr. Flanagin on the 1975 and 1978 injuries, the latest being made in 1982. *See* 39 M.R.S.A. § 95.

injury were made "with contemporaneous notice that they were made for *treatment that was in part necessitated by the 1974 injury*." *Id*. at 258 (emphasis added). Because the Commissioner had not made the critical finding whether the employer had notice when it made the payments, the Court remanded the case for additional findings. *Id*. at 258-59.

[¶13] The Court further addressed the issue in *Leighton*, 2005 ME 111, ¶ 1, 883 A.2d 906, in the broader context of allocating burdens of production and proof. The Court held that an employer bears the burden of establishing in the first instance the date of latest payment for the original injury "but that the burden shifts to the employee to establish that the statute of limitations has been tolled through contemporaneous notice." *Id*. It is through this explicit burden-shifting mechanism that an employer's exclusive ability to assign incapacity or medical payments to a date of injury can be questioned and tested.

[¶14] The Court noted that an employee, consistent with *Pottle* and *Klimas*, could satisfy his burden of proof by:

> for example, submitting medical records that *attribute* the onset of new symptoms *at least in part* to the prior injury, along with evidence that the insurer or employer had been made aware of the contents of the records at the time payments were made. Or, the employee could submit proof that he or she had *asserted a belief to the employer at the time payments were being made* that the older injury is at least in part responsible for the later incapacity.

Id. ¶ 17 (emphasis added).

[¶15] Considered together, the cases endorse as sufficient a relatively low threshold to meet the employee's burden to establish the causative relationship. Pursuant to *Pottle* and *Klimas*, the employee must show that the earlier injury "contributed in some part*"* to the later incapacity or need for medical treatment, or that medical treatment after the later injury was "in part necessitated by" the earlier injury. *Leighton* characterized the standard as attribution "at least in part," and added that the employee can, alternatively, demonstrate that he had informed the employer that the earlier injury was still in play at the time of the payments. It is apparent that this is not the same standard as may be required to establish medical causation in a contested workers' compensation claim. Rather, it is a somewhat lower "connection" standard that is unique to the circumstances inherent in determining whether the employer's unilateral assignment of dates of injury in successive injury cases is, or is not, correct.

C. The Medical Reports

[¶16] The hearing officer concluded that the State carried its burden with evidence that the latest payment specifically attributed to the 1975 and 1978 injuries was made in 1982. She further concluded, pursuant to section 95, that absent further payments on these injuries, the limitations period would have

expired in 1992.[3] *See Harvie v. Bath Iron Works Corp.*, 561 A.2d 1023, 1025 (Me. 1989) (stating that any payment by an employer once the statute of limitations expires does not revive a claim). Thus, the burden shifted to Mr. Flanagin to establish that payments made after the 1979 injury and before 1992 were made by the State with contemporaneous notice that the incapacity or treatment being compensated was attributable at least in part to the 1975 and 1978 injuries. *See Leighton*, 2005 ME 111, ¶ 16, 883 A.2d 906.

[¶17] The hearing officer evaluated the evidence submitted by Mr. Flanagin and properly concluded that there were only two medical reports generated before 1992 that could have established the State's contemporaneous knowledge that it was paying for the earlier injuries: Dr. Swengel's 1981 report, and Dr. Babbitt's 1989 report. The hearing officer further concluded that neither doctor's report satisfied Mr. Flanagin's burden of proof with respect to either injury because, in her view, the reports merely recited medical history that included the 1975 and 1978 back injuries, but did not establish a causal connection between those injuries and the need for medical or incapacity payments. There was no dispute that the employer received these reports around the time they were issued.

[¶18] We have reviewed the relevant medical reports and conclude that the hearing officer did not err when determining that Mr. Flanagin did not meet his

[3] Mr. Flanagin does not contest this conclusion on appeal, nor does he contest the hearing officer's finding that the last date of payment on both the 1975 or 1978 injury occurred no later than 1982.

burden of proof with respect to the 1978 work injury. However, with respect to the 1975 injury, we conclude that the hearing officer raised the legal bar to a height not required by *Pottle*, *Klimas*, or *Leighton*. The 1989 report from Dr. Babbitt conveyed the necessary information to the State to meet Mr. Flanagin's burden with respect to the 1975 injury, and was sufficient to establish contemporaneous notice as a matter of law.

[¶19] Dr. Babbitt stated in her report:

> In summary, both from history from the patient, and from his records, he had a first back injury February 6, 1975, when he was working with a hand driven snowplow and had pain in his lower back and pain in his left leg. . . . He relates this as his major back injury.
> . . .
>
> He has the same complaints of lower back pain and left leg pain, since 1975. He underwent surgery again 2 years ago for a lumbar laminectomy at L4-5 on the left, which did not change his symptomatology, except that he says he that may have felt somewhat better for about 4 months.
> . . .
>
> DIAGNOSIS: Chronic low back pain with radiation in the L-5 distribution in the left leg, unchanged by surgical intervention times 2.

[¶20] The report does more than merely recite the history of Mr. Flanagin's low-back problems. Rather, it indicates that Mr. Flanagin reported to Dr. Babbitt in 1989 that the 1975 injury was his "major back injury," and that he still had the same complaints of lower back pain and left leg pain in 1989 that he had in 1975. In other words, Dr. Babbitt's clinical examination demonstrated to her that the

then-current clinical diagnosis of chronic low-back pain started with the 1975 back injury and remained *unchanged* over the years, despite two intervening surgical procedures, which she specifically notes did not change his symptomatology. Mr. Flanagin's complaints to Dr. Babbitt in 1989 of ongoing symptoms since the 1975 injury, and the documentation of those complaints in her report based upon a clinical examination, were sufficient to establish a "partial attribution" or contribution in part of the 1975 injury to then-current symptomatology. The report also sufficiently demonstrated that the later-in-time *treatment* was in part necessitated by the earlier injury.

[¶21] The report also satisfied the alternative manner of proving contemporaneous notice discussed in *Leighton:* assertion of a belief by the employee at the time payments were being made and within the ten-year window that the older injury was in part responsible for the later incapacity and treatment.

III. CONCLUSION

[¶22] We conclude that Dr. Babbitt's report to the State in 1989 satisfied Mr. Flanagin's burden of proof and was sufficient as a matter of law to establish that the State had contemporaneous knowledge that it was making payments attributable in part to the 1975 work injury within ten years of the last payment specifically made on the 1975 work injury. Accordingly, Mr. Flanagin's petitions relative to the 1975 injury are not barred by section 95.

The entry is:

> The decision of the hearing officer is vacated in part. The case is remanded for further proceedings consistent with this decision on the employee's petitions relative to the 1975 injury. The hearing officer's decision is affirmed in all other respects.

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. 2013).

Attorneys for Appellant:
James J. MacAdam, Esq.
Nathan A. Jury, Esq.
David E. Hirtle, Esq.
MacADAM JURY, P.A.
208 Fore Street
Portland, ME 04101

Attorney for Appellee:
Robert W. Bower, Jr.
NORMAN, HANSON & DeTROY
Two Canal Plaza
P.O. Box 4600
Portland, ME 04112-4600