ESTATE OF PHILLIP McKAY and
MARY McKAY
(Appellees)

v.

WADE & SEARWAY CONSTRUCTION CORP.
(Appellant)

and

HANOVER INSURANCE COMPANY
(Insurer)

and

SULLIVAN & MERRITT CONSTRUCTORS
(Appellee)

and

MAINE INSURANCE GUARANTY ASSOCIATION
(Insurer)

Conference held: February 5, 2025
Decided: July 29, 2025

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

[¶1] Wade & Searway Construction Corporation appeals a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*), granting the Petition for Award—Fatal, and Petition for Award—Occupational Disease, filed by the Estate of Phillip McKay and Mary McKay against Wade & Searway. Wade & Searway contends the ALJ erred by making factual findings based on incompetent

evidence from witnesses who did not have personal knowledge of Mr. McKay's exposure to asbestos in the workplace, and by making inferences not logically drawn from facts. We disagree and affirm the decision.

I. BACKGROUND

[¶2] Phillip McKay died of lung cancer on September 16, 2021, at the age of 82, after a long career as a union pipefitter and welder. His death certificate lists the immediate cause of death as "squamous cell carcinoma of lung."

[¶3] Steven Colbath worked as a pipefitter in the same union as Mr. McKay from 1974 to 1989. He and Mr. McKay worked for Wade & Searway at the East Millinocket paper mill from 1986 to 1988 on the main steam line from the boiler to the paper machines. Mr. Colbath testified that he and Mr. McKay worked on pipe flanges with gaskets made of asbestos, which they removed with hand and electric wire brushes, creating asbestos dust. Neither used a respirator. Mr. Colbath also testified that he worked with Mr. McKay at the Diamond International paper mill from 1980 to 1981, while employed by Sullivan & Merritt, where they were exposed to airborne asbestos.

[¶4] Douglas Fisk worked at the East Millinocket paper mill from 1969 to 2003 in many roles. He testified that he oversaw the rebuilding of two paper machines between 1986 and 1988, and that the mill hired a Wade & Searway crew (including pipefitters) for that job, which involved removing asbestos gaskets and

insulated pipes. Although Mr. Fisk did not work with Mr. McKay, he observed asbestos and airborne asbestos dust in the Wade & Searway crew's work area and observed that the pipefitters did not wear respiratory protection while performing this work.

[¶5] Dr. Christine Oliver issued a report, dated August 2, 2023, which stated that Mr. McKay's exposure to asbestos and welding fumes were substantial contributing factors in his development of squamous cell carcinoma of the lung. She cited extensive research literature in support of her opinion that there was a causal connection between Mr. McKay's condition and occupational exposure to asbestos.

[¶6] The ALJ determined that Mr. McKay's last injurious exposure to asbestos occurred while he worked for Wade & Searway. *See* 39-A M.R.S.A § 606. The ALJ denied both petitions as against Sullivan & Merritt and granted both petitions as against Wade & Searway.[1] The ALJ applied the presumption in 39-A M.R.S.A. §327, applicable "when the employee has been killed or is physically or mentally unable to testify," which shifts the burden of persuasion to the employer to disprove certain presumed facts, including that the injury arose out of and in the course of employment. *See Hall v. State,* 441 A.2d 1010, 1021 (Me. 1982); *Estate of Sullwold v. The Salvation Army,* Me. W.C.B. No. 13-13, ¶¶ 21-22 (App. Div.

[1] Because we affirm the ALJ's determination that the last injurious exposure occurred while Mr. McKay worked for Wade & Searway, Sullivan & Merritt has no liability pursuant to sections 606 and 614 of the Act. Therefore, we do not address Sullivan & Merrit's argument on appeal that its insurer, Maine Insurance Guaranty Association, is not liable pursuant to 24-A M.R.S.A § 4435(4).

2013). The ALJ then determined that Wade & Searway failed to rebut the presumed facts and awarded total incapacity benefits to the Estate of Mr. McKay from the date of injury to the date of his death, and death benefits to his widow, Mary McKay, pursuant to 39-A M.R.S.A § 215.

[¶7] Wade & Searway filed a motion for further findings of facts and conclusions of law pursuant to 39-A M.R.S. § 318. The ALJ granted this motion and made additional findings but did not alter the outcome. Wade & Searway appeals.

II. DISCUSSION

A. Standard of Review

[¶8] The role of the Appellate Division "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). The Appellate Division will not disturb a factual finding made by the ALJ absent a showing that it lacks competent evidence to support it. *Dunkin Donuts of Am., Inc. v. Watson*, 366 A.2d 1121, 1125 (Me. 1976).

[¶9] "Although we are bound by the ALJ's factual findings unless they are clearly erroneous, and [we do not] substitute our own appraisal of the facts from the record below, the law does permit a review of factual findings based on

inference." *Dumont v. A.T. & T. Mobility Servs*., Me. W.C.B. No. 19-11, ¶ 6 (App. Div. *en banc* 2019); *see also 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).

B. Death Presumption

[¶10] Wade & Searway contends there is insufficient evidence to justify application of the section 327 presumption. Title 39-A M.R.S.A. § 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.

[¶11] In order for the presumption to apply, the proponent must establish a linkage between the employment and the employee's condition, with

> evidence . . . of circumstances which indicate that the bringing of a claim for compensation is a rational act—that is, that the incident to which the claim relates has some rational potential of eventuating in an award of compensation when it is deemed supplemented by testimony which, within reasonable limits, may be conceived as potentially forthcoming from the employee were the employee available as a witness.

Toomey v. City of Portland, 391 A.2d 325, 330-31 (Me. 1978).

[¶12] Once the presumption is determined to apply, the burden of persuasion with respect to the presumed facts shifts to the employer. *See Hall v. State,* 441 A.2d 1010, 1021 (Me. 1982); *Estate of Sullwold v. The Salvation Army,* Me. W.C.B. No. 13-13, ¶¶ 21-22 (App. Div. 2013).

[¶13] Wade & Searway asserts that the presumption should not have applied in this case because there was insufficient evidence that Mr. McKay was exposed to asbestos and the evidence is incompetent regardless of which party has the burden. Specifically, Wade & Searway contends that the ALJ improperly relied on testimony from Mr. Colbath and Mr. Fisk because they lacked personal knowledge regarding whether Mr. McKay was exposed to asbestos. Wade & Searway further argues that Dr. Oliver's causation opinion is not competent evidence because it relies on statements in Mr. Colbath's affidavit, which, it contends overstates Mr. Colbath's personal knowledge regarding Mr. McKay's exposure to asbestos on the job.

[¶14] The ALJ did not err when determining that the Estate and Ms. McKay were entitled to the benefit of the section 327 presumption. Mr. Colbath testified that he and Mr. McKay both worked at that mill from 1986 to 1988. Although he testified that he worked in a different area of the mill from Mr. McKay, he also testified: they performed the same duties but on different paper machines; their work involved asbestos removal; there were visible asbestos fibers in the air and on the floor; and none of the workers wore protective gear. And, while he testified that he never

received formal training in how to identify asbestos, he also testified that he could identify asbestos by its fibrous texture and that he had years of experience working with asbestos. Mr. Colbath's testimony is generally consistent with the facts set forth in his affidavit that was provided to Dr. Oliver. (A. 62)

[¶15] Mr. Fisk testified that although he did not know Mr. McKay, he had personal knowledge that a Wade & Searway crew worked at the East Millinocket mill from 1986 to 1988, and that the Wade & Searway pipefitters were exposed to asbestos during that time.

[¶16] Based on the testimony of Mr. Colbath and Mr. Fisk, as well as Dr. Oliver's medical opinion, it was proper for the ALJ to determine that the incident to which the claim relates—Mr. McKay's exposure to asbestos at work—had the rational potential of eventuating in an award of compensation, and that if Mr. McKay had lived, he could have provided evidence regarding his exposure. And, to the extent the finding that Mr. McKay was exposed to asbestos at the East Millinocket mill is an inference, it is a reasonable and logical inference drawn from facts—not mere surmise or conjecture. *See Dumont,* ¶ 14.

III. CONCLUSION

[¶17] We conclude that the ALJ did not err when applying the section 327 presumption, or when determining the presumed fact that Mr. McKay sustained an

injury arising out of and in the course of his employment with Wade & Searway was not disproved.

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.

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.

Attorneys for Appellant:
Joshua E. Birocco, Esq.
Kayla A. Estes, Esq.
(for Wade & Searway)
Tucker Law Group
P.O. Box 696
Bangor, ME 04402

Attorneys for Appellees:
James J. MacAdam, Esq.
(for the Estate and Mrs. McKay)
MacAdam Law Offices, PA
45 Mallett Drive
Freeport, ME 04032

Nelson J. Larkins, Esq.
(for Sullivan & Merritt)
Preti Flaherty, LLP
P.O. Box 9546
One City Center
Portland, ME 04112-9456