PATRICK W. McKINNEY
(Appellee)

v.

THE HERTZ CORPORATION
(Appellant)

and

SEDGWICK CMS, INC.
(Insurer)

Argument held: July 12, 2023
Decided: October 13, 2023

PANEL MEMBERS: Administrative Law Judges Hirtle, Rooks, and Stovall
BY: Administrative Law Judge Hirtle

[¶1] The Hertz Corporation appeals from a decision of a Workers' Compensation Board administrative law judge (*Chabot, ALJ*) granting Patrick McKinney's Petitions for Award and for Payment of Medical and Related Services regarding a low back injury incurred on May 16, 2021. Hertz contends the ALJ erred when determining that Mr. McKinney's injury (1) arose out of the employment because the ALJ's finding of causation was based on a speculative and unsupported medical opinion regarding the mechanism of injury, and (2) is compensable pursuant to 39-A M.R.S.A. § 201(4) because the evidence does not establish a significant employment contribution to Mr. McKinney's disability. We disagree and affirm the decision.

I. BACKGROUND

[¶2] Patrick McKinney injured his low back on May 16, 2021. He had an underlying, preexisting back condition. At the time of the work injury, he was working for Hertz moving vehicles between parking lots. On the date of injury, after having moved between ten and fifteen vehicles, he exited a vehicle, walked two of three steps, and felt pain in his right thigh. Subsequent medical imaging revealed multiple herniated lumbar discs with suspected nerve root impingement. Mr. McKinney underwent multi-level spinal surgery to decompress the lumbar nerve roots. Thereafter, Mr. McKinney filed his petitions. Hertz maintained that the injury was not work-related because it did not arise out of Mr. McKinney's employment.

[¶3] Mr. McKinney was examined by Dr. Douglas Pavlak, who authored a report in which he stated: "On the date in question, [Mr. McKinney] was just coming out of a car when he stepped down and his right leg developed acute and severe pain." The report further states that Mr. McKinney "sustained a pretty acute onset of symptoms after getting out of a car on 05/16/21. In all likelihood, he did something while getting out the car that put an unusual strain on his lumbosacral spine resulting in acute nerve root inflammation." Dr. Pavlak also opined that Mr. McKinney's activity of getting out of the vehicle "significantly aggravated and combined with his pre-existing low back condition [and] rendered it symptomatic to the point at which it required surgery."

[¶4] Hertz retained Dr. Eric Omsberg, who also performed an examination of Mr. McKinney and authored a report. Dr. Omsberg opined that since Mr. McKinney did not have symptoms until taking a few steps away from the vehicle, Dr. Omsberg did "not believe he had a work-related injury. The specifics would be up to the legal team." Dr. Omsberg also wrote that "There is nothing unusual or specific about this activity and it is not at all a typical or common mechanism of injury."

[¶5] The ALJ granted the petitions, finding that the mechanism of injury was Mr. McKinney getting out of the vehicle. The ALJ relied on Dr. Pavlak's opinion that getting in and out of a vehicle requires "a fair amount of bending and twisting," and in part on Dr. Omsberg's opinion that walking the few steps after he alighted from the car was not the cause because "it is not at all a typical or common mechanism of injury." The ALJ further noted that Mr. McKinney's employment conditions required him to bend and twist while entering and exiting vehicles 25 to 50 times per day, increasing his risk of injury above the risks he faced in everyday life.

[¶6] The ALJ concluded Mr. McKinney met his burden of persuasion that he sustained a work-related injury, that the injury combined with and aggravated his preexisting condition, and that the employment contributed to his resulting disability in a significant manner. *See* 39-A M.R.S.A. § 201(4). The ALJ ordered Hertz to pay a closed-end period of total incapacity benefits from the date of injury until the date

Mr. McKinney resumed work with a new employer, and to pay the disputed medical expenses (excluding one visit).

[¶7] Hertz filed a Motion for Additional Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.

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). Because Hertz requested findings of fact and conclusions of law following the decision, the Appellate Division will "review only the factual findings actually made and the legal standards actually applied by the [ALJ]." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Arising Out of the Employment

[¶9] Hertz contends the evidence does not support the determination that Mr. McKinney sustained a compensable, work-related injury. In general, coverage under the Workers' Compensation Act is limited to injuries that "arise out of and in the course of employment." 39-A M.R.S.A. § 201(1). This requirement is intended to

limit compensation to injuries that occur because of the employee's work and exclude injuries that only happen to occur while the employee is at work. *Bryant v. Masters Machine Co.*, 444 A.2d 329, 334 (Me. 1982).

[¶10] Because this case involves an alleged work injury combined with a preexisting medical condition, liability is ultimately determined pursuant to 39-A M.R.S.A. § 201(4). *McAdam v. United Parcel Serv.*, 2001 ME 4, ¶ 11, 763 A.2d 1173. Section 201(4) states:

> If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner.

[¶11] When a case comes within section 201(4), the ALJ "must first determine whether the employee has suffered a work-related injury . . . then [section] 201(4) is applied if the employee has a condition that preceded the injury." *Celentano v. Dep't of Corr.*, 2005 ME 125, ¶ 9, 887 A.2d 512 (quotation marks omitted).

[¶12] "In a combined effects case, the 'arising out of and in the course of employment' requirement is satisfied by showing both medical and legal cause." *Bryant*, 444 A.2d at 336. Medical causation can be shown when the work activity or incident does in fact produce the onset of symptoms. *See id.* at 338-39. To establish legal causation when "the employee bears with him some 'personal' element of risk because of a pre-existing condition, the employment must be shown to contribute

some substantial element to increase the risk, thus offsetting the personal risk which the employee brings to the employment environment." *Id*. at 337.

[¶13] Hertz argues it was error for the ALJ to rely on Dr. Pavlak's opinion that the injury resulted from Mr. McKinney's twisting and bending when getting out of the car. Hertz maintains that Dr. Pavlak's opinion is speculative[1] and inconsistent with Mr. McKinney's testimony and is therefore incompetent to establish the mechanism of injury, that is, medical cause.

[¶14] However, it is within the province of the ALJ to resolve ambiguities in the evidence and assess the persuasive weight of expert testimony like that from Dr. Pavlak and Dr. Omsberg. *Oriol v. Portland Housing Auth.*, Me. W.C.B. No. 14-35, ¶ 12 (App. Div. 2014). In this case, the ALJ reconciled any inconsistencies between Dr. Pavlak's report and Mr. McKinney's testimony when characterizing Dr. Pavlak's opinion as follows: that Mr. McKinney took two steps after exiting the vehicle before he felt pain, but that the act of exiting the vehicle caused the injury. It was not reversible error for the ALJ to rely on this medical opinion.

[1] At oral argument, counsel for Mr. McKinney characterized this argument as an objection to the admissibility of Dr. Pavlak's report and from this characterization argued that Hertz waived its objection by making it for the first time on appeal. We find that characterization of the argument inaccurate and therefore reject the claim of waiver.

C. Legal Causation

[¶15] Hertz further challenges the ALJ's determination that Mr. McKinney established legal causation—that the employment increased the risk of injury over that which Mr. McKinney brought to the employment environment. This argument is again rooted in the contention that the ALJ erred when adopting Dr. Pavlak's causation opinion and instead should have found that the injury occurred when Mr. McKinney was walking away from the vehicle—an activity that Hertz maintains did not substantially increase the risk of injury. We disagree.

[¶16] As noted above, the ALJ did not err when relying on Dr. Pavlak's medical opinion that the injury occurred when Mr. McKinney exited the vehicle. Further, the ALJ found that Mr. McKinney's work duties included exiting and entering a vehicle 25 to 50 times per day, activities that involve bending and twisting. These findings are based on Mr. McKinney's testimony and support the determination that the employment contributed a substantial element to increase the risk of injury at work above Mr. McKinney's personal element of risk. The ALJ did not err when determining that the employment was the legal cause of Mr. McKinney's injury. *See, e.g., Celentano,* 2005 ME 125, ¶ 14, 887 A.2d 512 (affirming determination that legal cause had been established when employee's trip over a table leg lit up a preexisting asymptomatic knee condition based on description of the table leg and the fact that another employee had tripped over the

table leg); *Briggs v. H & K Stevens, Inc.*, Me. W.C.B. No. 14-24, ¶ 19 (App. Div. 2014) (determining that standing on a hard surface for 90% of an eight to twelve-hour shift over a ten-year period constitutes an increased risk of injury and establishes legal causation).[2]

D. Significant Employment Contribution

[¶17] Finally, Hertz contends that the evidence does not establish that the employment made a *significant* contribution to Mr. McKinney's back condition under section 201(4) because his preexisting back condition included a long, serious history of back problems. The ALJ based the determination that the employment contribution was significant on Dr. Pavlak's report that "the activity of getting out of the car on 5/16/21 significantly aggravated and combined with his pre-existing low back condition rendered it symptomatic to the point at which it required surgery. In other words, but for the specific activity he could have stayed asymptomatic indefinitely." Dr. Pavlak's report is competent evidence that supports the finding that the employment contribution to the resulting disability was significant.

III. CONCLUSION

[¶18] We conclude that the ALJ's findings with respect to the issue of causation and compensability pursuant to section 201(4) are supported by competent

[2] Hertz also argues that the ALJ erred in analyzing Mr. McKinney's injury as a gradual injury. We find this characterization of the ALJ's decision unsupported by the plain text of the decision and therefore reject this argument.

evidence in the record and that the ALJ neither misconceived nor misapplied the law when adopting Dr. Pavlak's opinion.

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.

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