JAMES ALLEY
(Appellant)

v.

UNITED PARCEL SERVICE
(Appellee)

and

LIBERTY MUTUAL INSURANCE CO.
(Insurer)

Conference held: March 19, 2014
Decided: October 28, 2014

PANEL MEMBERS: Hearing Officers Jerome, Goodnough, and Stovall
BY: Hearing Officer Jerome

[¶1] James Alley appeals from a decision of a Workers' Compensation Board hearing officer (*Elwin, HO*) denying his Petition for Award for a gradual injury to his low back allegedly sustained while working for United Parcel Service (UPS) on December 24, 2010.[1] The hearing officer denied the petition on the ground that Mr. Alley failed to give notice of the gradual injury within the required time frame. *See* 39-A M.R.S.A. § 301 (Supp. 2013).

[¶2] Mr. Alley contends that the hearing officer erred when (1) finding that his delay in providing notice to UPS was not due to a mistake of fact; and (2) that

[1] Mr. Alley also filed a Petition for Award related to an acute low back injury sustained on December 23, 2010. The hearing officer granted that petition and awarded an eight week period of total incapacity benefits. This aspect of the hearing officer's decision has not been challenged on appeal.

statements he made to UPS's designated physician within the statutory time frame did not satisfy the notice requirement. *See* 39-A M.R.S.A. § 302 (Supp. 2013). We affirm the hearing officer's decision.

I. BACKGROUND

[¶3] James Alley suffered a low back injury while working for Bath Iron Works in 1991. He underwent fusion surgery, and experienced other health problems, but he was able to return to work. He worked for several different employers before beginning with UPS in 1996. He initially loaded and unloaded packages for UPS, but eventually became a driver. In that role, Mr. Alley typically made 100 stops per day, delivering 200-400 packages weighing as much as 150 pounds.

[¶4] On December 23, 2010, Mr. Alley again injured his low back when he reached for a heavy package in his truck. He reported the injury to UPS on January 3, 2011. On that same date, he also reported a gradual injury in the nature of an aggravation of his preexisting low back condition, allegedly sustained on December 24, 2010. He was taken out of work and began a course of epidural injections and physical therapy treatments.

[¶5] Mr. Alley filed two Petitions for Award, one related to the acute low back injury and one related to the gradual low back injury. The hearing officer

granted the petition related to the December 23, acute low back injury, and awarded Mr. Alley a closed-end, eight-week period of total incapacity benefits.

[¶6] The hearing officer, however, denied the petition for the gradual work injury. Although the hearing officer accepted the independent medical examiner's opinion that a gradual injury occurred, she found that the injury manifested itself on June 24, 2010; therefore the notice Mr. Alley gave to UPS on January 3, 2011, was untimely. The hearing officer specifically considered and rejected Mr. Alley's arguments that the lack of notice was excused by a mistake of fact, and that constructive notice had been provided to UPS through his communications with UPS's physician.

[¶7] Mr. Alley requested additional findings of fact and conclusions of law. The hearing officer issued additional findings, but did not alter the outcome. Mr. Alley now appeals.

II. DISCUSSION

A. Standard of Review

[¶8] The Appellate Division's role on appeal is "limited to assuring that the [hearing officer'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." *Pomerleau v. United Parcel Service*, 464 A. 2d 206, 209 (Me. 1983) (quotation

marks omitted). Findings of fact must be sustained on appeal if they are supported by competent evidence in the record, even if there is other evidence in the record which would support a different conclusion. *Bruton v. City of Bath*, 432 A.2d 390, 392 (Me. 1981).

B. Mistake of Fact

[¶9] Mr. Alley first contends that the record compels the conclusion that he was operating under a mistake of fact as to the work-related cause and nature of the gradual injury, and thus, the notice period did not begin to run until well after the injury manifested itself.[2]

[¶10] For claims arising prior to January 1, 2013, an employee must give notice of a work-related injury within 90 days after the date of injury. 39-A M.R.S.A. § 301.[3] This 90-day period may be extended during periods in

[2] Mr. Alley does not contest the hearing officer's finding that June 24, 2010, is the appropriate date of gradual injury pursuant to *Jensen v. S.D. Warren*, 2009 ME 25, ¶ 26, 968 A.2d 528.

[3] Title 39-A M.R.S.A. § 301 provides, in pertinent part:

> For claims for which the date of injury is prior to January 1, 2013, proceedings for compensation under this Act, except as provided, may not be maintained unless a notice of the injury is given within 90 days after the date of injury. . . . [T]he notice must include the time, place, cause and nature of the injury, together with the name and address of the injured employee. The notice must be given by the injured employee or by a person in the employee's behalf. . . .
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> [T]he notice must be given to the employer, or to one employer if there are more employers than one; or, if the employer is a corporation, to any official of the corporation; or to any employee designated by the employer as one to whom reports of accidents to employees should be made. It may be given to the general superintendent or to the supervisor in charge of the particular work being done by the employee at the time of the injury. Notice may be given to any doctor, nurse or other emergency medical

which the employee's failure to give notice is excused by a mistake of fact. 39-A M.R.S.A. § 302 (Supp. 2013).[4] "A failure to connect medical problems to a work-related cause constitutes a mistake of fact sufficient to extend the notice and limitations periods." *Jensen v. S.D. Warren Co*., 2009 ME 35, ¶ 17, 968 A.2d 528 (citing *Dunton v. E. Fine Paper Co.*, 423 A.2d 512, 518 (Me. 1980)). The mistake of fact exception applies when "the injury is latent or its relation to the accident unperceived [and does] not include instances where . . . the employee knows of the injury and its cause." *Pino v. Maplewood Packing Co*., 375 A.2d 534, 537 (Me. 1977). Likewise, "[a] mistake of fact takes place either when some fact which really exists is unknown or some fact is supposed to exist which really does not exist." *Brackett's Case,* 126 Me. 365, 368, 138 A. 557, 558 (1927) (quotation marks omitted).

[¶11] Mr. Alley argues that the complex nature of his gradual injury and the inherent difficulty in establishing the date of injury and medical causation required the hearing officer to find a mistake of fact in this case. He points to the particular difficulties with his case, including that he suffered from a preexisting low back

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> personnel employed by the employer for the treatment of employee injuries and on duty at the work site.

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

> 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.

condition; that both UPS's section 207[5] examiner and UPS's physician concluded that no work-related gradual injury had occurred; and that the independent medical examiner found the medical causation question to be particularly complex. He contends that there were sufficient grounds for finding that he did not become aware of the work-related cause and nature of the injury until the issue was settled by the independent medical examiner. *See* 39-A M.R.S.A. § 312(7) (Supp. 2013).

[¶12] However, the hearing officer found the following facts, established in the record, which support her determination that Mr. Alley was aware of his gradual back condition and its causal connection to his work by June 24, 2010: Mr. Alley told Dr. Gosselin on June 24, 2010, as documented in an office note, that "he was not sure he could continue his work because of back and neck pain which was aggravated by work duties"; Mr. Alley's supervisor at UPS credibly testified that although he complained of back pain, Mr. Alley never reported that his work at UPS was making his back condition worse or that he wanted to make a workers' compensation claim; and Mr. Alley informed UPS of his gradual injury claim in January 2011, and filed a petition alleging such an injury in August 2011—well before the section 312 examiner issued his report on June 21, 2012.

[5] 39-A M.R.S.A. § 207 (Supp. 2013).

[¶13] The hearing officer's finding that Mr. Alley was not operating under a mistake of fact as to the cause of his gradual back injury as of June 24, 2010, is supported by competent evidence in the record.

C. Notice to Physician

[¶14] Mr. Alley next contends that the record compels the conclusion that UPS had constructive notice of a work injury within the required time frame based upon Mr. Alley's statements to UPS's physician, Dr. Bielecki. *See* 39-A M.R.S.A. § 302 ("Want of notice is not a bar to proceedings under this Act if it is shown that the employer or employer's agent had knowledge of the injury."); *Ross v. Oxford Paper Co.*, 363 A.2d 712, 716 (Me. 1976) (stating that notice provided to a company physician may constitute notice to an employer's agent.).

[¶15] The hearing officer (1) found that Mr. Alley made general complaints about back pain to Dr. Bielecki, which he attributed to any number of reasons including recreational activities and his job; and (2) concluded that this evidence did not establish notice of a gradual work injury to Dr. Bilelecki. This finding is based on competent evidence in the record, and the conclusion is rational and is not based on any misconception of applicable law.

III. CONCLUSION

[¶16] The hearing officer did not err when finding Mr. Alley failed to give notice of a gradual injury within the time period required, and that the delay was not excused by a mistake of fact.

The entry is:

The hearing officer'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 (Supp. 2013).

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