MELISSA MOSCONE
(Appellee)

v.

MILLINOCKET REGIONAL HOSPITAL
(Appellant)

and

SYNERNET
(Insurer)

Conference held: April 10, 2019
Decided: August 7, 2019

PANEL MEMBERS: Administrative Law Judges Goodnough, Elwin, and Jerome
BY: Administrative Law Judge Jerome

[¶1] Millinocket Regional Hospital appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) granting Ms. Moscone's Petition for Award in part and awarding the protection of the Act for a gradual respiratory injury dated September 6, 2016.[1] Millinocket Hospital contends that the ALJ erred as a matter of law when establishing the date of the gradual injury. Finding no error, we affirm the decision.

[1] The ALJ also denied Ms. Moscone's Petition for Award: Occupational Disease Law. That decision has not been appealed.

I. BACKGROUND

[¶2] Melissa Moscone was employed by Millinocket Regional Hospital doing clerical work in a converted residential building adjacent to the Hospital. In the fall of 2015, renovations were performed on the building and workers cut a hole in the office floor near her desk. The building had significant issues with mold, mildew, and animal infestation, and exposure to these conditions in the period from October 2015 through September 6, 2016, aggravated Ms. Moscone's previously asymptomatic asthma. On September 6, 2016, Ms. Moscone was taken out of work by her treating provider. She filed her Petition for Award and alleged that environmental conditions at work led to a gradual respiratory condition on September 6, 2016, with psychological sequela resulting in total incapacity from September 7, 2016, until March 29, 2017.

[¶3] The ALJ found that Ms. Moscone had met her burden of demonstrating a work-related aggravation of her preexisting asthma condition based on evidence of exposure to environmental irritants at work during the period from mid-October 2015 to September 6, 2016. The ALJ further found that Ms. Moscone had not carried her burden of proving that her work-related respiratory condition was a significant contributing cause of her psychological diagnosis. Finding no resulting earning incapacity, the ALJ awarded the protection of the Act for the gradual respiratory injury with a date of injury of September 6, 2016. The Hospital filed a Motion for

Findings of Fact and Conclusions of Law, which the ALJ denied. The Hospital appealed.

II. DISCUSSION

[¶4] The Hospital contends that the ALJ erred in establishing the date of injury as September 6, 2016, because Ms. Moscone experienced work-related respiratory symptoms as early as October of 2015. It argues that the injury manifested itself at that earlier time. We discern no legal error.

[¶5] The Law Court has defined a gradual injury as "a single injury caused by repeated, cumulative trauma without any sudden incapacitating event." *Derrig v. Fels Co.*, 1999 ME 162, ¶ 7, 747 A.2d 580, 582. The Court has noted the difficulty in pinning down the date of injury for gradual injuries because of the "indefinite nature of their starting points," *Jensen v. S.D. Warren*, 2009 ME 35, ¶ 14, 968 A.2d 528, and has held variously that the date of injury for a gradual injury is the date on which "the injury manifests itself," *id.* ¶ 27, or the date on which "the disability manifests itself," *id.* ¶ 26 (quoting *Ross v. Oxford Paper Co.*, 363 A.2d 712, 714 (Me. 1976)). The Law Court's decisions do not establish a bright line rule for when a gradual injury manifests itself, but demonstrate that the date should be determined based on multiple considerations and the salient circumstances of each case.

[¶6] In *Ross v. Oxford Paper*, for example, the employee worked for twenty-five years as a roll handler in a paper mill where he manually manipulated heavy

rolls of paper. *Id*. at 713. He experienced numbness in his hands for years and had received treatment in the mill's first aid department several times before he had to stop working on March 17, 1974, due to carpal tunnel syndrome. *Id*. Affirming the Commissioner, the Law Court concluded that March 17, 1974, was the date of injury, because "it [was] undisputed that [on that date] the claimant was finally prevented from working inasmuch as the disability had fully manifested itself." *Id*. at 714.

[¶7] In *Farrow v. Carr Brothers Co.*, 393 A.2d 1341 (Me. 1978), the employee sought medical treatment on December 7, 1976, for what he had suspected was a work-related knee injury. *Id.* at 1342. Although his doctor confirmed the suspicion, the employee did not tell the employer immediately that the knee injury was work-related. *Id*. He worked until December 23, 1976, when he could no longer continue, in part due to the injury. *Id*. He notified the employer that the knee injury was work-related on January 14, 1977. *Id*. at 1343.

[¶8] Farrow had argued before the Commissioner that, as in *Ross*, the date of his gradual injury was his last day of work—when he became disabled—and thus he had provided notice within the statutory 30-day period. *Id.* The Commissioner disagreed, determining that Farrow had not given timely notice because he had been aware of his work injury and its compensable nature when his doctor told him the injury was work-related. *Id.* at 1342. The Law Court affirmed. *Id.* at 1344.

[¶9] In *Jensen,* the employee had performed many years of heavy work at the employer's paper mill. 2009 ME 35, ¶ 2, 968 A.2d 528. He had a preexisting, degenerative back condition that had been aggravated by an acute injury in 1993. *Id.* The employee continued to experience low back pain until his last day of work in January of 2004. *Id.* ¶ 3. More than two years later, he filed petitions for award alleging a 1993 acute back injury, and a gradual back injury on his last day of work. *Id*. ¶ 6. The hearing officer assigned the latter date as the date of the gradual injury. *Id.* ¶ 7. After discussing the distinction between the date of a gradual injury and the date that notice and limitations periods begin to run, and clarifying that the date of a gradual injury is the date the injury manifests itself, the Law Court remanded the case for (among other things) a redetermination of the date of injury. *Id.* ¶¶ 26-27. The Court stated: "It is unclear whether the date the injury manifested itself actually coincided with Jensen's last day of work. We therefore vacate the hearing officer's decision and remand for reconsideration of the date of injury." *Id.* ¶ 27.

[¶10] In *Marean v. City of Portland,* Me. W.C.B. No. 16-47, ¶ 14 (App. Div. 2016), the ALJ determined that the date of the employee's gradual mental stress injury was the date that his doctor had concluded that the employee could no longer perform his work duties, even though he had previously received treatment for his mental health condition. *Id.* ¶ 6. The Appellate Division affirmed, reasoning that "[a]lthough the City's contention that the date of the injury's manifestation is, at

times, independent of disability finds some support in *Jensen*, we find no error in the ALJ's determination that onset of Mr. Marean's disability was the salient point in determining the date of injury." *Id.* ¶ 14.

[¶11] Common definitions of manifest include "clearly apparent to the sight or understanding"; and "to show or demonstrate plainly; reveal." The *American Heritage Dictionary of the English Language* (5th ed. 2019). From the decisions discussed above, we glean that a gradual work-related injury can become clearly apparent or plainly demonstrated at various points, including the time of the onset of symptoms, the time medical care is sought or a medical diagnosis is provided, or the date the employee goes out of work or loses time due to the injury.[2]

[¶12] The Appellate Division has previously recognized the difficulty in ascertaining the point of manifestation and has afforded some degree of deference to the conclusion reached by an ALJ when deciding the date of a gradual injury, stating that "'[o]ur task is not to determine whether the [ALJ] reached the only correct conclusion but rather, whether [the ALJ's] conclusion is permissible on the record before us. [The appellant] can only prevail if legal error is evident in the

[2] *See, e.g., Lancaster v. Bangor Family Dentistry, LLC,* Me. W.C.B 18016151 (April 25, 2019) (*Hirtle, ALJ*) (determining that date of gradual injury was date employee received medical diagnosis and was informed of the need for surgery); *Baral v. Alliance Health Documentation, LLC,* Me. W.C.B. 14027475 (August 2, 2017) (*Hirtle, ALJ*) (date the employee considered symptoms to be serious and missed a day's work as a result); *Brennick v. Stanley D. Armstrong, DMD,* Me. W.C.B. 12-02-65-66 (January 17, 2014) (*Jerome, ALJ*) (date the injury required significant medical treatment and impacted the employee's ability to work); *Bacon v. Wal-Mart,* Me. W.C.B. 10-00-53-66 (January 9, 2014) (*Pelletier, ALJ*) (date gradual injury caused employee to cease working).

decree.'" *Marean*, Me. W.C.B. No. 16-47, ¶ 14 (quoting *Comeau v. Me. Coastal Servs.*, 449 A. 2d 362, 369 (Me. 1982)).

[¶13] The ALJ here concluded that Ms. Moscone established a compensable gradual aggravation of her preexisting asthma condition as of September 6, 2016, based on (1) testimony that the building where Ms. Moscone worked had significant issues with mold, mildew, and animal infestation; (2) Ms. Moscone's testimony that she began having worsening respiratory symptoms after the hole in her office floor was opened in October of 2015; and (3) her treating practitioner's opinion that Ms. Moscone's exposure to irritants in her workplace from October 2015 through September 6, 2016, resulted in a flare-up of her previously asymptomatic asthma condition. This conclusion is permissible on the record before us.

III. CONCLUSION

[¶14] The ALJ's determination of the date of injury in this matter involved no error of law.

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 (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.

Attorney for Appellant:
Allan M. Muir, Esq.
PIERCE ATWOOD
Merrill's Wharf
254 Commercial St.
Portland, ME 04101

Attorney for Appellee:
Kevin M. Noonan, Esq.
MCTEAGUE HIGBEE
P O Box 5000
Topsham, ME 04086