ESTATE OF TIMOTHY J. FLAHERTY
(Appellee)

v.

CITY OF PORTLAND
(Appellant)

and

MAINE MUNICIPAL ASSOCIATION
(Insurer)

Argument held: April 12, 2018
Decided: August 23, 2019

PANEL MEMBERS: Administrative Law Judges Pelletier, Collier, and Goodnough
BY: Administrative Law Judge Collier

[¶1] The City of Portland appeals from a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) awarding benefits to Theresa Flaherty, the widow of Timothy Flaherty, pursuant to 39-A M.R.S.A. § 215 (Supp. 2018). The City contends that the ALJ erred by concluding that Ms. Flaherty's petition was not barred by the statute of limitations and notice provisions of the Act, and by determining that Mr. Flaherty's development of cancer constituted a "personal injury" under the Act, rather than an occupational disease. We disagree with the City's contentions, and affirm the decision.

I. BACKGROUND

[¶2] Timothy Flaherty worked for the Portland Fire Department for nearly 33 years. During his career, he was exposed to many different types of fires that produced smoke, dust, and fumes from a wide variety of substances. Mr. Flaherty began his firefighting career in 1972, when the use of respirators was not common in firefighting. Although in the 1990s the City began to require that firefighters use respirators when actively fighting fires, they generally did not wear them during the overhaul stage, after the active fire had been knocked down. Mr. Flaherty also worked inside the firehouse repairing small engines, painting, and other tasks. He routinely used solvents and kerosene while performing these duties but did not wear a respirator. The ALJ specifically found that Mr. Flaherty had been exposed to benzene, among other chemicals, during his firefighting career.

[¶3] In August of 2004 Mr. Flaherty was diagnosed with myelofibrosis, a rare bone marrow cancer. He retired from the Portland Fire Department on February 28, 2005. In addition to firefighting, Mr. Flaherty had a part-time, side business painting houses that he continued, sporadically, after he retired. Unfortunately, however, his condition progressively worsened, and he died due to myelofibrosis on August 30, 2011.

[¶4] Throughout Mr. Flaherty's battle with myelofibrosis neither he nor his wife Theresa knew what caused his cancer. The Flahertys had asked his doctors what

caused the disease and were told that the cause was unknown. On June 19, 2012, Theresa saw a television news broadcast about cancer rates among firefighters. She then spoke with the president of the firefighters' union and learned that there may be a potential connection between Mr. Flaherty's work as a firefighter and his cancer. This led her to consult a lawyer in late June or early July of 2012.

[¶5] Theresa Flaherty filed two Petitions for Award—Occupational Disease Law in September of 2012. *See* 39-A M.R.S.A. §§ 601-615 (2001 & Supp. 2018). One petition was filed in her role as the personal representative of the Estate, and the other as a dependent of Mr. Flaherty. With the former she sought benefits on Mr. Flaherty's behalf for the time between his retirement and his death, and with the latter she sought death benefits on her own behalf. By Order dated February 2, 2014, the ALJ allowed Ms. Flaherty to amend the Petitions to include claims under the non-occupational disease provisions of the Workers' Compensation Act.

[¶6] The ALJ decided that Ms. Flaherty had not shown that myelofibrosis is a disease characteristic of the firefighting occupation, so she denied the claims under the Occupational Disease Act. *See* 39-A M.R.S.A. § 603 ("[T]he term 'occupational disease' means only a disease that is due to causes and conditions characteristic of a particular trade, occupation, process or employment and that arises out of and in the course of employment.").

[¶7] As to the claims under the non-occupational disease provisions of the Act, the ALJ concluded that Mr. Flaherty's myelofibrosis could constitute a personal injury within the meaning of 39-A M.R.S.A. § 201 (2001), even if it was not an occupational disease pursuant to sections 602 and 603. She further concluded that the evidentiary presumption that applies when an employee has been killed or is unable to testify applies to these claims, *see* 39-A M.R.S.A. § 327 (2001).[1] The ALJ also concluded that the petitions were not barred by either the statute of limitations or notice provisions of the Act because the Flahertys had been operating under a mistake of fact as to the possible work-relatedness of his cancer until shortly before the petitions were filed. *See* 39-A M.R.S.A. § 306(5) (Supp. 2018).

[¶8] The ALJ ultimately determined that the claim for incapacity benefits on behalf of Mr. Flaherty's Estate from the date of his retirement to the date of his death was barred by the retirement presumption, 39-A M.R.S.A. § 221 (2001), but that Ms. Flaherty had established entitlement as a dependent of Mr. Flaherty to 500 weeks of benefits pursuant to section 215. The City filed a Motion for Findings of Fact and Conclusions of Law, which the ALJ granted, issuing two amended decisions but not altering the outcome. The City filed this appeal.

[1] In an order dated August 16, 2013, the ALJ decided that the presumption regarding certain cancers acquired by firefighters, 39-A M.R.S.A. § 328-B (Supp. 2018), does not apply in this case. The ALJ determined that the provision, which became effective as of September of 2009, does not apply retroactively and thus does not apply to these petitions because Mr. Flaherty's last exposure occurred when he retired from firefighting in February of 2005. That determination has not been challenged in this appeal.

II. DISCUSSION

A. Statute of Limitations

[¶9] The City raises three issues regarding the statute of limitations. It contends (1) that the ALJ erred when determining that a mistake of fact tolled the limitations period pursuant to section 306(5); (2) that the six-year limitations period in section 306(2) bars the claims; and (3) because the 2012 amendment to section 306 applies, and no first report of injury was "required" to be filed, the limitations period was not extended beyond two years. We examine each in turn.

1. Mistake of Fact

[¶10] As amended in 2012, section 306(1) provides: "Except as provided in this section, a petition brought under this Act is barred unless filed within 2 years after the date of injury or the date the employee's employer files a required first report of injury if required in section 303, whichever is later." P.L. 2011, ch. 647, § 18 (codified at 39-A M.R.S.A. § 306 (Supp. 2018)).[2] Section 306(5) provides for

[2] The 2012 amendment to section 306 added the word "required" in section 301(1). Section 306 provides, in relevant part:

> **Time for filing petitions**
>
> **1. Statute of limitations.** Except as provided in this section, a petition brought under this Act is barred unless filed within 2 years after the date of injury or the date the employee's employer files a required first report of injury if required in section 303, whichever is later.
>
> **2. Payment of benefits.** If an employer or insurer pays benefits under this Act, with or without prejudice, within the period provided in subsection 1, the period during which an employee or other interested party must file a petition is 6 years from the date of the most recent payment.

tolling of the limitations period when the claimant is operating under a mistake of fact: "If an employee fails to file a petition within the limitation period provided in subsection 1 because of mistake of fact as to the cause or nature of the injury, the employee may file a petition within a reasonable time, subject to the 6-year limitation period provided in subsection 2." *Id.*

[¶11] The "mistake of fact" provision in the statute of limitations establishes an exception to the two-year limit when an injury, or its cause, is not recognized due to a mistake of fact. *Pino v. Maplewood Packing Co*., 375 A.2d 534, 537 (Me. 1977). 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." *Jensen v. S.D. Warren Co*., 2009 ME 35, ¶ 17, 968 A.2d 528 (quotation marks omitted). "A failure to connect medical problems to

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> **A.** The provision of medical care for an injury or illness by or under the supervision of a health care provider employed by, or under contract with, the employer is a payment of benefits with respect to that injury or illness if:
>
> (1) Care was provided for that injury or illness on 6 or more occasions in the 12-month period after the initial treatment; and
>
> (2) The employer or the health care provider knew or should have known that the injury or illness was work-related.
>
> For the purposes of this paragraph, "health care provider" has the same meaning as provided in rules of the board.
>
> . . . .
>
> **5. Mistake of fact.** If an employee fails to file a petition within the limitation period provided in subsection 1 because of mistake of fact as to the cause or nature of the injury, the employee may file a petition within a reasonable time, subject to the 6-year limitation provided in subsection 2.
>
> **6. Death of employee.** If an employee dies as a result of a work-related injury, a petition is barred unless filed within one year after the death or 2 years from the date of injury, whichever is later, but in any event not later than 6 years from the date of last payment.

a work-related cause constitutes a mistake of fact sufficient to extend the notice and limitations periods." *Id.* ¶ 18; *see also Dunton v. E. Fine Paper Co.*, 423 A.2d 512, 517 (Me. 1980).

[¶12] The ALJ determined that the date of injury was February 28, 2005—the date that Mr. Flaherty retired from the Portland Fire Department. The Estate filed its petitions in September of 2012. The ALJ concluded that the Flahertys had operated under a mistake of fact as to the cause and nature of Mr. Flaherty's illness until June 19, 2012, when Ms. Flaherty first learned of a possible causal connection between firefighting and the development of various forms of cancer from a television program. Therefore, the ALJ concluded, the limitations period was tolled until Ms. Flaherty saw the program. Because Ms. Flaherty consulted with counsel and filed her petitions within a few months after that date, the ALJ concluded the petitions were filed within a reasonable time and are not barred by the statute of limitations.

[¶13] The City contends this was error because Ms. Flaherty's mistake was one of law, not of fact. The City argues that the subject of the television broadcast was not related to the cause of cancer, but to the evidentiary presumption afforded firefighters in the context of litigation brought by firefighters who suffer from cancer; thus the program educated Ms. Flaherty on the law, not the facts, citing *Hird v. Bath Iron Works Corp.*, 512 A.2d 1035, 1038 (Me. 1986) (holding that mistaken

belief that the Longshore Act was the sole remedy for the employee's injury was not a mistake of fact as to the cause and nature of the injury that would excuse the failure to timely file under the Workers' Compensation Act).

[¶14] The ALJ found that the Flahertys had been told by the treating doctors that the cause of myelofibrosis was unknown; thus, they were mistaken regarding the possible causal connection between Mr. Flaherty's disease and his former occupation. We agree with this assessment. Although the television broadcast and the union president may have discussed the existence of the firefighter presumption in section 328-B, that discussion is legally significant only because it raised in Ms. Flaherty's mind the possibility of a causal link between Mr. Flaherty's former occupation and the cancer that ultimately took his life.

[¶15] The fact that Ms. Flaherty's mistake of fact was eventually corrected in the context of a discussion of an evidentiary presumption does not alter the fact that she had been laboring under a mistake of fact as to the possible causal connection between her husband's work and his cancer. The ALJ did not err when determining that the limitations period was tolled. *See Dunton*, 423A.2d at 517 (holding that failure to perceive causal connection between fall at work with back problem constituted a mistake of fact that tolled the limitations period).

2. Six-Year Period

[¶16] The City contends that the six-year limitations period set forth in section 306(2) provides a separate bar to the Estate's claims that cannot be tolled for mistake of fact. Essentially, the City argues that section 306(2) provides a six-year statute of repose applicable to all claims. The ALJ concluded that this provision applies, by its terms, only to cases in which benefit payments have been made. We agree.

[¶17] "When construing provisions of the Workers' Compensation Act, our purpose is to give effect to the Legislature's intent." *Hanson v. S.D. Warren Co*., 2010 ME 51, ¶ 12, 997 A.2d 730. "In so doing, we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results." *Id*. Only when the statutory language is ambiguous, do we "look beyond the plain meaning and consider other indicia of legislative intent, including legislative history." *Damon v. S.D. Warren Co.*, 2010 ME 24, ¶ 10, 990 A.2d 1028. "Statutory language is ambiguous if it is reasonably susceptible of different interpretations." *Id.*

[¶18] Section 306(2) states: "If an employer or insurer pays benefits under this Act, with or without prejudice, within the period provided in subsection 1, the period during which an employee or other interested party must file a petition is 6 years from the date of the most recent payment." The language plainly and unambiguously states that it applies when benefit payments have been made. No

such payments were made in this case. Accordingly, we conclude that the ALJ did not err when determining that the petitions are not barred by the six-year limitations period in section 306(2).[3]

B. Notice

[¶19] The City also contends that the petitions are barred by the failure to give notice within 90 days of the injury date. *See* 39-A M.R.S.A. § 301 (Supp. 2018). The mistake of fact analysis addressed above applies equally to this issue. *See* 39-A M.R.S.A. § 302 (Supp. 2018) ("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."); *see also Jensen*, 2009 ME 35, ¶ 26, 968 A.2d 528 (noting that when the employee is operating under a mistake of fact, the statute of limitations and notice periods begin to run when the employee becomes aware of the cause and nature of the injury). The ALJ found that Ms. Flaherty notified the City within 90 days of learning of the potential work-relatedness of her husband's death. This finding is supported by

[3] The City also contends that the ALJ erred by applying the unamended version of section 306(1), pursuant to which the limitations period would not begin to run until a first report of injury was filed. *See Wilson v. Bath Iron Works*, 2008 ME 47, ¶ 15, 942 A.2d 1237. The City asserts that the 2012 amendment to section 306(1) applies, and that because the City was not required to file a first report of injury until September of 2012, the limitations period had expired two years after the 2005 date of injury. The City requested and was granted leave to file additional briefing on this issue and the effect of the recent Appellate Division decision in *Bickmore v. Johnson Outdoors, Inc.*, Me. W.C.B. No. 18-18 (App. Div. 2018). Because we affirm the ALJ's decision regarding tolling of the limitations period due to a mistake of fact and conclude that the period would be tolled under either version of the statute, it is not necessary to decide this issue.

competent evidence. It was not error to determine that notice was given within the statutory time frame.

C. Existence of a Compensable Personal Injury

[¶20] The City argues that the ALJ committed legal error by determining that Mr. Flaherty's development of myelofibrosis constituted a "personal injury" within the meaning of section 201 of the Act.[4] We disagree.

[¶21] The Act recognizes various diseases as potentially compensable, including, for example, cardiovascular injury or disease and pulmonary disease, 39-A M.R.S.A. § 328 (2001); communicable diseases, 39-A M.R.S.A. § 328-A (Supp. 2018); and certain specified types of cancer, *id.* § 328-B. The Act also makes the condition of mental stress compensable in certain circumstances. *See* 39-A M.R.S.A. § 201(3) (Supp. 2018). Moreover, the Law Court has upheld the compensability of disease either aggravated by or contracted through work activity. *See, e.g.*, *Bryant v. Masters Machine Co.*, 444 A.2d 329, 333, 343 (Me. 1992) (spina bifida, degenerative disc disease, and arthritis); *Brodin's Case*, 126 A. 829, 829, 833 (1924) (typhoid fever). Professor Larson has observed that "it is hardly necessary at

[4] Title 39-A M.R.S.A. § 201 provides:

> If an employee who has not given notice of a claim of common law or statutory rights of action, or who has given the notice and has waived the claim or rights, as provided in section 301, receives a personal injury arising out of and in the course of employment or is disabled by occupational disease, the employee must be paid compensation and furnished medical and other services by the employer who has assented to become subject to this Act.

this point to say that such injuries as disease and sunstroke come within the general term 'injury' or 'personal injury,'" noting the "hundreds of cases cited" for that proposition. 4 Lex K. Larson, *Larson's Workers' Compensation* § 55.02 (Matthew Bender, Rev. Ed. 2019).

[¶22] The City cites *Manzo v. Great Northern Paper Co*., 615 A.2d 605 (Me. 1992), a case involving a worker who had been diagnosed with asbestosis with no resulting incapacity. *Manzo,* however, stands only for the proposition that a disease must result in incapacity or death to be compensable as a personal injury under the Act. *Id.* at 607-08. The Court stated: "a disease becomes a personal injury only when it produces incapacity or death. In the absence of the statutory equivalent of a personal injury, there is no basis for awarding a protective decree under . . . the Act." *Id.* at 608. *See also Carroll v. Celsius Contractors*, 637 A.2d 111, 112 (Me. 1994) (holding that mere exposure to radiation is insufficient to constitute an injury).

[¶23] In this case, the ALJ specifically found that Mr. Flaherty was incapacitated from performing his work as a firefighter due to myelofibrosis. We find no legal error in the ALJ's determination that Mr. Flaherty's development of myelofibrosis constituted a personal injury within the meaning of section 201 of the Act.

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, ch. 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:
Stephen Hessert, Esq.
NORMAN HANSON & DeTROY
Two Canal Plaza
P.O. Box 4600
Portland, ME 04112

Attorney for Appellee:
James J. MacAdam, Esq.
Nathan A. Jury, Esq.
Donald M. Murphy, Esq
MacADAM JURY, PA
45 Mallett Drive
Freeport, ME 04032