MICHELLE S. GURNEY
(Appellee)

v.

MERCY HOSPITAL
(Appellee)

and

ESIS

and

VNA HOME HEALTH HOSPICE
(Appellant)

and

CROSS INSURANCE TPA, INC.

Argued: September 27, 2018
Decided: March 1, 2019

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

[¶1] VNA Home Health Hospice (VNA) appeals from a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) finding that Ms. Gurney sustained two gradual injuries to her upper extremities. VNA asserts that on the facts of this case, as a matter of law, Ms. Gurney could only have suffered a single gradual injury. We disagree, and affirm the ALJ's decision.

I. BACKGROUND

[¶2] On September 12, 2011, while working for Mercy Hospital, Ms. Gurney sustained a gradual, work-related bilateral upper extremity injury as a result of repeatedly lifting a patient, which caused pain in her forearms and elbows. Ms. Gurney improved from the 2011 injury approximately 90% and was able to resume her regular duty work without formal restrictions, although she was advised to be careful.

[¶3] Ms. Gurney also sustained an acute bilateral upper extremity injury on August 25, 2012, also while working for Mercy Hospital, while lifting a patient who had fallen in a bathroom. The ALJ found that she again recovered almost fully from that injury.

[¶4] Lastly, Ms. Gurney claimed a third work-related injury (and second gradual injury) on April 26, 2014, while working for VNA Home Health. At that time she began to experience upper arm pain, as before, along with upper back pain as a result of having to use a draw sheet repeatedly to lift a patient into an upright position while the patient was in bed.

[¶5] Ms. Gurney filed Petitions for Award and for Payment of Medical and Related Services seeking compensation for all three dates of injury and payment of medical bills. Dr. Guernelli performed an independent medical examination of Ms. Gurney on April 10, 2017, pursuant to 39-A M.R.S.A. § 312 (Supp. 2018). He

opined that Ms. Gurney sustained a gradual injury on April 26, 2014. The ALJ adopted the independent medical examiner's opinion and made findings consistent with that opinion, including that the injury caused back pain and worsening of Ms. Gurney's bilateral upper arm pain. The ALJ cited *Eck v. Verso Paper*, Me. W.C.B. No. 16-20 (App. Div. 2016), as authority for the proposition that an employee may, as a matter of law, sustain more than one gradual injury, even to the same body part, provided the facts support that conclusion. No motion for additional findings and conclusions was made. VNA appeals.

II. DISCUSSION

[¶6] "A finding of fact by an administrative law judge is not subject to appeal [before the Appellate Division]." 39-A M.R.S.A. § 321-B (Supp. 2018). Instead, appellate review is "limited to assuring that [the ALJ's] factual findings are supported by competent evidence . . . ." *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982). On issues of law, we assure "that [the ALJ's] decision involves no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Id.* Because no motion for additional findings and conclusions was made after the decree issued, we may infer that the ALJ made all the factual findings necessary to support her determination, so long as those findings are supported by the record. *See Gallant v. Boise Cascade Paper Group*, 427 A.2d 976, 977 (Me. 1981).

[¶7] VNA contends that, as a matter of law, an employee cannot suffer two distinct gradual injuries to the same body part with the same symptoms from performing the same type of work within the time period alleged by Ms. Gurney. It relies on the holding in *Derrig v. Fels Co.*, 1999 ME 162, 747 A.2d 580 for support.

[¶8] In *Derrig*, the employee had worked as a pipefitter for a union, and thus had worked for numerous employers over a 20-year period. *Id.* ¶ 2. The hearing officer used the "significant contribution" standard applicable to aggravated preexisting conditions, *see* 39-A M.R.S.A. § 201(4) (Supp. 2018), to the work activity of each job separately as a prerequisite to determining whether a gradual, work-related injury had occurred at any job, *Derrig*, 1999 ME 162, ¶¶ 2, 5, 747 A.2d 580. The hearing officer found that the employee had not carried his burden for any of the claims, even though it was also found that, taken as a whole, the employee's work activity did cause a gradual injury. *Id.* ¶ 3. The Law Court vacated the decree and held that the determination of whether a work-related injury has occurred must be made first, and only then is section 201(4) applied to determine whether or not the injury is covered by the Act.

[¶9] VNA argues that *Derrig* did not simply hold that an injured worker is not required to prove successive gradual injures, but rather, it writes, "[t]o the contrary, Derrig shows that an injured worker is not *permitted* to prove successive

gradual injuries . . . .” We disagree with VNA’s characterization of *Derrig*. An Appellate Division panel recently addressed whether *Derrig* prohibits successive gradual injuries to the same body part. In *Eck v. Verso Paper*, the panel held that an employee may prove a second gradual injury where “both the severity and nature of the employee’s symptoms changed over time to such an extent as to produce a legitimate second injury.” *Eck*, Me. W.C.B. No. 16-20, ¶ 8. To argue that an employee can sustain only one gradual injury to the same body part is to argue, in essence, that a gradual injury can never resolve or be significantly aggravated over time by future employment or activities. *Derrig* does not stand for that proposition, and thus the Appellate Division in *Eck* rejected the same argument now made by VNA. We find persuasive the reasoning of the *Eck* decision and find no reversible error in the ALJ’s reliance on that case to reject VNA’s arguments in this case.

[¶10] Lastly, VNA contends that the ALJ’s factual findings with respect to Ms. Gurney’s second gradual injury are unsupported by competent evidence. The findings are supported by the IME’s report, which the ALJ was required to adopt absent clear and convincing evidence to the contrary. *See* 39-A M.R.S.A. § 312(7). The Appellate Division will affirm an ALJ’s decision based on an independent medical examiner’s findings unless the decision is unsupported by competent evidence or the record discloses no reasonable basis to support the IME’s medical

findings. *Dillingham v. Great N. Paper*, Me. W.C.B. No. 15-7, ¶ 3 (App. Div. 2015) (citing *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983)). The record in this case provides a rational basis for the IME's findings and for the ALJ's adoption of those findings, and thus we may not disturb them.

III. CONCLUSION

[¶11] The ALJ did not err by concluding that Ms. Gurney sustained a second gradual injury while working for VNA. The ALJ's factual findings were supported by competent evidence, and her application of the law to those facts was neither arbitrary nor without rational foundation.

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.

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