ROGER DESGROSSEILLIERS
(Appellee)

v.

AUBURN SHEET METAL
(Appellant)

and

MEMIC
(Insurer)

Conference held: June 13, 2018
Decided: October 23, 2020

PANEL MEMBERS: Administrative Law Judges Stovall, Collier, and Knopf
BY: Administrative Law Judge Collier

[¶1] Auburn Sheet Metal/MEMIC appeals from a decision of a Workers' Compensation Board administrative law judge (*Goodnough, ALJ*) determining that Roger Desgrosseilliers, who was last injuriously exposed to asbestos during his employment with Auburn Sheet Metal in 1994 (when insured by MEMIC), *see* 39-A M.R.S.A. §§ 601-615 (Pamph. 2020), was not barred from pursuing his claim for an occupational disease by the notice provision of the Act, 39-A M.R.S.A. § 301 (Supp. 2020). Auburn Sheet Metal/MEMIC contends that the ALJ erred when determining that notice was timely provided and maintains that the claim should be barred. Mr. Desgrosseilliers asserts that under the applicable statute, he had no

obligation to notify Auburn Sheet Metal's insurer within 30 days of the date of injury or otherwise. We affirm the decision.

I. BACKGROUND

[¶2] Roger Desgrosseilliers worked for a variety of employers in his decades-long career as a union sheet metal worker. He was exposed to asbestos at a number of those work sites, including while working for Auburn Sheet Metal, a company owned and operated by his wife, Elaine Desgrosseilliers. He worked for Auburn Sheet Metal from 1988 through 1994, primarily on jobs at the paper mill in Rumford. Mr. Desgrosseilliers was diagnosed with lung cancer in 2015 and underwent surgery on November 2, 2015. He was later diagnosed with asbestosis.

[¶3] In March of 2016, Mr. Desgrosseilliers brought Petitions for Award—Occupational Disease, alleging five different injury dates against several different employers and insurers. *See* 39-A M.R.S.A. § 606. The petitions were consolidated for hearing and the parties agreed to bifurcate the litigation in order to first address the issue of last injurious exposure.[1]

[¶4] The ALJ found that Mr. Desgrosseilliers's last injurious exposure to asbestos more likely than not occurred in 1994 while he was working for Auburn Sheet Metal. At that time, Auburn Sheet Metal was insured by MEMIC.

[1] 39-A M.R.S.A. § 614(4) (2001) provides, in relevant part: "Notwithstanding section 606, the only employer and insurance carrier liable is the last employer in whose employment the employee was last injuriously exposed to asbestos, and the insurance carrier, if any, on the risk when the employee was last so exposed under that employer."

[¶5] The ALJ further found that November 2, 2015, the day that Mr. Desgrosseilliers underwent lung cancer surgery, was the date of his incapacity and thus, the date of injury for purposes of the Maine Occupational Disease Law. 39-A M.R.S.A. §§ 606, 607. Pursuant to section 607, Mr. Desgrosseilliers was required to provide notice of the injury to his employer within 30 days from the date he gained awareness of the compensable nature of his injury. *See* 39-A M.R.S.A. §§ 301, 302; *Jensen v. S.D. Warren Co.,* 2009 ME 35, ¶ 26, 968 A.2d 528.

[¶6] The ALJ found that Mr. Desgrosseilliers became aware of the compensable nature of his injury when he met with his attorney on February 26, 2016.[2] Auburn Sheet Metal had been long out of business in 2016 and Elaine Desgrosseilliers had passed away years before.

[¶7] The ALJ determined that Mr. Desgrosseilliers provided notice to Auburn Sheet Metal sufficient to satisfy section 301 when Travelers, one of Auburn Sheet Metal's insurers, received his Petition for Award on Monday, March 28, 2016.[3] This date—March 28, 2016—is 31 days after the date on which the ALJ found Mr. Desgrosseilliers became aware of the compensable nature of his injury.

[2] This factual finding, although contested by MEMIC, is supported by competent evidence in the record, and is therefore is not subject to appeal. 39-A M.R.S.A. § 321-B(2) (Pamph. 2020).

[3] The decree states that Travelers likely received the Petition on March 28, *2017*, but it is apparent from the context that this was a clerical error and the ALJ meant that date to read March 28, 2016—31 days after the meeting with the attorney.

[¶8] The ALJ initially decided that the notice provided on March 28, 2016, was untimely because it was received by Travelers on the 31st day after the notice period began to run. The ALJ thus issued a decision denying the petition against Auburn Sheet Metal/MEMIC.

[¶9] On Motions for Findings of Fact and Conclusions of Law filed by both parties, however, the ALJ reversed that determination and concluded that notice on the 31st day was timely because the 30th day fell on a Sunday. The ALJ looked to Maine Rule of Civil Procedure 6(a) for guidance when interpreting the notice provision of the Act.[4] In the alternative, the ALJ concluded that Mr. Desgrosseilliers had provided notice within a "reasonable time" of curing his mistake, and thus notice was timely, citing *Dunton v. Eastern Fine Paper Co.*, 423 A.2d 512, 518 (Me. 1980) and *Estate of Zeitman v. W.W. Osborne*, Me. W.C.B. No. 15-1, ¶ 15 (App. Div. 2015). *See also* 39-A M.R.S.A. § 306(5) (Pamph. 2020).

[¶10] After the decision was issued, the parties entered into a Consent Decree, signed by the ALJ, in which they agreed that Mr. Desgrosseilliers' Petition for Award—Occupational Disease is granted against Auburn Sheet Metal, as insured by

[4] M.R. Civ. P. 6(a) provides, in relevant part:

> **(a) Computation.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, . . . the last day of the period so computed is to be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a holiday.

MEMIC, on all issues (including medical causation, which had not been previously litigated) except notice.[5] Auburn Sheet Metal/ MEMIC filed this appeal.

II. DISCUSSION

A. Standard of Review

[¶11] The Appellate Division is "limited to assuring that the [ALJ'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 Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). "When construing provisions of the Workers' Compensation Act, [the panel's] 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, the panel looks to the plain meaning of the statutory language, and construes that language to avoid absurd, illogical, or inconsistent results. *Id*. We also consider "the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Davis v. Scott Paper Co*., 507 A.2d 581, 583 (Me. 1986). In addition, "[a]ll words in a statute are to be given meaning, and no words are to be treated as surplusage if they can be reasonably construed." *Central Me. Power Co. v. Devereux*

[5] Accordingly, despite the bifurcation, all issues in the case have been finally resolved and there is no contention or issue that this appeal is interlocutory.

Marine, Inc., 2013 ME 37, ¶ 8, 68 A.3d 1262 (quotation marks omitted). We look beyond the plain meaning and consider other indicia of legislative intent, including legislative history, only when the statute is ambiguous. *Damon v. S.D. Warren Co*., 2010 ME 24, ¶ 10, 990 A.2d 1028.

B. Notice

[¶12] MEMIC contends that notice was untimely because it was provided on the 31st day, and that neither M.R. Civ. P. 6(a) nor the "reasonable time" provision in 39-A M.R.S.A. § 306(5) applied to excuse the late notice. Mr. Desgrosseilliers asserts that section 301 did not require him to provide notice of his occupational disease to Auburn Sheet Metal's insurer.

[¶13] Title 39-A M.R.S.A. § 301, governing notice of injury, applies in cases brought under the Occupational Disease Law. 39-A M.R.S.A. § 607. Section 301 provides, in relevant part:

> For claims for which the date of injury is on or after January 1, 2013 and prior to January 1, 2020, proceedings for compensation under this Act, except as provided, may not be maintained unless a notice of the injury is given within 30 days after the date of injury. . . .
>
> The 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 personnel employed by the employer for the treatment of employee injuries and on duty at the work site. *If the employee is self-employed, notice must be given to the*

> *insurance carrier or to the insurance carrier's agent or agency with which the employer normally does business*.

(Emphasis added).

[¶14] MEMIC contends that Mr. Desgrosseilliers was required to notify the insurer because the Act defines "employer" to include the insurer, providing: "If the employer is insured, 'employer' includes the insurer, self-insurer or group self-insurer unless the contrary intent is apparent from the context or is inconsistent with the purposes of this Act." 39-A M.R.S.A. § 102(12) (Pamph. 2020).

[¶15] The ALJ stated that pursuant to section 301, Mr. Desgrosseilliers "was under a duty to demonstrate that notice was provided to the employer *or insurer* within 30 days of February 26, 2016." (Emphasis added). However, section 301 describes in plain language those people or entities to whom an employee must give notice in various circumstances. The only situation in which the employer's insurer is specified as the recipient of the required notice is when the employee is self-employed. There is no contention that Mr. Desgrosseilliers was self-employed. Thus it is apparent from the context that for the purposes of section 301 notice, employer does not include insurer, except where specified.

[¶16] An Appellate Division panel recently addressed a similar issue in *Oullette v. Ouellette Funeral and Memorial Services, Inc.*, Me. W.C.B. No. 19-28 (App. Div. 2019). At issue was whether Mr. Ouellette, the sole owner and employee of a closely-held corporation, should be considered a self-employed individual who

was required under section 301 to notify the employer's insurance carrier of a work injury. *Id.* ¶ 5. Because Mr. Ouellette was an employee of a corporation and not self-employed, the panel held he was not required under section 301 to provide notice to the insurer. *Id.* ¶ 12. The panel reasoned:

> In section 301, the meaning of self-employment plainly does not include a corporation, whether "closely-held" or not, because the notice requirements in the statute pertaining to corporations are separate and distinct from the notice requirements pertaining to self-employed individuals. If the Legislature intended to require employees of closely-held corporations to provide notice to the insurance carrier it could have done so. Pursuant to the plain language of the statute, employees of a corporation are not considered self-employed.

Id.[6]

[¶17] Although the *Ouellette* panel based its decision on the plain meaning of the statute, it nevertheless examined section 301's legislative history, and noted that the Legislature added the self-employment clause in response to the Law Court's decision in *Daigle v. Daigle*, 505 A.2d 778 (Me. 1986). *Ouellette*, ¶¶ 15-19. *See* P.L. 1987, ch. 103, § 1. In that case, the Court considered whether a self-employed individual was required to provide notice to the insurance carrier pursuant to the predecessor to section 301, 39 M.R.S.A. § 63, which did not contain the self-employment reporting clause. *Daigle*, 505 A.2d at 778. The insurance carrier had

[6] Mr. Ouellette as both an employee and employer, was deemed to have knowledge of his own injury such that the alleged lack of notice under section 301 did not bar him from proceeding with his claim. *See* 39-A M.R.S.A. § 302 (Pamph. 2020). *Ouellette*, Me. W.C.B. No. 19-28, ¶ 21.

argued that the Court should read such a clause into the statute. *Id.* The Court disagreed, reasoning that in the absence of an express statutory provision requiring a self-employed individual to provide notice to their insurer, such notice was not required to maintain the claim. *Id.* at 780.

[¶18] Here, we are presented with a case in which the employee was under an obligation to notify his former employer of his injury, but that obligation arose at a time when that employer no longer existed. The ALJ found as fact and there is no dispute that Auburn Sheet Metal was "long out-of-business" by 2016. The company had been owned and operated by Mr. Desgrosseilliers's former wife who, the ALJ noted, had "passed away a number of years ago."[7]

[¶19] When providing the statutorily required notice to an employer is impossible, and there is no specific legislative directive that the employee notify an insurer, the failure to provide notice within the time constraints of section 301 cannot be held to bar a claim. The term "employer" in section 301 does not include the employer's insurer and does not impose an independent obligation to notify an employer's insurer of an injury—except in the circumstance of a self-employed employee.[8]

[7] Mr. Desgrosseilliers testified Auburn Sheet Metal had not designated any specific person to receive notice of injuries before they went out of business.

[8] Under principles of agency, notice to an employer's insurer will generally constitute notice to that employer. Our conclusion here is that section 301, by its terms, requires notice to an employer's insurer only in cases involving an injury to a self-employed employee.

III. CONCLUSION

[¶20] Although on different grounds, we conclude that the ALJ did not err when deciding that Mr. Desgrosseilliers' petition against MEMIC is not barred by the notice provisions of the Act and should not be denied on that basis. Because this determination is dispositive, we do not reach the remaining issues raised by Mr. Desgrosseilliers.

The entry is:

The decision of the administrative law Judge 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 (Pamph. 2020).

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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