KEVIN THOMAS
(Appellee)

v.

UNITED AMBULANCE SERVICE
(Appellant)

and

MAINE EMPLOYERS' MUTUAL INSURANCE CO.
(Insurer)

Conference held: February 6, 2019
Decided: March 16, 2021

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

[¶1] United Ambulance Service appeals from a Workers' Compensation Board administrative law judge (*Goodnough, ALJ*) decision granting Kevin Thomas's Petition for Award and granting in part his Petition for Payment of Medical and Related Services. United Ambulance contends that the ALJ erred in determining that an August 14, 2016, injury[1] arose out of and in the course of employment even though the injury manifested off the employer's premises when Mr. Thomas was not working. We disagree and affirm the decision.

[1] The ALJ also granted petitions related to a December 1, 2015, work injury. That decision has not been appealed.

I. BACKGROUND

[¶2] Mr. Thomas worked at United Ambulance as a dispatcher beginning in 2004. Although he was promoted to supervisor, he continued to do full-time dispatching. Mr. Thomas estimated that he handled 230 to 240 calls per day. He worked ten-hour days, four days a week plus frequent overtime, in a highly stressful environment. He worked in a fixed-posture position performing repetitive movements using a telephone and keyboard.

[¶3] Mr. Thomas's employment with United Ambulance was terminated in March 2017 for reasons unrelated to the injury, and he has returned to his prior occupation, truck driving.

[¶4] On August 14, 2016, Mr. Thomas was at home, reaching over his bathtub with an arm extended, when he felt a "pop" and immediately felt pain in his neck and left shoulder. He was treated at the emergency department and diagnosed with a thoracic strain. He was ultimately diagnosed with cervical disc herniations at C5-6 and C6-7. He pursued a workers' compensation claim, contending his cervical disc problems were caused by his employment.

[¶5] Mr. Thomas underwent an independent medical examination by Dr. Bradford (IME), pursuant to 39-A M.R.S.A. § 312(7) (Pamph. 2020). Based on Dr. Bradford's opinion, the ALJ concluded that Mr. Thomas sustained a compensable injury to his cervical spine, finding that the 2016 the injury "occurred gradually due

to repetitive computer activities and static posturing while functioning as a dispatcher over many years." He further reasoned that the bathtub incident was the culmination of a delayed-onset work injury rather than a nonwork-related event.

[¶6] The ALJ granted the petitions and awarded the protection of the Act for the 2016 cervical spine injury, and payment of related medical bills. United Ambulance filed a Motion for additional findings of fact and conclusions of law, which the ALJ granted. The ALJ issued additional findings but did not change the outcome. United Ambulance appeals.

II. DISCUSSION

A. Standard of Review

[¶7] The Appellate Division accords deference to ALJ decisions addressing whether an injury is compensable under the Act. *See Cox v. Coastal Prods. Co., Inc*., 2001 ME 100, ¶ 12, 774 A.2d 347; *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995). The ALJ's findings of fact are not subject to appeal. 39-A M.R.S.A. § 321-B(2) (Pamph. 2020). "[O]ur role on appeal is limited to assuring that the [ALJ's] . . . decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Moore*, 669 A.2d at 158 (quotation marks omitted).

B. Arising Out of and in the Course of Employment

[¶8] At issue is whether Mr. Thomas's injury arose out of and in the course of his employment pursuant to 39-A M.R.S.A. § 201 (Pamph. 2020). "An injury arises out of and in the course of employment when there is a sufficient connection between the injury and the employment." *Celentano v. Dep't of Corr.*, 2005 ME 125, ¶ 9, 887 A.2d 512 (citing *Comeau v. Me. Coastal Servs.*, 449 A.2d 362, 366-67 (Me. 1982)). An injury "arises out of" employment when there is "'some causal connection between the conditions under which the employee worked and the injury which arose, or that the injury, in some proximate way, had its origin, its source, its cause in the employment.'" *Comeau*, 449 A.2d at 365 (quoting *Barrett v. Herbert Eng'g, Inc.*, 371 A.2d 633, 636 (Me. 1977)). An injury occurs "'in the course of employment when it occurs within the period of employment at a place where the employee reasonably may be in the performance of [the employee's] duties and while [the employee] is fulfilling those duties or engaged in something incidental thereto.'" *Comeau*, 449 A.2d at 365 (quoting *Fournier's Case*, 120 Me. 236, 240, 113 A. 270, 272 (1921)).

1. Arising Out of the Employment

[¶9] United Ambulance first contends that the ALJ erred when determining that the August 14, 2016, injury arose out of Mr. Thomas's employment. It asserts that because Mr. Thomas showed no symptoms before August 14, 2016, and the

precipitating incident happened at home during activity not associated with his employment, there is an insufficient basis on which to find that the injury had its origin or source in the employment. We disagree with these contentions.

[¶10] As the ALJ noted, United Ambulance "provides no authority for the proposition that gradually progressing overt symptomology is always required as an element of a gradual injury"; nor has our research disclosed any. The ALJ based his finding that the injury arose out of the employment on Dr. Bradford's medical findings. Dr. Bradford found that Mr. Thomas worked for many years "in a position with a fixed posture with repetitive if not nearly constant arm postures," which resulted in a gradual, degenerative neck condition. Dr. Bradford further opined:

> I think it is more likely than not that [August 14, 2016] was when Mr. Thomas manifested signs and symptoms of cervical radiculopathy. As noted above, this likely overlapped with symptoms already suggesting that he had cubital tunnel syndrome and possibly ulnar tunnel syndrome of the left arm, as well.
> …
>
> The reaching over a bathtub with arm extended may simply have been the "straw that broke the camel's back," the maneuver in and of itself [was] probably not sufficient to cause significant disc disease.… I do not feel the bathtub incident, in and of itself, was causative, but simply exacerbated the cervical condition which, as noted above, is related to his work, in my opinion.

[¶11] The IME's opinion supports the finding that Mr. Thomas developed a degenerative neck condition as a result of his work activities over the years. Thus,

the ALJ did not err in determining that the neck injury arose out of Mr. Thomas's employment.

2. In the Course of Employment

[¶12] United Ambulance contends that Mr. Thomas's injury occurred outside the course of his employment because it occurred on his day off, while he was at home, and not while performing his work duties; thus, the injury did not occur at a place where the employee reasonably could be in the performance of his duties and while fulfilling those duties. We perceive no error.

[¶13] The ALJ determined that "Mr. Thomas's neck injury, from a medical perspective, originated in activities that occurred at work over a long period of time." The ALJ reasoned that the outward manifestation of the injury having occurred at home is not dispositive, noting correctly that the Law Court has found compensable injuries that have occurred off premises. *Citing Waycott v. Beneficial Corp*., 400 A.2d 392 (Me. 1979); *Brown v. Palmer Constr*. *Co.*, 295 A.2d 263 (Me. 1972); *Sargent v. Raymond F. Sargent, Inc*., 295 A.2d 35 (Me. 1972); *Moreau v. Zayre Corp*., 408 A.2d 1289 (Me. 1979). Nor has the Court required an injury to have acquired all of its injurious elements, including the final manifestation of the injury, on the employer's premises during work hours, *citing Wescott v. S.D. Warren*, 447 A.2d 78 (Me. 1982) (upholding compensation for a heart attack occurring at home but arising from work stress).

[¶14] The ALJ also based the decision on a "delayed action" theory of work-connection, articulated by Professor Larson as follows:

> "Arising" connotes origin, not completion or manifestation. If, for example, a strain occurs during employment hours which produces no symptoms, and the claimant suffers a heart attack or other injury as a result some time after working hours, the injury is routinely held compensable. . . . If, in the language of Justice Cardozo, the injurious incident . . . "from origin to ending must be taken to be one," it should be sufficient that the origin of this single unit of injury lies within the bounds of employment, whether the ending, in the form of the actual impact, falls within those bounds or not.

3 Arthur Larson, Lex K. Larson & Thomas A. Robinson, *Larson's Workers' Compensation Law*, § 29.03 (2019) (footnotes omitted); *Stein v. Inland Hosp.*, Me. W.C.B. No. 19-40, ¶¶ 15-16 (App. Div. 2021) (holding that stroke that occurred nearly four months after the employment ended resulted from a stress-related injury that began before employee left employment); *see also Sanders v. Kenkev*, W.C.B. 08-02-86-29 (Me. 2012) (holding that a gunshot injury that occurred off premises several months after the instigating incident was compensable based on a delayed action theory). The final test is not whether the ultimate injury happened at work, but whether the injurious activities that caused the injury were undertaken in the course of employment. *See Moore v. Daigle & Daigle, Inc.*, No. 88-232 (Me. W.C.C. App. Div. Dec. 9, 1988) (distinguishing the terms "manifestation" and "consummation" from "arising").

[¶15] The record contains competent evidence that the injury in this case fell within the bounds of the employment, despite that its culmination occurred at a time when Mr. Thomas was not working. We find no error in the conclusion that the injury arose in the course of employment.[2]

3. Independent Medical Examiner's Opinion

[¶16] United Ambulance next contends that the IME's medical findings should have been rejected based on clear and convincing contrary evidence in the record. *See* 39-A M.R.S.A. § 312(7). United Ambulance contends the contrary evidence shows that that Mr. Thomas experienced no neck symptoms until the bathtub incident, thus there is a high probability that the IME's opinion cannot support a finding that the injury arose out of and in the course of employment.

[¶17] When considering whether evidence contrary to the IME's findings permits a rejection of those findings, "we determine whether the [ALJ] could reasonably have been persuaded by the contrary medical evidence that it was highly probable that the record did not support the IME's medical findings." *Dubois v. Madison Paper Co.*, 2002 ME 1, ¶ 14, 795 A.2d 696 (quotation marks omitted). When the ALJ adopts the IME's findings, however, we will reverse only if those

[2] Finally, we find no authority for United Ambulance's assertion that the ALJ erred when determining the date of injury as August 14, 2016, a day when Mr. Thomas was not working. The date of injury assigned to Mr. Thomas's gradual injury is the date on which the injury manifested itself, *Jensen v. S.D. Warren Co.*, 2009 ME 35, ¶ 26, 968 A.2d 528. That date of injury does not require a commensurate finding that the injury did not arise out of and in the course of employment.

findings are not supported by any competent evidence or the record discloses no reasonable basis to support the decision. *See Pomerleau v. United Parcel Serv*., 464 A.2d 206, 209 (Me. 1983); *Dillingham v. Great N. Paper*, Me. W.C.B. No. 15-7, ¶ 3 (App. Div. 2015).

[¶18] There is support in the record for the finding that Mr. Thomas's work activity involved repetitive motion in a fixed posture over many years, connecting the injury to the performance of his work duties. Thus, there is a reasonable basis in the record for the ALJ's decision, based on the IME's opinion, that the degenerative cervical spine condition developed over many years due to work activity and existed as of the event that precipitated the disc herniations. Accordingly, we will not reverse the decision on this basis.[3]

4. *Comeau* Analysis.

[¶19] When the facts of a case do not "fall snugly" within the arising out of and in the course of employment requirement, the ALJ may consider a nonexclusive list of factors identified by the Law Court that bear on the question of work-

[3] United Ambulance also asserts that certain factual errors in the IME's report undermine the report's reliability. For example, Dr. Bradford indicated that Mr. Thomas had been in his position as a dispatcher for twenty years when it had been only twelve. In addition, he indicated that Mr. Thomas worked twelve hours a day when, in fact, he worked ten. The ALJ noted that Mr. Thomas worked overtime in addition to his ten-hour work days and concluded "[t]he discrepancy with respect to years worked on the job is more pronounced, but is not so off the mark that it causes me to reject Dr. Bradford's findings as a whole regarding the work-related nature of Mr. Thomas's cervical problems." We find no reversible error in the ALJ's reliance on Dr. Bradford's report in this regard. *See Higgins v. H.P. Hood*, 2007 ME 94, ¶ 19, 926 A.2d 1176 (determining that an IME opinion that contained multiple, minor factual errors nevertheless constituted competent evidence on which the hearing officer properly relied).

connectedness. *Comeau v. Me. Coastal Servs.*, 449 A.2d at 366-67.[4] United Ambulance contends that an analysis of this case applying the *Comeau* factors would lead to the conclusion that Mr. Thomas's injury did not arise out of and in the course of employment.

[¶20] The ALJ determined that resorting to the *Comeau* factors was not helpful or necessary under the circumstances of this case because from a medical perspective, there was "little doubt that Mr. Thomas's work activities at United Ambulance over a 12 year period were… the underlying reason why the employee's cervical spine degenerated," and the *Comeau* factors would likely focus on the off-

[4] The Law Court identified the following nonexclusive list of factors to consider when determining whether an injury arises out of and in the course of employment:

> (1) Whether at the time of the injury the employee was promoting an interest of the employer, or the activity of the employee directly or indirectly benefited the employer.
>
> (2) Whether the activities of the employee work to the benefit or accommodate the needs of the employer.
>
> (3) Whether the activities were within the terms, conditions or customs of the employment, or acquiesced in or permitted by the employer.
>
> (4) Whether the activity of the employee serves both a business and personal purpose, or represents an insubstantial deviation from the employment.
>
> (5) Whether the hazard or causative condition can be viewed as employer or employee created.
>
> (6) Whether the actions of the employee were unreasonably reckless or created excessive risks or perils.
>
> (7) Whether the activities of the employee incidental to the employment were prohibited by the employer either expressly or implicitly.
>
> (8) Whether the injury occurred on the premises of the employer.

Comeau, 449 A.2d at 366 (citations omitted).

premises activity at the time of the disc herniation. The *Comeau* test was not designed to address the delayed-injury situation. *See Sanders*, W.C.B. 08-02-86-29.

[¶21] Dr. Bradford's opinion strongly supports medical causation in this case, and the ALJ was properly persuaded that the work activities over twelve years caused the degeneration of the cervical spine. We find no error in the ALJ's conclusion that the injury is compensable.

III. CONCLUSION

[¶22] After a thorough legal analysis, the ALJ concluded that Mr. Thomas met his burden of proving his cervical spine injury arose out of and in the course of employment as required under section 201. We find no reversible error in the ALJ's analysis and affirm the decision.

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 (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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