DAVID FURROW
(Appellant)

v.

BATH IRON WORKS CORPORATION
(Appellee and Self-Insured)

and

LIBERTY MUTUAL
(Insurer)

Argued: February 6, 2019
Decided: March 2, 2021

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

[¶1] David Furrow appeals from a decision of a Workers' Compensation Board administrative law judge (*Knopf, ALJ*) which, among other things, denied Mr. Furrow's Petition for Award for a 1981 injury due to expiration of the statute of limitations, and declined to award benefits for a 2012 gradual knee injury. We affirm the decision.

I. BACKGROUND

[¶2] Mr. Furrow, who has worked for BIW since 1978, filed petitions for award alleging eight work injuries. The first injury relevant to this appeal occurred on May 19, 1981, when Mr. Furrow stepped in a hole in the floor, injuring his left knee. He underwent two surgeries, and BIW/Liberty Mutual paid Mr. Furrow

benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.S. §§ 901-950 (Longshore payments), but did not pay workers' compensation benefits.

[¶3] Mr. Furrow returned to his regular job in January 1982, and had no further medical treatment until May 2004, when he returned to BIW's health department complaining of knee problems. Due to worsening knee pain, Mr. Furrow began treating with his own doctor on June 6, 2005. By February 2006, Mr. Furrow reported right knee pain, which was bothering him more than the left knee. Mr. Furrow continued to treat conservatively for both knees. Several doctors recommended total knee replacement surgery after 2006, including Dr. Gomberg, an orthopedic surgeon who saw Mr. Furrow once in July 2012.

[¶4] Mr. Furrow underwent total right knee replacement surgery in March 2014. He continued to have difficulties and underwent additional procedures and courses of physical therapy. Mr. Furrow remained out of work after February 25, 2015.

[¶5] Dr. Bradford performed an independent medical examination of Mr. Furrow pursuant to 39-A M.R.S.A. § 312 (Pamph. 2020). The ALJ adopted Dr. Bradford's opinion as expressed at his deposition, noting that it had "evolved substantially" from the opinion expressed in his initial report.

[¶6] The board issued a decree on November 21, 2016, granting protection of the Act for all injuries except the 1981 injury. The petition for the 1981 injury, as

well as BIW/self-insured's petition for apportionment regarding that injury, were denied due to the expiration of the statute of limitations. While the petition for award alleging a July 3, 2012, gradual, bilateral knee injury was granted, benefits were not awarded for that injury because Mr. Furrow failed to sustain his burden of proof under 39-A M.R.S.A. §201(4) (Pamph. 2020) that his employment contributed to his disability in a significant manner.

[¶7] The ALJ granted Motions for Further Findings of Fact and Conclusions of Law filed by Mr. Furrow and by BIW/self-insured, and issued an amended decree that did not change the result with regard to the issues of statute of limitations and compensability of the alleged 2012 gradual injury. Mr. Furrow appeals.

II. DISCUSSION

A. Statute of Limitations

[¶8] Based on payment records and Mr. Furrow's testimony, the ALJ found that BIW last made a Longshore payment on the 1981 injury in 1981. Mr. Furrow first asserts that because BIW did not file a First Report of Injury, both the two-year statute of limitations and the ten-year statute of repose were tolled. We disagree.

[¶9] The statute of limitations applicable to a 1981 work injury is found at 39 M.R.S.A. § 95 (1989).[1] An appellate division panel construed this provision in

[1] Title 39 M.R.S.A. § 95 provides, in relevant part:

> Any employee's claim for compensation under this Act shall be barred unless an agreement or petition . . . shall be filed within 2 years after the date of the injury, or, if the employee

Young v. Mead Westvaco Corp., Me. W.C.B. No. 13-7 (App. Div. 2013). In *Young*, the employee contended that the ten-year period of repose in section 95 remained tolled because any payments made for a 1981 date of injury had been made without prejudice, and because the employer did not file a first report of injury until 2019. *Id.* ¶ 9.

[¶10] The panel rejected these arguments, holding that section 95, which states "[n]o petition of any kind may be filed more than 10 years following the date of the latest payment made under this Act,"

> places an "outside limit" on the filing of the claim of ten years from the date the last payment was made pursuant to the Act. *Harvie v. Bath Iron Works Corp.*, 561 A.2d 1023, 1024 (Me. 1989) (stating since shortly after the original enactment of section 95 by P.L. 1965, ch. 408, § 9, the "incarnations" of that statute have always included a ten-year statute "provid[ing] an outside limit in cases that were recognized exceptions to the two year limit"); *see also, e.g., Dahms v. Osteopathic Hosp. of*

> is paid by the employer or the insurer, without the filing of any petition or agreement, within 2 years of any payment by such employer or insurer for benefits otherwise required by this Act. The 2-year period in which an employee may file his claim does not begin to run until his employer, if the employer has actual knowledge of the injury, files a first report of injury as required by section 106 of the Act. . . . No petition of any kind may be filed more than 10 years following the date of the latest payment made under this Act. For the purposes of this section, payments of benefits made by an employer or insurer pursuant to section 51-B shall be considered payments under a decision, unless a timely notice of controversy has been filed.

Title 39 M.R.S.A. § 95 (1989) was repealed and replaced by P.L. 1991, ch. 885, §§ A-7, A-8 (effective January 1, 1993) codified at 39-A M.R.S.A § 306 (Supp. 2012). Section 306 has been amended several times since 1993, most recently by P.L. 2019, ch. 344, § 13 (effective Sept. 19, 2019).

> *Me.*, 2001 ME 145, ¶ 1 n.1, 782 A.2d 774 (referring to the longer period of limitation as a statute of repose).

Id. ¶ 15.

[¶11] The ALJ found in this case that "Liberty Mutual acknowledges that it is unable to produce a first report on the 1981 injury"; but there is no express finding that Liberty Mutual failed to file a first report. Even if that were the case, as stated in *Young*, failure to file a first report tolls the two-year statute of limitations but does not toll the ten-year period of repose under section 95. *Id.* ¶ 21 (stating "pursuant to the plain language [of section 95], the employer's failure to file a required first report of injury does not toll the running of the ten-year period.").

[¶12] Mr. Furrow next asserts that this case is distinguishable from *Young* because the payments he received were made under the Longshore Act, not the Workers' Compensation Act. However, the Law Court held in *Stockford v. Bath Iron Works Corp.*, 482 A.2d 843, 845 (Me. 1984), that Longshore payments are "essentially equivalent" to Workers' Compensation Act payments and operate to toll the limitation period. Mr. Furrow contends that the holding in *Stockford* applies only when the equivalent treatment of Longshore and workers' compensation payments would benefit the employee. We find no merit to this argument. And, as the ALJ found, Mr. Furrow did benefit from this equivalent treatment: the Longshore payments he received in 1981 extended the two-year statute of limitations to December 1983, and the ten-year period of repose to December 1991.

[¶13] We find that the holdings in *Young* and *Stockford* are applicable in this case, and we discern no error in the ALJ's conclusion that the statute of limitations expired on Mr. Furrow's 1981 claim.

B. 2012 Gradual Injury

[¶14] The ALJ found that Mr. Furrow's work at BIW between 2005 and 2012 accelerated his osteoarthritis, and that this acceleration constituted a separate, gradual work injury dated July 13, 2012. The ALJ noted, however, that because Mr. Furrow had a pre-existing knee condition, he also bore the burden of proving that his work contributed to his disability in a significant manner, citing *Derrig v. Fels Co.*, 1999 ME 162, 747 A.2d 580. *See* 39-A M.R.S.A. § 201(4) (Pamph. 2020).

[¶15] Based primarily on Dr. Bradford's opinion as the independent medical examiner,[2] the ALJ found that Mr. Furrow failed to sustain this burden. Specifically, Dr. Bradford (1) characterized the 2005 and 2012 conditions as the same condition; (2) testified that continued deterioration of Mr. Furrow's condition was foreseeable and expected; and (3) opined, along with Mr. Furrow's treating orthopedists, that knee replacement surgery was likely since 2005. The ALJ determined that the July 13, 2012, date of injury has no significance other than being the date Mr. Furrow had his only appointment with Dr. Gomberg, who also recommended total knee

[2] Pursuant to 39-A M.R.S.A. § 312(7), the ALJ was required to accept the independent medical examiner's medical findings, absent clear and convincing contrary evidence.

replacement. The ALJ also relied on the fact that Mr. Furrow continued to delay knee replacement surgery for two years beyond 2012 (as he had been delaying it since it was first suggested in 2005), in finding that Mr. Furrow's employment did not contribute to his disability in a significant manner. This finding is supported by competent evidence.

III. CONCLUSION

[¶16] We find no error in the ALJ's conclusions that the 1981 claim is barred pursuant to 39 M.R.S.A. § 95, and that the 2012 claim is not compensable because Mr. Furrow failed to sustain his burden of proof that his employment contributed to his disability in a significant manner.

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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