STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
App. Div. Case No. 20-0028
Decision No. 22-29

DUANE CARLOW
(Appellee)

v.

FULGHUM FIBRES
(Appellant)

And

AIG CLAIMS, INC.
(Insurer)

Argued: September 29, 2021
Decided: September 21, 2022

PANEL MEMBERS: Administrative Law Judges Elwin, Hirtle, and Rooks
By: Administrative Law Judge Elwin

[¶1] Fulghum Fibres (Fulghum) appeals a decision of a Workers' Compensation Board administrative law judge (*Pelletier, ALJ*) granting Duane Carlow's Petitions for Award and for Payment of Medical and Related Services. Fulghum contends the ALJ erred (1) in admitting into evidence a letter from Mr. Carlow's treating surgeon because that letter was not produced fourteen days prior to the scheduled hearing pursuant to 39-A M.R.S.A. § 309(3); and (2) in determining that Mr. Carlow met his burden of proof on the issues of (a) causation of the acute injury and (b) timely notice of a gradual injury. We affirm the decision.

I. BACKGROUND

[¶2] Mr. Carlow worked at Fulghum's mill in Baileyville for over twenty years, most recently as a working shift supervisor. On November 16, 2017, while shoveling wood chips, he felt a "pop" in his right shoulder. When later grabbing a paper towel off a roll, he felt a knife-like sensation in his right shoulder and noticed that his biceps muscle appeared deformed. Mr. Carlow's supervisor acknowledged that Mr. Carlow provided notice of the injury orally and in writing within 30 days of November 16.

[¶3] Mr. Carlow had preexisting arthritis and tendonitis in his right shoulder and had been in treatment for that condition in the months prior to the November 16 incidents at work. Thereafter, Mr. Carlow was treated by Dr. Jessica Aronowitz, an orthopedic surgeon. Based on an MRI, Dr. Aronowitz diagnosed a right shoulder rotator cuff tear with proximal biceps tendon rupture. Mr. Carlow returned to work and was able to work regular duty until he underwent right shoulder surgery in April 2019. He underwent left shoulder surgery in November 2019.

[¶4] Mr. Carlow filed petitions with the board alleging an acute and a gradual work-related right shoulder injury. A hearing was held on January 24, 2020. The ALJ left the record open after the hearing to receive medical records, fringe benefit information, and other specified evidence. On March 4, 2020, before the record had been officially closed, the ALJ received a letter forwarded by Mr. Carlow's counsel

dated February 24, 2020, and signed by the treating surgeon, Dr. Aronowitz. In the letter, Dr. Aronowitz opined that the November 2017 incidents at work caused a right shoulder injury that significantly aggravated Mr. Carlow's underlying shoulder condition, accelerating the need for surgery. She also opined that the left shoulder injury was caused by overuse to compensate for the injured right shoulder.

[¶5] Fulghum objected to the admission of the letter on the grounds that it was untimely pursuant to 39-A M.R.S.A. § 309(3) and Me. W.C.B. Rule, ch. 12, § 12(1). At a conference on March 13, 2020, the ALJ overruled the objection but gave Fulghum two weeks in which to inform the board of any evidence it wished to develop in response to the admission of the letter. The ALJ issued a written order dated March 19, 2020, memorializing the oral order. At Fulghum's request, the ALJ extended the period to respond an additional week. Fulghum offered into evidence Employer's Exhibit 4, additional entries from the supervisor's calendar, but did not inform the board of any other evidence it wished to develop.

[¶6] Based on Dr. Aronowitz's opinion, the ALJ found that Mr. Carlow sustained an acute work injury that combined with, aggravated, or accelerated a preexisting right shoulder condition, and that the employment contributed to the resulting disability in a significant manner, *see* 39-A M.R.S.A. § 201(4). The ALJ also found that he had sustained a left shoulder sequela. Mr. Carlow was awarded ongoing total incapacity benefits and payment of related medical expenses. Fulghum

filed a motion for additional findings of fact and conclusions of law. The ALJ issued additional findings regarding the application of section 309(3), but did not alter the outcome. Fulghum filed this appeal.

II. DISCUSSION

A. The Aronowitz Letter

[¶7] Fulghum contends the ALJ violated 39-A M.R.S.A. § 309(3) or abused his discretion under Rule, ch. 12, § 12(1) in admitting the Aronowitz letter. Title 39-A M.R.S.A. § 309(3) provides, in relevant part:

> Sworn written evidence may not be admitted unless the author is available for cross-examination or subject to subpoena; except that sworn statements by a medical doctor or osteopathic physician relating to medical questions, by a psychologist relating to psychological questions, by a chiropractor relating to chiropractic questions, by a certified nurse practitioner who qualifies as an advanced practice registered nurse relating to advanced practice registered nursing questions or by a physician's assistant relating to physician assistance questions are admissible in workers' compensation hearings only if notice of the testimony to be used is given and service of a copy of the letter or report is made on the opposing counsel 14 days before the scheduled hearing.

[¶8] The purpose of this provision is to address hearsay concerns by making a physician's written statement on medical questions admissible to the same extent that the physician's oral testimony would be. *Cote v. Osteopathic Hosp. of Me., Inc*., 432 A2d 1301, 1306 (Me 1981) (construing the predecessor provision to section 309(3), 39 M.R.S.A. § 93(3)).

[¶9] The evidentiary record remained open at the time Mr. Carlow submitted the Aronowitz letter. The ALJ gave Fulghum fourteen days to suggest the manner in which it might respond to the letter, suggesting that Fulghum could "(1) depose the doctor, (2) obtain its own causation opinion (via section 207 or Section 312), or present additional testimonial evidence." Thus, the March 13 order, memorialized on March 19, contemplated that another proceeding would be held at Fulghum's behest to address the medical opinion offered in the letter, effectively extending the fourteen-day period set forth in section 309(3). At Fulghum's request, the ALJ extended the response period an additional seven days. Fulghum chose not to develop any additional evidence or request any additional hearings in response to the admission of the Aronowitz letter. On this record, we find no error in the application of section 309(3).

[¶10] Moreover, rulings regarding the admission of evidence are reviewed for abuse of discretion. *Boulanger v. S.D. Warren*, Me. W.C.B. No. 22-2, ¶ 21 (App. Div. 2022) (citing *Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 (Me. 1985) (applying an abuse of discretion standard of review to administrative body's decision based on its own rules)). We will vacate the ALJ's decision only if the proceedings violate due process; that is, considering all the circumstances, the proceedings were fundamentally unfair. *Kuvaja*, 495 A.2d at 806-07.

[¶11] Although Rule 12, § 12(1) authorizes an ALJ to "exclude an exhibit offered at hearing that was not exchanged by the parties at least 7 days before the final hearing in the matter," it does not require exclusion. Board rules provide the ALJ with broad discretion in matters regarding the sequence and conduct of hearings and the admission of evidence. *Smith v. Me. Sea Coast Vegetables,* Me. W.C.B. No. 20-1, ¶ 13 (App. Div. 2020). *See also* Rule, ch. 12, § 16 ("Upon notice to the parties and for good cause, an Administrative Law Judge may alter the requirements and timeframes in this chapter."); Rule ch. 12, § 13 (authorizing the ALJ to adjust the length of a hearing or allow an additional hearing if necessary).

[¶12] Given the circumstances of this case and its procedural posture, we see no fundamental unfairness in this case. The ALJ acted within the bounds of his discretion when admitting the Aronowitz letter, having given Fulghum a full and fair opportunity to respond.

B. Causation

[¶13] Fulghum contends that absent the Aronowitz letter, no competent medical evidence supports a finding that Mr. Carlow sustained a work injury on November 16, 2017, and therefore the award should be vacated on appeal. As set out above, it was not reversible error to admit the Aronowitz letter and that letter is competent evidence to support the ALJ's finding of medical causation for an acute, work-related injury. We therefore affirm the decision on medical causation grounds.

[¶14] Fulghum further contends that the act of tearing a paper towel from a roll is insufficient to establish legal causation. To establish legal causation when "the employee bears with him some 'personal' element of risk because of a pre-existing condition, the employment must be shown to contribute some substantial element to increase the risk, thus offsetting the personal risk which the employee brings to the employment environment." *Bryant v. Masters Mach. Co.*, 444 A.2d 329, 337 (Me. 1982). *Id*. at 337. Fulghum asserts that the risk of injury from tearing a paper towel at work objectively does not exceed the risk from doing so in an average person's non-employment life.

[¶15] The ALJ found that tearing the paper towel presented an increased risk of injury because it had no perforation and was significantly thicker and heavier than household paper towels. However, he did not base his finding of legal causation on the paper towel incident alone, stating: "tearing the paper towel from the roll cannot be separated from the pop in his shoulder while shoveling sawdust and woodchips just before attempting to rip the paper towel off the roll." Fulghum does not contest that shoveling sawdust and woodchips enhances the risk of injury above that of everyday life. The finding that the shoveling contributed to the injury has support in both Mr. Carlow's testimony and Dr. Aronowitz's medical records. Accordingly, we find no error.

C. Notice

[¶16] Fulghum further argues that the correct date of injury was October 17, 2017, that a gradual injury occurred on that date, and that therefore Mr. Carlow did not timely provide notice of his injury. The Aronowitz letter constitutes competent evidence supporting the ALJ's finding that Mr. Carlow sustained an acute work-related injury that aggravated a preexisting condition on November 16, 2017, rather than the gradual injury date alleged by Fulghum. As it is supported by competent evidence, we affirm the ALJ's finding that the work-related injury date is November 16, 2017. Accordingly, there is no need to determine whether Mr. Carlow provided adequate notice in relation to a gradual injury of any different date.

[¶17] The ALJ found as fact that "Mr. Carlow gave [his supervisor] notice of his acute injury of November 16 verbally and in writing within the 30 days." *See* 39-A M.R.S.A. § 301. This finding is supported by competent evidence, particularly, Mr. Carlow's testimony and the testimony of his supervisor. As such, we will not disturb it. 39-A M.R.S.A. § 318 ("The administrative law judge's decision, in the absence of fraud, on all questions of fact is final.").

III. CONCLUSION

[¶18] The ALJ did not err or abuse his discretion when admitting the Aronowitz letter. The letter constitutes competent evidence that supports the ALJ's finding that Mr. Carlow sustained an acute work-related injury that aggravated

a preexisting condition. Moreover, the finding that Mr. Carlow provided timely notice is also supported by competent evidence in the record. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983)

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.

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.

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