JAMES WISSER
(Appellee/Cross-Appellant)

v.

NEW BALANCE ATHLETIC SHOE, INC.
(Appellant/Cross-Appellee)

and

THE HARTFORD
(Insurer)

Argued: February 10, 2021
Decided: January 20, 2022

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

[¶1] New Balance Athletic Shoe, Inc., appeals from a decision of a Workers' Compensation Board administrative law judge (*Chabot, ALJ*) granting James Wisser's Petitions for Award of Compensation and for Payment of Medical and Related Services. New Balance contends that the administrative law judge erred when determining that Mr. Wisser provided timely notice of a gradual, bilateral foot injury pursuant to 39-A M.R.S.A. §§ 301, 302 (Pamph. 2020). Mr. Wisser cross appeals from the ALJ's finding that he was not entitled to ongoing benefits for 100% partial incapacity, and instead awarding him benefits based on a full-time, minimum wage-earning capacity. We vacate the decision in part and remand for additional findings of fact on the issue of notice.

I. BACKGROUND

[¶2] James Wisser suffered a gradual injury to his feet due to his work as a shoemaker for New Balance, which required that he stand for 7.5 to 8 hours per day. The gradual injury significantly aggravated, accelerated, and combined with his pre-existing idiopathic peripheral neuropathy to cause a disability. *See* 39-A M.R.S.A. § 201(4) (Pamph. 2020). Mr. Wisser went out of work due to bilateral foot pain on February 23, 2018. The ALJ found that the injury manifested on that date, and thus designated February 23, 2018, the date of injury. However, Mr. Wisser did not provide notice of the foot injury until he filed his petitions in this case on September 4, 2018.[1]

[¶3] A hearing was held on February 27, 2020, at which Mr. Wisser, New Balance's Human Resources Manager, and New Balance's Workers' Compensation Specialist, testified. New Balance asserted a notice defense, contending that Mr. Wisser did not provide notice within thirty days of the date of injury. 39-A M.R.S.A. § 301. The ALJ nevertheless granted Mr. Wisser's Petitions, determining that he was

[1] At the request of the administrative law judge, the following clerical mistakes, apparent on the face the record, are hereby corrected in the decree dated May 15, 2020:

> In paragraphs 15 and 16 of the decree, the date September 23, 2018, is changed to February 23, 2018.

See 39-A M.R.S.A. § Section 318 (Pamph. 2020) (allowing for a correction of mistake arising from oversight or omission may be corrected by the board at any time).

under a mistake of fact as to the cause and nature of his injury, and that notice provided on September 4, 2018—the date he filed the petition—was timely. The ALJ awarded Mr. Wisser ongoing partial incapacity benefits, calculated based on an imputed full-time minimum wage-earning capacity.

[¶4] Both parties filed motions for further findings of fact and conclusions of law, which the ALJ denied. New Balance appeals, and Mr. Wisser Cross appeals.

II. DISCUSSION

A. Standard of Review

[¶5] The role of the Appellate Division "is limited to assuring that the [ALJ's] 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." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, "we review only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnaker Indus. Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Notice

[¶6] New Balance contends that the ALJ erred when determining that Mr. Wisser provided timely notice of his injury. An injured employee under the

Workers' Compensation Act with a 2018 date of injury has 30 days from that date to provide notice of the injury to the employer. 39-A M.R.S.A. § 301.[2] However, "[a]ny time during which the employee is unable … to give the notice or fails to do so on account of mistake of fact, may not be included in the computation of proper notice." 39-A M.R.S.A. § 302. The notice period is tolled under section 302 "when an injury, or its cause, is not recognized due to a mistake of fact." *Jensen v. S.D. Warren Co.*, 2009 ME 35, ¶ 17, 968 A.2d 528; *Pino v. Maplewood Packing Co.*, 375 A.2d 534, 537 (Me. 1977). The 30-day period begins to run on the date the compensable nature of the injury becomes apparent to the employee. *Jensen*, 2009 ME 35, ¶ 26.

[¶7] As the petitioning party, Mr. Wisser bore the burden of proof to establish all elements of the claim on a more probable than not basis. *Fernald v. Dexter Shoe Co.*, 670 A.2d 1382, 1385 (Me. 1996). Once the issue of notice was raised as a defense, he bore the burden to demonstrate that timely notice was provided. *Boober v. Great N. Paper Co.*, 398 A.2d 371, 373-74 (Me. 1979).

[¶8] In the decree issued May 15, 2020, the ALJ found as fact that "[Mr. Wisser] did not know the cause of his bilateral foot pain as of the date of injury, and thought it might be diabetic related." This finding is supported by Mr. Wisser's own

[2] The Legislature amended title 39-A M.R.S.A. § 301 after the date of Mr. Wisser's injury. *See* P.L. 2019, ch. 344, § 13.

testimony. Additionally, the medical evidence shows that Mr. Wisser's doctors believed that his foot pain was caused by a nonwork related pre-diabetic condition or an idiopathic neuropathy. The medical evidence that demonstrates a work connection—records from Dr. Buck diagnosing Mr. Wisser with a Morton's neuroma likely caused or significantly aggravated by his work, and the independent medical examiner's (IME's) report indicating that Mr. Wisser's employment significantly aggravated his preexisting peripheral neuropathy—were generated after the petitions were filed. Moreover, New Balance's Human Resources manager testified that in discussions with her, Mr. Wisser did not connect his foot pain to his work. Thus, the ALJ's finding that Mr. Wisser was under a mistake of fact as to the cause and nature of his injury is supported by competent evidence in the record.

[¶9] With regard to the issue of when the 30-day notice period began to run, as noted above, there is nothing in the medical records from which the ALJ could infer Mr. Wisser's knowledge of work-relatedness before or on the date he provided notice, September 4, 2018. Mr. Wisser did not testify as to when he became aware that his foot condition was work related. The ALJ found "September 4, 2018, the date the petitions were filed, is the earliest evidence of when the Employee had awareness of the compensable nature of the injury." However, the filing of the petition is evidence that Mr. Wisser was aware the injury was work-related on that

date, but it is not evidence that he *became* aware on that date. It does not establish the date that triggered the 30-day notice period. *See Jensen*, 2009 ME 35, ¶ 26.

[¶10] Because we cannot determine from the findings whether the ALJ erred when concluding that Mr. Wisser provided timely notice, the ALJ's findings on this issue are inadequate for appellate review. We therefore remand for clarification. *See Spear v. Town of Wells*, 2007 ME 54, ¶ 13, 922 A.2d 474 (remanding for clarification of findings); *see also Freeman v. Me. Medical Partners*, Me. W.C.B. No. 21-25, ¶ 14 (App. Div. 2021) (remanding for clarification and additional findings when ALJ found that the employee became aware of the cause and nature of the injury after the date notice was provided).

C. Level of Incapacity and Imputed Income

[¶11] Mr. Wisser contends on cross-appeal that the ALJ erred when determining that he has the capacity to work full time at minimum wage. He contends it was error for the ALJ to rely on the IME'S findings rather than the findings of Mr. Wisser's treating physician regarding his ability to earn, particularly during the period preceding the independent medical examination on September 17, 2019. We disagree with his contention.

[¶12] The IME, appointed pursuant to 39-A M.R.S.A. § 312 (Pamph. 2020), opined that Mr. Wisser could not return to his previous job due to the effects of the injury, and that he was restricted from standing for more than 30 minutes at a time

while at work. The IME recommended he find "a sit down job where he does not have to stand on his feet." Although Mr. Wisser's treating physician expressed the view that Mr. Wisser did not have any work capacity, the ALJ was required to accept the IME's medical findings absent clear and convincing contrary evidence. 39-A M.R.S.A. § 312(7). We do not read the IME's opinion as prospective only. Moreover, the medical records that Mr. Wisser refers to were made available to and were considered by the IME when issuing the medical findings.

[¶13] Mr. Wisser did not perform a work search except to inquire about several jobs appearing in a labor market survey prepared by New Balance's expert. The ALJ rejected the conclusion of New Balance's labor market expert that Mr. Wisser had a residual earning capacity of $551.20 per week, and the ALJ instead imputed a full-time minimum wage-earning capacity. *See Hogan v. Great N. Paper, Inc.*, 2001 ME 162, ¶ 9, 784 A.2d 1083 (holding that in all cases involving partial incapacity, including those in which there is no specific offer or when the employee has failed to perform job search, the ALJ must determine what the employee is "able to earn" under section 213 of the Act).

[¶14] Because competent evidence in the record supports the ALJ's factual findings regarding Mr. Wisser's earning capacity, we affirm the decision on that issue. *See Moore,* 669 A.2d at 158.

The entry is:

> The administrative law judge's decision is vacated in part and remanded for additional findings on the issue of whether the employee provided timely notice of the work injury. In all other respects, the 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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