PHILIP A. HEBERT
(Appellant)

v.

IRVING LUMBER
(Appellee)

and

LIBERTY INSURANCE CORP.
(Insurer)

Argued July 23, 2014
Decided: June 30, 2015

PANEL MEMBERS: Hearing Officers Collier, Goodnough, Jerome
BY: Hearing Officer Jerome

[¶1] Philip A. Hebert appeals from a decision of a Worker's Compensation Board Hearing Officer (*Elwin, HO*) denying his Petition to Remedy Discrimination brought pursuant to 39-A M.R.S.A. § 353 (2001). The hearing officer found that Irving Lumber's decision to terminate Mr. Hebert's employment was not motivated by the assertion of his workers' compensation claims, and thus, did not constitute discrimination under section 353. On appeal, Mr. Hebert contends that the record mandates a finding that his termination was substantially or significantly rooted in the exercise of his workers' compensation rights and, alternatively, that the hearing officer made insufficient findings on that issue. We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Philip Hebert began working in the Irving Lumber's Dixfield saw mill in 2007. He suffered three work-related injuries during his employment with the mill: (1) on October 17, 2007, he developed a rash on his arms from the oils used on a machine; (2) on April 4, 2011, he got sawdust in his left eye, despite wearing safety glasses; and (3) on May 31, 2011, he sprained his left ankle while walking on uneven ground. Mr. Hebert received "safety counseling" on June 30, 2011, after having had two incidents in less than six months. Irving Lumber suggested at that time that Mr. Hebert could have prevented the eye injury and the ankle sprain, perhaps by paying more attention. Two months later, Mr. Hebert received a written warning for failing to wear safety glasses while running a machine called an unscrambler.

[¶3] Mr. Hebert was terminated from his employment at the mill on January 27, 2012, following his failure to follow a prescribed safety measure, referred to as a "lockout/tagout" procedure, employed when cleaning or performing maintenance on a particular machine. Under that procedure, each employee responsible for machine maintenance is issued a lock with his or her name on it. The employee is required to shut off all sources of power to the machine, lock the machine, and then perform the required maintenance. When finished, the employee removes the lock and restores power to the machine.

[¶4] On the day in question, Mr. Hebert performed the maintenance as required, but forgot to remove the lock from the machine, and he left his key on top of the circuit box. When he arrived home, there was a message on his answering machine indicating that he had left the lock on and that Irving Lumber would have to cut it off. Mr. Hebert called back and left a message that he had left his key on the circuit box and that cutting the lock was unnecessary. The next day, Mr. Hebert was put on administrative leave, pending an investigation of the lockout/tagout problem. On January 27, 2012, he was terminated.

[¶5] Mr. Hebert filed his Petition to Remedy Discrimination. At the hearing, the mill manager was asked to describe what role, if any, the three work injuries suffered by Mr. Hebert had played in the decision to terminate. The mill manager testified that the occurrence of those injuries would have played a very small role in the decision, characterized as 20%, because the overall number of injuries suggested that Mr. Hebert might not be able to do his job safely.

[¶6] The hearing officer found that Mr. Hebert was not terminated because he asserted claims for work injuries, but because the mill manager thought that he did not take his responsibilities for workplace safety seriously. The hearing officer specifically credited the mill manager's explanation for the decision to terminate, finding that the decision was due to concerns about Mr. Hebert's willingness and ability to adhere to its safety policies, and based on his pattern of inattention and

carelessness regarding safety. In making this determination the hearing officer characterized Mr. Hebert's attitude about the lockout/tagout procedure as "cavalier," and found that he was annoyed that his supervisor had cut off his lock rather than using the key which he had left nearby.

[¶7] Mr. Hebert filed a motion for additional findings of fact and conclusions of law, which the hearing officer denied. He then filed this appeal.

II. DISCUSSION

[¶ 8] Appeals from hearing officer decisions are governed by 39-A M.R.S.A. §§ 321-B, 322 (Supp. 2014). Section 321-B (2) provides that "[a] finding of fact by a hearing officer is not subject to appeal under this section." The role of the Appellate Division "is limited to assuring that the [hearing officer'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).

[¶9] Title 39-A prohibits discrimination against an employee for "testifying or asserting any claim under this Act." 39-A M.R.S.A. § 353. In order to prevail on a claim of discrimination, an employee must demonstrate that the disciplinary action at issue "was rooted substantially or significantly in the employee's exercise of his rights under the Worker's Compensation Act." *Maietta v. Town of*

Scarborough, 2004 ME 97, ¶ 14, 854 A.2d 223 (quoting *Delano v. City of S. Portland*, 405 A.2d 222, 229 (Me. 1979)).

[¶10] Mr. Hebert argues that the mill manager's uncontradicted testimony that his history of work injuries represented 20% of the reason he was terminated establishes, as a matter of law, that Irving Lumber's decision to terminate him was rooted substantially or significantly in the exercise of his right to assert worker's compensation claims.

[¶11] The hearing officer, however, addressed the issue of Mr. Hebert's past work injuries in the decision. She found that Irving Lumber considered Mr. Hebert's previous work injuries, but concluded only "that these incidents, and Mr. Hebert's attitude about them, suggested that Mr. Hebert might not be taking full responsibility for his own safety." While not directly addressing the "20%" testimony, the hearing officer nonetheless made the requisite finding on motivation, based on the testimony as a whole, as well as her determination of credibility.[1] *See Maietta*, 2004 ME 97, ¶ 14; *cf*, *Lindsay v. Great N. Paper* Co., 532 A. 2d 151 (Me. 1987); *Shaver v. Poland Spring Bottling Corp.*, WCB 320-06-01 (July 31, 2006).

[1] The hearing officer in this case was presented with adequate evidence upon which to conclude that Irving Lumber was motivated to terminate Mr. Hebert because his repeated injuries demonstrated a cavalier attitude about safety in the workplace, and not because he filed workers' compensation claims. This is not a case, for instance, in which the employer terminated employment simply because the employee filed several claims. Such a decision could potentially run afoul of section 353. *See Bellefleur v. Fraser Paper Ltd.*, Me. W.C.B. No. 14-10, ¶ 14 n.2 (App. Div. 2014).

[¶12] A finding on the issue of motivation is factual in nature. *Delano*, 405 A.2d at 229; *see also Maietta*, 2004 ME 97, ¶ 17, 854 A.2d 223. Because the hearing officer's finding on that issue is supported by competent evidence, we affirm.

The entry is:

The hearing officer'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 (Supp. 2014).

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