WORKERS' COMPENSATION BOARD

STATE OF MAINE DECISION NO.: WCB-320-06-01

APPELLANT

LAURA LEE KLEIN, ESQ.
SR. STAFF ATTORNEY
WORKER ADVOCATE DIVISION
WORKERS' COMPENSATION BOARD
106 HOGAN RD
BANGOR ME 04401

APPELLEE

ROBERT J. PIAMPIANO, ESQ.
TROUBH HEISLER
PO BOX 9711
PORTLAND ME 04104-5011

AMICUS CURIÆ

JAMES J. MACADAM, ESQ.
MACADAM LAW OFFICES
208 FORE ST
PORTLAND ME 04101

JAMES W. CASE, ESQ.
MCTEAGUE HIGBEE CASE
PO BOX 5000
TOPSHAM ME 04086-5000

ALLAN M. MUIR, ESQ.
PIERCE ATWOOD
ONE MONUMENT SQ
PORTLAND ME 04101

Mail Date: 07/31/2006

WCB File No.: 04-001827 DOI: 01/18/2004

* *

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 20 days of receipt of this decision, and by filing a petition seeking appellate review with the Law Court within 20 days thereafter. *See* 39-A M.R.S.A. Section 322.

Pursuant to Board Rule Chapter 12 Section 19, all evidence and transcripts in this matter may be destroyed after 60 days unless (1) we receive written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed. The 60 days will not begin to run until all post-decree motions have been decided or otherwise disposed.

* *

ROBERT M. SHAVER
(Employee)
v.
POLAND SPRING BOTTLING CORP.
(Employer)
and
LIBERTY MUTUAL INSURANCE CO.
(Insurer)

BEFORE: DIONNE, CHAIR; AND COONEY, HILTZ, KIRKPATRICK, KOOCHER, MINGO& MONFILETTO, DIRECTORS

DECISION AND ORDER

1. The Board granted a request for review of a September 1, 2005 Hearing Officer Decision involving *Robert M. Shaver v. Poland Spring Bottling Co.* ("Poland Spring").

2. In issuing this decision, the Board has considered the record and the following written briefs: Brief of Appellant (Robert Shaver); Brief of Appellee (Poland Spring); Brief of Amicus Curiæ (Maine AFL-CIO); Brief of Amicus Curiæ (James J. MacAdam, Esq.); Brief of Amicus Curiæ (Maine State Chamber of Commerce, Maine Workers' Compensation Coordinating Council, and Maine Council of Self-Insureds); Reply Brief of Appellant to Amicus Curiæ's Brief; Appellee's Reply Brief to Briefs of Amici; and, Reply Brief of Appellant to Poland Spring's Brief.

3. Deliberations in this case were held on July 11, 2006. At the conclusion of the deliberations, the Board, for the reasons stated herein, upon a majority vote of its membership, reversed the Hearing Officer's decision. The vote was 4-3 (Directors Cooney, Koocher, and Mingo opposed).

4. The employee began working for the employer in 1984. Starting in 1994, the employee commenced working for the employer in Maine.

5. On January 18, 2004, near the end of a twelve-hour shift, the employee stumbled and fell. The employee struck his left knee on the concrete floor.

6. At the time, the employee didn't think anything of it, other than being embarrassed that he had tripped over his own feet, and thought everything was fine.

7. The employee did not report the fall to a supervisor on January 18, 2004.

8. The next morning, January 19, 2004, while kneeling down on his left knee, the employee realized that he might have injured his knee when he fell the previous day.

9. The employee reported the injury (i.e. the fall on January 18, 2004) to his supervisor that same morning.

10. At the time of the injury, the employer had in place an accident/injury reporting policy that read as follows:

    - All accidents must be reported <u>immediately</u> to a Department Resource. Failure to report Accidents will be grounds for dismissal.
    - Forklift Accidents – Do Not Move your forklift after an accident until cleared by a Department Resource. The Department Resource will

> investigate all accidents and fill out appropriate paperwork. Employee will complete the "Employee Vehicle and/or Accident" Report.
>
> - Personal Injury Accidents – Employees must report all accidents immediately to a Department Resource and fill out an accident report. Employees will follow the Poland Spring Medical Protocol should medical treatment be required. (Emphasis in the original.)

11. The employee was aware of the reporting policy prior to January 18, 2004.

12. Pursuant to this policy, the employee, on January 19, 2004, was terminated for failing to immediately report to a supervisor that he stumbled and fell on January 18, 2004.

13. The employee filed a Petition to Remedy Discrimination on November 12, 2004 seeking back wages, reinstatement and re-establishment of employee benefits.

14. In *Lindsay v. Great Northern Paper Co.*, 532 A.2d 151 (Me. 1987), the employee missed two months of work because of a work-related injury. When he returned to work, he was suspended without pay for fourteen days pursuant to the employer's "no fault" absenteeism policy. *Lindsay*, 532 A.2d at 152.

15. The policy at issue in *Lindsay* permitted four unexcused absences in any given four month period and provided that a fifth unexcused absence during that same four-month period would result in an oral warning. Pursuant to the policy, five or more unexcused absences during a subsequent four-month period would result in a suspension without pay for two weeks. *Lindsay*, 532 A.2d at 152.

16. The employee's absence, which was caused by his work-related injury, was the fifth unexcused absence in a subsequent four-month period. Thus, pursuant to the policy, the employee was suspended without pay for fourteen days. *Lindsay*, 532 A.2d at 152.

17. The Law Court agreed with the employee's argument that the employer's "'no fault' absenteeism policy, although facially neutral, . . . unlawfully discriminate[d] against him because it label[ed] his rightful absence because of a work-related injury as an unexcused absence." *Lindsay*, 532 A.2d at 153.

18. The Law Court also stated that the employer's policy "in essence deprived [the employee] of compensation to which he is entitled under the Act. To avoid [the fourteen-day suspension without pay], [the employee's] only recourse would have been

to work despite his injury, an alternative clearly at odds with the beneficent purposes of the Act." *Lindsay,* 532 A.2d at 153.

19. Section 353 of the Workers' Compensation Act states an "employee may not be discriminated against in any way for testifying or asserting any claim under this Act."

20. The employee in the case before the Board reported an injury within 90 days of its occurrence as permitted by 39-A M.R.S.A. § 301.

21. When he gave notice, the employee was "asserting a claim."

22. The employee was terminated because he did not report the injury immediately.

23. The employer's policy forced the employee to choose between reporting an injury or losing his job. Similar to *Lindsay*, the only way for the employee to have avoided being fired would have been to not file a claim, "an alternative clearly at odds with the beneficent purpose of the Act." *Lindsay*, 532 A.2d at 153. An Employee has a right to report a work related incident or injury without fear of retaliation by an Employer. If an Employer takes any disciplinary action against an Employee for the assertion of such a right, the Employee is protected by the Workers' Compensation Act, for the Employer has discriminated against the Employee.

24. By forcing the employee to choose between giving up his rights under the Act or suffer an adverse consequence, the employer's policy "operate[d] in a discriminatory manner to subvert the purposes of the Workers' Compensation Act."

25. Thus, the Board finds that the employer's decision to terminate the employee "'was rooted substantially and significantly in the employee's exercise of his rights under the Workers' Compensation Act.'" *Lindsay*, 532 A.2d at 154 (quoting *Delano v. City of South Portland*, 405 A.2d at 222, 229 (Me. 1979).

26. In addition, the notice period set forth in the Act was established by the Legislature. The Legislature extended the notice period to 90 days from 30 days effective January 1, 1993. The employer's policy in this case had the effect of shortening that period: The employer cannot substitute its judgment for that of the Legislature.

27. Furthermore, the Board finds that policies like the one at issue in this case would have the chilling effect of discouraging employees from reporting injuries. An Employee cannot be disciplined for timely reporting or claiming that he or she sustained a work-related injury. There is an inseparable nexus between "reporting an injury" and "an

employee's exercise of his rights under the Workers' Compensation Act." *Lindsay*, 532 A.2d at 154 (quoting *Delano v. City of South Portland*, 405 A.2d at 222, 229 (Me. 1979). Even if Poland Springs had legitimate policy concerns such as preventing fraud or further accident, the chilling effect cannot be ignored. If the Board upheld employment policies such as the Poland Springs policy in this case, it would have a significant negative impact on the operation of the workers' compensation system.

28. Finally, the Board finds that the failure to promptly reinstate the Employee would constitute ongoing discrimination. Even though Poland Springs may have had legitimate policy concerns when it took the action of terminating the Employee, the Board has found that those policies are contrary to the Workers' Compensation Act. Even if the Employer's concerns were legitimate at the time Mr. Shavers was terminated, the failure to reinstate the employee, when the employee has been terminated for exercising his rights under the Act, constitutes discrimination on an ongoing basis and must be remedied.

WHEREFORE, for the foregoing reasons, the employee's Petition to Remedy Discrimination is granted. The employer is ordered to reinstate the employee to his previous job, pay back wages until the employee is reinstated to his previous job, and re-establish the employee's benefits.

SO ORDERED.

WORKERS' COMPENSATION BOARD

Date	Paul R. Dionne, Chair
Date	Rodney Hiltz, Director
Date	Joan Kirkpatrick, Director
Date	Anthony Monfiletto, Director