JOHN BELLEFLEUR
(Appellant)

v.

FRASER PAPER LIMITED
(Appellee)

and

SEDGWICK CLAIMS MANAGEMENT SERVICES
(Insurer)

Conference held: September 4, 2013
Decided: March 17, 2014

Panel Members: Hearing Officers Greene, Jerome, and Stovall
By: Hearing Officer Jerome

[¶1] John Bellefleur appeals from a decision of a Workers' Compensation Board hearing officer (*Pelletier, HO*) denying his Petition to Remedy Discrimination filed in relation to a September 13, 2007, work injury. Mr. Bellefleur contends that the hearing officer (1) applied an incorrect legal standard when assessing whether Fraser Paper discriminated against him for asserting his workers' compensation rights, (2) erred when concluding that there was no discrimination, and (3) made a finding of fact regarding dishonesty that is inconsistent with a prior agreement of the parties. We disagree, and we affirm the hearing officer's decision.

I. BACKGROUND

[¶2] John Bellefleur works in the maintenance department at Fraser Paper's mill in Madawaska. He suffered a work-related injury to his left shoulder on September 13, 2007. He aggravated that injury on October 27, 2008, after another work incident. In May 2008, Mr. Bellefleur's orthopaedic surgeon, Dr. Michaud, restricted him from working at or above chest level with his left arm, and from lifting more than ten pounds. Fraser Paper accommodated these restrictions. After the October 2008 exacerbation, Dr. Michaud increased the restrictions to include minimal to no use of Mr. Bellefleur's left arm. Fraser Paper's physician issued a similar restriction. These restrictions presented obstacles to Mr. Bellefleur performing his job duties, but Fraser Paper nevertheless accommodated him, and he lost no time from work.

[¶3] Mr. Bellefleur declined requests to perform tasks on two specific occasions because of the restrictions on the use of his left arm. In early January of 2009, he declined to help "change out the roll" during a paper machine shutdown. In early February of 2009 he declined to go up to the mill roof to remove tarps. Mr. Bellefleur was excused from these tasks and reassigned to other duties.

[¶4] Fraser Paper received information during this period that Mr. Bellefleur was engaging in activities at home that exceeded his work restrictions. Fraser Paper authorized surveillance to be conducted. Mr. Bellefleur was videotaped over

a period of several months engaging in various activities including ice fishing, using an ice auger, handling a trailer hitch, lifting and carrying furniture, and cleaning his windshield. On July 1, 2009, Mr. Bellefleur attended a section 207 exam with Dr. Kimball, an orthopaedic specialist. He told Dr. Kimball that he had not been able to go ice fishing with his son because he could not use the ice auger.

[¶5] On July 22, 2009, Fraser Paper suspended Mr. Bellefleur with pay, and on August 11, 2009, terminated his employment. Fraser Paper charged that Mr. Bellefleur had been dishonest regarding his actual physical capabilities, given the evidence of his activities outside of the workplace and his statements to Dr. Kimball.

[¶6] Mr. Bellefleur grieved his suspension and termination pursuant to his union contract, and the case went to arbitration. The parties negotiated a settlement of the grievance, according to which Fraser Paper allowed Mr. Bellefleur to return to work without the loss of seniority but with no back pay, and agreed to strike all allegations of dishonesty from his employment records.

[¶7] Mr. Bellefleur also filed a Petition for Award and a Petition to Remedy Discrimination with the Board. He contended that Fraser Paper suspended him and ultimately terminated his employment for asserting his right under the Workers' Compensation Act not to work above his restrictions. The hearing officer granted Mr. Bellefleur's petition for award in part, awarding total incapacity benefits for

the closed-end period coinciding with the surgical repair of his shoulder and subsequent recuperation. However, the hearing officer denied the petition to remedy discrimination. The hearing officer found, based on substantial evidence in the record, that Fraser Paper took disciplinary action against Mr. Bellefleur because it believed at the relevant time, in good faith, that Mr. Bellefleur was being dishonest regarding the extent of his physical limitations.

[¶8] Mr. Bellefleur filed a motion for additional findings of fact and conclusions of law. The hearing officer issued additional findings, awarding partial incapacity benefits for the period between his discharge and reinstatement, but did not alter the decision on the discrimination claim. Mr. Bellefleur appeals.

II. DISCUSSION

[¶9] Mr. Bellefleur contends that the hearing officer applied an incorrect legal standard for establishing discrimination under 39-A M.R.S.A. § 353 (2001)[1]; that he erred as a matter of law when concluding that Fraser Paper did not discriminate against him for refusing to work above his restrictions; and erred

[1] Title 39-A M.R.S.A. § 353 (2001) provides, in relevant part:

> An employee may not be discriminated against by any employer in any way for testifying or asserting any claim under this Act. Any employee who is so discriminated against may file a petition alleging a violation of this section. The matter must be referred to a hearing officer for a formal hearing under section 315, but any hearing officer who has previously rendered any decision concerning the claim must be excluded. If the employee prevails at this hearing, the hearing officer may award the employee reinstatement to the employee's previous job, payment of back wages, reestablishment of employee benefits and reasonable attorney's fees.

when finding that he had been dishonest because the grievance settlement prohibited any allegation of dishonesty.

[¶10] The Appellate Division's role on appeal 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). The hearing officer's findings of fact are not subject to appeal. 39-A M.R.S.A. § 321-B(2) (Supp. 2013).

[¶11] Title 39-A M.R.S.A. § 353 states in part that "an employee may not be discriminated against by any employer in any way for testifying or asserting any claim under this Act." For purposes of a discrimination action, assertion of a claim means an assertion of a right under the Act. *Lindsay v. Great N. Paper Co.*, 532 A.2d 151, 153 (Me. 1987).

[¶12] In order to establish discrimination pursuant to section 353, an employee must demonstrate on a more likely than not basis that the adverse employment action was "rooted substantially or significantly in the employee's exercise of his rights under the Workers' Compensation Act." *Delano v. City of S. Portland*, 405 A.2d 222, 229 (Me. 1979). An employee is considered to have asserted a claim under the Act when the employee represents to an employer that

he is unable to work due to a work-related injury. *Lindsay*, 532 A.2d at 153. ("[A]ssertion of a right not to work while physically incapacitated as a result of a work-related injury constituted a 'claim' under the Workers' Compensation Act."). Similarly, the assertion of a right not to perform work that exceeds medical restrictions resulting from a work injury constitutes the assertion of a right under the Act. *See Delano*, 405 A.2d at 227.

[¶13] Mr. Bellefleur argues that the hearing officer wrongly required him to prove not only that Fraser Paper discharged him because he asserted his rights under the Act, but also that Fraser Paper had a punitive motive in doing so. The hearing officer stated that Mr. Bellefleur had "not met his burden of proof by persuasive evidence that the disciplinary action and loss of pay . . . was the result of punitive action taken by the employer in response to his work injury."

[¶14] The hearing officer did not misconceive the applicable legal standard. The hearing officer assessed Fraser Paper's motivation for terminating Mr. Bellefleur. There is competent evidence in the record supporting the finding that the adverse employment action was motivated by a good faith perception that Mr. Bellefleur was not being honest about the extent of his physical capabilities.[2]

[2] An employee's assertion of a right under the Act, and an employer's belief regarding the employee's truthfulness when making that assertion, are closely intertwined. The hearing officer in this case was presented with adequate evidence upon which to conclude that the adverse employment action was likely motivated by the Fraser Paper's good faith belief, and not Mr. Bellefleur's assertion of the right. This is not a case, for instance, in which the employer terminated employment simply because it did not believe

[¶15] Mr. Bellefleur also contends that the hearing officer erred when making a factual finding that he was dishonest, because the parties had reached an agreement during grievance proceedings to purge any reference to the discipline and allegations of dishonesty. He argues that by entering into the agreement, Fraser Paper waived its defense that it terminated him because it believed him to be overstating the effects of his work injury.

[¶16] Fraser Paper's motivation is the key fact in the case. *See Maietta v. Town of Scarborough*, 2004 ME 97, ¶ 14, 854 A.2d 223. There is no evidence that the terms of the agreement prevented Fraser Paper from presenting its defense to Mr. Bellefleur's discrimination claim. That defense concerns Fraser Paper's motivation for its decision. An agreement of the parties to strike allegations of dishonesty from the employment record does not prevent the hearing officer from hearing evidence and finding facts in a later action for discrimination relevant to the employer's state of mind at the time.

III. CONCLUSION

[¶17] The hearing officer neither misconceived the law nor applied the law arbitrarily when determining that Fraser Paper did not discriminate against Mr. Bellefleur for asserting a claim under the Workers' Compensation Act, and the

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the employee's claim of injury. Such a decision could potentially run afoul of section 353 absent evidence supporting the employer's position.

hearing officer's factual findings are supported by competent evidence in the record.

The entry is:

The decision of the hearing officer 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. 2013).

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