MANON OAKES
(Appellee)

v.

NORTHERN MAINE MEDICAL CENTER
(Appellant)

and

SYNERNET
(Insurer)

Conference held: August 19, 2020
Decided: February 28, 2022

PANEL MEMBERS: Administrative Law Judges Elwin, Hirtle, and Knopf
BY: Administrative Law Judge Hirtle

[¶1] Northern Maine Medical Center (NMMC) appeals from a decision of an administrative law judge (*Pelletier, ALJ*) of the Workers' Compensation Board granting Manon Oakes's Petitions for Award, for Payment of Medical and Related Services, to Determine Average Weekly Wage, and to Remedy Discrimination. NMMC contends that the ALJ erred by (1) finding that NMMC discriminated against Ms. Oakes in violation of 39-A M.R.S.A. § 353 (Pamph. 2020); (2) awarding back pay as a remedy for the discrimination after finding Ms. Oakes was unable to perform the job from which she was terminated; and (3) calculating Ms. Oakes's average weekly wage (AWW) using 39-A M.R.S.A. § 102(4)(A) (Pamph. 2020) instead of section 102(4)(B). We find no reversible error and affirm the decision.

I. BACKGROUND

[¶2] Manon Oakes worked as a housekeeper for Northern Maine Medical Center. Ms. Oakes was injured at work on February 18, 2015, impacting her left elbow and left shoulder. NMMC voluntarily paid for her medical treatment and intermittent lost time resulting from the injury. Her condition required surgery after which Ms. Oakes returned to work at modified duty with a restriction of no left arm use. NMMC attempted to accommodate this restriction, but Ms. Oakes complained that she felt forced to use both arms while on modified duty.

[¶3] In May of 2017, Ms. Oakes was taken out of work for a period, then released again to modified duty in September 2017, again with the left arm restriction. She was nevertheless asked to perform tasks, including moving objects to dust surfaces, that required the use of both arms.

[¶4] NMMC took disciplinary action against Ms. Oakes in April and September 2017; it issued written warnings that her job performance was sub-standard and admonished her to complete assigned tasks in a satisfactory manner. In conjunction with the September written warning, Ms. Oakes was required to sign a full-duty job description for her position as a housekeeper, even though she continued to be restricted due to the work injury.

[¶5] NMMC terminated Ms. Oakes's employment on October 17, 2017, on the stated bases that she was not staying on task, that she was unable to perform her

job duties in a satisfactory manner, and that she had lied about performing those duties. NMMC determined Ms. Oakes was no longer eligible for incapacity benefits because she had been discharged for cause, and it filed a notice of controversy with the board. Ms. Oakes filed her petitions.

[¶6] After a hearing, the ALJ granted Ms. Oakes's petitions, including the Petition to Remedy Discrimination. The ALJ found on a more likely than not basis that Ms. Oakes's termination was not due to any fault of her own, but "was substantially and significantly rooted in her work injury, the restrictions related to it, and her claim for benefits under the Act."

[¶7] The ALJ awarded Ms. Oakes partial incapacity benefits and calculated her AWW pursuant to 39-A M.R.S.A. § 102(4)(A) as $418.64. As a remedy for discrimination, the ALJ awarded Ms. Oakes "back wages from October 17, 2017 through the date of this decision at the rate of $418.64 per week . . . subject to offset for payments of partial incapacity benefits pursuant to Section 213[.]"

[¶8] NMMC filed a motion for further findings of fact and conclusions of law that led to significant revisions in the ALJ's decision.[1] Thereafter, NMMC filed this appeal.

[1] It is the revised decision that is summarized above.

II. DISCUSSION

A. Standard of Review

[¶9] 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). Because NMMC requested findings of fact and conclusions of law following the decision, the Appellate Division will "review only the factual findings actually made and the legal standards actually applied by the hearing officer." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Discrimination

[¶10] NMMC asserts that the ALJ erred when finding discrimination under section 353 because the ALJ also found that Ms. Oakes was unable to perform her pre-injury work tasks, and because the record lacks evidence of discriminatory intent. These contentions lack merit.

[¶11] Title 39-A M.R.S.A. § 353 prohibits discrimination against employees "in any way for testifying or asserting any claim" under the Workers' Compensation Act. The key question for the ALJ on NMMC's claim of discrimination was whether the motivation for Ms. Oakes's termination '"was rooted substantially or

significantly in the employee's exercise of [their] rights under the Workers' Compensation Act.'" *Maietta v. Town of Scarborough*, 2004 ME 97, ¶ 14, 854 A.2d 223 (quoting *Delano v. City of So. Portland*, 405 A.2d 222, 229 (Me. 1979)).

[¶12] NMMC mainly relies on *Lavoie v. Re-Harvest, Inc.*, 2009 ME 50, 973 A.2d 760, in support of its contention that the decision to terminate Ms. Oakes's employment could not be discriminatory because the ALJ found that she was not able to perform essential duties of her employment. In *Lavoie*, the employee had sustained a substantial work injury and was unable to perform any work, even a light duty job designed for him. *Id.* ¶ 4. Fewer than four weeks after the injury, the employer terminated Mr. Lavoie's employment, but from that point on, paid him total incapacity benefits voluntarily and without prejudice. *Id.* Mr. Lavoie filed a petition to remedy discrimination. *Id.* ¶ 5. The hearing officer granted the petition on the basis that Mr. Lavoie's "termination was discriminatory relative to other employees since it was based upon Mr. Lavoie's status as an injured worker unable to perform light duty work." *Id.* ¶ 13.

[¶13] The Law Court vacated that decision, reasoning:

> [W]here there is no question that the employee cannot perform any work functions weeks after the injury, and there is no evidence that the employee's health is likely to change in the near future, there is no requirement in the law that the employer maintain a nonworking employee on the rolls for long periods of time during which the employee is totally unable to work. Rather, the employer is required to act promptly in responding to the claim, to pay compensation and

> furnish medical and other services, and to otherwise comply with the Workers' Compensation Act.

Id. ¶ 14; *see also Jandreau v. Shaw's Supermarkets, Inc*., 2003 ME 134, ¶ 13, 837 A.2d 142 (concluding that "the decision to terminate [the employee] was not discrimination . . . because it was based on legitimate employment considerations directly bearing on the employee's physical ability to return to work.").

[¶14] The ALJ determined that this case is distinguishable from *Lavoie.* Although the ALJ found that the work injury left Ms. Oakes unable to perform some of her work duties, the ALJ also found that NMMC terminated Ms. Oakes's employment because she asserted a workers' compensation claim. Moreover, the employer in *Lavoie* immediately paid all workers' compensation benefits after terminating the employment. Here, NMMC denied Ms. Oakes's claim for workers' compensation benefits because it claimed to have fired her due to her own fault. We find no error in the ALJ's assessment that *Lavoie* does not govern the outcome in this case.

[¶15] With respect to NMMC's contention that the record lacks evidence of motivation rooted in Ms. Oakes's exercise of rights under the Act, we also find no reversible error.

[¶16] The ALJ heard extensive evidence regarding Ms. Oakes's post-injury conduct at work, and found that two of NMMC's witnesses, including her supervisor, were not credible when testifying to her alleged deficiencies in

performing her work tasks. In particular, the ALJ found the supervisor "unworthy of belief" when testifying that she had lied about the cleaning tasks she had performed.

[¶17] The ALJ also made the following findings that are based on competent evidence in the record: Ms. Oakes was knowingly and repeatedly asked to perform tasks beyond her restrictions, and disciplined for not being able, due to her work injury, to perform those tasks. The ALJ found that asking her to sign a full duty job description in the context of being disciplined, "sent an implied message to Ms. Oakes to stop complaining or she would lose her job."

[¶18] Ms. Oakes's supervisor gave conflicting testimony under oath about a test he devised, by which he sprayed a liquid mixture on surfaces intending to demonstrate that Ms. Oakes did not clean those surfaces. Based on this test, the supervisor concluded that Ms. Oakes lied about performing her duties and he used the results to support the decision to terminate her employment. The unemployment hearing officer characterized the test as a "flawed system" that used an "unproven recipe" that failed to show that Ms. Oakes did not perform her duties. The ALJ found that the supervisor should have known that the testing fluid was an unreliable indicator of whether Ms. Oakes completed work duties and "could not have formed the basis of a legitimate discharge for cause."

[¶19] Further, Ms. Oakes was first told not to ask for assistance from coworkers, but to report any difficulties to her supervisor. The supervisor later told

her to ask for assistance, which was impractical because it would have required a second housekeeper to be with her at all times while she was dusting. She was assigned shifts on alternate weekends when staff levels were low, making it difficult to obtain assistance. The ALJ thus found that the supervisor acted in bad faith when instructing Ms. Oakes to ask for help. Additionally, she was at times assigned administrative work at the charge nurse's station, which required little work, yet she was disciplined for not keeping on task.

[¶20] In sum, the ALJ found the circumstances surrounding Ms. Oakes's termination "amount to compelling evidence that the employer's motivation for termination for 'fault' was the work injury."

[¶21] A finding on the issue of motivation is factual in nature. *See Maietta*, 2004 ME 97, ¶ 17, 854 A.2d 223. Although the evidentiary record contains no *direct* evidence of NMMC's intentions, it nevertheless contains competent evidence that provides a basis in reason and logic for the ALJ's inferred finding that Ms. Oakes's termination was rooted substantially or significantly in the exercise of her rights under the Workers' Compensation Act. *See, e.g., Dumont v. AT&T Mobility Servs.*, Me. W.C.B. No. 19-11, ¶ 15 (App. Div. *en banc* 2019).

C. Back Wages Remedy

[¶22] Alternatively, NMMC argues that the ALJ erred in ordering payment of any back wages as a remedy for discrimination because Ms. Oakes also sought

incapacity benefits and was found unable to perform her pre-injury job, citing *Delano v. Town of S. Portland*, 405 A.2d 222 (Me. 1979).[2] We find this argument unsupported by applicable authority as the Court in *Delano* interpreted a prior version of the anti-discrimination provision of the Workers' Compensation Act and the current version offers the different remedy of "back wages" rather than that discussed in *Delano*: "net wages lost."

[¶23] Specifically, title 39-A M.R.S.A. § 353 provides the following remedies for discrimination:

> If the employee prevails at this hearing, the administrative law judge may award the employee reinstatement to the employee's previous job, *payment of back wages*, reestablishment of employee benefits and reasonable attorney's fees.

[2] The Court stated in *Delano:*

> Should the Commissioner find on re-hearing that the employee's assertion of right under the Workers' Compensation Act was a substantial factor motivating the employee's demotion in job classification, then the Commissioner should determine in Delano's petition for further compensation on account of partial incapacity (which has not been acted upon), whether the employee, because of his physical condition, is unable to perform the duties of Equipment Operator II or is unable to perform those duties in a manner which would not reasonably entail a recurrence of the original injury, and if so, to determine under the Act whether the employee is entitled to further compensation. Notwithstanding employer discrimination in the instant case, should that finding be legally reached by the Commissioner on re-hearing, Delano would not be entitled under section 111 to "net wages lost" for any period of time following a Commission decision that he cannot perform the duties of Equipment Operator II or is unable to perform those duties in a manner which would not subject him to aggravation of his present physical condition, nor, if he should be found capable of performing the duties of Equipment Operator II, for any period of time following reinstatement of the employee by the employer to the higher job classification either voluntarily or on Commission order.

405 A.2d at 229-30.

(Emphasis added). In *Delano*, a prior version of the discrimination statute was at issue, which provided for an award of "net wages lost" as a remedy, rather than "back wages." 39 M.R.S.A. § 111.[3] After the *Delano* decision in 1979, the Legislature acted in 1985 to change the remedies available for discrimination under the Workers' Compensation Act, removing the term "net wages lost," and replacing it with "back wages." P.L. 1985, ch. 118 (codified at 39 M.R.S.A. § 111). The amended language was carried over into section 353 when the Act was repealed and replaced effective January 1, 1993. P.L. 1991, ch. 885, §§ A-7, A-8.[4]

[¶24] The term "back wages" used in section 353 is not defined anywhere in the Act. The ALJ in this case interpreted the term to permit an injured employee under the Act to receive back pay at the rate she was earning when injured, reduced

[3] Title 39 M.R.S.A. section 111 provided:

> No employee shall be discriminated against by any employer in any way for testifying or asserting any claim under this Act. Any employer who so discriminates against any employee shall be liable to such employee on petition before the commission and hearing before the commission, for all *net wages lost* suffered by such employee by reason of such discrimination.

(Emphasis added).

[4] The question of whether an award of back wages under section 353 can be reduced by workers' compensation benefits paid was raised but not reached in *Jandreau v. Shaw's Supermarkets, Inc.*, 2003 ME 134, 837 A.2d 142. In that case, the injured employee was receiving incapacity benefits pursuant to a decree and was terminated after being unable to return to work within six months. *Id.* at ¶¶ 3, 4. The employee prevailed on a discrimination petition and was awarded "back pay from July 26, 2000, to the present and continuing until [the employee] is reinstated, less the workers' compensation paid to her." *Id.* at ¶ 5. On appeal, the Law Court reversed the finding of discrimination and therefore did not reach the issue whether the remedy of "back wages" was appropriately reduced by incapacity benefits paid. *Id.* at ¶ 1. The contention here is slightly different—whether the employee can be awarded back wages as a remedy for discrimination in addition to an award of incapacity benefits—not whether an award of back wages is appropriately reduced by a concurrent award of incapacity benefits.

by the amount of partial incapacity benefits ordered on the merits of the wage loss aspect of the claim.[5] NMMC cites to no applicable authority that would support a contrary interpretation. Because the ALJ's interpretation of the back wages provision is consistent with the plain meaning of the statutory language, we affirm the award. *See Graves v. Brockway-Smith*, 2012 ME 128, ¶ 9, 55 A.3d 456 (instructing the reviewing body to look first to the plain meaning of the statutory language in issue).

D. Average Weekly Wage

[¶25] NMMC contends that the ALJ erred when calculating Ms. Oakes's AWW pursuant to 39-A M.R.S.A. § 102(4)(A) instead of section 102(4)(B) because, although she worked more than 200 days, her wages varied from week to week. We discern no error.

[¶26] Payment to an injured worker pursuant to the Act "is intended to compensate [the employee for] loss of capacity to earn." *Thibeault's Case*, 119 Me. 336, 337-38, 111 A. 491, 491-92 (1920). Thus, the worker's average weekly wage must be calculated by looking to

> a period of employment . . . sufficiently long, to obtain a fair average of his earnings as a basis of computation—not his earnings at the time of injury or for a short period before, when they may be at an unusually low figure, thus operating unfairly to him, or at an unusually high figure, thus operating unfairly to the employer, but taken over a period

[5] An amount that is set by statute to be at least one-third less than the injured employee's pre-injury earnings. 39-A M.R.S.A. § 213(1)(B).

> long enough to show the variations in his earning power incident to the employment.

Id. The purpose of section 102(4) "is to provide a method of arriving at an estimate of the employee's future wage earning capacity as fairly as possible." *Fowler v. First Nat. Stores, Inc.*, 416 A.2d 1258, 1260 (Me. 1980) (quotation marks omitted). The methods of calculating AWW are set forth in paragraphs A through D of 39-A M.R.S.A. § 102(4), and the appropriate method is chosen by proceeding sequentially through the four alternatives. *Alexander v. Portland Natural Gas, Co.*, 2001 ME 129, ¶ 101, 778 A.2d 343.

[¶27] Title 39-A M.R.S.A. § 102(4), which governs AWW, provides in relevant part:

> The term "average weekly wages" or "average weekly wages, earnings or salary" is defined as follows.
>
> > **A.** "Average weekly wages, earnings or salary" of an injured employee means the amount that the employee was receiving at the time of the injury for the hours and days constituting a regular full working week in the employment or occupation in which the employee was engaged when injured; . . . In the case of piece workers and other employees whose wages during that year have generally varied from week to week, wages are averaged in accordance with the method provided under paragraph B.
> >
> > **B.** When the employment or occupation did not continue pursuant to paragraph A for 200 full working days, "average weekly wages, earnings or salary" is determined by dividing the entire amount of wages or salary earned by the injured employee during the immediately preceding year by the total number of weeks, any part of which the employee worked during the same period. . . .

[¶28] NMMC argues that Ms. Oakes rarely earned the same amount each week, that the largest variance between weeks was 19% and due to that variance, paragraph A did not apply; thus the ALJ should have applied paragraph B. However, "[t]he mere fact that wages are not identical from week to week does not mean that the wages 'varied' for purposes of subparagraph A. The extent and frequency of fluctuation will determine whether the wages varied for purposes of averaging." *McAadam v. United Parcel Serv.*, 2001 ME 4, ¶ 17, 763 A.2d 1173.

[¶29] In *McAdam*, the employee's wages increased approximately 46% from the lowest to highest weeks and varied substantially within that range from week to week. *Id.* The Law Court determined, based on that variance, that the hearing officer acted within his authority when determining that averaging was appropriate under paragraph B. *Id.*

[¶30] In this case, the ALJ found that although there was a variance in Ms. Oakes's biweekly earnings before the injury, "[t]he variance . . . is not extensive and easily explained by increases in the rate of pay during the 52 weeks preceding the injury." We see no error in this analysis, and conclude that the ALJ acted within his authority when applying paragraph A.

III. CONCLUSION

[¶31] The ALJ did not commit reversible error by finding discrimination in violation of 39-A M.R.S.A. § 353, nor by ordering the remedy of back wages less

incapacity benefits. Further, the ALJ did not commit reversible error by calculating Ms. Oakes's AWW pursuant to 39-A M.R.S.A. § 102(4)(A).

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, 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.

Attorney for Appellant:
Allan M. Muir, Esq.
PIERCE ATWOOD, LLP
254 Commercial Street
Portland, ME 04101

Attorney for Appellee:
William J. Smith, Esq.
SMITH LAW OFFICE, LLC
P.O. Box 7
Van Buren, ME 04785