ESTATE OF DONALD JUSTARD
(Appellant)

v.

NEWPAGE CORPORATION
(Appellee)

and

SEDGWICK CLAIMS MANAGEMENT SERVICE

Argued: July 23, 2014
Decided: October 22, 2015

PANEL MEMBERS: Administrative Law Judges[1] Elwin, Collier, and Goodnough

Majority: Administrative Law Judges Elwin and Goodnough
Dissent: Administrative Law Judge Collier

BY: Administrative Law Judge Goodnough

[¶1] The Estate of Donald Justard appeals from a decision of a Workers' Compensation Board Administrative Law Judge (*Jerome, ALJ*) denying the Estate's Petition to Remedy Discrimination, brought pursuant to 39-A M.R.S.A. § 353 (2001).[2] The Estate contends that the administrative law judge (ALJ) erred by concluding that NewPage Corporation did not discriminate against Mr. Justard

[1] Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers are now designated administrative law judges.

[2] Mr. Justard passed away just prior to the oral argument in this case. Under the circumstances, the Division will permit an amendment to the appeal to substitute the Estate of Donald Justard as the appellant.

by paying him less in bonus and vacation pay, pursuant to the terms of a collective bargaining agreement, because he was absent from work due to a work injury. We affirm the ALJ's decision.

I. BACKGROUND

[¶2] Donald Justard was a long-time employee at NewPage's Rumford mill. Under the collective bargaining agreement entered into between NewPage and the union to which Mr. Justard belonged, employees were entitled to annual vacation time based on the hours they worked in the prior year. An employee could choose to take the accumulated vacation as time off, or work the hours and receive additional pay. The collective bargaining agreement also provided for a contract ratification bonus in 2010 based on each employee's earnings during the prior year.

[¶3] Mr. Justard sustained a work-related bilateral shoulder injury on August 26, 2007. He was out of work due to the injury from April 23 to November 5, 2009, and again from January 13, 2010, to January 26, 2011. Because he had been absent as a result of his work injury, Mr. Justard received less in vacation and bonus pay when NewPage applied the terms of the collective bargaining agreement to his situation. Mr. Justard filed a Petition to Remedy Discrimination, claiming that NewPage paid him less in vacation and bonus pay because he asserted his rights under the Workers' Compensation Act.

[¶4] A hearing was held over two days, on June 20 and July 25, 2013. Thereafter, the ALJ denied Mr. Justard's Petition, concluding that although the collective bargaining agreement's "provisions present a consequence to an employee's absence from work on account of a work-related injury," she found "no evidence that the provisions are intended to be either retaliatory or punitive or are otherwise rooted substantially or significantly in the exercise of Mr. Justard's rights under the Act."

[¶5] Mr. Justard filed a Motion for Additional Findings of Fact and Conclusions of Law, which the ALJ denied. He then filed this appeal.

II. DISCUSSION

A. Standard of Review

[¶6] The Appellate Division is "limited to assuring that the [ALJ's] factual 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." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). Because Mr. Justard requested findings of fact and conclusions of law, we will "review only the factual findings actually made and the legal standards actually applied by the [ALJ]." *Daley v. Spinnaker Inds., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446.

B. Title 39-A M.R.S.A. § 353 and Case Law

[¶7] Title 39-A M.R.S. § 353 prohibits discrimination against employees "in any way for testifying or asserting any claim" under the Workers' Compensation Act.[3] The key question for the ALJ on Mr. Justard's claim of discrimination was whether NewPage's obligation to pay him less in vacation and bonus pay under the terms of the collective bargaining agreement "was rooted substantially or significantly in the employee's exercise of his rights under the Workers' Compensation Act." *Delano v. City of So. Portland*, 405 A.2d 222, 229 (Me. 1979).

[¶8] The Estate contends that this case should be governed by *Lindsay v. Great N. Paper Co.*, 532 A.2d 151 (Me. 1987). In *Lindsay*, the employee had taken time off while he recovered from a work injury and, pursuant to the company's no-fault policy concerning absences, was suspended without pay for two weeks upon his return to work. *Id.* at 152. Mr. Lindsay had already used up his

[3] 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.

allotment of unexcused absences when he was injured, and the absence resulting from his work injury triggered the suspension under the policy. *Id.* The Law Court held that the effect of the company's policy was to penalize Mr. Lindsay for exercising his rights under the Act—in essence, depriving him of compensation to which he was entitled. *Id.* at 153.

[¶9] The Court, affirming the hearing commissioner, focused on the factual determination that was required to be made:

> The correct principle of law to be applied by the hearing commissioner in reaching his conclusion was to determine whether as a fact Lindsay's suspension was rooted substantially or significantly in the employee's exercise of his rights under the Workers' Compensation Act. The hearing commissioner explicitly so found and we cannot say on this record that that finding was clearly erroneous.

Lindsay, 532 A.2d at 154 (citations and quotation marks omitted). *See also Shaver v. Poland Spring Bottling Corp.*, WCB 320-06-01 (July 31, 2006) (full Board holding, pursuant to *Lindsay*, that employee who was terminated for failure to comply with a workplace policy that required immediate reporting of work injuries was discriminated against for exercising his right to give notice within ninety days of injury).[4]

[¶10] After deciding *Lindsay,* the Law Court on at least two occasions examined facially neutral employer policies that operated to the detriment of the

[4] The full Workers' Compensation Board considered *Shaver v. Poland Spring* pursuant to 39-A M.R.S.A. § 320 (Supp. 2014).

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employee, finding no discrimination. In *Laskey v. Sappi Fine Paper,* as part of a plant downsizing, the employer decided that employees who were unable to perform all of the essential functions of their jobs would no longer have their work restrictions accommodated and would be terminated. 2003 ME 48, ¶ 5, 820 A.2d 579. The Court concluded that Mr. Laskey's termination pursuant to the policy was based on bona fide employment considerations, affirming the ALJ's finding that it was not related substantially or significantly to his exercise of rights under the Act. *Id.* ¶ 15.

[¶11] In *Jandreau v. Shaw's Supermarkets, Inc*., 2003 ME 134, 837 A.2d 142, the Law Court addressed a facially neutral absenteeism policy. The employer had terminated an employee who had been out of work for six months due to a work-related injury, pursuant to the company's no-fault absenteeism policy. *Id.* ¶ 3. Unlike the employee in *Lindsay*, who was physically capable of returning to work after his injury, Ms. Jandreau was not able to return to her pre-injury employment. *Id*. ¶ 13. The Court concluded that Ms. Jandreau's termination was not discrimination prohibited by section 353 but rather was "based on legitimate employment considerations directly bearing on the employee's physical ability to return to work." *Id*.

[¶12] In *Maietta v. Town of Scarborough*, 2004 ME 97, 854 A.2d 223, the Law Court examined another excessive absenteeism case. The employee was

terminated following several periods of leave and pursuant to a doctor's authorization to be out of work indefinitely. The Court stated the standard for evaluating claims of unlawful discrimination as follows: "we look to the motivation for an adverse employment action to determine if a discrimination claim under section 353 has been established." *Id.* ¶ 14. Because the ALJ made no findings regarding the employer's motivation, the Court remanded the case for a determination whether "the motivating factor for the discipline was Maietta's assertion of his workers' compensation claim, rather than policies prohibiting excessive absenteeism." *Id.* ¶ 18.

[¶13] The Court in *Maietta* focused on the critical requirement that the ALJ render factual findings necessary for adequate appellate review:

> While the exact words 'motivated by assertion of the workers' compensation claim' need not appear in the decision, a decision finding discrimination pursuant to 39-A M.R.S.A. § 353, after a request for findings of fact is made, must include some finding, in whatever words the hearing officer chooses to adopt, that indicates that assertion of the workers' compensation claim was the primary basis or cause for the discipline or termination of an employee.

Id. ¶ 18. *See also Delano v. City of So. Portland,* 405 A.2d 222, 229 (Me. 1979) (holding that an employer's reclassification of an employee to a lower pay scale based on his inability to perform certain job duties due to a work injury was not discriminatory because the "reclassification [was] based on the lack of bona fide qualification for the higher classified occupation"); *Lavoie v. Re-Harvest, Inc.*,

2009 ME 50, ¶¶ 13-14, 973 A.2d 760 (vacating grant of petition to remedy discrimination; reasoning that firing an employee within a short period after a work injury does not demonstrate improper motive when employee had no prospect of returning to work in the near future).

[¶14] The ALJ distinguished *Lindsay* in part on the ground that it involved a "unilaterally imposed" employer policy on absenteeism, whereas this case involves the application of a bargained-for agreement between the parties.[5] The ALJ specifically found as fact that the provisions of the collective bargaining agreement that resulted in less compensation to Mr. Justard were not "intended to be either retaliatory or punitive" and were not "otherwise rooted substantially or significantly in the exercise of Mr. Justard's rights under the Act." These findings of fact are exactly what the Court in *Maietta* required of ALJs in evaluating the specific allegedly discriminatory actions at issue.

[¶15] The ALJ recognized that the bargained-for agreement regarding absenteeism was not without "consequence" to Mr. Justard. It deprived him of bonus and vacation income he otherwise might have earned had he not been injured, assuming, of course, he had not missed work for any other reasons in the prior year. However, because the ALJ found as fact that there "was no evidence

[5] The ALJ also distinguished *Lindsay* on the alternative basis that it was premised on the rule of liberal construction that was removed in later versions of the Act. The Court in *Lindsay* referred to the "beneficent purposes" of the Act, 532 A.2d at 153, rather than the rule of construction.

that the provisions are intended to be either retaliatory or punitive or are otherwise rooted substantially or significantly in the exercise of Mr. Justard's exercise of right under the Act" she concluded, correctly, that section 353 of the Act had not been violated.

[¶16] We discern no legal error in the ALJ's analysis. The facts of this case are distinguishable from *Lindsay*. The ALJ's decision is consistent with the Law Court's other analogous precedents in discrimination cases, particularly the Court's admonition in *Maietta* to render findings of fact regarding motive. The ALJ neither misconceived nor misapplied the law when denying the Petition to Remedy Discrimination.

III. CONCLUSION

The entry is:

The ALJ's decision is affirmed.

Administrative Law Judge Collier, dissenting

[¶17] I respectfully dissent. The effect of applying the collective bargaining agreement to Mr. Justard's situation was to penalize him for asserting a right that has been recognized as protected by the Workers' Compensation Act—taking time off to recover from his work-related injury. *Lindsay v. Great N. Paper*, 532 A.2d 151, 153 (Me. 1987). The Law Court's decision in *Lindsay* remains good law and

is on all fours with the facts of this case. Therefore, in my view, the ALJ's decision should be vacated.

[¶18] Mr. Justard missed work in 2009 and 2010 while undergoing three shoulder surgeries for his work-related injury. The ALJ specifically found that he

> received three weeks of vacation pay in 2010. He would have received four weeks of vacation pay, but . . . [b]ecause Mr. Justard missed work in 2009 on account of the effects of his work injury, he received less vacation time than he would have if he had been able to work during that period. Likewise, Mr. Justard received no vacation pay in 2011 because he missed all of 2010 due to the effects of his work injury.

She also found that "[b]ecause Mr. Justard's wages were reduced during the relevant period on account of lost time related his work injury, he received approximately $1000 less of a bonus than he would have otherwise been entitled to." These findings are difficult to square with her conclusion that the consequence of his absence from work was not substantially or significantly rooted in the exercise of his rights under the Act.

[¶19] I would conclude that the fact that the employer's action in this case was taken pursuant to a collective bargaining agreement rather than an employer-imposed policy is of no consequence.[6] To the extent that the collective bargaining agreement here is viewed as a waiver of the employees' rights under the Act, the

[6] The Court in *Lindsay* did not discuss whether that company's policy was the subject of collective bargaining, and did not analyze the case on that basis. The Court did note that the "Act in effect superimposes on the underlying employment contract a vested right to receive compensation and a fixed obligation to pay it upon the happening of an industrial accident." *Lindsay*, 532 A.2d at 153.

Act expressly prohibits such a waiver. 39-A M.R.S.A. § 106 (2001).[7] Furthermore, the collective bargaining agreement by its very terms yields to any contrary state or federal legislation. It contains a provision that states: "The parties intend that this Agreement shall conform to the provisions of all State and Federal legislation. If any provision herein is held to be in contravention of such statutory provisions by a court or agency of competent jurisdiction such provisions shall be inoperative and unenforceable."

[¶20] As evidence of the employer's intent to discriminate, or lack thereof, the terms of the collective bargaining agreement are indistinguishable from the workplace policy that was at issue in *Lindsay.* As the Law Court stated:

> The effect of Great Northern's 'no fault' absenteeism policy in this case was to penalize an employee, like Lindsay, who became subject to a fourteen-day suspension without pay because of work-related injury. As a result, Great Northern in essence deprived Lindsay of compensation to which he is entitled under the Act. To avoid this result, Lindsay's only recourse would have been to work despite his injury, an alternative clearly at odds with the beneficent purposes of the Act.

532 A.2d at 153.

[7] Title 39-A M.R.S.A. § 106 (2001) provides, in relevant part: "No agreement by an employee, unless approved by the board or by the Commissioner of Labor, to waive the employee's rights to compensation under this Act is valid." The record contains no such approval. The Court in *Lindsay* cited the non-waiver provision in the prior Act, 39 M.R.S.A. § 67, in concluding that "although Lindsay's acceptance of the employment at Great Northern implied acceptance of the absenteeism policy as a term of employment . . . it cannot be construed as a waiver of his rights to compensation under the Act." *Lindsay*, 532 A.2d at 153 (citation omitted).

[¶21] The majority concludes that *Laskey v. Sappi Fine Paper*, 2003 ME 48, ¶ 5, 820 A.2d 579, and *Jandreau v. Shaw's Supermarkets, Inc*., 2003 ME 134, 837 A.2d 142, control the outcome here. In those cases, the Law Court focused on the employer's motivation when taking an adverse employment action pursuant to an overtly neutral workplace policy. Finding no punitive motive in the employer's application of the workplace policies, the Court found no discrimination. *See also Maietta v. Town of Scarborough*, 2004 ME 97, 854 A.2d 223.

[¶22] However, in those cases, the Court also considered that there were "legitimate employment considerations" for applying the workplace policies to the employees who had exercised their rights under the Act. *Jandreau*, 2003 ME 134, ¶ 13. Ms. Jandreau, for example, was not able to return to work due to her workplace injury. *Id.* Mr. Laskey returned to work but with restrictions and limitations on the assignments he could perform. *Laskey*, 2003 ME 48, ¶¶ 2-4. The Court noted in *Jandreau* that the Workers' Compensation Act does not require an employer to retain an employee who can "no longer meet the requirements of a job." *Jandreau*, 2003 ME 134, ¶ 13; *see also Lavoie v. Re-Harvest*, 2009 ME 50, ¶ 17, 973 A.2d 760.

[¶23] Thus, in *Jandreau* and *Laskey*, legitimate employment considerations regarding the ongoing nature of the employment relationship between the parties counterbalanced the negative effects that the neutral workplace policies had on

employees exercising their rights under the Act. That was not the case in *Lindsay*, and it was not the case in *Shaver v. Poland Spring Bottling Corp.*, WCB 320-06-01 (July 31, 2006). In *Shaver*, the employer had a workplace policy requiring employees to report any work injury immediately. *Id.* Mr. Shaver fell and injured his left knee at work, but did not report the occurrence until the next day. *Id.* He was fired for failing to comply with the policy. *Id.* The Board determined that the company's policy, though facially neutral, was discriminatory as applied to Mr. Shaver. *Id.* Following *Lindsay*, the Board reasoned that the policy constituted discrimination under the Act, even though the employer had legitimate concerns behind the policy, because it (1) forced an employee to choose between reporting an injury or keeping his job; (2) shortened the ninety-day notice period provided for in the Act for reporting an injury; and (3) would have the chilling effect of discouraging employees from reporting work injuries. *Id.*

[¶24] In *Lindsay* and *Shaver*, the Court and the full Board focused on the effects of a neutral policy on the employee. Because in those cases there were negative consequences to the employees for the exercise of their rights, not counterbalanced by compelling business interests, it was determined that the

employers had discriminated.[8] The employer's motive was not a decisive factor in those cases.[9]

[¶25] In this case, although the ALJ made a finding that the employer was not motivated to retaliate against Mr. Justard for exercising his workers' compensation rights, she also found that application of the collective bargaining agreement had a negative effect on him—less income—as a result of the exercise of his rights. And, critically, she made no finding that there were legitimate employment considerations for applying the agreement in a manner that disadvantaged Mr. Justard for exercising his rights. Accordingly, I conclude that this case is more closely analogous to *Lindsay* and *Shaver* than to *Jandreau* and *Laskey*. I would vacate the ALJ's decision and remand for further proceedings.

[8] *See also Lee v. Cooper-Weymouth*, WCB-03-729 (January 23, 2004). In that case, the Law Court granted the employee's petition for appellate review and summarily vacated a decision in which the ALJ had denied a petition to remedy discrimination, citing *Laskey*. Mr. Lee had been disciplined by being given an "occurrence" pursuant to a facially neutral absenteeism policy for attending a workers' compensation mediation and hearing. The Court found it apparent that the "employer's action in this case was punitive and unsupported by a compelling business purpose," and remanded the case for a determination of discrimination pursuant to *Lindsay*. The Court's Order in *Lee* demonstrates that, even after *Jandreau* and *Laskey*, there are circumstances in which the effects of a facially neutral workplace policy can result in discrimination against employees for exercising their rights under the Act.

[9] In *Maietta v. Town of Scarborough*, 2004 ME 97, 854 A.2d 223, the Court emphasized the focus on motivation for an adverse employment decision, but did not discuss or explain *Lindsay*.

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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