MICHAEL BAILEY
(Appellant)

v.

PAUL G. WHITE TILE CO., INC.
(Appellee)

Argued: September 30, 2021
Decided: August 24, 2022

PANEL MEMBERS: Administrative Law Judges Knopf, Pelletier, and Stovall
BY: Administrative Law Judge Knopf

[¶1] Michael Bailey appeals a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) in which the ALJ denied his Petition to Remedy Discrimination. *See* 39-A M.R.S.A. § 353. Mr. Bailey contends the ALJ erred in determining he failed to establish his employment was terminated because he asserted a claim or exercised a right, or the termination was rooted substantially or significantly in the exercise of his rights, under the Workers' Compensation Act. We affirm the decision.

I. BACKGROUND

[¶2] On November 19, 2018, Mr. Bailey was installing tile for a PWT client in Auburn. While on his way to lunch, he slipped on a piece of snow-covered plywood on the client's premises, and nearly fell. He reported a low back injury to

PWT's human resources coordinator and his supervisor that day.[1] He did not seek medical treatment at that time and missed no time from work due to the incident; nor did he fill out any paperwork to report a workers' compensation claim.

[¶3] At a Christmas party in December 2018, Jonathan White, one of the owners and the president of the company, commented to Mr. Bailey about his back, to which Mr. Bailey responded that he thought it would improve with rest. Mr. White replied to the effect that "It better…. Your job depends on it." Mr. Bailey testified he feared for his job if he made an issue of his back injury.

[¶4] Approximately six months later, on June 3, 2019, Mr. Bailey told Mr. White he would be taking a leave of absence for back surgery in November 2019 and he had secured short-term disability benefits as income while he recovered. On June 12, 2019, Mr. White called Mr. Bailey and terminated his employment.

[¶5] In July 2019, Mr. Bailey filed his Petition to Remedy Discrimination pursuant to 39-A M.R.S.A. § 353.[2] At the hearing, he argued that PWT discriminated against him by terminating his employment after he had told Mr. White his plans to

[1] Mr. Bailey did not argue that by reporting the injury he asserted a claim or exercised a right.

[2] Title 39-A M.R.S.A. § 353 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 an administrative law judge for a formal hearing under section 315, but any administrative law judge who has previously rendered any decision concerning the claim must be excluded.

undergo surgery for a condition Mr. White knew was work-related and about which Mr. White had threatened Mr. Bailey's job. PWT defended on the ground that Mr. Bailey was fired for performance issues.

[¶6] Although the ALJ generally credited Mr. Bailey's version of events, she concluded Mr. Bailey failed to establish that PWT had discriminated against him when terminating his employment, finding Mr. Bailey did not prove a violation of section 353. Mr. Bailey filed a Motion for Findings of Fact and Conclusions of Law, which the ALJ denied. Mr. Bailey appeals.

II. DISCUSSION

A. Discrimination

[¶7] 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. In a discrimination action, assertion of a claim means an assertion of a right under the Act. *Delano* v. *City of S. Portland*, 405 A.2d 222, 227 (Me. 1979) ("We hold that, in the use of the expression 'asserting any claim under this Act' in 39 M.R.S.A., § 111, the Legislature was referring to any right conferred by the Workers' Compensation Act on the employee, and not merely to the voicing of a demand for benefits by petition or otherwise.").[3] To establish discrimination

[3] Title 39 M.R.S.A. § 111 was the predecessor statute to section 353, which in relevant part contained nearly identical language to section 353.

pursuant to section 353, an employee must demonstrate on a more likely than not basis that the motivation for the adverse employment action was "rooted substantially or significantly in the employee's exercise of [their] rights under the Workers' Compensation Act." *Id.* at 229.

[¶8] Mr. Bailey contends the ALJ erred in determining that he failed to assert a claim or exercise a right under the Act. He argues the facts, including PWT's awareness that he had sustained a work injury, compel a finding that he actually or constructively asserted a claim or right, as broadly construed by the court in *Delano*.[4] Mr. Bailey further argues the ALJ should have considered the chilling effect of Mr. White's statement at the Christmas party indicating Mr. Bailey's job depended on his recovery, and viewed his conduct thereafter as the constructive assertion of a right.

[¶9] The ALJ, however, found as fact "that Mr. Bailey likely characterized his need for medical treatment as non-work-related during [the June 3] conversation, despite his claims to the contrary." She further found Mr. Bailey did not ask for workers' compensation benefits at that time but instead characterized his back problems as long-standing and indicated he would be receiving short-term disability

[4] It is noteworthy that the *Delano* case was decided when the Act expressly endorsed liberal construction in favor of the employee, 39 M.R.S.A. § 92, as the Law Court referenced in the decision numerous times. That provision does not appear in the current Act.

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while he was out of work recovering from the procedure in November. Additionally, the ALJ found that after reporting the incident, Mr. Bailey did not complete requested paperwork or follow through with medical treatment arranged by PWT; he later underwent medical treatment, including a steroid injection in February 2019, but did not ask PWT to pay for it; and he testified he had no intention of making a claim for workers' compensation benefits. Moreover, the ALJ noted that six months had elapsed between Mr. White's remark at the Christmas party and Mr. Bailey's termination (during which he made no claim for benefits under the Act) thereby weakening the likelihood of a connection between the remark and the termination.

[¶10] Based on these factual findings, which are supported by competent evidence, even if the ALJ erred in finding no assertion of a claim or right, we find no error in her conclusion that Mr. Bailey did not establish that PWT's motivation in terminating his employment was rooted substantially or significantly in his exercise of rights under the Act.

B. Sufficiency of Findings

[¶11] Mr. Bailey next argues the ALJ erred in denying his motion for further findings of fact and conclusions of law. Mr. Bailey asserts that in his motion for findings, he "sought clarification as to whether the employer's threat was the cause of the employee's failure to formally assert a claim before he was terminated." Mr.

Bailey contends such a finding was necessary because the alleged threat was the reason he did not assert a claim and should therefore excuse the lack of an assertion.

[¶12] Because Mr. Bailey made a request for additional findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318, and submitted proposed additional findings, we do not assume the ALJ made all the necessary findings to support the conclusion that he did not assert a claim or right. *See Spear v. Town of Wells*, 2007 ME 54, ¶ 10, 922 A.2d 474. "Instead, we review the original findings and any additional findings made in response to a motion for findings to determine if they are sufficient, as a matter of law, to support the result and if they are supported by evidence in the record." *Id*. (quotation marks omitted). When requested, an ALJ is under an affirmative duty under section 318 to make additional findings to create an adequate basis for appellate review. *See Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982); *Malpass v. Phillip J. Gibbons*, Me. W.C.B. No. 14-19, ¶ 18 (App. Div. 2014).

[¶13] Contrary to Mr. Bailey's argument, the ALJ addressed that issue in her original decision. As noted above, she found that although Mr. White made the statement that Mr. Bailey's job depended on his back getting better, six months had passed between the statement and the termination, during which Mr. Bailey took no action to pursue a claim. The findings are sufficient for appellate review.

III. CONCLUSION

[¶14] The ALJ committed no legal error in determining Mr. Bailey had failed to establish that Paul White Tile Company's motives were rooted substantially or significantly in his assertion of a claim or right under the Workers' Compensation Act and thereby denying his petition to remedy discrimination. Moreover, the original decision provided an adequate basis for appellate review and therefore, the ALJ did not err in denying the motion for findings of fact and conclusions of law.

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.

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