COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
STEVEN P. DUSO,
Complainants

v. DOCKET NO. 06-BEM-00579

ROADWAY EXPRESS, INC.
n/k/a YRC, Inc.,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia M. Guastaferri in favor of Complainant Steven P. Duso on his claim of discrimination in employment based on disability (arthritis and limited range of motion in his knee). After an evidentiary hearing, the Hearing Officer concluded that Respondent had violated its obligation to provide reasonable accommodation to Complainant. Respondent was ordered to pay to Complainant the sum of $16,283.40 in back pay damages for regular time and $11, 011.49 for lost overtime wages; the sum of $821.49 for lost pension contributions and $3,319.40 for out-of-pocket health care expenses; and the sum of $100,000 in damages for emotional distress. Respondent was also ordered to conduct a training session regarding handicap discrimination and the provision of reasonable accommodation for all of its managers and supervisors at the North Reading terminal and those managers or officers who participate in the handicap accommodation process, regardless of whether they are based in Massachusetts. Respondent has appealed to the Full Commission.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 *et. seq.*) and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c.151B, §5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. Massachusetts Comm'n Against Discrimination, 365 Mass. 357, 365 (1974); G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Committee of Chicopee v. Massachusetts Comm'n Against Discrimination, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The role of the Full Commission is to determine, inter alia, whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion or was otherwise not in accordance with the law. See 804 CMR 1.23.

SUMMARY OF THE FACTS

Respondent, Roadway, is a motor carrier providing freight transportation services. It transports freight by truck throughout North America, using a network of terminal facilities. Three different positions at Respondent are primarily involved in the movement of freight: the city driver ("P& D" driver); the dockworker; and the linehaul driver (or "over-the-road" driver).

P&D drivers deliver inbound freight from a terminal to its final destination within the local area, and pick up freight from customers in the local area and deliver it to the terminal for outbound shipping from the terminal. Dockworkers unload incoming or outgoing freight and load it on to another truck for delivery in the local area or for shipping long haul to another destination. Freight is transported over-the-road to a terminal in another area by linehaul drivers. Linehaul drivers drive freight long distances from point to point across the country. They are paid by the mile, not by the hour, and generally spend several days out of their home area staying at hotels.

Complainant began working for Roadway in 1997 as a P&D driver. From 1997 until February 2006, Complainant worked as a city driver, responsible for delivering and picking up freight from customers located in the territory served by the North Reading terminal. He is a member of Teamsters Local Union No. 25 ("Local 25" or "Union"), which represents the drivers at Roadway in North Reading.

In April of 2004, Complainant had a total knee replacement surgery on his left knee to remedy a painful arthritic condition. He was out of work for a total of fourteen weeks following his knee surgery. Following the surgery, Complainant had only 90 degrees range of motion in his left knee which limited his activities. When Complainant returned to work in August of 2004 he generally drove linehaul trucks. His shift began at 10:00 a.m. and ended around 6:30 p.m. Complainant underwent arthroscopic surgery in September of 2005. When he returned to work on October 31, 2005, he provided Respondent with a note from his surgeon indicating that he could return to work, but that he "does require a properly fitting truck for his size." In January of 2006, Complainant sprained his ankle while working. He filed a worker's compensation claim, and was out of work for approximately one month.

On February 14, 2006, in response to Respondent's terminal manager's request for a doctor's note to support his claim he was disabled, Complainant presented Respondent with a letter from Dr. King. (Jt. Ex-2). The letter stated that following a total knee replacement in April of 2004 and arthroscopic surgery in September of 2005, Complainant was left with limited range of motion in his knee, and would not regain full range of motion. The doctor's note stated that, "to that degree, his knee is a disability," and that his limited range of motion coupled with his height requires him to drive a truck with ample seating room to allow him to safely operate the truck, as he had been doing for 1 ½ years since his surgery. Upon receipt of the letter, Respondent refused to allow Complainant to continue driving and sent him home out of concern that he presented a safety issue. This resulted in his filing of a complaint at the Commission.

Following receipt of the Commission complaint, Respondent continued to seek further information about Complainant's disability. He remained out of work involuntarily until March 2006, when he returned as a dock worker, at the same rate of pay and benefits as the P&D driver position. Shortly after, his start time was abolished and he began working a 4:00 pm to 2:00 am shift. In March 2008, in an attempt to resolve his complaint, Complainant requested his doctor send Respondent a letter; the letter submitted by the doctor stated that Complainant has a "significant disability" and that his limited range of motion prevents him from operating only certain vehicles. Respondent responded by requiring further clarification regarding dimensions under which he could perform his job. In August 2008, Respondent offered Complainant the option of returning to a P&D driver position, but the Union refused to agree to it. After Complainant's doctor provided further information in April 2009, Complainant bid into a linehaul position as an over-the-road driver and began driving long distances. Prior to 2009, Complainant had worked exclusively as a P& D driver on a day time shift and had never bid on a

linehaul position. Complainant alleged that working the line-haul position was a great hardship on him and his family and that Respondent's refusal to allow him to drive a larger truck for the P&D driver position was a failure to accommodate his disability. On March 1, 2009 Roadways Express, Inc. and Yellow Transportation, Inc. merged to form YRC, Inc. with the two operations consolidated into one terminal in North Reading.

The complaint arose from Complainant's allegation that Respondent refused to accommodate his disability which consists of a limited range of motion in his knee after undergoing arthroscopic surgery in September 2005.

BASIS OF THE APPEAL

Respondent has appealed the decision on the grounds that the Hearing Officer's findings were not supported by substantial evidence, were arbitrary and capricious, an abuse of discretion and otherwise not in accordance with the law. Respondent specifically raises the following arguments: Complainant is not disabled within the meaning of the law, cannot safely perform the essential functions of his position, and failed to engage in the interactive process; the multiple accommodations offered to Complainant were reasonable while Complainant's preferred accommodation was not reasonable; and Complainant is not entitled to lost wages or emotional distress damages.

The Hearing Officer carefully considered and addressed in her decision all of the above issues raised on appeal. Relying upon Complainant's doctor's report and his testimony, the Hearing Officer concluded that Complainant is disabled within the meaning of the law because of the limitations caused by limited range of motion in his knee. The Hearing Officer noted that, consistent with the legislature's statutory directive, the Commission has traditionally interpreted

the definition of handicap broadly to effect protections for employees who have suffered impairments that impact the ability to do their job but yet who remain capable of carrying out the job's essential functions. The Hearing Officer cited to pending amendments to the ADA and Federal regulations as support for her argument that Massachusetts has been correct in granting liberal effect to the statute and not focusing unduly on the threshold question of disability, but interpreting the definition broadly. We concur with the Hearing Officer's conclusion and will not disturb this finding.

The Hearing Officer also found that there was no objective evidence to suggest that Complainant posed a safety risk. In order to establish a defense that an employee poses a safety risk, the employer must prove that there is a "reasonable probability of substantial harm" to the employee or others. The Hearing Officer concluded that Respondent had not done so. She weighed the evidence of Complainant's prior safety record, the fact that he had been driving with the accommodation he sought, the fact that his driving certification and credentials remained valid, and finally, the fact that Respondent allowed him to begin driving linehaul trucks long distances in April 2009, absent any change in his circumstances. Given these facts, she found no credible, objective evidence to suggest that Complainant posed a safety risk. We conclude that there is substantial evidentiary support for her determination.

Respondent's arguments concerning the interactive process, the accommodations it offered Complainant and its whether it fulfilled its obligation to provide reasonable accommodation were also adequately addressed by the Hearing Officer. She considered whether Respondent's offer to Complainant to resume driving linehaul tractors in an over-the-road position in 2008 constituted a reasonable accommodation. We concur with the Hearing Officer's determination that this offer was *not* an accommodation as it materially disadvantaged Complainant and fundamentally

altered the terms and conditions of his job, drastically altering his schedule and requiring him to drive long distances and be away from home for days at a time.

Under G.L. c. 151B, the Respondent must demonstrate that the accommodation sought was not reasonable because it would impose an undue hardship on the employer's business. The Hearing Officer did not credit Respondent's assertion that it would to be an undue burden to its operations to assign Complainant to a linehaul truck for use in his P&D driver position. The facts support her finding that it is not an essential function of the P&D driver position to be able to operate all of the trucks in Respondent's city fleet, that many P&D drivers are routinely assigned to the same truck, and that, as a general rule, Respondent attempts to assign drivers to the same truck as much as possible. These facts led her to conclude that Respondent's assertion that it could not grant the accommodation Complainant sought was not credible. She ordered the Respondent to grant Complainant the guaranteed accommodation of driving an appropriately sized truck in his P&D position commencing immediately.

Respondent also argues that the Hearing Officer erred by overlooking undisputed testimony from Complainant and others regarding the seniority based assignment of routes. We conclude that this argument lacks merit, because the Hearing Officer found that Union seniority rule do not govern the particular equipment used by a driver and that management retains the discretion to make assignments of equipment and trucks. The Complainant was not asking management to violate seniority rules by granting him more desirable assignments, but was merely the equipment he needed. There was evidence that finding a sufficiently large truck had rarely been a problem and the co-workers had volunteered to shift equipment with Complainant. We conclude that these findings were supported by substantial evidence.

We conclude that the Hearing Officer's officers detailed findings of fact support the

conclusion that Respondent violated its obligation to provide reasonable accommodation to Complainant in his P&D driver position and that the accommodation should be granted immediately as ordered by the Hearing Officer. We conclude that her decision on the merits should not be disturbed.

Respondent challenges the Hearing Officers award of damages, and claims Complainant is not entitled to lost wages or emotional distress damages because Respondent offered it claims to have offered a reasonable accommodation when it created a dock worker position in March of 2006 and encouraged Complainant to bid into the position. Respondent asserts that Complainant also failed to mitigate his damages by refusing to sign up for Sunday overtime and that the Hearing Officer's calculations for lost wages were based on the wrong comparator. The Hearing Officer clearly found that Complainant's decision not to sign up for overtime work on weekends after he was placed in the dock worker position was justified, as his schedule changed drastically and he worked the 4pm to mid-night shift often arriving home at 2:00am. Complainant testified that because of this schedule, weekends were the only time he had to spend time with his family and that working overtime in light of his already draconian schedule would have been incredibly burdensome. We concur with that conclusion. We reject Respondent's assertion that Complainant did not calculate lost wages properly as she used as a comparator the P& D driver who has seniority closest to Complainant and we find his earnings as a P& D driver are most likely to approximate what Complainant's would have been had he remained in that position. Lastly, the Hearing Officer, credited testimony from Complainant and his wife regarding the emotional and physical toll these involuntary job changes and alteration in schedule exacted on Complainant and found that his distress was significant, and that Complainant has continued to suffer as an over-the-road driver with difficult, long hours, and

being away from home for days at a time. The Hearing Officer's credibility determinations are supported by substantial evidence and should be granted deference. We conclude that the damage awards are supported and should be affirmed.

We have carefully reviewed Respondent's grounds for appeal and the full record in this matter and have weighed all of the objections to the decision in accordance with the standard of review stated herein. We find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law. We properly defer to the Hearing Officer's findings which are supported by substantial evidence in the record. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). The key to substantial evidence is whether a "reasonable mind" would accept the evidence as adequate to form a conclusion. M.G.L. c. 30A, s. 1(6). See also, Gnerre v. MCAD, 402 Mass. 502, 509 (1988) . The standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support the contrary point of view. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984)

We conclude that the Hearing Officer's decision was rendered in accordance with the law and therefore we deny the appeal and affirm the Hearing Officer's decision in its entirety.

COMPLAINANT'S PETITION FOR ATTORNEY FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant we conclude that Complainant has prevailed in this matter and is entitled to an award of reasonable attorney fees and costs. See M.G.L. c. 151B, § 5.

The determination of what constitutes a reasonable fee is within the Commission's discretion and relies upon consideration of such factors as the time and resources required to litigate a claim of discrimination in the administrative forum and the degree of success achieved,

which may include the relief awarded. In reaching a determination of what constitutes a reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). This method requires the Commission to undertake a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate considered to be reasonable. The Commission then examines the resulting figure, known as the "lodestar", and adjusts it either upward or downward or not at all depending on various factors.

The Commission's efforts to determine the number of hours reasonably expended involves more than simply adding up all the hours expended by all personnel. The Commission carefully reviews the Complainant's submission and will not simply accept the proffered number of hours as "reasonable." See, e.g., Baird v. Bellotti, 616 F. Supp. 6 (D. Mass. 1984). Hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are hours that are insufficiently documented. Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir. 1984); Brown v. City of Salem, 14 MDLR 1365 (1992). Only those hours that are reasonably expended are subject to compensation under M.G.L. c. 151B. In determining whether hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and tasks involved.

Complainant's counsel has filed a petition seeking attorney fees in the amount of $43, 312.50 for 222.25 hours of work devoted to this case, supported by an affidavit. Respondent filed an Opposition stating that it was unclear that Complainant incurred any fees in this matter as he was represented by counsel for his Union. At the Hearing counsel for Complainant objected to questioning of Complaint regarding counsel fee arrangements on the

grounds that it was privileged and the objection was sustained by the Hearing Officer. Regardless of whether or not Complainant actually sustained fees, there is no reason why a Union cannot seek reimbursement for counsel fees incurred in the representation of a member against an employer, should the member prevail. Commission attorneys represent Complainants in proceedings before the agency. These Complainants do not pay for the services of Commission Counsel who nonetheless, routinely seek, and are awarded, fees. We expressly reject Respondent's argument that the statute authorizes attorney fee payments to a complainant only, and not to his attorney or other third party financing the litigation.

Complainant's petition states that pursuant to financial arrangements with Complainant and his Union, work performed by a partner, associate, and paralegal prior to August 1, 2009 was charged at the rate of $225.00, $200.00, and $125.00 per hour, respectively, and of August 1, 2009, at the rate of $250.00 per hour for a partner, $225.00 for an associate, and $150.00 per hour for a paralegal. Counsel also seeks costs in the amount of $7,505.74. Given the experience of counsel as outlined in the petition, we find the hourly rates reasonable and well within the rates charged by experience employment counsel in the area. This Commission has held that fee requests may be examined in light of the degree of success that is achieved, including the damage award obtained and has considered the reasonableness of fee requests in relation to the amount of damages awarded. Rottenberg v. Massachusetts State Police 32 MDLR 90 (2010).

Having reviewed the contemporaneous time records that support the attorney fees request, and based on this and similar matters before the Commission, we conclude that the attorney's fee request is reasonable. We therefore award attorneys fees in the amount of $43,312.50 and costs in the amount of $7,505.74 to Complainant.

ORDER

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law of the Hearing Officer and issue the following Order of the Full Commission:

(1) Respondent shall cease and desist from refusing to provide Complainant with the accommodation of an appropriately sized truck that will allow him to bid on a P&D driver position and grant him this guaranteed accommodation commencing forthwith.

(2) Respondent shall pay Complainant damages in the amount of $16,283.40 in back pay for regular time and $11, 011.49 in back pay damages for overtime; the sum of $821.49 for lost pension contributions and $$3,319.40 for out-of-pocket health care expenses; and the sum of $100,000 for emotional distress as set forth in the Hearing Officer's decision, with interest thereon at the rate of 12% per annum from the date the Complaint was filed, until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) The training provisions ordered in the Hearing Officer's decision are incorporated by reference herein.

(4) Respondents shall pay Complainant attorneys fees in the amount of $43,312.50 and costs in the amount of $7,505.74 with interest thereon at the rate of 12% per annum from the date the petition for attorneys fees was filed until such time as payment is made or this order is reduced to a court judgment and post judgment interest begins to accrue.

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer. Respondent's appeal to the Full Commission is hereby dismissed. This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this Decision may file a complaint in superior court seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within thirty (30) days of receipt of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, §6, and the 1996 Standing Order on Judicial Review of Agency Actions. Failure to file a petition in court within thirty (30) days of receipt of this order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, §6.

SO ORDERED this 3rd day of April, 2012

.

_____
Julian Tynes
Chairman

_____
Sunila Thomas George
Commissioner

_____
Jamie Williamson
Commissioner