COMMONWEATLH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
ROBERT LAING,
Complainants

v. DOCKET NO. 10-BEM-00856

J.C. CANNISTRARO, LLC,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia M. Guastaferri in favor of Complainant Robert Laing. Complainant was terminated from his position as a commercial plumber for Respondent after suffering a work-related back injury. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for discrimination on the basis of handicap in violation of M.G.L. c.151B, § 4(16). Respondent appealed to the Full Commission. For the reasons provided below, we affirm the Hearing Officer's decision.

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. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A, § 1(6).

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. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). Fact-finding determinations are within the sole province of the Hearing Officer who is in the best position to judge the credibility of witnesses. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); MCAD and Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because the Hearing Officer sees and hears witnesses, her findings are entitled to deference). It is nevertheless the Full Commission's role to determine whether the decision under appeal was supported by substantial evidence, among other considerations, including whether the decision was arbitrary or capricious or an abuse of discretion. 804 CMR 1.23(1)(h).

BASIS OF THE APPEAL

Respondent has appealed the decision on the grounds that the Hearing Officer erred by (1) making erroneous factual findings; (2) determining that Complainant is a handicapped individual; (3) concluding that Respondent did not engage in the interactive process; and (4) awarding Complainant $50,000 in emotional support damages. After careful review 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 that are supported by substantial evidence in the record. See Quinn v. Response Electric Services, Inc., 27 MDLR at 42. This 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).

Respondent argues that the Hearing Officer's determination that Respondent discriminated against Complainant based on his disability was based on erroneous factual findings. Specifically, Respondent challenges two of the Hearing Officer's factual findings: (1) that the dates provided by Complainant's orthopedic doctor, Dr. Kwon, to Liberty Mutual, Respondent's workers' compensation carrier, regarding Complainant's return to work were estimates and (2) that Complainant was unaware that Dr. Kwon had provided Liberty Mutual with any return to work dates. Respondent additionally argues that the videotape evidence of Complainant performing yard work contradicted all other evidence concerning Complainant's ability to perform light-duty work in May of 2009. We disagree with Respondent's assertions, as there is substantial evidence in the record that supports the Hearing Officer's findings.

The Hearing Officer found that Dr. Kwon prescribed six to eight weeks of physical therapy for Complainant at his initial appointment on April 9, 2009 and scheduled a follow-up for May 27, 2009, to reevaluate Complainant's physical condition. Shortly after this initial visit, at the request of Liberty Mutual, Dr. Kwon filled out a form dated April 13, 2009 indicating May 15, 2009 as the date of Complainant's return to work on light duty and June 1, 2009 as the date of Complainant's return to work on full duty. The Hearing Officer credited Dr. Kwon's testimony that the dates he provided on the form he sent to Liberty Mutual were estimates of when Complainant may be able to return to work. This is further supported by the form itself which contains a header at the top of the section completed by Dr. Kwon, "Work Status (Target Dates)." The Hearing Officer also credited the testimony of Complainant that he was unaware of the form Dr. Kwon submitted to Liberty Mutual and that Complaint was unaware of any estimated dates for his return to work. This testimony was also supported by the form submitted by Dr. Kwon as it states that Complainant was not advised of his work status. The Hearing

Officer is responsible for making credibility determinations and weighing conflicting evidence. Thus, we will not disturb the Hearing Officer's factual findings where, as here, they are supported by credible evidence in the record.

Respondent further argues that the surveillance video of Complainant doing yardwork on May 19, 2009, undermines Complainant's claim that he was unable to return to work on light duty on May 15, 2009. Contrary to this assertion, the evidence supports the Hearing Officer's finding that performing yard work was consistent with Complainant's treatment plan for his back injury. Complainant was delayed in starting his six to eight weeks of physical therapy as he did not start physical therapy until May 4, 2009,[1] and was not cleared by a doctor to return to light-duty work in May of 2009. The Hearing Officer credited the testimony of Complainant that his physical therapist agreed that he could do some yard work as a physical activity to help him strengthen and improve his physical condition. The Hearing Officer also found that Dr. Kwon testified credibly that it would not have been inconsistent with Complainant's treatment plan for Complainant to do some physical activities to test his abilities. It is well established that a Hearing Officer is in the best position to credit or not credit witnesses and weigh the significance of evidence presented at the hearing, including the "right to draw reasonable inferences from the facts found." Ramsdell v. W. Massachusetts Bus Lines, Inc., 415 Mass. 673, 676 (1993) (recognizing that credibility is an issue for the commissioner and not for the reviewing court, and that fact-finder's determination had substantial support in the evidence). Where there is conflicting evidence, the Hearing Officer is charged with the responsibility of weighing that evidence and making findings of fact based on their determinations of the significance of the evidence presented and the credibility of witnesses. School Committee of Chicopee, 361 Mass. at

[1] The Hearing Officer found that Liberty Mutual's delay in approving Dr. Kwon's prescription for physical therapy delayed the start of Complainant's physical therapy treatments until May 4, 2009, nearly one month after his initial appointment with Dr. Kwon.

354. The Hearing Officer's finding that doing yard work was consistent with Complainant's treatment plan was supported by credible evidence in the record.

Respondent argues that the Hearing Officer erred in determining that Respondent discriminated against Complainant based on his handicap. Specifically, Respondent argues that Complainant is not a "qualified handicapped person" as his back injury does not meet the statutory definition of "handicap" pursuant to M.G.L. c. 151B, § 1(17). We disagree.

Pursuant to M.G.L. c. 151B, § 1 a "qualified handicapped person" is someone who has a "physical or mental impairment which substantially limits one or more major life activities"; a "record of having such impairment"; or "being regarded as having such impairment" and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of the job with a reasonable accommodation. Additionally, pursuant to M.G.L. c. 152, § 75(B)(1), an individual who sustains a workplace injury, receives workers' compensation benefits, and is capable of performing the essential functions of the job with a reasonable accommodation is presumed to be a "qualified handicapped person" under M.G.L. c. 151B. Under this expanded definition of "qualified handicapped person," a person receiving workers' compensation need not show that he is handicapped pursuant to M.G.L. c. 151B, § 1(17), "but still must demonstrate an ability to perform the essential functions of a particular job." Canfield v. Con-Way Freight, Inc., 578 F.Supp.2d 235, 240 (D. Mass. 2008); see Gilman v. C& S Wholesale Grocers, Inc., 170 F.Supp.2d 77, 84 (D. Mass 2001) (providing that individuals suffering work-related injuries, without more, are "deemed" handicapped persons under chapter 151B for the period of time that their status under the workers' compensation law influences their treatment by others). An employee injured at work "is entitled to reasonable accommodation to enable him to return to work, and is protected from discrimination based on

the injury during the time he is affected by it." Hall v. Laidlaw Transit, Inc., 26 MDLR 216 (2004)

The Hearing Officer determined that Complainant was entitled to the presumption that he was a qualified handicapped individual, as the parties did not dispute that Complainant was injured on the job and receiving workers compensation. See MG.L. c. 152, §75(B)(1); Canfield v. Con-Way Freight, Inc., 578 F.Supp.2d 235, 240 (D. Mass. 2008). Complainant's receipt of workers' compensation benefits directly influenced his treatment by Respondent, as Respondent relied exclusively on the information that Liberty Mutual—the insurance company handling Complainant's workers' compensation claim—relayed to them information regarding Complainant's purported medical condition. Furthermore, the Hearing Officer found that the evidence established Complainant continued to be affected by the work related injury. This was supported by Complainant's orthopedic doctor who did not clear Complainant to return to work at his May 27, 2009 visit, as well as the written report dated May 5, 2009 of Dr. McGlowan, the physician hired by Liberty Mutual to conduct an Independent Medical Exam (IME), which stated that Complainant was unable to return to his prior duties at that time. Even the IME addendum report dated May 27, 2019, prepared by Dr. McGlowan after review of the surveillance video, determined that Complainant continued to be affected by the injury as the doctor continued to recommend modified duty with a lifting restriction. The Hearing Officer also determined that Complainant was capable of performing the essential functions of a plumber's job with the reasonable accommodation of a medical leave of absence to allow him to complete physical therapy.[2] The Hearing Officer did not err in determining that Complainant was a qualified

[2] Although an open-ended or indefinite leave extension is generally not considered a reasonable accommodation, see Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 455 (2002), Complainant was not requesting an indefinite leave extension at the time of his termination. Instead, Complainant informed his supervisor on May 13, 2009 that he had not yet been cleared to return to work and had a follow-up visit with his doctor in two weeks. Here,

handicap individual.

Respondent argues that the Hearing Officer erred in determining that Respondent failed to engage in the interactive process with Complainant. Specifically, Respondent contends that it satisfied its obligation to engage in an interactive dialogue with the Complainant, but that Complainant was evasive, unable to provide Respondent with information about his anticipated return to work, and refused the light-duty work offered to him. We disagree.

"Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation . . . through a flexible, interactive process that involves both the employer and the qualified individual with a disability." Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 457 (2002). This process is designed to identify the precise limitations associated with the employee's disability and the potential adjustments to the work environment that could overcome the employee's limitations. See MBTA v. MCAD, 450 Mass. 327, 342 (2008).

The Hearing Officer found that on May 13, 2009, Complainant was informed by Liberty Mutual that his workers' compensation benefits were ending and that he needed to return to work on May 15, 2009. Complainant called his supervisor, Daly, and Respondent's Safety Officer, Guillette, to advise them that his doctor had not yet cleared him to return to work, he had only just started his physical therapy program on May 4, 2009, and he did not know what his medical restrictions were. Complainant advised Respondent that he had an appointment with his doctor in two weeks, and he would inform Respondent of the results of that appointment. The Hearing

---

had Respondent engaged in any dialogue with Complainant prior to his termination, it would have learned that in that follow up visit his orthopedic doctor recommended that Complainant complete six to eight weeks of physical therapy – a finite period of time. Complainant's "request for a limited extension, setting a more definite time for the employee's return to work" may have been a reasonable accommodation had it been considered by Respondent. See id. Further, Respondent, once alerted to Complainant's need for an accommodation, did not discuss any options for a reasonable accommodation with Complainant, nor did Respondent demonstrate that the accommodation Complainant sought—an extended medical leave of absence to complete physical therapy— was an undue hardship on Respondent's business.

Officer's determination that Complainant sought an accommodation from Respondent to have additional time to complete his physical therapy treatment and recuperate from his injury was supported by sufficient evidence. Respondent denied Complainant's request for an extension of his medical leave to complete physical therapy, as Guillette told Complainant that Liberty Mutual had received clearance for him to return to light-duty work on May 15, 2009 from his doctor.[3] Further, there is sufficient evidence to support a finding that Respondent denied Complainant's request for an additional two weeks of leave to permit him be evaluated by his doctor.

The evidence supports the Hearing Officer's finding that from May 13, 2009 through Complainant's termination on or about June 15, 2009 Respondent did not attempt to contact Complainant to explore the discrepancy between Liberty Mutual's assertion that Complainant had been cleared to return to work on May 15, 2009 and Complainant's assertion that he had not been cleared to work. Respondent did not independently verify Complainant's condition or prognosis, and did not obtain any information regarding what restrictions Complainant had with regards to his condition. Indeed, the evidence supports the finding that Respondent had no communication at all with Complainant about his medical condition following his May 27, 2009 exam. Rather than engaging in open and direct dialogue with Complainant and his doctor regarding the limitations of Complainant's disability and about possible accommodations, Respondent relied entirely on Liberty Mutual's assertion that Complainant had been cleared to return to work and insisted that Complainant report to light-duty work on May 15, 2009. Given these facts, Complainant's request for additional time to complete physical therapy merited consideration by Respondent and required further inquiry into Complainant's precise medical

[3] Daly and Guillette did not inform Complainant that there would be consequences if he did not return to work on May 15, 2009.

restrictions.[4] These facts are sufficient to support the Hearing Officer's conclusion that Respondent failed to engage in the interactive process with Complainant.

Respondent argues that the Hearing Officer's award of $50,000 in emotional distress damages is unwarranted and unsupported by the evidence. The Hearing Officer is authorized to award damages to Complainant for emotional distress suffered as a direct and probable consequence of Respondents' discriminatory acts. Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). Such an award must be supported by substantial evidence and the record must be clear with respect to the factual basis of such damages as well as the causal connection between the unlawful act and the emotional distress. Stonehill College v. MCAD, et al., 441 Mass. 549, 576 (2004); see MCAD and Tara Leary v. James F. Braden & Joan G. Braden, 26 MDLR 234, 240-241 (2004).

The Hearing Officer credited Complainant's testimony that he was upset about his termination from Respondent and that he felt that his termination stigmatized him for being disabled. Complainant was also upset because his termination gave the appearance that he was engaged in wrong-doing and committing fraud when instead he was taking direction from his physical therapist about engaging in yard work to test his strength. Complainant testified that he had a strong work ethic and was upset that his reputation in the plumbing industry would be tarnished because of Respondent's perception that Complainant was lazy, unwilling to work, and dishonest about his ability to return to work. Complainant further testified that the stress he suffered as a result of his termination contributed to his poor interactions with his family and

[4] In workers' compensation cases, Respondent's return-to-work policy included sending a letter to the employee's treating physician with the employee's job description and asking the physician to provide any restrictions the employee is subject to. See Exhibit 29. This letter was intended to provide Respondent with detailed information about the employee's specific work restrictions. Respondent never sent this letter to Complainant's treating physician and instead relied exclusively on information it received from Liberty Mutual. See Dartt v. Browning-Ferris Indus., Inc., 427 Mass. 1, 17 (1998) (providing that an employer's deviation from its normal practice and procedures can be probative of the employer's discriminatory intent).

caused him to struggle sleeping. We will not disturb the Hearing Officer's award of damages in the amount of $50,000 for Complainant's emotional distress resulting from his termination by Respondent, where it is supported by substantial evidence in the record.

ATTORNEYS' FEES AND COSTS

Complainant filed a Petition for Attorneys' Fees and Costs on July 22, 2015, which Respondent did not oppose. Complainant's Petition seeks attorneys' fees in the amount of $57,575 and costs in the amount of $3,933.52. The total amount of fees sought represents a total of 164.5 hours of compensable time at an hourly rate of $350. We determine that the hourly rate sought by Complainant's petition is consistent with rates customarily charged by attorneys with comparable experience and expertise in these cases. The petition is supported by contemporaneous detailed time records noting the amount of time spent on tasks and an affidavit of counsel.

M.G.L. c. 151B allows prevailing complainants to recover reasonable attorneys' fees for the claims on which Complainant prevailed. The determination of whether a fee sought is reasonable is subject to the Commission's discretion and includes such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. The Commission has adopted the lodestar methodology for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). By this method, the Commission will first calculate the number of hours reasonably expended to litigate the claim and multiply that number by an hourly rate it deems reasonable. The Commission then examines the resulting figure, known as the "lodestar," and adjusts it either upward or downward or determines that no adjustment is warranted depending on various factors, including complexity of the matter. Baker v.

Winchester School Committee, 14 MDLR 1097 (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 will consider contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved. Id. at 1099. Compensation is not awarded for work that appears to be duplicative, unproductive, excessive, or otherwise unnecessary to the prosecution of the claim. Hours that are insufficiently documented may also be subtracted from the total. Grendel's Den v. Larkin, 749 F.2d 945, 952 (1st Cir. 1984); Brown v. City of Salem, 14 MDLR 1365 (1992).

Having reviewed Complainant's Petition, we determine that Complainant's fee request, along with counsel's time records, reveal a fair accounting of the work she performed in furtherance of Complainant's case. Accordingly, we grant Complainant's Petition and award attorneys' fees in the amount of $57,575 and costs in the amount of $3,933.52.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and issue the following Order:

1. Respondent shall cease and desist from all acts that violate M.G.L. c. 151B, § 4(16).
2. Respondent shall pay to the Complainant the amount of $50,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
3. Respondent shall conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's human resources director, managers,

supervisors or other employees who have authority to negotiate reasonable accommodations for handicapped employees or to terminate handicapped employees. Respondent shall utilize a trainer certified by the Massachusetts Commission Against Discrimination. Following the training session, Respondent shall report to the Commission the names of persons who attended the training. Respondent shall repeat the training session at least one time for any of the above described employees who fail to attend the original training and for new personnel hired or promoted after the date of the initial training session.

4. Respondent shall pay to the Complainant attorneys' fees in the amount of $57,575 and costs in the amount of $3,933.52, with interest thereon at the rate of 12% per annum from the date the petition for attorneys' fees and costs was filed, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This order represents the final action of the Commission for purposes of M.G.L. c.30A. Any party aggrieved by this final determination may contest the Commission's decision by filing 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 service 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,

Superior Court Standing Order 96-1. Failure to file a petition in court within thirty (30) days of service 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[5] this 10th day of December, 2019

Monserrate Quiñones
Commissioner

Neldy Jean-Francois
Commissioner

[5] Chairwoman Sunila Thomas George was the Investigating Commissioner in this matter, so she did not take part in the Full Commission Decision. See 804 CMR 1.23(1)(c).