STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF LEONI, Petitioner/Appellee/Cross-Appellant,	UNPUBLISHED January 20, 2009
v	No. 279143 Jackson Circuit Court
MICHIGAN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, Respondent/Appellant/Cross-Appellee.	LC No. 06-002201-AA

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Respondent Michigan Occupational Health and Safety Administration (MIOSHA) appeals by leave granted[1] the circuit court's order reversing a decision of the administrative law judge that petitioner Leoni Township terminated Benjamin Brzezinski's employment in violation of § 65 of the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq*. Petitioner cross-appeals. We reverse.

I. Facts and Procedural History

Brzezinski worked for petitioner as a Department of Public Works (DPW) laborer from January 12, 2004, until November 3, 2005. His job duties included maintaining house grinders and pumps, rebuilding pumps, maintaining equipment, and installing water lines and taps on sewer and water lines. At times, Brzezinski was an outspoken and difficult employee. He attended several township board meetings. At these meetings, Brzezinski verbalized his displeasure over the hiring of an employee who he believed was unintelligent, lazy and dangerous to work with. He also complained of the fact that he did not receive a raise when Art Manke, the DPW supervisor, was promoted and received a pay raise during a pay freeze, and the decision to reduce overtime. Brzezinski also argued with Manke on occasion. Brzezinski once

[1] *Leoni Twp v MIOSHA*, unpublished order of the Court of Appeals, entered November 16, 2007 (Docket No. 279143).

told Manke that he did not respect him and did not like working with him and that Manke did not know what he was doing. Following an August 15, 2005, argument with Manke about board policies and procedures and certain employees, Manke issued Brzezinski a written reprimand. Manke stated that Brzezinski referred to the written reprimand as "bullshit" and told Manke that he'd better "watch [his] back." Brzezinski denied saying these things.

Despite the fact that Brzezinski was a difficult employee at times, he nevertheless received a positive employee evaluation from Manke on January 13, 2005. In the evaluation, Manke rated Brzezinski as "excellent" in cooperation and attitude. Manke also indicated that Brzezinski was friendly, courteous and calm under pressure. Manke further wrote several positive comments about Brzezinski.

According to Brzezinski, he had experienced hole[2] cave-ins "[n]umerous times" while working. He explained: "A couple times I was buried up to my knees, and a couple—and one other time in particular I was buried up to my shirt pockets[.]" Brzezinski asserted that he spoke to both Manke and David James ("Jim") Phelps, the township supervisor, about the lack of safety equipment and trench boxes[3] and brought the issue up at a township board meeting. After he raised his safety concerns at the board meeting, board member Shirley Johnson told him if he did not like his job, he could quit. On the morning of November 3, 2005, Brzezinski, George Manke and Gary Sharpe were working together on a water extension project. Brzezinski had been assigned to go into a hole to install a water line on the end of an extension to flush the line. He asserted that on that day, he was "pretty much the hole guy[,]" a position which required him to spend "[t]he majority of [his] time . . . in the hole." Brzezinski stated that the hole was about 3 feet wide and 6-1/2 feet deep.[4] There was not a trench box in the hole. Brzezinski refused to go into the hole because he believed it was unsafe. He stated: "I looked in the hole and it was over my head deep, and I was, like, 'George, I don't want to go in that hole.' I go, 'I don't feel safe.' He says, 'Oh, I can't work with you when you're like this[.]'" George Manke then called Art Manke, and another worker was sent to complete the work in the hole, Brzezinski went back to the shop.

Brzezinski asserts that Art Manke told him that Phelps wanted him to come to his office after lunch. Phelps, however, testified that earlier in the morning of November 3, 2005, Brzezinski had requested a meeting with him after lunch. Brzezinski's and Phelps's accounts of the events that transpired at the meeting are completely contradictory. Brzezinski asserted that at the meeting, he told Phelps that he had refused to go into the hole and that the township needed to get some safety equipment. He said that when Phelps told him it was his job to go into the holes, he repeated that he was not going to go in the hole, whereupon Phelps slammed his hand on the table and said, "You're fired." According to Brzezinski, the men then went across the hall

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[2] We use the terms "hole" and "trench" interchangeably in this opinion.

[3] A trench box is a safety device that is generally made of steel that is placed in a trench to prevent trench failure (walls collapsing) from injuring a worker.

[4] The witnesses gave different estimates of the dimensions of the hole, but the dimensions are not relevant to the ALJ's decision or the circuit court's review of that decision.

to the secretary's office, and Phelps instructed the secretary to write a termination letter, which Phelps then handed to Brzezinski. The termination letter provided:

> This letter is to inform you that insubordination is cause for immediate termination for at will employees.
>
> Due to several conversations involving the township supervisor and the DPW supervisor where you demonstrated insubordination you are hereby notified of your immediate termination of employment with Leoni Township.

According to Brzezinski, Phelps did not explain what insubordinate action he had taken, and his only insubordinate conduct at that point was his refusal to go into the hole. Brzezinski believed that the reference in the second paragraph of the termination letter to past demonstrations of insubordination referred to the August 15, 2005, argument with Art Manke that resulted in the written reprimand.

Phelps's account of what transpired at the meeting in which he terminated Brzezinski was much different than the events described by Brzezinski. According to Phelps, the two men never had any discussion about the trench or safety issues during the meeting. Rather, Brzezinski carried on about how the township board did not know how to hire employees and yelled and screamed about certain employees and asked Phelps why he did not think he was qualified for a lab tech position. Phelps asserted that he asked Brzezinski to calm down 2 or 3 times. When Brzezinski left angrily, Phelps told him to come back to his office. Brzezinski refused and began hollering and screaming again, and Phelps told Brzezinski: "You're fired. I've had enough of you, Ben, you're done[.]" According to Phelps, he fired Brzezinski for "insubordination."

Phelps's testimony regarding whether he was aware that Brzezinski had refused to enter the hole was inconsistent. He first testified that he was in the shop when George Manke called Art Manke on the radio and that he "heard [George Manke] say that—send someone over to take [Brzezinski's] place. He was refusing to work that day . . . ." Phelps later saw Brzezinski return to the shop. Later in his testimony, however, Phelps equivocated regarding whether he heard George Manke say that he was sending Brzezinski back to the shop because Brzezinski was refusing to work. When the trial court reminded him about his earlier testimony, he acknowledged that he "might have said that, maybe, yeah." Art Manke testified that George Manke called him to say that he was sending Brzezinski back to the shop and that he needed a replacement so that they could finish the job, but did not say why he needed a replacement at that time.

Immediately after Phelps fired him, Brzezinski contacted MIOSHA (respondent) by telephone. He later filed a written MIOSHA complaint on December 13, 2005, claiming that he was fired after he refused to enter an unsafe hole that was not properly shored and did not have the protection of a trench box. Respondent conducted an investigation and issued a decision and order on February 22, 2006, in which it determined that petitioner violated § 65(1) of MIOSHA by terminating Brzezinski for refusing to enter a hole that he believed was unsafe. Section 65(1) provides:

> (1) A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or

> caused to be instituted a proceeding under or regulated by this act or has testified or is about to testify in such a proceeding or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act. [MCL 408.1065.]

Petitioner requested administrative review of respondent's determination that petitioner violated § 65(1) of MIOSHA. Administrative Law Judge (ALJ) J. Andre Friedlis conducted a contested hearing and affirmed respondent's determination that petitioner had violated § 65(1) of MIOSHA in firing Brzezinski for refusing to enter the hole. ALJ Friedlis ordered petitioner to reinstate Brzezinski and to pay him back pay in the amount of $10,070.

Petitioner then sought review of the ALJ's decision in circuit court. According to petitioner, the ALJ applied the incorrect legal standard to determine the reasonableness of Brzezinski's refusal to enter the hole, and the ALJ made a finding that was not supported by substantial evidence in relying solely on the temporal proximity between Brzezinski's refusal to enter the hole and his discharge to establish causation. The circuit court reversed the ALJ's decision, ruling that there was not competent, material and substantial evidence to support the ALJ's decision, that the ALJ applied the wrong test to determine the reasonableness of Brzezinski's refusal to enter the hole, and that the ALJ erred in relying solely on the temporal connection between Brzezinski's refusal to enter the hole and his termination to find causation.

II. Standard of Review

Judicial review of decisions, findings, rulings and orders of an administrative officer includes, "as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." Mich Const 1963, art 6, § 28. "When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record." *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994). The administrative decision is supported by substantial evidence when the inferences made were legitimate and supportable. *Id.* at 690-691 n 8. "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *St. Clair Intermediate School District v Intermediate Education Ass'n/Michigan Education Ass'n*, 218 Mich App 734, 736; 555 NW2d 267 (1996), aff'd 458 Mich 540 (1998).

Judicial review of an administrative agency's decision regarding a matter of law is limited to determining whether the decision was authorized by law. Const 1963, art 6, § 28; *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003). An agency's decision that violates a statute or constitution, exceeds the statutory authority or jurisdiction of the agency, is made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious is a decision that is not authorized by law and must be set aside. *Romulus*, *supra* at 64. An agency's decision is arbitrary and capricious if it lacks a determining principle, reflects an exercise of will or caprice without acknowledgment of principles, circumstances, or significance, reflects an unreasoned, freakish, whimsical or humorous outcome. *VanZandt v State Employees' Retirement System*, 266 Mich App 579, 584-585; 701

NW2d 214 (2005).

This Court's review of a circuit court's review of an administrative decision is "to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clearly erroneous standard of review." *Id.* at 585. This Court will overturn the circuit court's decision only if this Court is left with a definite and firm conviction that a mistake has been made. *Glennon v State Employees' Retirement Bd*, 259 Mich App 476, 478; 674 NW2d 728 (2003).

III. Analysis

A. Respondent's Appeal

Respondent argues that the circuit court exceeded the scope of its appellate review of the ALJ's decision and in so doing, acted as an initial trier of fact, substituted its judgment for that of the ALJ and ignored the ALJ's credibility determinations.

The circuit court's review of the ALJ's decision is limited, and the ALJ's findings of fact and credibility determinations are entitled to deference:

> Review of an administrative agency's fact finding is akin to an appellate court's review of a trial court's findings of fact in that an agency's findings of fact are entitled to deference by a reviewing court. In its fact finding capacity, the agency has reviewed evidence, such as witness testimony, and it is in the best position to evaluate the credibility and weight of that evidence. . . . [A] reviewing court must ensure that the finding is supported by record evidence; however, the reviewing court does not conduct a new evidentiary hearing and reach its own factual conclusions, nor does the reviewing court subject the evidence to review de novo. [*In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 101; 754 NW2d 259 (2008).]

The reviewing court should defer to administrative expertise and not invade administrative fact finding by replacing an agency's selection between two reasonably differing views. *Romulus, supra* at 63.

In rendering its decision regarding whether petitioner's termination of Brzezinski violated MIOSHA, the ALJ was required to weigh evidence and make credibility determinations because witnesses, specifically Brzezinski and Phelps, gave different accounts of the events that led to Brzezinski's termination on November 3, 2005. According to Brzezinski, he raised the safety issue regarding the hole during the meeting with Phelps. Brzezinski stated that Phelps fired him during the meeting because he was insubordinate, and the only insubordinate action he had taken was his refusal to enter the hole. On the other hand, Phelps denied ever discussing the hole or any safety issues during the meeting and claimed that during the meeting, Brzezinski carried on about how the township board did not know how to hire employees and yelled and screamed about certain specific employees and asked Phelps why he did not think he (Brzezinski) was qualified for a lab tech position. Phelps asserted that he fired Brzezinski for "insubordination," essentially because Brzezinski was "hollering and screaming" during the meeting and refused to

come back in to Phelps's office when Phelps asked him to do so.

It is clear from the ALJ's decision that the ALJ, who heard the testimony and observed the demeanor of the witnesses, found Brzezinski's version of the events that transpired on November 3, 2005, to be more credible than Phelps's version of the events of that day:

> I conclude Petitioner's separation was a violation of Section 65. The *credible* evidence on the record supports the conclusion that Petitioner reasonably understood Mr. Phelps discharged him because he refused to enter the trench on November 3, 2005. Mr. Phelps heard the communication from George Manke to Art Manke that Petitioner refused to enter the trench. This discharge would not have occurred but for Petitioner's refusal to enter the trench. . . . [Emphasis added.]

In its opinion reversing the decision of the ALJ, the circuit court articulated Phelps's version of the events that transpired on November 3, 2005, in detail, but did not articulate Brzezinski's version of the events of that day. In reversing the ALJ, the circuit court stated:

> This Court is satisfied that a fair reading of the evidence establishes that Mr. Brzezinski was terminated for insubordination and not the fact that he did not enter the trench in question earlier that day. The evidence establishes that Mr. Brzezinski was insubordinate to Mr. Manke as well as Mr. Phelps on several occasions prior to the date of his termination. Brzezinski had a pattern of arguing and yelling at his supervisors and had no compunction about telling them as well as the township board that he could do the job better than they could. He was also vocal about not being hired for another job for which he was unqualified. He had previously threatened a supervisor to "watch his back." On the date of his firing, it appears that Mr. Brzezinski simply went off the deep end yelling at the township supervisor, arguing with him, and refusing to return to his office as requested. No supervisor can put up with this type of conduct and behavior from one employee and hope to be able to adequately supervise other employees. This Court finds that the hearings officer did not adequately consider the actions of Mr. Brzezinski and his inappropriate behavior, not only on the day of his termination, but for a period of time preceding the termination. It appears from the totality of the evidence that Mr. Phelps acted appropriately under the circumstances. The Court finds that the four step disciplinary policy does not prohibit an employee from being fired for extreme insubordination as occurred in this instance. This court finds and determines that the administrative law judge erred in disregarding the behavior and insubordination of Mr. Brzezinski and relying only on the proximity of the trench incident and the firing. This Court finds and determines that the administrative law judge did not base his findings on competent material and substantial evidence as found in the record of the proceedings, but erred in his determination that Mr. Brzezinski established causation.

In so ruling, the circuit court re-evaluated the evidence and made its own credibility determinations, which were different than the ALJ's. It was the function of the ALJ, not the circuit court, to hear the evidence and evaluate the credibility of the testimony. The ALJ heard the evidence and resolved conflicts and credibility determinations in Brzezinski's favor. The

circuit court then made its own credibility determinations in Phelps's favor. The circuit court's role in reviewing the ALJ's decision was to determine whether the decision was supported by competent material and substantial evidence on the whole record. Const 1963, art 6, § 28. Instead, the circuit court re-evaluated the evidence, resolved conflicts in the evidence and made its own credibility determinations. It is clear from the ALJ's decision that the ALJ found Brzezinski's testimony regarding the circumstances of his termination to be more credible than Phelps's testimony. The circuit court's decision invaded the ALJ's fact-finding and failed to afford the proper deference to the ALJ in choosing between two reasonably different views. *Romulus*, *supra* at 63.

"[I]f the administrative findings of fact and conclusions of law are based primarily on credibility determinations, such findings generally will not be disturbed because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence." *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). "A reviewing court may not set aside factual findings supported by the evidence merely because alternative findings could also have been supported by evidence on the record or because the court might have reached a different result." *Id.* at 373. In this case, the circuit court clearly erred by acting as a finder of fact, weighing evidence and substituting its credibility assessment for the credibility assessment of the ALJ. The circuit court's ruling exceeded the scope of review allowed for an agency's decision. For these reasons, we reverse the circuit court's order reversing the decision of the administrative law judge that petitioner terminated Brzezinski's employment in violation of § 65 of MIOSHA.[5]

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[5] We note that the circuit court also erred in concluding that the ALJ based its conclusion that petitioner violated § 65 of MIOSHA in terminating Brzezinski solely on the temporal proximity of Brzezinski's termination following his refusal to enter the trench. In the context of a claim for retaliatory discharge brought under the Whistleblowers' Protection Act, our Supreme Court ruled:

> a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action. Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed. [*West v General Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003).]

Although the ALJ's finding of causation was based, in part, on the temporal proximity of Brzezinski's discharge after his refusal to enter the hole, this was not the only factor relied on by the ALJ in finding causation. In his findings of fact, the ALJ found that Phelps overheard the conversation in which George Manke informed Art Manke that Brzezinski refused to enter the trench and asked Art Manke to send a replacement. The ALJ further found that Phelps knew that Brzezinski had refused to enter the trench on November 3, 2005. The ALJ relied on these findings, in addition to the temporal proximity of Brzezinski's refusal to enter the trench and his discharge, in concluding that petitioner violated § 65 of MIOSHA.

In light of our decision to reverse on this basis, we need not address respondent's remaining arguments on appeal.

B. Petitioner's Cross-Appeal

Petitioner argues on cross-appeal that there was not competent material and substantial evidence to support the ALJ's conclusion that because he did not discipline Brzezinski, Art Manke did not take Brzezinski's threats seriously. Petitioner also argues that the ALJ's decision to order petitioner to reinstate Brzezinski violates MIOSHA because MIOSHA requires an employer to provide employees with a safe and healthful work environment free of recognized hazards and that because Brzezinski threatened employees with physical violence, he is a recognized hazard.

Although petitioner raised this argument below, the circuit court reversed the ALJ's decision and therefore did not address it. Therefore, this Court must address this issue for the first time on appeal. This Court reviews a decision of an administrative agency in the same limited manner as does the circuit court. *Barker Bros Construction v Bureau of Safety & Regulation*, 212 Mich App 132, 141; 536 NW2d 845 (1995).

There was competent material and substantial evidence to support the ALJ's conclusion that Art Manke did not take Brzezinski's threats seriously. Manke testified that he felt threatened by comments Brzezinski made about him at a township board meeting. He also testified that Brzezinski told him he better "watch [his] back" after the men argued on August 15, 2005. Manke testified that he did not write Brzezinski up for threatening him because he "just didn't want to get in a big argument with [Brzezinski]." An administrative decision is supported by substantial evidence if the inferences made were legitimate and supportable. *In re Payne*, *supra* at 690-691 n 8. Manke's testimony regarding his inaction in the face of Brzezinski's threats permits the legitimate inference that he did not take Brzezinski's threats seriously. If he really believed that Brzezinski intended to carry out the threats, he would have risked an argument with him and taken action to ensure his safety. Thus, there was competent, material and substantial evidence to support the ALJ's conclusion that Manke did not take Brzezinski's threats seriously.

Also, the ALJ's decision to order petitioner to reinstate Brzezinski was not improper. The ALJ struggled with whether to order petitioner to reinstate Brzezinski. On the record at the April 17, 2006, contested hearing, the ALJ indicated that Brzezinski was not happy working for petitioner and stated: "For him [Brzezinski] to go back to work there I don't think would be really a reasonable proposition. It seems to me that if indeed discrimination is found that—of course, that would be the option, that you'd be ordered back to work there." Ultimately, the ALJ did order petitioner to reinstate Brzezinski, but it was not an easy decision, as the following statements in the ALJ's decision illustrate: "Job reinstatement is one of the possible remedies listed in MCL 408.1065(2). In view of petitioner's negative employment history since his January 12, 2006 evaluation, I considered not requiring reinstatement. I rejected this course of action because Respondent should not benefit from a Section 65 violation."

Petitioner argues that the ALJ erred in reinstating Brzezinski because Brzezinski is a "recognized hazard" under MCL 408.1009. MCL 408.1009 provides that "all employees shall be provided safe and healthful work environments free of recognized hazards." Petitioner offers

no legal authority for its conclusion that an employee who has made verbal threats but never carried them out is a "recognized hazard" under MCL 408.1009. Petitioner has also failed to present any argument regarding whether a third party's conduct can be a hazard or when such a hazard might be deemed recognized. A party may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his or her claims. *In re Temple Marital Trust*, 278 Mich App 122, 139; 748 NW2d 265 (2008). Petitioner has therefore abandoned this issue. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Contrary to petitioner's argument on appeal, the ALJ properly ordered petitioner to reinstate Brzezinski. MCL 408.1065(2) includes "rehiring or reinstatement of an employee to his or her former position with back pay" as a remedy for an employer's violation of § 65. Thus, the ALJ's decision to order petitioner to reinstate Brzezinski was authorized by law.

Petitioner also argues that the ALJ's decision requires plaintiff to follow a four-step disciplinary process when disciplining Brzezinski in the future and is improper and unenforceable.

In a notice dated October 21, 2005, petitioner announced that it had established a four-step disciplinary process. The notice stated:

> On August 24, 2005 the Board approved a 4 step reprimand process and goes as follows, 1st time is a verbal warning, 2nd time is a written warning, 3rd time is 3 days off with no pay, and the 4th would constitute employment termination. This pertains to all at will employees that do not work under a specific contract. Insubordination will absolutely not be tolerated from any employees.

This notice was distributed to employees with their paychecks on November 2, 2005.

In its decision, the ALJ stated: "If [Brzezinski's] negative behavior continues after reinstatement, Respondent *may* use the four step reprimand process . . . to discipline Petitioner for legitimate reasons not connected to his exercise of rights granted by MIOSHA." (Emphasis added.) The ALJ used the permissive term "may" rather than the mandatory term "shall." *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008). Therefore, contrary to petitioner's argument, the ALJ did not mandate or require that petitioner use its four-step disciplinary process to reprimand Brzezinski in the future. The ALJ was merely acknowledging petitioner's discretion to use its own disciplinary procedure. There was nothing improper in the ALJ's decision to recognize petitioner's authority to use its own disciplinary policy to discipline Brzezinski in the future.

For the reasons set forth in this opinion, we reverse.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis