An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-985

NORTH CAROLINA COURT OF APPEALS

Filed: 15 March 2011

ROWLAND BAKER,
Employee,
Plaintiff

v.

North Carolina
Industrial Commission
I.C. No. 62355

CHIZEK TRANSPORT, INC.,
Employer,

ACCIDENT FUND INSURANCE
COMPANY OF AMERICA,
Defendants

Appeal by defendants from opinion and award entered 18 May 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 February 2011.

Oxner, Thomas, & Permar, by Thomas M. Clare, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by David A. Rhoades and Jaye E. Bingham, for defendant-appellants.

CALABRIA, Judge.

Chizek Transport, Inc. ("Chizek") and Accident Fund Insurance Company of America (collectively "defendants") appeal an opinion and award of the North Carolina Industrial Commission ("the Commission") determining that the Commission had jurisdiction to hear Rowland Baker's ("plaintiff") workers' compensation claim. We affirm.

Plaintiff is a resident of Fayetteville, North Carolina. Beginning on 18 April 2006, plaintiff was employed as a truck driver for Chizek, a Wisconsin trucking company. Plaintiff had initially contacted Chizek and was instructed to go to Wisconsin, where plaintiff filled out employment paperwork. In addition, plaintiff was given both a drug test and a driving test, which he successfully completed.

On 27 July 2006, plaintiff submitted a Chizek form entitled "Employee Voluntar[y] Termination and Tractor check-in" ("the termination form") to Chizek. On this form, plaintiff wrote the following: "I, Rowland Baker, voluntarily terminate my employment with Chizek Transport, Inc., requesting 2-3 wks unpaid personal time off." The form was signed by plaintiff and a Chizek representative. In conjunction with this form, plaintiff turned in his truck and all work-related materials to Chizek. Plaintiff then returned to North Carolina.

A few weeks later, plaintiff, who was still in North Carolina, contacted Chizek's personnel manager and indicated he was ready to return to work. The personnel manager told plaintiff he would get back to him. Shortly thereafter, plaintiff, who was still located in North Carolina, received a call from one of Chizek's dispatchers informing him that a driver would pick plaintiff up in North Carolina and return him to Wisconsin.

Upon plaintiff's return, he was reissued his truck and other work materials. Plaintiff did not have to go through any new

employee training, paperwork, or tests because less than 30 days had elapsed since he had last worked for Chizek.

On 26 August 2007, plaintiff was injured in Missouri as a result of an accident that occurred while he was driving his Chizek truck. After exhausting his Wisconsin workers' compensation benefits, plaintiff filed a Form 33 with the Industrial Commission to initiate a claim in North Carolina on 26 August 2008. On 17 September 2008, defendants filed a Form 61 denying plaintiff's claim because, *inter alia*, the Commission did not have jurisdiction over the claim.

On 19 May 2009, a hearing on defendants' jurisdictional claim was conducted by Deputy Commissioner Ronnie E. Rowell. On 22 December 2009, Deputy Commissioner Rowell filed an opinion and award concluding that the Commission had jurisdiction over plaintiff's claim. Defendants appealed to the Full Commission, which affirmed the deputy commissioner's opinion and award on 18 May 2010. Defendants appeal.

Defendants' sole argument on appeal is that the Commission erred by concluding that it had jurisdiction over plaintiff's claim. We disagree.

> As a general rule, the Commission's findings of fact are conclusive on appeal if supported by any competent evidence. It is well settled, however, that the Commission's findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.

Perkins v. Arkansas Trucking Servs., Inc., 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000)(internal quotations and citations omitted). Thus, "our task [is] to review the record *de novo* and make jurisdictional findings independent of those made by the Commission[.]" *Morales-Rodriguez v. Carolina Quality Exteriors, Inc.*, ___ N.C. App. ___, ___, 698 S.E.2d 91, 94 (2010).

Plaintiff was injured in an accident in Missouri while he was working for Chizek. N.C. Gen. Stat. § 97-36 (2009) "contains the factors to determine if an employee, who is injured in an accident outside of North Carolina, is entitled to compensation." *Washington v. Traffic Markings, Inc.*, 182 N.C. App. 691, 696, 643 S.E.2d 44, 47 (2007). This statute states, in relevant part:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him . . . to compensation if it had happened in this State, then the employee . . . shall be entitled to compensation (i) if the contract of employment was made in this State, . . . provided, however, that if an employee . . . shall receive compensation or damages under the laws of any other state nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Article.

N.C. Gen. Stat. § 97-36 (2009).

In order to resolve the dispute over where plaintiff's employment contract was made, we must first determine the effect of plaintiff's execution of the termination form on 27 July 2006. In this form, plaintiff both "voluntarily terminate[d] [his] employment" and "request[ed] 2-3 wks unpaid personal time-off." Defendants contend that under the termination form, plaintiff's

employment continued during his time off, unless he did not return after his time off was completed. In contrast, plaintiff contends that the effect of the form was to terminate plaintiff's employment until he requested to return. The plain language of the termination form does not resolve the matter, as it includes provisions for both termination of employment and unpaid time off during employment, which are mutually exclusive of each other.

> The general rule is that when a written instrument is introduced into evidence, its terms may not be contradicted by parol or extrinsic evidence, and it is presumed that all prior negotiations are merged into the written instrument. . . . However, if the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement between the parties.

Mosley & Mosley Builders, Inc. v. Landin Ltd., 87 N.C. App. 438, 442, 361 S.E.2d 608, 611 (1987)(internal quotations and citations omitted).

In support of their jurisdictional argument, defendants presented deposition testimony from two Chizek employees regarding the effect of an executed termination form. Mary Jo Driscoll ("Ms. Driscoll"), who worked in Chizek's payroll and workers' compensation departments, testified about the effect of the termination form as follows:

> Q. Okay. Can you explain why this form has voluntarily terminate and then two weeks requesting two weeks personal time off?
>
> A. We do it that way because over the years quite often they just say they need time off and they will had come back and they never return. So this way we are covered if they

> don't ever want to come back, fine, but if they do come back we allow them to come back. Quite often they don't tell you that they are not coming back when they leave or something changes when they are off for personal reasons and they decide not to come back then we already had the forms filled out that they were terminating.
>
> Q. Or they voluntarily resigned?
>
> A. Correct.
>
> Q. But in Mr. Baker's case when he comes back or is called to come back did you consider this a rehire or just a continuation of his employment?
>
> A. Just a continuation. He was coming back like he said was going to.
>
> Q. So the voluntary termination language is just it protects the company?
>
> A. Right, because quite often they don't come back and then they will go to unemployment and say we fired them or something. This way we have it covered that they were the ones that choose to leave.
>
> Q. Now during this two week or 2-3 week period of time they are unpaid, they are not paid; correct?
>
> A. Correct.
>
> Q. And I guess in terms of how do you consider their status?
>
> A. *They are not working for us at the time*.

(Emphasis added). In addition, Harland Palmer ("Palmer"), who was Chizek's former director of safety and human resources, testified about plaintiff's status after he executed the termination form as follows:

> Q. Between July 27, '06 and August 17, '06, would you consider Mr. Baker to be a Chizek employee during that period?

A. *No. He voluntarily terminated his employment.*

. . .

Q. And with respect to you mentioned that you said you would consider him terminated was this the form that he said he voluntarily terminated his employment but was requesting 2-3 weeks of unpaid personal time off is this the situation that is a form used by the company so that if they don't show back up you can close their file but in this case he is asking for 2-3 weeks of unpaid time off.

A. Correct, he is asking for the time off, we allow that.

Q. So I guess what I'm asking you you've answered a question that you would consider him to not be an employee at that point yet you are saying you gave him 2-3 weeks off so when he came back he is just continuing his employment. Can you explain that?

A. Okay. He asked for time off. He asked for the 2-3 weeks, okay. We granted him that wish. He voluntarily terminated his employment with us and signed that and dated it.

Q. So you don't consider that new hire when he came back or new employment you just considered he's coming back to his employment after his 2-3 weeks of personal time off?

A. That is correct. That is personal time that is not employment of period.

Q. So you are just saying during this 2-3 week unpaid leave you don't consider him to be an employee at that point but he's continuing his employment once he comes back?

A. Correct.

Q. We're kind of dancing around this thing and I'm just wondering has the company had situations where people say they are coming back in a week or two weeks and don't and they just need to have some type of document terminating the employment?

> A. Correct.
>
> Q. And is that what this is, is this how Chizek handles that?
>
> A. This specific incident here states that Rowland Baker voluntarily terminated his employment for unpaid personal time off period.
>
> Q. Right. So I guess it just seems to me to say it is a conflict to say I'm terminating my employment but all I'm asking for is a couple weeks of time off?
>
> A. Correct.
>
> Q. So what I'm just saying from Chizek's standpoint when he came back to work is this a new hire, new employment or is this just a continuation of his prior employment?
>
> A. *This would be not a continuation, he was not employed, he was not paid, he did not do any service for us*. That is the definition. Did he did a service for us, no, he took the time off and signed for that.

(Emphasis added). While Chizek's witnesses were not entirely clear on the purpose of the voluntary termination form, it ultimately appears the form was created to ensure that drivers would have formally terminated their employment if they did not return to work after the requested time off period. After the form was completed, there was nothing else that a Chizek employee would be required to do to terminate employment. Thus, Chizek treated the termination form as a voluntary termination of employment *until* the employee indicated he was willing to return in order to protect its interests.

Based on this treatment, both Ms. Driscoll and Palmer testified that plaintiff was not considered an employee during the

weeks of time off he requested on the termination form. Since plaintiff was no longer considered an employee after he executed the termination form on 27 July 2006, plaintiff's return to work several weeks later was necessarily pursuant to a new employment contract. It is the location of the formation of this new contract which determines whether the Commission had jurisdiction over plaintiff's claim under N.C. Gen. Stat. § 97-36 (2009).

"To determine where a contract for employment was made, the Commission and the courts of this state apply the 'last act' test." *Murray v. Ahlstrom Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998). "[F]or a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Thomas v. Overland Express, Inc.*, 101 N.C. App. 90, 96, 398 S.E.2d 921, 925 (1990).

In *Murray*, the employee was initially hired to work at a project located in Calhoun, Tennessee. 131 N.C. App. at 295, 506 S.E.2d at 725. After the completion of this project, the employee was laid off. *Id.* Two and one-half months later, the employee's former supervisor telephoned him at the employee's residence in Canton, North Carolina and offered him an identical position at a project in Corinth, Mississippi. *Id.* After negotiations over compensation, the employee, who was still located in North Carolina, accepted the offer over the phone. *Id.* Under these facts, this Court held that the last act to make the employment contract binding occurred while plaintiff was in North Carolina, and consequently, the Commission had jurisdiction over the

employee's workers' compensation claim. *Id.* at 297, 506 S.E.2d at 726.

The facts in the instant case closely parallel those in *Murray*. Plaintiff voluntarily terminated his previous employment with Chizek when he executed the termination form. Several weeks later, he called Chizek from North Carolina and indicated he was willing to return to work. While plaintiff's personnel manager never explicitly accepted plaintiff's offer to return to work over the phone, Chizek shortly thereafter sent a driver to pick up plaintiff in North Carolina and return him to Wisconsin. "Acceptance by conduct is a valid acceptance." *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980). Thus, the final act necessary to make plaintiff's new employment contract a binding obligation occurred in North Carolina. *Murray*, 131 N.C. App. at 297, 506 S.E.2d at 726.

Defendants briefly argue that plaintiff's new employment contract was not binding until after he had returned to Wisconsin and "signed out a new truck, obtained the additional documents and kits and started driving again . . . ." However, these administrative matters are "more of a consummation of the employment relationship than the 'last act' required to make it a binding obligation." *Murray*, 131 N.C. App. at 297, 506 S.E.2d at 727; *see also Warren v. Dixon and Christopher Co.*, 252 N.C. 534, 114 S.E.2d 250 (1960). These incidental matters do not affect the conclusion that plaintiff entered into a binding employment obligation while he was located in North Carolina.

Since plaintiff's employment contract was made in North Carolina, the Commission correctly concluded that it had jurisdiction over plaintiff's claim. Accordingly, the Commission's opinion and award is affirmed.

Affirmed.

Judges STROUD and HUNTER, Jr., Robert N. concur.

Report per Rule 30(e).