NO. COA04-1040

NORTH CAROLINA COURT OF APPEALS

Filed: 7 June 2005

ROBBIE L. WAGONER,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 972261

PIEDMONT/HAWTHORNE HOLDINGS,
Employer,

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by plaintiff from Opinion and Award entered 4 March 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 May 2005.

George Francisco, PC, by George Francisco, for plaintiff-appellant.

Davis and Hamrick, L.L.P., by Shannon Warf Beach, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff, Robbie Wagoner, was employed by defendant-employer beginning in October of 1996. In December 1997, he was diagnosed with degenerative disc disease, but sought no further treatment for the condition until after 20 September 1999, when he injured his back while at work. Due to worsening pain, plaintiff reported his back injury to his employer. On 27 September 1999, he sought medical treatment and was removed from work for a week. An MRI on 7 October 1999 revealed degenerative changes and a herniated disc. According to his treating

physician, the back pain was related to "the lifting incident at work" and plaintiff elected to have surgery.

Plaintiff returned to work for defendant-employer on 3 April 2000. On 19 April, while performing heavy lifting, plaintiff "experienced a specific onset of back pain." He was diagnosed as suffering from recurrent herniation and despite being given lifting restrictions of 25 pounds, he was removed from work again due to ongoing pain. He worked intermittently thereafter and consulted with a neurosurgeon on 20 July 2000. A second surgery was scheduled for 6 September 2000. On 21 August 2000, plaintiff was removed from work because of his persistent pain. After the surgery, plaintiff returned to work full-time on 11 December 2000.

On 29 October 2001, the deputy commissioner found that plaintiff had sustained an injury in the course of his employment and required defendants to pay temporary total disability from 9 October 1999 through 2 April 2000, and from 21 August 2000 through 10 December 2000, as well as all reasonable medical expenses relating to the injuries. Defendants paid Wagoner all disability benefits on 17 December 2001.

On 10 December 2001, defendant-employer terminated plaintiff's employment for violations of its attendance policy. Plaintiff requested a hearing, contending that he had been fired under a false pretext after the favorable award from the Commission. The deputy commissioner denied his claim. On appeal, the Full Commission found that over the course of his employment, plaintiff had been "reprimanded for his work attendance, both before and since the workplace injuries." The Commission also made the following pertinent findings:

> 5. In accordance with the attendance policy, employees with six months to six years of employment were entitled to six days of sick leave and ten vacation days per year. Employees are charged with a Full Date Occurrence (FDO) anytime they are not at work if the absence does not qualify as vacation, sick, funeral, holiday or jury duty leave, as spelled out in

> the policy. Employees who incur two FDO's in twelve months are given a verbal warning. Those with three FDO's in twelve months receive a written warning. Those with more than three FDO's in twelve months may be terminated.
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> 6. Under the attendance policy, employees are charged a partial day occurrence (PDO) for arriving late to work, returning late from lunch, leaving work for appointments, or leaving before the end of the shift. Employees who receive eight PDO's in 12 months receive a verbal warning, nine PDO's receive a written warning and more than nine PDO's in 12 months may be terminated.
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> 7. In 2001, plaintiff's attendance record showed he took sick leave on January 2, 3, 18; February 15; March 5 and 6, for a total of six days. Plaintiff took vacation leave January 11; March 16; July 2, 3, 5; August 8, 22, 29, and October 8, 10, 17 and 25, for a total of twelve days.
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> 8. Plaintiff had six PDO's (June 11, 21, 28; August 17; October 18 and November 13) and four FDO's (June 15; August 29; November 28 and December 7).
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> . . . .
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> 12. Defendant-employer's attendance policy is uniformly applied to all employees. Plaintiff was well aware of the policy, as he had previously been reprimanded for his chronic absenteeism. Any other employee would have been terminated for such absenteeism under defendant's policy.

The Commission found plaintiff's contention that "he was fired under false pretext shortly after receiving a favorable ruling from the Industrial Commission" was not supported by competent evidence. Similarly, his testimony "that some of his occurrences should have been charged as compensatory leave" was deemed not to be credible. The Commission also found "[p]laintiff's disability relating to his compensable injury had ended by 7 December 2001" and he had been allowed to lift up to 50 pounds by his treating physician since 22 February 2001.

Based on these findings, the Full Commission concluded that the defendants

> successfully rebutted the presumption of continuing disability by showing that suitable work has been available . . . since he returned to work on 11 December 2000 and that plaintiff was capable of performing the suitable employment available. Plaintiff continued to work for the employer for approximately one year; he was physically able to perform his job duties; by August 2001 he was only reporting some back pain . . . and he was not taking any medication for back pain; defendants provided suitable employment and plaintiff has demonstrated that he was capable of performing this work. Any inability to earn pre-injury wages on or after 10 December 2001 was due to misconduct by the plaintiff and was not due to the compensable injury.

Additionally, the Commission found that "plaintiff's misconduct, his chronic absenteeism, is the basis for his dismissal" due to the mandatory attendance policy. The Commission concluded, with one commissioner dissenting, that plaintiff's chronic absenteeism amounted to a constructive refusal to accept suitable employment and denied his claim for additional temporary total disability compensation. Plaintiff appeals.

On appeal, plaintiff argues the Industrial Commission erred by concluding that defendant had satisfied its burden to show: 1) that he was terminated for misconduct, 2) that a non-disabled employee would have been terminated for the same conduct, and 3) that his termination was not related to the compensable injury. On appeal from an opinion and award of the Industrial Commission, our review " is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). These findings are conclusive on appeal as long as there is competence evidence to support them, even if there is evidence to support contrary findings. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801-02 (1997). The "Commission is the sole

judge of the credibility of the witnesses and the weight to be given their testimony," *Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 458, 518 S.E.2d 200, 204 (1999), but we review its conclusions of law *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

In *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996), this Court held that when employees who previously sustained compensable injuries are terminated from rehabilitative employment due to misconduct, the termination does not automatically bar them from receiving benefits as if they had constructively refused to accept employment. Instead, "the test is whether the employee's loss of . . . wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether" the loss is attributable to the "work-related disability, in which case the employee will be entitled to benefits for such disability." *Id.* at 234, 472 S.E.2d at 401. "[T]o bar payment of benefits, an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury." *McRae*, 358 N.C. at 493, 597 S.E.2d at 699.

In the present case, the Commission found: 1) plaintiff was terminated for his chronic absenteeism, 2) defendant's attendance policy applied to all employees and would have resulted in their termination as well, and 3) the absenteeism was not related to the back injury. The evidence in the record indicates that even if one of plaintiff's sick days (January 18) and one of his FDO's (November 28) were attributed to his back injury, he also took twelve vacation days, rather than the ten allowed by the policy. Furthermore, the number of days he was absent without providing his employer with any kind of excuse also violated company policy. The Commission

also found that "defendant-employer developed and uniformly applied its attendance policy to all its employees." There was also evidence that Wagoner's healing period had ended; unlike the plaintiff in *McRae*, he was not in a light duty or rehabilitative position where he was terminated for lack of productivity. *See McRae*, 358 N.C. at 497, 597 S.E.2d at 701 (plaintiff terminated from light-duty position because of failure to label the required amount of boxes).

Since competent evidence in the record supports the Commission's findings which, in turn, support the Commission's legal conclusion that plaintiff's termination was due to chronic absenteeism, amounting to a constructive refusal to accept suitable employment, we affirm the Commission's decision denying Wagoner's claim for additional temporary total disability benefits.

Affirmed.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).