OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-273-457-001

ISSUE

Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his October 1, 2024 termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving Temporary Total Disability (TTD) benefits.

FINDINGS OF FACT

1. On May 20, 2024 Claimant sustained an admitted industrial injury to his right lower extremity. He was struck by a pipe being moved by a forklift operator.

2. Claimant visited UCHealth Greeley Hospital-Emergency Care for treatment with Darren Erick Trembly, M.D. Dr. Trembley's impression after ordering x-rays was an avulsion fracture of the anterior tibial plateau. Claimant's right knee was placed in a knee immobilizer pending an orthopedic appointment and additional imaging studies.

3. On May 23, 2024 Claimant visited Physician's Assistant Jaqueline House and Mark Krisburg, M.D. at Banner Occupational Health Clinic – Greeley. Diagnoses included a fracture of the upper right tibia, superficial head injury, left shoulder pain, and left knee pain. Referral to an orthopedic specialist and CT scan were ordered. Claimant was restricted from working.

4. On June 5, 2024 Respondents filed a General Admission of Liability (GAL). They acknowledged medical benefits and Temporary Total Disability (TTD) benefits for open periods.

5. Claimant testified that on August 9, 2024 he received a telephone call from Sedgwick claim representative Maria Abrahim-Petrone. She advised Claimant that he was expected to return to work for eight hours each day.

6. Following his release to light duty, Claimant returned to work on August 13, 2024. Claimant initially returned to work for eight hours per day.

7. On August 15, 2024 Claimant returned to PA-C House and Dr. Krisburg. He received modified work restrictions. Claimant was not to drive for work, seated office work only, and ambulation for personal reasons only and with crutches. He was limited to 2 hours of work per day.

8. Respondents filed a second GAL on August 23, 2024. They acknowledged Temporary Partial Disability (TPD) benefits after Claimant's return to work pursuant to

the work restrictions assigned on August 15, 2024.

9. On September 26, 2024 Claimant returned to PA-C House. She released him to work eight hours per day. PA-C House modified Claimant's work restrictions to include driving his personal vehicle short distances, seated work only, ambulating for personal reasons with crutches or cane, and elevating his right foot above the hip for 10-15 minutes every two hours.

10. Claimant testified that he returned to work full time on September 30, 2024 for his first day with the recently modified restrictions. He commented that it very difficult to accommodate his restrictions in the area where he was seated. It was especially difficult to elevate his foot above his hip. Claimant remarked that when he started feeling pain, he went home to ice his leg.

11. Employer's Executive Assistant for Human Resources and Payroll Whitney Hale testified at hearing. Ms. Hale confirmed that she had direct supervisory duties over Claimant following his release to modified duty.

12. Ms. Hale explained that Employer provided various accommodations to allow Claimant to stretch his leg. She remarked that Employer offered Claimant an additional chair to put his leg up or flipped over a bench so he could elevate his leg. Moreover, in the front entry way, there were cushioned chairs where he could take a rest break during his time in the office. Ms. Hale confirmed that Claimant was allowed to leave for 15 minutes at a time without clocking out. However, she had communicated to Claimant that if he had to leave for over one hour, he was expected to clock out. In contrast, Claimant maintained he did not know he was supposed to clock out if he had to leave work for several hours, despite his acknowledgement that he had to clock out for any medical appointments during work hours.

13. On October 1, 2024 Ms. Hale and partial company owner Amy Janssen had a text message conversation about Claimant clocking in and leaving while on the clock. Ms. Hale detailed that she and Ms. Janssen closely monitored Claimant's hours while he was working modified duty. She commented that, once she noticed that Claimant was absent for long periods of time when he was supposed to be at the office, they reviewed video camera footage and the times when Claimant left.

14. Ms. Hale explained that on September 30, 2024 Claimant clocked in to work at 9:06 a.m. and clocked out at 3:41 p.m. However, when Claimant quickly left out the back door early in the day, Ms. Hale waited to see whether he simply left to rest in his car or stretch his leg. When he failed to return for a couple of hours, they checked the cameras. After reviewing the video, Employer adjusted Claimant's card to reflect the time he was in the office at his desk. The adjusted time reflected Claimant was only at work from 9:06 am to 9:07 am and 1:52 pm to 3:31 pm.

15. On the following day, or October 1, 2024, Claimant clocked in at 8:38 am and clocked out at 2:00 pm. However, as Claimant's adjusted timecard reveals, he was

only in the office from 8:38 am until 9:52 am and returned from 11:25 am until 2:00 pm. Ms. Hale noted that Employer was only paying Claimant for his time at work, not for the time that he went home to stretch.

16. On October 1, 2024 Employer terminated Claimant for time clock fraud. The termination document specifies that Claimant had clocked in and left the building for multiple hours on different days. Ms. Hale explained that Employer had previously terminated employees for time clock fraud, and in fact turned off mobile clock-ins to eliminate the issue of not properly clocking in and out.

17. Claimant maintained that another partial owner of Employer advised him that it was in the best interests of the company to remain clocked in even if he was not working. Claimant acknowledged that he was not at the office during the hours reflected in his timecards for September 30, 2024 and October 1, 2024, but maintained he was unaware that he had to clock out if he left for two hours at a time.

18. Respondents have established it is more probably true than not that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on May 20, 2024 Claimant sustained an admitted industrial injury to his right lower extremity while working for Employer. Following his release to light duty, Claimant returned to work on August 13, 2024. Claimant initially returned to work for eight hours per day, but because he was unable to tolerate the pain and discomfort, the restrictions were reduced to two hours each day. Employer accommodated Claimant's restrictions including allowing him to leave for short periods of time to stretch his leg.

19. On September 26, 2024 Claimant returned to PA-C House and she released him to work eight hours per day. She modified Claimant's work restrictions to include driving his personal vehicle short distances, seated work only, ambulating for personal reasons with crutches or cane, and elevating his right foot above the hip for 10-15 minutes every two hours. Claimant testified that he returned to work full time on September 30, 2024 for his first day with the recently modified restrictions. He commented that it was very difficult to accommodate his restrictions in the area where he was seated. It was especially difficult to elevate his foot above his hip. Claimant remarked that when he started feeling pain, he went home to ice his leg.

20. While Claimant alleges that he left work due to his disability, the first day when he was supposed to work for eight hours he stayed at work for only one minute before leaving. Claimant did not let his supervisor know, or clock out, but left out the back door and did not return for several hours. Notably, on September 30, 2024 Claimant clocked in to work at 9:06 a.m. and clocked out at 3:41 p.m. However, after reviewing video, Employer adjusted Claimant's card to reflect the time he was in the office at his desk. The adjusted time reflected Claimant was only at work from 9:06 am to 9:07 am and 1:52 pm to 3:31 pm. On the following day, Claimant again left after being at work for less than an hour and a half. He failed to inform anyone or clock out. Importantly,

Claimant clocked in at 8:38 am and clocked out at 2:00 pm. However, as Claimant's adjusted timecard reveals, he was only in the office from 8:38 am until 9:52 am and returned from 11:25 am until 2:00 pm.

21. Claimant maintained that another partial owner of Employer advised him that it was in the company's best interests to remain clocked in even if he was not working. He acknowledged that he was not at the office during the hours reflected in his timecards for September 30, 2024 and October 1, 2024, but explained he was unaware that he had to clock out if he left for two hours at a time. Despite Claimant's explanation that he was not aware of the requirement to clock out, his testimony is not credible. Claimant knew he had to be off the clock to attend medical appointments, and he communicated with his Employer prior to leaving for appointments when he would be absent for several hours. Moreover, Ms. Hale credibly explained that Claimant's job duties and attendance requirements had been communicated to him.

22. On September 26, 2024 Claimant's treating physician released him to work eight hours per day. Claimant failed to apprise his supervisors of his inability to tolerate an eight-hour shift and unilaterally decided to leave work without clocking out. Furthermore, Claimant's Employer complied with his work restrictions and provided various accommodations, including allowing him to leave for short periods of time to stretch his leg. Ms. Hale noted that, prior to September 30, 2024, Employer was working with Claimant to allow him to maintain his employment by accommodating his restrictions and the need to do what was necessary for him to tolerate his symptoms while at work. Notably, Claimant admitted that he was able to tolerate a three-hour work shift for over one month prior to September 30, 2024. Claimant's termination was not predicated on the worsening of his work-related condition, but on timecard fraud. Claimant's failure to properly clock out was a violation of company policy that could lead to termination. Ms. Hale remarked that other employees had previously been terminated for similar misconduct. Claimant's actions in failing to adhere to Employer's attendance and time recording policies demonstrate that he exercised some control over his October 1, 2024 termination under the totality of the circumstances. Claimant precipitated his employment termination by volitional acts that he would reasonably expect to cause the loss of employment. Accordingly, Claimant was responsible for his termination from employment and is precluded from receiving TTD benefits after October 1, 2024.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Off.*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that a claimant was responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

5. As found, Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on May 20, 2024 Claimant sustained an admitted industrial injury to his right lower extremity while working for Employer. Following his release to light duty, Claimant returned to work on August 13, 2024. Claimant initially returned to work for eight hours per day, but because he was unable to tolerate the pain and discomfort, the restrictions were reduced to two hours each day. Employer accommodated Claimant's restrictions including allowing him to leave for short periods of time to stretch his leg.

6. As found, on September 26, 2024 Claimant returned to PA-C House and she released him to work eight hours per day. She modified Claimant's work restrictions

to include driving his personal vehicle short distances, seated work only, ambulating for personal reasons with crutches or cane, and elevating his right foot above the hip for 10-15 minutes every two hours. Claimant testified that he returned to work full time on September 30, 2024 for his first day with the recently modified restrictions. He commented that it was very difficult to accommodate his restrictions in the area where he was seated. It was especially difficult to elevate his foot above his hip. Claimant remarked that when he started feeling pain, he went home to ice his leg.

7. As found, while Claimant alleges that he left work due to his disability, the first day when he was supposed to work for eight hours he stayed at work for only one minute before leaving. Claimant did not let his supervisor know, or clock out, but left out the back door and did not return for several hours. Notably, on September 30, 2024 Claimant clocked in to work at 9:06 a.m. and clocked out at 3:41 p.m. However, after reviewing video, Employer adjusted Claimant's card to reflect the time he was in the office at his desk. The adjusted time reflected Claimant was only at work from 9:06 am to 9:07 am and 1:52 pm to 3:31 pm. On the following day, Claimant again left after being at work for less than an hour and a half. He failed to inform anyone or clock out. Importantly, Claimant clocked in at 8:38 am and clocked out at 2:00 pm. However, as Claimant's adjusted timecard reveals, he was only in the office from 8:38 am until 9:52 am and returned from 11:25 am until 2:00 pm.

8. As found, Claimant maintained that another partial owner of Employer advised him that it was in the company's best interests to remain clocked in even if he was not working. He acknowledged that he was not at the office during the hours reflected in his timecards for September 30, 2024 and October 1, 2024, but explained he was unaware that he had to clock out if he left for two hours at a time. Despite Claimant's explanation that he was not aware of the requirement to clock out, his testimony is not credible. Claimant knew he had to be off the clock to attend medical appointments, and he communicated with his Employer prior to leaving for appointments when he would be absent for several hours. Moreover, Ms. Hale credibly explained that Claimant's job duties and attendance requirements had been communicated to him.

9. As found, on September 26, 2024 Claimant's treating physician released him to work eight hours per day. Claimant failed to apprise his supervisors of his inability to tolerate an eight-hour shift and unilaterally decided to leave work without clocking out. Furthermore, Claimant's Employer complied with his work restrictions and provided various accommodations, including allowing him to leave for short periods of time to stretch his leg. Ms. Hale noted that, prior to September 30, 2024, Employer was working with Claimant to allow him to maintain his employment by accommodating his restrictions and the need to do what was necessary for him to tolerate his symptoms while at work. Notably, Claimant admitted that he was able to tolerate a three-hour work shift for over one month prior to September 30, 2024. Claimant's termination was not predicated on the worsening of his work-related condition, but on timecard fraud. Claimant's failure to properly clock out was a violation of company policy that could lead to termination. Ms. Hale remarked that other employees had previously been terminated for similar misconduct. Claimant's actions in failing to adhere to Employer's attendance and time

recording policies demonstrate that he exercised some control over his October 1, 2024 termination under the totality of the circumstances. Claimant precipitated his employment termination by volitional acts that he would reasonably expect to cause the loss of employment. Accordingly, Claimant was responsible for his termination from employment and is precluded from receiving TTD benefits after October 1, 2024.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant was responsible for his termination from employment and is precluded from receiving TTD benefits after October 1, 2024.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 4, 2025.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203