OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-281-625-001

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. Claimant worked as a general manager for Employer. His duties involved managing a car wash facility. On June 29, 2024 Claimant suffered an admitted industrial injury to his left shoulder.

2. Claimant continued working modified duty following his work injury. Respondents acknowledged Temporary Partial Disability (TPD) benefits from June 30, 2024 and continuing.

3. Operations Manager Tony Salazar testified at the hearing in this matter. He explained that he had approximately 2.5 years of experience with Employer and directly oversaw Claimant's performance. Mr. Salazar noted he supervised Claimant daily. The record reveals that on October 1, 2024 Claimant was terminated from employment.

4. Mr. Salazar explained that Claimant was terminated for violation of company policy, numerous instances of tardiness, low performance, and insubordination. He commented that employees have previously been written up and terminated for being late. Although Claimant's separation form did not have the boxes checked related to the reasons for his termination, Mr. Salazar explained there had been a technical issue, and noted the form in Claimant's Human Resources (HR) folder was completed with all boxes checked.

5. Mr. Salazar testified that employees received training on Employer policies and guidelines. Although Claimant did not obtain a written copy of Employer's Handbook, the materials were reviewed during new hire orientation. Moreover, the Handbook is also available for employees to access anytime on Employer's website.

6. The record is replete with documentation of Claimant's infractions. Mr. Salazar explained that Claimant was late for his 6:30 a.m. shift six times between September 3-17, 2024. He confirmed Claimant's tardiness after reviewing CCTV footage showing his late arrival to work. The tardiness was unacceptable for a general manager of one of Employer's facilities. Mr. Salazar also noted that, regardless of whether the facility opened on time, Claimant was repeatedly late for his shift.

7. Mr. Salazar commented that during Claimant's employment he was made aware of various performance deficiencies including poor site presentation. Notably, the facility was in disarray and equipment was not clean. Generally, there was a poor customer experience despite several audits and coaching.

8. Mr. Salazar also explained that Claimant reached out to him regarding employee Mike Ariano, who Claimant oversaw at Employer's car wash. In a September 20, 2024 e-mail to HR employee Audrey Scanga, Mr. Salazar documented that Mr. Ariano had not arrived for his work shift by 7:00 am because he had overslept. Claimant had sought to terminate Mr. Ariano for job abandonment if he did not show up or call by 1:00 pm. However, Mr. Salazar explained that one no call no show was an insufficient basis for termination, and Claimant could not fire Mr. Ariano. Claimant responded negatively to the instruction and stated he was going to force Mr. Ariano to quit. Moreover, Mr. Salazar noted that Claimant had recently openly expressed that he did not care about his job or performance. Claimant did not timely submit the car wash belt inspection and received a 0 on his report card as a result.

9. In the September 20, 2024 e-mail to Ms. Scanga, Mr. Salazar also explained that Claimant had been deflecting his shortcomings and failures onto a supervisor named Ernesto. Mr. Salazar reminded Claimant several times that he was the general manager and "should not be pawning everything off on his employees." Notably, on September 18, 2024 Claimant received a "secret shop with a score of 75%." Claimant forwarded the result to Mr. Salazar blaming Ernesto for the shortcomings. Mr. Salazar then sent Claimant an informative email with coaching and training on how to handle the situation. He explained that the preceding responses from Claimant demonstrated a complete disregard for his position. Claimant simply did not care about timely submissions or following company policies and guidelines.

10. In a September 26, 2024 e-mail to Claimant, Mr. Salazar addressed Claimant's insubordination. He remarked that Employer has specific pre-approved vendors used for ordering specific products. However, Claimant insisted on using an unapproved vendor for a product. When Mr. Salazar attempted to direct Claimant to use the vendor approved for the order, Claimant responded that he would simply find a different way to obtain reimbursement. Mr. Salazar noted this was not an acceptable practice, and failure to follow the direction would be considered insubordination. Ms. Scanga also sent Claimant an e-mail explaining the importance of following established ordering processes. She noted it was essential to adhere to Employer guidelines to ensure consistency and efficiency across all car wash locations. Although she appreciated Claimant's initiative, she directed him not to make independent purchases.

11. Mr. Salazar summarized that the cause for Claimant's termination was tardiness on six occasions. There were other factors considered in Claimant's termination including inappropriate comments to other employees, several instances of subordination and poor customer service.

12. Shawn Liberge testified at the hearing in his capacity as Employer's director of operations. He had indirect supervisory duties over Claimant because he oversaw the operations team including Claimant's direct supervisor Mr. Salazar. Mr. Liberge commented that there were multiple concerns with Claimant's job performance during his employment. All of the concerns were related to Claimant's conduct. Mr. Liberge stated he personally visited the location where Claimant was a general manager. After speaking with Claimant and attempting to coach and redirect him, he did not leave with a feeling that any of the performance issues would be addressed.

13. On September 26, 2024 Mr. Salazar sent an e-mail to Mr. Liberge and Ms. Scanga explaining that he was "[g]etting very frustrated with [Claimant] and the blatant disrespect despite over a dozen conversations with him. I feel as if I'm stuck with him due to the workers comp claim and can't hold him accountable." Ms. Scanga responded that just because Claimant was on Workers' Compensation did not mean he was able to break policies. She also reiterated that Claimant was required to order products that other Employer locations were using. She noted "[I]f he wants to be insubordinate about it after that, I would write him up." Mr. Liberge echoed [s]tick to your guns, he needs to order what is standard across all locations as directed."

14. Claimant testified at hearing that Employer never told him that arriving late for work was a concern. He noted the store was open every day on time. Claimant also explained that he never received an Employee Handbook. Employer also did not explain why he was terminated. Furthermore, Mr. Liberge visited Claimant's car wash in person only once while he worked for Employer.

15. Claimant remarked that he received 25 hours of paid time off (PTO) from Employer after termination. However, he had not earned or accrued 25 hours of PTO by October 1, 2024. Claimant also noted he began working for a different employer on October 21, 2024.

16. 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 June 29, 2024 Claimant sustained an admitted industrial injury to his left shoulder while working for Employer. Claimant subsequently worked modified duty and Employer accommodated his work restrictions. Claimant's medical restrictions or physical condition did not contribute to his October 1, 2024 termination. Rather, the evidence reveals that Claimant was terminated based his conduct and numerous policy violations.

17. Mr. Salazar detailed that Claimant was terminated for violation of company policy, numerous instances of tardiness, low performance, and insubordination. The record is replete with documentation of Claimant's infractions. Mr. Salazar credibly explained that Claimant was late for his 6:30 a.m. shift six times between September 3-17, 2024. He confirmed Claimant's tardiness after reviewing CCTV footage showing his late arrival to work. The tardiness was unacceptable for a general manager of one of Employer's facilities.

18. Mr. Salazar commented that during Claimant's employment he was made aware of various performance deficiencies including poor site presentation. Notably, the facility was in disarray and equipment was not clean. Claimant also engaged in insubordination by failing to comply with Employer's policies and guidelines regarding ordering supplies. Ms. Scanga emphasized the importance of following established ordering processes. She noted it was essential to adhere to the guidelines to ensure consistency and efficiency across all of Employer's car wash locations. Claimant also threatened to force another employee to quit and exhibited an overall lack of care about his job. Mr. Salazar summarized that the cause for Claimant's termination was tardiness on six occasions. Other factors included inappropriate comments to other employees, several instances of subordination and poor customer service.

19. Mr. Liberge also credibly commented that there were multiple concerns with Claimant's job performance during his employment. All of the concerns were related to Claimant's conduct. Mr. Liberge stated he personally visited the location where Claimant was a general manager. After speaking with Claimant and attempting to coach and redirect him, he did not leave with a feeling that any of the performance issues would be addressed. Claimant's performance was unsatisfactory, and he failed to use opportunities for improvement or follow directions from his supervisors.

20. In contrast, Claimant testified that Employer never told him that arriving late for work was a concern. He noted the store was open every day on time. Claimant explained that he never received an Employee Handbook. Employer also did not apprise him of the reasons for his termination. However, Claimant's testimony that he was unaware that he could be terminated for his conduct is simply not credible. Mr. Salazar remarked that employees received training on Employer policies and guidelines. Although Claimant did not obtain a written copy of Employer's Handbook, the materials were reviewed during new hire orientation. Moreover, the Handbook was available for employees to access anytime on Employer's website.

21. Claimant's termination was not predicated on his work-related injuries, but on his violation of Employers' policies, lateness to work on numerous occasions during a short period of time, poor performance and insubordination. Claimant's actions in failing to adhere to Employer's attendance policies and deficiencies in job performance 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 June 29, 2024 Claimant sustained an admitted industrial injury to his left shoulder while working for Employer. Claimant subsequently worked modified duty and Employer accommodated his work restrictions. Claimant's medical restrictions or physical

condition did not contribute to his October 1, 2024 termination. Rather, the evidence reveals that Claimant was terminated based his conduct and numerous policy violations.

6. As found, Mr. Salazar detailed that Claimant was terminated for violation of company policy, numerous instances of tardiness, low performance, and insubordination. The record is replete with documentation of Claimant's infractions. Mr. Salazar credibly explained that Claimant was late for his 6:30 a.m. shift six times between September 3-17, 2024. He confirmed Claimant's tardiness after reviewing CCTV footage showing his late arrival to work. The tardiness was unacceptable for a general manager of one of Employer's facilities.

7. As found, Mr. Salazar commented that during Claimant's employment he was made aware of various performance deficiencies including poor site presentation. Notably, the facility was in disarray and equipment was not clean. Claimant also engaged in insubordination by failing to comply with Employer's policies and guidelines regarding ordering supplies. Ms. Scanga emphasized the importance of following established ordering processes. She noted it was essential to adhere to the guidelines to ensure consistency and efficiency across all of Employer's car wash locations. Claimant also threatened to force another employee to quit and exhibited an overall lack of care about his job. Mr. Salazar summarized that the cause for Claimant's termination was tardiness on six occasions. Other factors included inappropriate comments to other employees, several instances of subordination and poor customer service.

8. As found, Mr. Liberge also credibly commented that there were multiple concerns with Claimant's job performance during his employment. All of the concerns were related to Claimant's conduct. Mr. Liberge stated he personally visited the location where Claimant was a general manager. After speaking with Claimant and attempting to coach and redirect him, he did not leave with a feeling that any of the performance issues would be addressed. Claimant's performance was unsatisfactory, and he failed to use opportunities for improvement or follow directions from his supervisors.

9. As found, in contrast, Claimant testified that Employer never told him that arriving late for work was a concern. He noted the store was open every day on time. Claimant explained that he never received an Employee Handbook. Employer also did not apprise him of the reasons for his termination. However, Claimant's testimony that he was unaware that he could be terminated for his conduct is simply not credible. Mr. Salazar remarked that employees received training on Employer policies and guidelines. Although Claimant did not obtain a written copy of Employer's Handbook, the materials were reviewed during new hire orientation. Moreover, the Handbook was available for employees to access anytime on Employer's website.

10. As found, Claimant's termination was not predicated on his work-related injuries, but on his violation of Employers' policies, lateness to work on numerous occasions during a short period of time, poor performance and insubordination. Claimant's actions in failing to adhere to Employer's attendance policies and deficiencies in job performance 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 10, 2025.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
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