STATE OF MICHIGAN

COURT OF APPEALS

LORI J. (GLICK) RIDDLE,

Plaintiff-Appellant,

v

EAGLE PICHER INDUSTRIES, INC.,

Defendant-Appellee.

UNPUBLISHED
December 20, 1996

No. 177557
LC No. 92-000391

Before: McDonald, P.J., and Bandstra and C.L. Bosman*, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the July 8, 1994 order of the Worker's Compensation Appellate Commission, which reversed the magistrate and denied plaintiff's claim for benefits. We affirm.

Plaintiff injured her hand at work in October 1987 while operating a press. She returned to work in January 1989 and was given a number of light duty or favored jobs. However, she was discharged from her employment on August 16, 1989. The reason given was that she failed to pass a drug test.

Plaintiff applied for worker's compensation benefits. In a decision mailed April 30, 1992, the magistrate found plaintiff disabled and rejected defendant's argument that plaintiff was disqualified from receiving benefits because she was terminated from favored employment for misconduct. The magistrate relied on § 301(5) of the Worker's Disability Compensation Act, MCL 418.301(5); MSA 17.237(301)(5), which provides in part:

> (5) If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:
>
> (a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan

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* Circuit judge, sitting on the Court of Appeals by assignment.

> employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.
>
> * * *
>
> (e) If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job for whatever reason, the employee shall receive compensation based upon his or her wage at the original date of injury.

Because plaintiff was employed at favored work for less than 100 weeks, the magistrate held that her termination for misconduct did not affect her entitlement to benefits under subsection (5)(e).

Defendant appealed, arguing that plaintiff had failed to establish a work-related disability within the meaning of the statute, and that the magistrate erred in holding that she was entitled to benefits even though terminated for misconduct. In an opinion and order dated July 8, 1994, the WCAC rejected defendant's first claim of error but agreed that the magistrate erred as a matter of law in his interpretation of the favored work provisions of the statute. The WCAC held that the Legislature's adoption of § 301(5)(e) did not upset a long line of cases holding that an employee who is terminated for misconduct while performing favored work is in the same position as an employee who refuses favored work, i.e., the employee loses his or her right to benefits. Finding that plaintiff was performing favored work and that she was discharged for violating a company drug policy unconnected with plaintiff's disability, the WCAC held that plaintiff was disqualified from receiving benefits.

Plaintiff argues that the WCAC erred in rejecting the magistrate's interpretation of § 301(5), and that this is an issue of first impression. Plaintiff is incorrect on both counts. In *Lee v Koegel Meats*, 199 Mich App 696, 701-702; 502 NW2d 711 (1993), this Court rejected the interpretation of the statute offered by plaintiff in this case. This Court held that subsections 301(5)(b)-(e) all deal with the amount of benefits to be paid and not whether benefits are to be paid. In particular, this Court held that an employee who is terminated from favored work is not automatically entitled to resumption of benefits simply because she was employed for less than 100 weeks. *Lee* was followed in *Brown v Contech, Division of Sealed Power Technologies*, 211 Mich App 256, 263-264; 535 NW2d 195 (1995). In *Brown*, as in the present case, plaintiff was terminated from favored work after testing positive for marijuana in a drug screen. This Court held that the Legislature intended § 301(5) to be interpreted consistent with past precedent in the area of favored work and that an employee terminated from favored work for cause forfeits his or her right to benefits.

We hold that a plaintiff is not automatically entitled to benefits simply because she was terminated from favored work after less than 100 weeks. Moreover, because the WCAC found that

she was terminated for cause, we agree with the WCAC that plaintiff thereby forfeited her rights to benefits.

In the alternative, plaintiff argues that the WCAC's finding that she was terminated for cause is not supported by competent record evidence. She contends that the only evidence in this regard consists of the testimony of an employer representative who reported that plaintiff was terminated because of a positive drug screen. Plaintiff contends that this testimony is inadmissible hearsay and that no competent evidence supports the finding of discharge for cause. Plaintiff is once again mistaken on both counts. Plaintiff does not dispute the fact that she had a positive drug screen and, in fact, testified that she "tested positive for THC in [her] urine." An admission by a party is by definition not hearsay. MRE 801(d)(2)(A). Moreover, even the testimony of the employer representative was not hearsay because it was not an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c); *City of Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1994). Plaintiff's real concerns with the evidence involve the reliability of the testing procedures and the accuracy of the results of the drug screen. However, these are matters of weight, not admissibility.

We affirm.

/s/ Gary R. McDonald
/s/ Richard A. Bandstra
/s/ Calvin L. Bosman