COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP74 **Cir. Ct. No. 2007CV1313**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

REGENT INSURANCE COMPANY AND CERTCO, INC.,

PLAINTIFFS-APPELLANTS,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND CHRISTOPHER MCFARLIN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Regent Insurance Company and Certco, Inc. (collectively "Certco") appeal an order affirming a Labor and Industry Review Commission decision awarding worker's compensation benefits to Christopher McFarlin. Certco challenges the Commission's findings and argues that

McFarlin's injuries were not incidental to his employment. We reject these arguments and affirm the order.

BACKGROUND

¶2 The Commission adopted the following facts as found by the administrative law judge (ALJ). McFarlin worked for Certco, a grocery warehouse. On September 27, 2002, McFarlin was transporting a load to the warehouse cooler using a pallet jack. En route to the cooler, McFarlin encountered another pallet jack, operated by a less-experienced worker who had stopped when his path was blocked by a dock loader. The less-experienced worker was unable to maneuver his machine around the dock loader. McFarlin elected to move the dock loader out of the way so he and his co-worker could proceed. When exiting the dock loader, however, the machine rolled back and pinned McFarlin against the wall, causing serious injuries to his back, pelvis, bladder, and urethra. It is undisputed that McFarlin had neither training nor permission to operate the dock loader machine.

¶3 McFarlin filed for worker's compensation benefits. After a hearing, the ALJ concluded that McFarlin suffered a traumatic injury while performing service growing out of and incidental to his employment. The Commission affirmed the ALJ's decision and adopted the ALJ's findings and order as its own. On certiorari review, the circuit court affirmed the Commission's decision, and this appeal follows.

DISCUSSION

¶4 On appeal, this court reviews the Commission's findings of fact and conclusions of law, not those of the circuit court. *See* ***United Parcel Serv., Inc. v.***

Lust, 208 Wis. 2d 306, 321, 560 N.W.2d 301 (Ct. App. 1997). The determination of whether an employee was injured in the scope of his or her employment generally presents a mixed question of fact and law for the Commission. *See* ***Michels Pipeline Constr., Inc. v. LIRC***, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995). The Commission's findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence. ***Id.***; *see also* WIS. STAT. § 102.23(6).[1] Our role on appeal is to search the record for evidence supporting the Commission's factual determinations, not to search for evidence against them. *See* ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

¶5 Citing what it characterizes as McFarlin's inconsistent testimony, Certco argues that the Commission's findings regarding the circumstances giving rise to McFarlin's injuries are not supported by credible and substantial evidence. Specifically, Certco focuses on the following exchange on cross-examination:

> [Counsel]: So is it your testimony that with the dock loader, as it was parked at the time you decided to operate it, that it was impossible for two pallet jacks with pallets on them to pass side by side in the remaining corridor?
>
> [McFarlin]: It was possible to pass through.

Although McFarlin conceded it was possible for two pallet jacks to pass through, he had earlier emphasized: "It is possible to pass through with the two pallet jacks, yes, that is true. However, as I testified earlier, the gentleman in front of me had a very large load and I believe was inexperienced." That two pallet jacks

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

could pass through is not inconsistent with McFarlin's testimony that he believed the less-experienced worker was unable to maneuver around the dock loader. Therefore, we are not persuaded that this exchange constitutes inconsistent testimony or otherwise undermines the Commission's findings.

¶6 Certco nevertheless argues that, regardless of McFarlin's motive for operating the dock loader, his injuries are not compensable under the Worker's Compensation Act. For liability to attach under the Worker's Compensation Act, an employee's injury must occur when he or she is performing services or duties "growing out of and incidental to" his or her employment. WIS. STAT. § 102.03(1)(c). Certco contends that, because McFarlin was expressly prohibited from using the dock loader and was effectively performing another employee's job, his injuries were not incidental to his employment as a matter of law.

¶7 As a preliminary matter, the parties dispute the proper level of deference this court should accord the Commission's legal conclusions. However, regardless what level of deference we apply, if any, we would conclude that Certco's arguments fail pursuant to our supreme court's decision in ***Grant County Service Bureau, Inc. v. Industrial Commission***, 25 Wis. 2d 579, 584, 131 N.W.2d 293 (1964).

¶8 In ***Grant County***, a collection agency employee, in willful disobedience of his employer's directions, was attempting to repossess a TV antenna from a rooftop for the benefit of his employer. ***Id.*** at 580-81, 584. When making that attempt, the employee fell off the roof and was killed. Our supreme court held that if an employee's disobedient actions are undertaken in furtherance of the employer's interests rather than those of the employee, compensation should be granted. ***Id.*** at 584-85. Coverage under the Worker's Compensation Act,

therefore, does not hinge on whether the employee is engaging in an activity prohibited by his or her employer but, rather, on whether the activity is ultimately done in the employer's interest.

¶9 Citing ***Anderson v. Industrial Commission***, 250 Wis. 330, 334, 27 N.W.2d 499 (1947), Certco urges this court to adopt what it describes as "the eminently sensible proposition that an employer inures no benefit from employee activity that has been expressly forbidden by the employer." ***Anderson***, however, predates our supreme court's decision in ***Grant County***. Moreover, although Certco suggests that the holding in ***Grant County*** is "contrary to … logic," ***Grant County*** has not been overruled and is still controlling law. We are therefore obligated to follow it regardless whether we agree with its logic. *See* ***Schwittay v. Sheboygan Falls Mut. Ins. Co.***, 2001 WI App 140, ¶10, 246 Wis. 2d 385, 630 N.W.2d 772.

¶10 Based on our review of the record, we conclude that there was credible and substantial evidence to support a conclusion that McFarlin's unauthorized operation of the dock loader was done in Certco's interest, as McFarlin was attempting to facilitate the movement of goods in the warehouse. Because McFarlin's injuries occurred while performing services or duties "growing out of and incidental to" his employment, the Commission properly awarded worker's compensation benefits.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.