NO. COA02-700

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2003

FRANK EDWARD KING,
Plaintiff-Employee,

v.

North Carolina Industrial Commission
I.C. File No. 031286

EPES TRANSPORT SYSTEMS, INC.,
Defendant-Employer,

and

AMERICAN MANUFACTURERS
MUTUAL INSURANCE COMPANY,
Defendant-Carrier.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 12 February 2002. Heard in the Court of Appeals 17 February 2003.

Bridgers & Ridenour, P.L.L.C., by Eric Ridenour, for plaintiff-appellant.

Tuggle Duggins & Meschan, P.A., by Joseph F. Brotherton, for defendant-appellees.

EAGLES, Chief Judge.

Plaintiff, Frank Edward King, appeals from an Opinion and Award entered by the Full Industrial Commission denying his claim for workers compensation benefits.

The evidence tends to establish the following: In March 2000, plaintiff Frank Edward King ("King") owned and operated his own semi-truck under a contract to provide both his truck and hauling services exclusively to defendant, EPES Transport Systems, Inc.("EPES"). The

contract provided that King, as an independent contractor, was "responsible for all costs and expenses of providing the services under th[e] Agreement, including but not limited to . . . parts, accessories [and] repairs . . . applicable to the operation of the equipment leased [t]herein." The contract further provided that King, as an independent contractor, was "responsible for maintaining workers' compensation insurance" on himself and anyone else in his employ.

In March 2000, EPES dispatched King to Trenton, Ohio to deliver a load of freight. From Trenton, King was dispatched to Bloomington, Indiana to pick up another load. However, King did not arrive in Bloomington until after 5:00 p.m. and was unable to make his scheduled pickup. King contacted the dispatcher at EPES and advised the dispatcher of his situation. When the dispatcher told King that there were no other loads available, King began driving home to Sylva, North Carolina. After leaving Bloomington, King noticed that the power steering pump on his truck was beginning to give out. Earlier that week, King noticed that the water pump on his truck was leaking. With this in mind, King stopped for the night somewhere near Danville, Tennessee.

The EPES dispatcher called King the following morning and instructed him to pick up another driver's load and take it to Texas. King declined, telling the dispatcher that he was experiencing mechanical trouble. King then drove from Danville, Tennessee to Sylva, North Carolina, arriving in Sylva sometime during the evening of Saturday, 1 April 1999. At 8:30 p.m., King made a notation in his log book that he was "off duty" and his truck remained parked for the next two days. On Monday, 3 April 1999, King initiated repairs to the truck's water pump. Repairs were delayed until the following Friday while King awaited the arrival of the new water pump. At no time during this week did King receive dispatch instructions from EPES or attempt to contact EPES.

King resumed the truck repairs on Saturday, 8 April 1999. Prior to beginning work on the truck, King attached a tarpaulin to the side of his house and draped it over his truck in order to shield him from the inclement weather. At some point during the repairs, the wind blew the tarpaulin loose. When King climbed up a ladder in order to reattach the tarpaulin to the side of the house, another gust of wind filled the tarpaulin and pulled King off the ladder. As a result of the fall, King sustained injuries to his nose, wrist, elbows and knees. King informed EPES that he had been injured later that weekend and remained out of work for the next nine weeks.

King filed a written notice of the accident on 27 April 2000. EPES denied compensability. On 11 April 2001, Deputy Commissioner Edward Garner, Jr. found King's injury compensable, concluding that "[p]laintiff suffered an injury by accident arising out of and in the course of his employment . . . ." Defendants appealed to the Full Commission, who reversed the Deputy Commissioner's award of benefits and denied plaintiff's claim. Plaintiff appeals.

We begin by noting that "[o]ur review of the Commission's decision is limited to whether there is any competent evidence to support the Commission's findings of fact, and whether the findings of fact justify its conclusions of law." *Gaddy v. Anson Wood Products*, 92 N.C. App. 483, 487, 374 S.E.2d 477, 479 (1988). "[W]here there is evidence to support the Commissioner's findings in this regard, we are bound by those findings." *Barham v. Food World, Inc.*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). Therefore, "an opinion and award entered by the Industrial Commission may not be disturbed on appeal unless a patent error of law exists therein." *Hoffman v. Ryder Truck Lines, Inc.*, 306 N.C. 502, 505, 293 S.E.2d 807, 809 (1982).

Plaintiff contends that the Full Commission erred, as a matter of law, by concluding that plaintiff's injury did not occur within the course and scope of his employment as a truck driver for defendant. We disagree.

The question of whether an injury occurs within the course and scope of employment presents a mixed question of law and fact with the determination depending largely upon the particular facts of each case. *Id*. at 506, 239 S.E.2d at 809-10. Our decisions in this area recognize the existence of a "dual relationship" between an owner-operator who independently contracts to provide hauling services and the carrier with whom the operator contracted:

> As [a] driver and operator of the truck in the service of the defendant-carrier, plaintiff [i]s, like any other driver, clearly an employee who [i]s generally protected by the provisions of our workers' compensation law. As [an] owner-lessor and caretaker of the truck, however, he [i]s an independent contractor with defendant who [i]s excluded from such statutory protection. . . . In short, the actual circumstances surrounding the task undertaken by plaintiff determine[] whether he [i]s working for himself or the carrier at any given time and thus whether he [i]s, in fact, covered under the Act.

Id. at 506-07, 239 S.E.2d at 810 (citations omitted). "In other words, compensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer 'to any appreciable extent' when the accident occurred." *Id*. at 506, 239 S.E.2d at 810 (citation omitted).

Generally, a driver is considered to be acting for the benefit of his employer and within the scope of his employment if, once he has accepted a particular job on behalf of his employer, he is injured while engaged in preparatory acts that are necessary in order to undertake that job. *See Thompson v. Refrigerated Transport Co., Inc.*, 32 N.C. App. 693, 236 S.E.2d 312 (1977). Likewise, a driver may be considered to be acting for the employer's benefit and within the scope of his employment where his injuries are suffered while undertaking the performance of

specific repairs that are necessary in order to complete delivery of a load already in tow. *See Hoffman v. Ryder Truck Lines, Inc.*, 306 N.C. 502, 293 S.E.2d 807 (1982). Furthermore, contract terms that place the responsibility to pay for repair and maintenance on the owner-operator are generally construed to "assign to the *owner-lessor* all costs and burdens associated with the *general* repair, maintenance and operation of the truck, . . . [including] the duty to obtain his own liability and damage insurance to cover the vehicle *when it is not in the carrier's service*." *Id*. at 507, 239 S.E.2d at 810.

Here, the Commission specifically found that plaintiff "was not 'under load'" at the time of his injury. Nor was plaintiff "in preparation for a specific trip for defendant-employer." Instead, plaintiff "declined a trip to Texas" and "intended to take the entire week of April 2, 2000 'off' in order to work on his truck . . . ." Furthermore, "[p]laintiff's logs . . . show that he was 'off duty' from driving from the time of his arrival at home on April 1, 2000 through April 8, 2000" and "[t]he work plaintiff was performing . . . was in the nature of general maintenance . . . ." Finally, the contract between plaintiff and defendant "states that plaintiff, as owner and independent contractor, is responsible for all parts, accessories and repairs necessary to provide the contracted for services."

We conclude there is ample evidence in the record to support these findings and that the findings support the Commission's conclusion that plaintiff's injury did not occur within the course and scope of his employment. Accordingly, the order of the Industrial Commission is affirmed.

Affirmed.

Judges MARTIN and GEER concur.

Report per Rule 30(e).