NO. COA02-331

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

PATRICIA GRADY,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 049720

HILLANDALE MEDICAL CENTER,
Employer,

C.N.A.,
Carrier,
Defendants

Appeal by plaintiff from Opinion and Award entered 11 January 2002 by The North Carolina Industrial Commission. Heard in the Court of Appeals 9 December 2002.

Browne, Flebotte, Wilson & Horn, P.L.L.C., by Martin J. Horn, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by James B. Black IV, for defendant-appellees.

CAMPBELL, Judge.

In March of 2000, plaintiff, Patricia Grady ("plaintiff"), was working as a staff nurse at Hillandale Medical Center ("defendant" or "Hillandale"). Defendant leased office space in a shopping center from Ticon, Inc. Defendant instructed its employees to park their vehicles in a parking lot outside the shopping center. On 31 March 2000, plaintiff left work and walked to her car, which was parked in the shopping center parking lot. As she approached her vehicle,

plaintiff tripped, causing her to fall on her right hip, leg and buttock area. Plaintiff fractured her right femur and ruptured a disk as a result of her fall.

After Hillandale denied plaintiff's claim for workers' compensation benefits, Deputy Commissioner Pamela T. Young conducted a hearing on the matter. Deputy Young allowed plaintiff coverage under the Workers' Compensation Act ("Act"), finding that because defendant was responsible for a *pro rata* cost of the upkeep and maintenance of the common areas, including the parking lot, plaintiff's injury occurred on defendant's premises and, therefore, plaintiff had sustained an injury by accident arising out of the course of her employment with defendant.

On appeal, the North Carolina Industrial Commission ("Full Commission") reversed the deputy commissioner's decision. In its Opinion and Award, the Full Commission found, in pertinent part:

> 4. The parking lot where plaintiff fell was not owned by defendant-employer.
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> 5. In 1994, defendant-employer entered into a Lease Agreement with Ticon, Inc. to lease about 5,632 square feet of interior space. Coastal Medical Group is a prior name of defendant. The Lease Agreement between defendant and Ticon, Inc. was in effect on 31 March 2000.
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> . . .
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> 9. Section 4.2 of the Lease Agreement provides that the tenant's use of the Common Areas "shall be subject at all times during the term to reasonable rules and regulations adopted by Landlord . . . governing the use of the parking areas . . . ." There are no other rules or regulations listed which specifically make the tenant responsible in any manner for the parking areas or any other Common Areas.
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> 10. Section 6.1 of the Lease Agreement provides, in part, "that within a reasonable period after receipt of written notice from Tenant of the need therefore, Landlord shall make . . .

> necessary repairs to sidewalks, parking areas and curbs." There are no sections of the lease that instruct the tenants to undertake any maintenance of common areas under any circumstances.
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> 11. Section 2.7 of the Lease Agreement states that the tenants in the Shopping Center, including defendant-employer, must pay to the Landlord, as an additional rent, Tenants' share of "Common Area Costs." The "Common Area Costs" are defined in the Lease as ". . . all of the Landlord's costs and expenses of operating and maintaining the Common Areas in the Shopping Center . . . ." Moreover, pursuant to Section 2.10 of the Lease Agreement, the additional rent for all Tenants, including defendant-employer, is based upon the size of each Tenants' [sic] leased square footage area, thus resulting in a corresponding pro rata adjustment for its share of the Common Area costs related to the size of the demised premise and not upon any designated section of the parking area.
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> 12. Under the terms of the Lease Agreement, defendant-employer did not own or lease the parking lot, nor was defendant-employer responsible for maintenance or upkeep of the parking area. Although defendant-employer was responsible for its pro rata share of the "Common Area Costs," thereby providing capital for the Landlord's upkeep or maintenance of those areas, defendant-employer could reserve spaces for patient parking and defendant-employer directed employees to park in areas not reserved for patients. These factors do not operate to impute tenant control over any specific area of the parking lot.

Based on these findings, the Full Commission concluded, in part:

> 3. In the instant case, the Lease Agreement specifically reserves the maintenance and upkeep of the parking area as a duty of the Landlord. The fact that a portion of defendant-employer's rent was designated by the Landlord as reimbursement for the costs of such maintenance is not indicative of any control or responsibility on the part of the tenant for the parking area. As the parking area was not a part of defendant-employer's premises, plaintiff's injuries did not arise out of or in the course of her employment and plaintiff is not eligible for compensation under the Act for injuries incurred in the parking lot. [*Barham v. Food World*, 300 N.C. 329, 266 S.E.2d 676 (1980]; N.C. Gen. Stat. §97-2(6).

The Full Commission denied plaintiff's claim for benefits. Plaintiff appeals the Opinion and Award of the Full Commission.

An injury must arise out of and in the course of employment in order to be compensable under the Workers' Compensation Act. N.C. Gen. Stat. §97-2(6) (2001). "The Commission's determination that an accident *arose out of* and *in the course of* employment is a mixed question of law and fact; thus, this Court may review the record to determine if the findings and conclusions are supported by sufficient evidence." *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996), *disc. review denied*, 345 N.C. 751, 485 S.E.2d 49 (1997).

Generally, an injury by accident occurring while an employee travels to and from work is not one that arises out of or in the course of employment. *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676 (1980). "A limited exception to the 'coming and going' rule applies when an employee is injured when going to or coming from work but is on the employer's premises." *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996).

In *Barham*, our Supreme Court denied compensation to a grocery store employee who was injured when she slipped and fell on ice in a loading zone in front of the employer's store in a shopping center. The employee was walking to her work site after parking her car in the shopping center parking lot. The employer did not own the parking lot or the loading zone, but the lease gave it access to the entire parking lot of the shopping center for use by the employer's customers and employees. The *Barham* Court denied compensation because the employer did not own, maintain, or control the parking lot, and the employee was not performing any duties of her employment at the time of the injury and was not exposed to any danger greater than that of the general public. *Barham*, 300 N.C. at 333-34, 266 S.E.2d at 679-80. In *Jennings v. Backyard Burgers of Asheville*, 123 N.C. App. 129, 472 S.E.2d 205 (1996), an employee was injured when

he fell down stairs while walking to his employer's premises from an employee parking lot. This Court held that the employee was not covered by workers' compensation although the defendant had instructed the employee to use the parking lot because defendant "did not own, maintain, or control the stairway or parking lot, and at the time of his injury plaintiff was not performing any duties for defendant." *Id.* at 132-33, 472 S.E.2d at 207-08.

The present case is analogous to *Barham* and *Jennings* because the evidence shows that Hillandale did not own or control the shopping center parking lot on which plaintiff was injured and plaintiff was not performing any duties for defendant at the time of the injury and was not exposed to any greater danger than that of the public generally. We conclude that the Full Commission's findings of fact are supported by competent evidence and, the findings of fact support the Full Commission's conclusion that plaintiff "is not eligible for compensation under the Act for injuries incurred in the parking lot."

Plaintiff argues alternatively that *Barham* and its progeny should be overturned. One panel of the Court of Appeals may not, however, overturn the holding of another panel. *In the Matter of Appeal from Civil Penalty,* 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Furthermore, this Court has "the responsibility to follow" decisions of the North Carolina Supreme Court. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993). Accordingly, this argument is without merit.

Plaintiff also contends the Full Commission erred by refusing to grant her motion to strike portions of defendant's brief. Plaintiff argues that defendant "attempted to inject facts that were neither agreed upon nor otherwise introduced into evidence." Section 97-85 of the

Workers' Compensation Act, provides that "[i]f application is made to the Commission ... the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]" N.C. Gen. Stat. §97-85 (2001). These are plenary powers to be exercised in the sound discretion of the Commission. *Lynch v. M.B. Kahn Constr. Co.*, 41 N.C. App. 127, 130-31, 254 S.E.2d 236, 238, *cert. denied*, 298 N.C. 298, 259 S.E.2d 914 (1979). Plaintiff has not shown that the Full Commission abused its discretion. Accordingly, we reject this assignment of error and affirm the Opinion and Award of the Industrial Commission.

Affirmed.

Judges WYNN and McGEE concur.

Report per Rule 30(e).