NO. COA04-861

NORTH CAROLINA COURT OF APPEALS

Filed: 19 July 2005

GLENN HANSON POWERS,
Plaintiff-Employee,

v.

North Carolina Industrial Commission
I.C. File No. 084629

APAC-CAROLINA/BARRUS,
Defendant-Employer,

ACE USA/ESIS,
Defendant-Carrier.

Appeal by plaintiff from Opinion and Award dated 16 March 2004 by the Full Commission. Heard in the Court of Appeals 19 April 2005.

R. Allen Lytch and Marshall L. Miller for plaintiff-appellant.

Womble, Carlyle, Sandridge, & Rice, PLLC, by Clayton M. Custer and Mark A. Davis for defendant-appellees.

BRYANT, Judge.

Glenn Hanson Powers (plaintiff) appeals from an Opinion and Award of the Full Commission dated 16 March 2004 denying his claim for workers' compensation benefits from APAC-Carolina/Barrus and ACE USA/ESIS (defendants).

Plaintiff was employed as an estimator with defendant. As an estimator, his duties included meeting customers, determining the quantity of work to be done on a project, developing contracts, determining final quantities for jobs, and preparing bills. On 14 February

2000, plaintiff left his home at 6:30 a.m. to travel to defendant's office. He was driving a vehicle leased by defendant and collided with another vehicle while en route to work at 6:45 a.m. As a result of the accident, plaintiff sustained a back injury. Dr. Robert Wilfong performed plaintiff's back surgery which caused plaintiff to be out of work from February until May 2000. Plaintiff returned to work for defendant at the same pay rate from May 2000 until 7 February 2001, at which time he stopped working because of the pain in his back.

Plaintiff filed this action alleging injuries sustained in the vehicle accident on 14 February 2000 were compensable under the Workers' Compensation Act. This matter came for hearing before Deputy Commissioner Phillip A. Holmes on 27 August 2002. At the hearing, the parties submitted a pre-hearing agreement, stipulating to jurisdictional issues and various exhibits. On 7 February 2003 Deputy Commissioner Holmes entered an Opinion and Award stating plaintiff had sustained an injury which was not compensable, as it did not arise out of the course and scope of employment. Plaintiff appealed to the Full Commission. On 16 March 2004, the Full Commission entered an Opinion and Award affirming the denial of plaintiff's claim. Plaintiff appeals.

The dispositive issue is whether the Commission erred in determining plaintiff's claim is not compensable under the Workers' Compensation Act.

"The standard of review on appeal to this Court from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law. Therefore, if there is competent evidence to support the findings, they are conclusive on appeal even though there is plenary evidence to support contrary findings." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544

S.E.2d 606, 608 (2001) (citations omitted). "[T]he Commission's conclusions of law are fully reviewable." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (citing *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000)).

Under N.C. Gen. Stat. §97-2(6) (2003), an injury by accident must arise out of and in the course of employment to be compensable under the Workers' Compensation Act. *Royster v. Culp, Inc.*, 343 N.C. 279, 470 S.E.2d 30 (1996). The general rule is that an accidental injury occurring while an employee travels to and from work is not one that arises out of and in the course of employment. *Powers v. Lady's Funeral Home*, 306 N.C. 728, 730-31, 295 S.E.2d473, 475 (1982). The "hazards of traffic are not incident to the employment and are common to the general public," and not covered by the Act. Leonard T. Jernigan, Jr., North Carolina Worker's Compensation Law and Practice §6-3 (3d ed. 1999) (citing *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E.2d 47 (1968)). This is known as the "coming and going" rule. *Id.*

Plaintiff claims his injuries are compensable because his accident falls within an exception to the "coming and going" rule. We disagree.

We first note plaintiff fails to set out assignments of error in his brief as required by N.C. R. App. P. Rule 28(b)(6). "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be deemed abandoned." N.C. R. App. P. Rule 28(b)(6) (2003). Therefore, plaintiff's assignments of error are deemed abandoned and the Commission's findings of fact are binding on appeal. *See Hooker v. Stokes-Reynolds Hospital/North Carolina Baptist Hosp.*, 161 N.C. App. 111, 114-15, 587 S.E.2d 440, 443 (2003), *disc. review denied*, 358 N.C. 234, 594 S.E.2d 192 (2004).

The Commission made the following pertinent findings of fact:

> 1. On February 14, 2000, plaintiff was employed as an estimator with [defendant]. He has been so employed since 1977.

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4. Plaintiff lived approximately 21 miles from [defendant's place of business]. The majority of the time, plaintiff traveled straight to the office on weekday mornings from his house.

5. On the morning of February 14, 2000, plaintiff left his home in Maple Hill, North Carolina at approximately 6:30 a.m. . . .

6. Plaintiff testified at the hearing before the Deputy Commissioner that on February 14, 2000 he was not traveling to run any errands to benefit his employer and his destination was [defendant's place of business]. Plaintiff was driving a [vehicle] leased by [defendant] and [defendant] did not give plaintiff any travel allowance for his commutes to and from work.

7. The plaintiff was approximately seven miles [from work] when his vehicle collided with another vehicle. The plaintiff was alone in his vehicle at the time of the accident.

8. Plaintiff sustained back injuries in the accident and was transported to a hospital in Jacksonville.

9. The plaintiff was later transported to [the hospital and] his x-rays revealed a fracture at his L-1 vertebrae. Dr. Robert Wilfong performed a spinal fusion on the plaintiff and he remained hospitalized for ten days.

10. Dr. Wilfong ultimately released plaintiff to return to work and he went back to work [for defendant] from May, 2000 through February 7, 2001. During these nine (9) months, plaintiff performed quantity takeoffs for estimators, took measurements of units at job sites, and performed survey layouts.

11. On February 7, 2001, plaintiff left work with [defendant] and has not worked anywhere since.

12. Dr. Wilfong remains as plaintiffs primary treating physician. The plaintiff continues to experience pain.

. . .

14. Defendant[] gave plaintiff a choice of driving his company vehicle to and from work or driving his own personal vehicle to and from work each day. There would have been no disadvantage to plaintiff had he elected to leave the [company vehicle] at work at the end of each workday rather than drive it home. [Defendant had not] ever told plaintiff that he had to take his company vehicle home at night. Plaintiff chose to drive [the company vehicle] to and from his house each day, instead of his personal vehicle.

15. [Defendant] employees who were permitted to use company vehicles were required to fill out an expense account form on a monthly basis. On these forms, they had to record personal miles and business miles. For every personal mile listed, a calculation would be made as to the value of that mileage and it would be declared by the employee as income, and the employee would then be taxed on that income. On the front of the expense form, the employee was required to fill in his work-related mileage for that month in a column labeled "Business Miles" and was required to list his personal miles for that month in a column labeled "Other Personal Miles." It was [defendant's] expectation that the mileage incurred by employees traveling to and from work be included within the personal mileage category. Plaintiff [] attended a meeting several years ago in which [defendant] employees were informed on this procedure.

16. At the hearing before the Deputy Commissioner, the plaintiff testified that he knew that he would be taxed for every personal mile he placed on the vehicle. According to [p]laintiff's expense forms for 1999 and 2000 plaintiff listed his mileage to and from work in the personal miles category, based on his understanding that he was going to be taxed on these miles.

17. The competent evidence in the record establishes that the provision of the [company vehicle] was not a contractual benefit of plaintiff's employment. No contractual right to employer-provided transportation existed as the provision for transportation offered plaintiff by defendant was not an incident to plaintiff's contract of employment with defendant. Plaintiff had no contractual right to the transportation and therefore plaintiff's right to the transportation was a mere accommodation.

18. The competent evidence in the record further establishes that on February 14, 2001, plaintiff was commuting to work and was thus outside the scope of his employment with [defendant].

Based on these findings of fact, the Commission made the following conclusions of law:

> 1. Plaintiff must prove by the greater weight of the evidence that he sustained an injury by accident arising out of and in the course of his employment. N.C.G.S. . 97-3(6). An injury occurring while an employee is traveling to and from work does not arise in the course of employment and is not compensable. *Royster v. Culp, Inc.*, 343 N.C. 279, 470 S.E.2d 30 (1996); *Jennings v. Backyard Burgers* [], 123 N.C. App. 129, 472 S.E.2d 205 (1996). In the instant case, plaintiff has not established that he sustained an injury by accident arising out of and in the course of his employment with defendant on February 14, 2000.
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> 2. The greater weight of the competent evidence in the record establishes that plaintiff was not engaged in performing any service for his employer at the time of his accident. The "hazards of traffic" are common to the general public and therefore not incident to employment. *Tew v. E.B. Davis [Elec. Co.]*, 142 N.C. App. 120, 541 S.E.2d 764 (2001) citing *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E.2d 47 (1968).
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> 3. The vehicle provided in the present case was not incident to the contract of employment. A claim may be compensable, pursuant to the "contractual duty" exception, if a vehicle is provided as a matter of right as a result of the employment contract. If a vehicle is "provided permissively, gratuitously or as an accommodation, the employee is not within the course of employment while in transit." *Hunt v. Tender Loving Care Home Care Agency, [Inc.]*, 153 N.C. App. 266, 569 S.E.2d 675, *disc. review denied*, 356 N.C. 436, 572 S.E.2d 784 (2002).
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> 4. An exception to the "coming and going" rule states that if an employer provides a vehicle or compensation to cover the cost of transportation, injuries that occur while commuting to and from work are compensable. *Puett v. Bahnson Co.*, 231 N.C. 711, 58 S.E.2d 633 (1950). The facts in *Puett* are distinguishable from the present case since [defendant] provided plaintiff with a vehicle in which plaintiff listed all of the miles traveling to and from work as personal miles and paid taxes for these miles. The competent evidence in the record establishes plaintiff was traveling alone on February 14, 2000 and [defendant] never paid plaintiff a travel allowance for the miles he traveled to work and back home. Therefore, plaintiff's injury on February 14, 2000 does not fall under the paid travel exception to the "coming and going" rule.

> 5. Based on the totality of the circumstances in the present case, plaintiff did not sustain an injury by accident arising out of and in the course of his employment with defendant employer on February 14, 2000. Plaintiff's claim, therefore, is not compensable under the provisions of the North Carolina Workers' Compensation Act. N.C.G.S. . 97-2(6).

In many cases involving facts analogous to those in the present action, North Carolina appellate courts have applied the "coming and going" rule in holding that the claims at issue were not covered under the Act. In *Travelers Ins. Co. v. Curry*, 28 N.C. App. 286, 221 S.E.2d 75, *disc. review denied,* 289 N.C. 615, 223 S.E.2d 396 (1976), the decedent employee was allowed to use a vehicle owned by his employer to transport himself and two other employees to and from work. This transportation was a part of the employee's job, for which he was compensated. While driving to the employer's place of business, he was involved in a collision in which he was killed. The pertinent facts as found by the trial court and affirmed by this Court in *Curry* were as follows: (1) the employee was not performing any duty or labor for his employer on the date of the accident while traveling to and from work in the vehicle furnished by the employer; (2) the actual commencement of the daily employment of the decedent and the other two employees riding in his vehicle occurred when they arrived at their place of employment and terminated when they departed said place of employment; (3) the employees had no entitlement to transportation furnished by the employer; (4) the employees were not required by the employer to use such transportation in traveling to and from work; and (5) the transportation to and from work furnished to the employees by the employer was gratuitous and merely an accommodation. *Id.* at 290, 221 S.E.2d at 78. Holding that the accident did not occur within the course and scope of the employee's employment, the Court of Appeals noted that employers do "not expose [themselves] to liability for workmen's compensation purposes by gratuitously furnishing transportation for [their] employees." *Id.*; *See Tew v. E.B. Davis Elec. Co.*, 142 N.C.

App. 120, 541 S.E.2d 764 (2001) (holding employee injured in collision while riding home in employer's car was claim barred by the "coming and going" rule and concluding employer-provided transportation was a mere accommodation rather than evidence of a contractual right); *See also Harris v. Jack O. Farrell, Inc.*, 31 N.C. App. 204, 207-08, 229 S.E.2d 45, 47 (1976) (holding employer-provided transportation was not incident to employees' contract, therefore the resulting accident was not compensable).

It is clear the "coming and going" rule applies to plaintiff in the present action. Defendant was under no contractual duty to provide transportation to plaintiff. The provision of the company vehicle to plaintiff was merely permissive and gratuitous, not obligatory. Plaintiff was not performing duties for defendant at the time of the accident but rather was merely en route to work. Plaintiff had the option of driving his personal vehicle to work but chose to drive the company vehicle instead, with the knowledge he would be taxed on the value of his miles commuting to and from work as personal income. Defendant could have taken the company vehicle from plaintiff at any time for any reason. Accordingly, based on the operation of the "coming and going" rule, plaintiff's claim is not compensable.

Affirmed.

Judges WYNN and JACKSON concur.

Report per Rule 30 (e).