NO. COA06-268

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

SUSAN BARDIN FULLER, in Her Individual Capacity and in Her Capacity as Guardian Ad Litem for ANNIE CAMP FULLER, PAUL SLADE FULLER, and LANDON ALYCE FULLER, the Minor Children of PAUL FRANKLIN FULLER, JR., Deceased Employee,
Plaintiffs,

v.

North Carolina Industrial Commission
I.C. File No. 286748

CLEAR CHANNEL COMMUNICATIONS, Employer, LUMBERMEN'S INSURANCE (GALLAGHER BASSETT SERVICES, Third Party Administrator), Carrier,
Defendants.

Appeal by defendants from an Opinion and Award filed 3 November 2005 by the Full Commission. Heard in the Court of Appeals 20 September 2006.

Elliot Pishko Morgan, P.A., by J. Griffin Morgan, and Morrow Alexander & Porter, P.L.L.C., by John F. Morrow, for plaintiff-appellees.

McAngus, Goudelock & Courie, P.L.L.C., by John T. Jeffries and Sally G. Boswell, for defendant-appellants.

BRYANT, Judge.

Clear Channel Communications and Lumbermen's Insurance (defendants) appeal from an Opinion and Award from the Full Commission filed 3 November 2005 granting compensation

to Susan Bardin Fuller, in her individual capacity and in her capacity as Guardian ad Litem for the minor children of the decedent, PaulFranklin Fuller, Jr. (plaintiffs). For the reasons stated herein, we affirm the Full Commission's Opinion and Award.

Facts

At the time of his injury, Paul Fuller (the decedent) was employed by Clear Channel Communications as Program Director for radio station WTQR, and as host of that station's morning show, "Good Morning, Good Morning, Good Morning." The program aired live from 5:30 a.m. until 10:00 a.m., Monday through Friday. The decedent's co-host on the show was by Mr. Toby Young.

Prior to his death, the decedent planned a trip with his wife and friends to Myrtle Beach, South Carolina to attend the Bike Week festivities there. The trip was originally planned in celebration of the wedding anniversary of the decedent and his wife, Mrs. Susan Fuller. As the trip approached, the decedent repeatedly discussed his plans on the air with Mr. Young, often in conjunction with paid advertisements for Crossroads Harley-Davidson, a motorcycle dealership that regularly advertised on "Good Morning, Good Morning, Good Morning," and which was a sponsor of the upcoming Bike Week. In the course of these discussions, the decedent eventually made an on-the-air promise to listeners that he would do a live telephone call-in to the show from Myrtle Beach during Bike Week. Since the show did not air live on weekends, the decedent changed his plans, electing to leave for Myrtle Beach on Thursday, 16 May 2002 rather than Friday, 17 May 2002 as originally planned, so that he could call in during the Friday morning show. This required that the decedent be absent from WTQR's premises during a ratings period, which was extremely rare for him due to the importance of ratings periods to the station.

The decedent was fatally injured while traveling by motorcycle from Greensboro to Myrtle Beach on Thursday, 16 May 2002. Plaintiffs sought compensation and benefits and were denied by defendants. Plaintiffs then filed a Form 33 Request that Claim be Assigned for Hearing. The matter was originally heard on 13 October 2003 before Deputy Commissioner George T. Glenn, II of the North Carolina Industrial Commission. On 18 August 2004, Deputy Commissioner Glenn issued an Opinion and Award, finding that the decedent's fatal accident occurred within the course of his employment, and awarding compensation and benefits to plaintiffs pursuant to N.C. Gen. Stat. §§97-25, 97-38 and 97-39.

Defendants gave notice of appeal to the Full Commission in a letter dated 27 August 2004, and the matter came before that body on 30 August 2005. On 3 November 2005, the Full Commission filed its Opinion and Award, upholding that of Deputy Commissioner Glenn. Defendants then gave notice of appeal to this Court in a letter dated 2 December 2005.

Defendants present three issues on appeal: (I) whether the Industrial Commission erred in considering hearsay testimony as to statements made by the decedent; (II) whether the Commission erred in finding that the decedent was acting for the appreciable benefit of his employer in traveling to Myrtle Beach Bike Week; and (III) whether the Commission erred in concluding that the decedent was acting within the course of his employment when he suffered the fatal injuries.

Standard of Review

Appellate review of an award from the Industrial Commission is limited to two issues: (1) whether the Commission's findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings. *Clark v. Wal-Mart*, 360 N.C. 41, 43,

619 S.E.2d 491, 492 (2005). In an appeal such as the one at bar, this Court "'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding[s].'" *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). The Industrial Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

I

Defendants first argue that the Commission erred in considering hearsay testimony as to statements made by the decedent prior to the accident. Defendants contend that hearsay testimony regarding statements made by the decedent on his radio program was improperly admitted by the Full Commission. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. §8C-1, Rule 801(c) (2005). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. §8C-1, Rule 802 (2005). One form of hearsay not excluded by this rule is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." N.C. Gen. Stat. §8C-1, Rule 803(3) (2005). This state of mind hearsay exception includes "statements of then-existing intent to engage in future acts." *State v. Nicholson*, 355 N.C. 1, 35, 558 S.E.2d 109, 133 (2002).

Defendants argue the admission under Rule 803(3) of testimony regarding statements by the decedent of his intent to do a live call-in to "Good Morning, Good Morning, Good Morning" from Myrtle Beach Bike Week was improper because the testimony did not establish the

decedent would have actually completed a call-in, but rather shows merely that it was the decedent's intent to do so at the time he made the statements. This argument is without merit. For hearsay evidence pertaining to a declarant's then-existing intent to engage in future acts to be admissible, that evidence need not demonstrate that such intent was certain to be brought to fruition. It is sufficient to satisfy the state of mind hearsay exception that the statements at issue here, the decedent's on-the-air promises to listeners that he would do a live call-in from Bike Week, were statements of the decedent's intent to complete the call-in in the future. *See* N.C. Gen. Stat. §8C-1, Rule 803(3)(2005); *Nicholson*, 355 N.C. at 35, 558 S.E.2d at 133.

Defendants then argue that it was improper for the Full Commission to consider this state of mind testimony in order to infer that the decedent would have actually completed a live call-in to the morning show had he made it to Myrtle Beach. This argument is also without merit. If the Full Commission were prohibited from drawing reasonable inferences from the evidence before it, then the admission of the evidence would be pointless. It was for the Commission to decide what inferences to draw, and it is for this Court to determine on appeal whether the Commission's findings are supported by competent evidence. *Wal-Mart* at 43, 619 S.E.2d at 492.

Since the hearsay evidence of the decedent's intent to do a call-in to his radio program supports an inference that he would have completed the call-in had he made it to Bike Week, and because that evidence is competent in that it was properly admitted under the state of mind exception to the hearsay rule, we hold that the Full Commission did not err in its admission and use of the challenged hearsay testimony. This assignment of error is overruled.

II

Defendants next contend that the competent evidence does not support the Full Commission's finding that the decedent was acting for the appreciable benefit of his employer in

traveling to Myrtle Beach Bike Week. In order for plaintiffs to receive compensation for the decedent's death under the Workers' Compensation Act, the accident must have arisen out of and in the course of the decedent's employment. *See* N.C. Gen. Stat. §97-2(6) (2005). It is a well settled rule that the question of whether an injured worker's injury arose out of and in the course of employment "'basically turns upon whether or not the employee was acting for the benefit of his employer to any appreciable extent when the accident occurred.'" *McBride v. Peony Corp.*, 84 N.C. App. 221, 226, 352 S.E.2d 236, 240 (1987) (quoting *Pollock v. Reeves Bros., Inc.*, 313 N.C. 287, 292, 328 S.E.2d 282, 285 (1985)) (internal quotation omitted).

Contrary to defendants' contention, there is competent evidence to support a finding that the decedent was acting for the benefit of his employer when the fatal accident took place. Mr. Young testified that the decedent's plan to do a call-in to the radio show from Myrtle Beach Bike Week was aimed at maintaining strong ties with advertiser Crossroads Harley-Davidson, and at increasing the station's listenership by appealing to motorcycle enthusiasts. Essentially, Young testified that the decedent's intent was to confer appreciable benefits upon his employer.

Since this Court's role in this appeal "'goes no further than to determine whether the record contains any evidence tending to support the finding,'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), and since Mr. Young's testimony supports the Full Commission's finding that the decedent was acting for the benefit of his employer in making the trip to Myrtle Beach, defendants' assignments of error with regard to this issue are overruled.

III

Defendants' final contention is that the Full Commission erred in concluding that the decedent was acting within the course of his employment when he suffered the fatal injuries. As

noted above, in order for plaintiffs to receive compensation for the decedent's death under the Workers' Compensation Act, the accident must have arisen out of and in the course of the decedent's employment. *See* N.C. Gen. Stat. §97-2(6) (2005). "'Ordinarily, an injury suffered by an employee while going to or coming from work is not an injury arising out of and in the course of employment.'" *Osmond v. Carolina Concrete Specialties*, 151 N.C. App. 541, 544, 568 S.E.2d 204, 207 (2002) (quoting *Felton v. Hospital Guild of Thomasville, Inc.*, 57 N.C. App. 33, 34, 291 S.E.2d 158, 159 (1982)). There are exceptions to this general rule, however.

One such exception is that "employees whose work requires travel away from the employer's premises are within the course of their employment *continuously* during such travel, except when there is a distinct departure for a personal errand." *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996); *see also Clark v. Burton Lines, Inc.*, 272 N.C. 433, 438, 158 S.E.2d 569, 572 (1968). The Full Commission concluded that in the instance of his trip to Myrtle Beach, the decedent's work entailed travel away from his employer's premises, and that the decedent was not engaged in any distinct departure for a personal errand when the fatal accident occurred. Thus, according to the Commission, the decedent was within the course of his employment while traveling to Bike Week.

These conclusions are justified in light of the Commission's findings of fact. The Commission found that the decedent's planned call-in from Bike Week necessitated travel to Myrtle Beach on Thursday, 16 May 2002, since the decedent would have to be on location on the morning of Friday, 17 May 2002 in order to call while "Good Morning, Good Morning, Good Morning" was on the air live. The Commission also found that if the trip to Myrtle Beach had been solely for personal reasons, the decedent would have left on Friday after completing that morning's show, rather than leaving on Thursday as he did. These findings, in turn, are

supported by competent evidence. Both Mrs. Fuller and Mr. Young testified that in order to do the live call-in from Bike Week, it was necessary for the decedent to travel to Myrtle Beach on Thursday rather than on Friday. Both also testified that the decedent would never have taken a personal vacation day during a ratings period. In fact, Mrs. Fuller testified that the decedent had made personal visits to Bike Week in past years, but that he had always left on Friday so as not to miss work.

Another exception to the general rule regarding travel to and from the workplace is the dual purpose rule. Our Supreme Court has set out the test for whether a trip with both personal and business purposes falls within the dual purpose exception:

> If the work of the employee creates the necessity for travel, [he] is in the course of his employment, though he is serving at the same time some purpose of his own. . . . If however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel was then personal, and personal the risk.

Murray v. Associated Insurers, 341 N.C. 712, 714, 462 S.E.2d 490, 491 (1995) (alterations in original) (quotation omitted). The Full Commission concluded that the decedent had dual purposes in traveling to Myrtle Beach Bike Week. First, the trip was intended to benefit the decedent's employer. Second, the decedent intended to enjoy Bike Week with his friends, and to celebrate his anniversary with his wife. The Commission concluded further that if the business purpose of the trip had been dropped, then the personal trip would have been postponed from Thursday, 16 May 2002 until Friday, 17 May 2002. Thus, the Commission concluded that the decedent was in the course of his employment at the time of the accident even though he was also traveling to Myrtle Beach to pursue personal interests.

These conclusions are justified by the Commission's findings of fact, which in turn are supported by competent evidence. As noted above, the Commission found that the decedent was acting for the benefit of his employer when the fatal accident took place, and this finding is supported by Mr. Young's testimony that the decedent's intent in going to Myrtle Beach on Thursday rather than Friday was to confer appreciable benefits upon his employer. Also noted above is the Commission's finding that if the trip had been solely for personal reasons, the decedent would have left on Friday after completing that morning's show. This finding is supported by testimony that the decedent would never have taken a personal vacation day during a ratings period, and justifies the conclusion that the personal trip would have been postponed if the business purpose of the trip had been dropped.

Thus, since its conclusions of law are justified by the findings of fact, and since those findings are supported by competent evidence, the Full Commission did not err in concluding that the decedent was within the course of his employment when he suffered the fatal injuries. Accordingly, defendants' assignments of error with regard to this issue are overruled.

Affirmed.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).