NO. COA05-512

NORTH CAROLINA COURT OF APPEALS

Filed: 21 February 2006

JAMES WILLIE HUNT,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 305628

APAC CAROLINA, INC./ASHLAND INC.,
Employer,

ACE USA,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 3 January 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 January 2006.

Huggins, Pounds & Davis, L.L.P., by Dallas M. Pounds, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Phillip J. Mohr, for defendants-appellants.

STEELMAN, Judge.

Defendants, APAC Carolina, Inc./Ashland Inc., and ACE USA, appeal an opinion and award concluding that plaintiff, James Willie Hunt, was injured during the course and scope of his employment and that he is temporarily and totally disabled. For the reasons discussed herein, we affirm the opinion and award of the Industrial Commission (Commission).

Defendant-employer, APAC, hired Hunt in September 2001 as a traffic flagger. Shortly thereafter, Hunt obtained his certification to operate heavy equipment and began operating a backhoe. Aside from his duties as a heavy equipment operator, Hunt also transported temporary workers APAC hired from the MegaForce employment agency to and from job sites. APAC compensated Hunt by adding one additional hour to his time card for each day he transported MegaForce employees. Initially, Hunt used his own vehicle to transport workers. However, in the spring of 2002, APAC provided him with a company truck to transport MegaForce employees. As part of the arrangement, APAC paid for the gas, oil, and other maintenance of the vehicle. Each employee, including Hunt, was required to pay $3.00 per day for each day they were provided transportation. APAC continued to compensate Hunt for one hour each day that he drove the truck. Hunt was not allowed to use the truck for personal reasons without prior approval from his employer, nor were his family members allowed to ride in the truck at any time. APAC tracked the truck's mileage each day and over weekends to ensure Hunt did not operate the truck for personal use.

On Friday, 4 October 2002, after leaving work, Hunt traveled eastbound on Highway 41 in Robeson County and took MegaForce employee Dennis Locklear home. Both Mr. Locklear and Hunt lived off of Highway 41. After dropping off Mr. Locklear, Hunt turned back onto Highway 41 and proceeded east towards his home. Shortly thereafter, he was involved in a motor vehicle accident. According to Hunt, his body was thrown forward and then back, striking the steering wheel. As a result of the accident, Hunt felt pain in his lower back and shortly thereafter experienced numbness radiating down his left leg. Conflicting evidence was presented as to whether Hunt's son was in the vehicle at the time of the accident.

While Hunt awaited the arrival of the police, one of his employer's foremen passed the scene of the accident and stopped to offer assistance. Hunt used the foreman's phone to call APAC's safety director. He informed the safety director of the accident and requested authorization to obtain medical treatment. The safety director told Hunt to wait until Monday so that he could submit to a mandatory drug test at APAC's office. Over the weekend Hunt's pain progressively worsened. On Sunday, Hunt was called at home and told to report to a job site in Bladenboro. Hunt worked light duty on Monday and Tuesday flagging traffic. On Wednesday, 9 October 2002, Hunt received a call from his employer, telling him to report to the office in Fayetteville for a mandatory drug test. At that time, Hunt again requested authorization for medical treatment, but was told he needed to wait. When Hunt arrived at his employer's office, he was informed he had been terminated due to his poor driving record. Prior to Hunt's accident on 4 October 2002, APAC had implemented a continuing driver qualification policy in which any employee who was charged with eight points from the employer's point schedule in a twenty-four month period would be disqualified from driving a company vehicle. APAC terminated Hunt for violating the continuing driver qualification policy by receiving eight company driving points within twenty-four months and for having his son, an unauthorized person, in the company vehicle. Defendant asserted that Hunt accumulated these eight points for the following reasons: three points for the 4 October 2002 accident, three points for an accident occurring on 21 March2002, and two points for a speeding violation on 23 April 2002. Conflicting evidence was presented as to the validity of two of the eight points.

The day Hunt was notified of his termination he again requested permission to seek medical treatment. Hunt testified he was told to speak with the human resources manager, who informed him that since he had been terminated she could not speak with him regarding a

worker's compensation claim. Immediately thereafter, Hunt went to the emergency room at Southeastern Regional Medical Center. He was diagnosed with a muscle strain and discharged. He was not restricted from working.

On 4 November 2002, Hunt saw Dr. H.M. Livingston, Jr., a chiropractor. He complained of radiating lower back pain and numbness in his left leg. Dr. Livingston opined Hunt was unable to work at any type of employment. Hunt last saw Dr. Livingston for treatment on 13 January 2003. At that time, Dr. Livingston felt Hunt had not reached maximum chiropractic improvement based on his continued complaints of pain. Hunt next received treatment at Carolina Complete Rehabilitation Center where he attended physical therapy eleven times between 4 March and 10 April 2003. On 13 May 2003, Hunt underwent a functional capacity evaluation, from which his doctor concluded he was able to work at the light physical demand level for an eight-hour day. However, Hunt's position with defendant-employer was considered heavy duty and not within his physical work restraints.

On 4 December 2003, over one year after the accident, Hunt was evaluated by Dr. Andrew Bush. Dr. Bush noted inconsistencies in the records and the physical examination and was concerned with the lack of objective findings and the fact no MRI had been performed. He recommended Hunt undergo an MRI and a second functional capacity exam before he would be able to give an opinion as to Hunt's medical condition.

Following Hunt's termination, he began receiving unemployment compensation benefits starting 14 October 2002. As a condition of receiving those benefits, he conducted two job searches per week, but was unable to secure any employment.

The Commission determined Hunt suffered a compensable injury, finding that his automobile accident arose out of and in the course of his employment. The Commission awarded

Hunt on-going temporary total disability benefits at the weekly rate of $297.86, subject to defendant receiving a credit for unemployment benefits that Hunt received. It also ordered defendants to pay for all reasonably necessary medical and vocational rehabilitation expenses Hunt had incurred or would incur as a result of his compensable injury. Defendants appeal.

Standard of Review

Our review of an award by the Industrial Commission is limited to: (1) whether there was any competent evidence before the Commission to support its findings; and (2) whether such findings support its legal conclusions. *Lewis v. Orkand Corp.*, 147 N.C. App. 742, 744, 556 S.E.2d 685, 687 (2001). Findings of fact from an opinion and award of the Commission, if supported, are deemed conclusive, even if there is evidence that would support findings to the contrary. *Id*. On appeal this Court does not weigh the evidence, as the Commission is the "sole judge of the weight and credibility of the evidence[.]" *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Instead our "duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). We must view the evidence in the light most favorable to the plaintiff, who is entitled to the benefit of every reasonable inference that may be drawn therefrom. *Id*.

I. Arising Out of the Course and Scope of Employment

In their first argument, defendants contend the Commission erred in determining the accident arose out of the course and scope of employment because the automobile accident occurred after Hunt had completed his duties for his employer and while driving home. We disagree.

"'An employee is entitled to workers' compensation benefits for injuries sustained in an accident arising out of and in the course of [their] employment.'" *Stanley v. Burns Int'l Sec. Servs.*, 161 N.C. App. 722, 724, 589 S.E.2d 176, 178 (2003) (citations omitted). "Arising out of" refers to the cause of the accident, such that there is a "causal connection between the accident and the employment[.]" *Battle v. Electric Co.*, 15 N.C. App. 246, 250, 189 S.E.2d 788, 791 (1972). "In the course of" refers to "the time, place, and circumstances of the accident." *Id*. The accident will be deemed to have arisen "in the course of" the employment "if it occurs while the employee is engaged in a duty which he is authorized or directed to undertake or in an activity incidental thereto." *Id*. Whether an injury arises out of and in the course of an employee's job presents a mixed question of law and fact. *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 481 (1997). As such, our review is confined to whether the findings and conclusions are supported by the evidence. *Id.*

Workers' compensation rules are subject to liberal construction. *Munoz v. Caldwell Mem'l Hosp.*, ___ N.C. App. ___, ___, 614 S.E.2d 448, 452-453 (2005). Thus, "[w]here any reasonable relationship to employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment.'" *Id*. (quoting *Kiger v. Service Co.*, 260 N.C. 760, 762, 133 S.E.2d 702, 704 (1963)).

As a general rule, an injury by accident is not compensable where the employee is injured while traveling to or from work, as it is not considered an injury that arises out of or in the course of employment. *Dunn v. Marconi Communications, Inc.*, 161 N.C. App. 606, 610, 589 S.E.2d 150, 154 (2003). This is known as the "coming and going rule." *Id*. There are several exceptions to this general rule, including: the "traveling salesman" exception, the "contractual duty"

exception, the "special errand" exception, and the "dual purpose" exception. *Id*. at 611, 589 S.E.2d at 154.

Under the "contractual duty" exception, where an employee is injured while coming or going to work, such injuries will be deemed compensable if the employer is under a contractual duty to provide transportation for his employees or the employer's provision of transportation is incident to the contract of employment. *Robertson v. Shepherd Constr. Co.*, 44 N.C. App. 335, 337, 261 S.E.2d 16, 18 (1979). "The transportation must be provided as a matter of right; if it is merely permissive, gratuitous, or a mere accommodation, the employee is not in the course of employment." *Id*.

In the instant case, defendant-employer's provision of a company vehicle to Hunt was not merely gratuitous, nor simply an accommodation. When this accident occurred, APAC provided Hunt a company vehicle to transport the MegaForce employees and himself to and from its work site. Defendant had to pay $3.00 per day for each day he used the company truck to get to work, but he was also compensated by the addition of one hour to his time card for each day he transported the MegaForce employees. Further, the accident occurred " in the course of" employment since it occurred while Hunt was engaged in a duty which he was authorized and directed to undertake, or at the very least, he was engaged in an activity incidental thereto. As part of Hunt's job, he was directed to drive the company truck to and from work each day. In addition, part of his job also included picking up and returning the MegaForce employees to work each day. This included driving himself home, since this is where he was required to park the company truck when he was not at the work site.

It is also useful to consider, when viewing all the circumstances, whether the employer is deemed to have retained authority over the employee. *Shaw v. Smith & Jennings, Inc.*, 130 N.C.

App. 442, 446, 503 S.E.2d 113, 117 (1998). If an employer is found to have retained such authority, the injury is generally deemed compensable. *Id.* In the instant case, defendant-employer retained authority over Hunt for the entire time he drove the company truck. Hunt was not allowed to use the vehicle for personal errands or to have family members in the vehicle at any time without first obtaining APAC's permission. Defendant-employer checked the mileage on the vehicle each day to insure Hunt was in compliance with these restrictions.

We hold there was competent evidence in the record to support the finding that Hunt sustained an injury by accident arising out of and in the course of his employment with defendant-employer.

Defendants further contend that even if we determine Hunt's job responsibilities continued until he reached his home, the Commission's findings of fact 8 and 9 were contradictory as to whether Hunt had completed a personal deviation.

Findings of fact 8 and 9 read as follows:

> 8. As plaintiff was standing at the accident site waiting for the trooper to arrive, his wife drove by on the way to take their son, Dakota Hunt, to Dakota's grandmother's house. She was taking the child to the child's grandmother's house because plaintiff was not at his house, having been delayed by the accident. Plaintiff's wife left Dakota with him, since Dakota was to spend the night with plaintiff. A little while later, a friend drove by and stopped. The friend volunteered to take Dakota home and plaintiff accepted the offer. When the trooper asked whether anyone else had been with him, plaintiff mentioned that Dakota had been with him. It might well have been that plaintiff was fearful that this information might be misinterpreted by his boss, as certainly was the case if Dakota indeed had not been in the truck that day but merely had been at the accident scene for a time. Thus, the trooper's testimony is not inconsistent with plaintiff's testimony on this point. The Full Commission finds plaintiff's testimony concerning Dakota to be credible and is unable to find any credible evidence that plaintiff had departed from the course and scope of his employment when the accident occurred.

> 9. Dakota's grandmother lives on 5th Street in Lumberton. Locklear lives on or near Meadow Road. Plaintiff lives at 101 Ricco Lane, near Lumberton. The Full Commission takes judicial notice of official N.C. Department of Transportation road maps for Robeson County. *See State v. Martin*, 270 N.C. 286, 154 S.E.2d 96 (1967), and *State v. Saunders*, 245 N.C. 338, 95 S.E.2d 876 (1957). Such maps show that Highway 74 and the site of work that day is southwest of Lumberton. The maps further show that a direct route from the worksite to plaintiff's home, encompassing a drop-off of Locklear on Meadow Road, is from Highway 74 north on I-95 to Fifth Street. Fifth Street becomes Highway 41 as a person heads east out of Lumberton, and Highway 41 passes by Meadow Road on its way to Old Allentown Road, which is a direct and natural turnoff from Highway 41 leading to 101 Ricco Lane. The accident occurred at the intersection of Highway 41 and PRP 1954 (Moores Lane), which is between Meadow Road and Old Allentown Road. Even if plaintiff had picked up his son at the child's grandmother's house on Fifth Street, any alleged departure from the course and scope of employment ended when he departed Fifth Street headed for Meadow Road to drop off Locklear, long before the accident occurred.

The Commission's finding regarding Hunt's son is found in finding of fact 8. It found that Hunt's wife dropped their son off with Hunt *after* the accident had taken place. Finding of fact 9 simply points out that assuming *arguendo* that the facts were as defendants asserted, it would not change the result of the case. These are not contradictory findings. It is the role of the Commission to determine the weight and credibility of the evidence. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Although there was contradictory evidence in the record as to whether the child was in the vehicle at the time of the accident, we hold the Commission's clear factual finding, that Hunt's son was not a passenger in the truck at the time of the accident, is supported by the evidence and is controlling. This argument is without merit.

II. Proof of Existence and Extent of Disability

In defendants' second argument, they contend the Commission erred in determining Hunt had proven both the existence and extent of his disability. We disagree.

First, defendants contend any loss in wage earning capacity that Hunt suffered was attributable to his termination from APAC for violation of its driving policy and not from any disability resulting from the motor vehicle accident. Defendants argue Hunt has constructively refused to accept suitable employment and is not entitled to benefits.

"To substantiate their argument, defendants 'must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated.'" *Frazier v. McDonald's*, 149 N.C. App. 745, 751, 562 S.E.2d 295, 299 (2002) (quoting *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 234, 472 S.E.2d 397, 401 (1996)). The Commission found as fact that:

> 13. Prior to October 4, 2002 defendant-employer had implemented a continuing driver qualification policy in which any employee who was charged with eight points from a violation or violations using a point schedule in any twenty-four month period would be disqualified from driving a company-owned vehicle. The policy does not indicate that termination would result after eight points. Plaintiff received three points for an accident that occurred on March 21, 2002, for which he was at fault. Plaintiff received two points for a speeding violation, with which he was charged on April 23, 2002. However, plaintiff was not convicted of this speeding violation, but defendant-employer did not remove the two points from his record. Thereafter, plaintiff received three points for the accident on October 4, 2002. Thus, plaintiff only had six points, not eight points.
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> 14. Defendants failed to prove that a non-injured employee would have been terminated for the same conduct as plaintiff.

Steven Walters, Sr., the Director of Environment, Health and Safety, testified that if an employee accumulated as many as eight points in a two-year period, their driving privileges could be revoked. Instead of being punished by having his driving privileges with APAC revoked, Hunt's employment was terminated. Mr. Walters testified he did not know why Hunt had been terminated rather than have his driving privileges revoked. We hold that there is

competent evidence in the record to support the Commission's finding and conclusion that defendants failed to show that Hunt's termination was for misconduct or fault, unrelated to his compensable injury, for which a nondisabled employee would ordinarily have been terminated. *Accord id*.

Defendants further argue that Hunt failed to prove his inability to find work in other employment was caused by a condition resulting from the accident.

An employee injured during the course of his employment is disabled under the Workers' Compensation Act if the injury results in an "incapacity . . . to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. §97-2(9) (2005). Thus, disability under the Act means "the impairment of the injured employee's earning capacity rather than physical disablement." *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). The employee bears the burden of demonstrating he is unable to earn the same wages he earned prior to being injured, "either in the same employment or in other employment." *Id*. The employee can meet this burden by producing evidence that he is capable of some work, but he has been unsuccessful in his effort to obtain employment after reasonable effort on his part. *Id*.

Viewing the evidence in the light most favorable to Hunt, it shows he was able to do some work. Based on the results from his functional capacity evaluation, he could work at light physical demand level for an eight-hour day. Dr. Livingston first opined that on 4 November 2002, Hunt was unable to work in any type of employment. As of 13 January 2003 when Dr. Livingston last examined Hunt, he felt Hunt had not reached maximum chiropractic improvement and needed further evaluation and treatment. The Commission afforded Dr. Livingston's opinion regarding Hunt's disability more weight than Dr. Bush's since he had

examined and treated Hunt closer to the time of accident. Credibility determinations made by the Commission are binding on this Court. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553.

Further, as a condition of Hunt's receipt of unemployment, he was required to conduct at least two job searches per week. Hunt meet this condition. However, despite his efforts, he was unable to obtain employment. In order to meet his burden of demonstrating he was "disabled," Hunt only had to show he is capable of some work, but has been unsuccessful, despite reasonable efforts, to obtain employment. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Hunt presented evidence from Dr. Livingston that he was capable of doing light duty work. He also presented competent evidence that he had made reasonable efforts to find employment, although he had been unsuccessful.

Once Hunt met his burden of proof, the burden shifted to defendants to "'come forward with evidence to show not only that suitable jobs are available, but also the plaintiff is capable of getting one. . . .'" *Workman v. Rutherford Elec. Membership Corp.*, ___ N.C. App. ___, ___, 613 S.E.2d 243, 250 (2005). Defendants did not present any evidence that there are suitable jobs available for Hunt. Consequently, there exists evidence in the record supporting the Commission's findings that Hunt was disabled as a result of his work-related injury and entitled to workers' compensation benefits. This argument is without merit.

For the reasons discussed herein, we affirm the opinion and award of the Industrial Commission.

AFFIRMED.

Chief Judge MARTIN and Judge MCGEE concur.

Report per Rule 30(e).