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NO. COA06-992

NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2007

ESTATE OF DAVID WILLIAM KAY, JR.,
Deceased,
Plaintiff-appellee

v.

North Carolina Industrial Commission
I.C. File No. 353936

EXCEL BODY WORKS,
Employer;

COMMERCIAL UNDERWRITERS,
Carrier,
Defendant-appellants.

Appeal by defendants from opinion and award entered 7 April 2006 by the Full Commission. Heard in the Court of Appeals 10 April 2007.

Cranfill, Sumner & Hartzog, L.L.P., by Dawn Conger Lane and Meredith L. Taylor, for defendant-appellants.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr., for plaintiff-appellee.

ELMORE, Judge.

Excel Body Works and its insurance carrier, Commercial Underwriters (together, defendants), appeal an opinion and award entered by the Full Commission in favor of the Estate of David William Kay, Jr. (plaintiff).

Although defendants repeatedly assert that the facts of this case are not in dispute, we cannot agree with their assessment because defendants insist on including in their brief testimony

from three witnesses whom the Full Commission specifically found to lack credibility. Based on the evidence that the Full Commission adduced to be credible, the following events gave rise to the appeal now before us.

Before his death, David Kay (David) worked for his uncle, Charles Kay (Charles), at his uncle's auto body shop, Excel Body Works (Excel). On days when work at the shop was slow, Charles arranged for David to do yard work at the residence of Margaret Kay, his grandmother, or at the home Charles shared with his wife, Brenda (the Kay residence). Occasionally, David was dispatched to perform some other task similarly unrelated to auto body repair, but again at the behest of his uncle and during working hours. On 27 June 2003, the day of David's death, business was slow and Charles arranged for David to spend the day at his home doing yard work.

David did not have a driver's license; his grandmother had taken him to work that morning. David's friend, Bobby Bullard, who sometimes worked at Excel, drove David to the Kay residence, and the two of them worked on the yard until mid-afternoon. Bullard admitted that he purchased beer and drank a "fair amount" during the course of the day. When Bullard was driving David back to Excel after they concluded their work at the Kay residence, Bullard's car veered off the side of the road. David died as a result of the accident.

David's estate filed a worker's compensation claim, stating that David "was killed in a motor vehicle collision that occurred while he was in the course and scope of his employment with the defendant employer." The Industrial Commission determined that David "was performing work pursuant to direct instructions of his bosses with said work being of benefit to his bosses and defendant-employer," and concluded "that at the time of his death, the deceased-employee was an employee of defendant-employer while he was performing this special errand for his bosses and defendant-employer."

The Industrial Commission also determined that at the time of decedent's death, "Chelsey Inman was his acknowledged illegitimate child" and "is conclusively presumed to have been wholly dependent on [decedent] for support, thereby entitling her to receive at the exclusion of all others benefit payments at the rate of \$265.77 per week . . . continuing until she reaches eighteen (18) years of age."

Defendants were ordered to pay death benefits to Chelsey Inman's mother, Candice, any medical expenses related to David's death, statutory burial expenses, and costs. Defendants appealed the order to the Full Commission.

The Full Commission made the same substantive conclusions of law as the Deputy Commissioner, and made the same award, adding a provision for the payment to plaintiff's counsel of twenty-five percent of the lump sum due plaintiff and of plaintiff's subsequent payments.

"Our Supreme Court has previously held that a determination that an injury arose out of and in the course of employment is a mixed question of law and fact, 'and where there is evidence to support the Commissioner's findings in this regard, [the appellate court is] bound by those findings.'" *Rose v. City of Rocky Mount*, ___ N.C. App. ___, ___, 637 S.E.2d 251, 254 (2006) (quoting *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980)). Accordingly, we "review[] the record to determine if the findings of fact and conclusions of law are supported by the record." *Ramsey v. Southern Indus. Constructors Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006).

Defendants first argue that plaintiff failed to meet its burden of producing affirmative evidence to prove that David's death arose out of his employment with Excel and in the course of his employment with Excel. Defendants maintain that "there was simply no affirmative

evidence in the record to support any of these determinations.” The Full Commission did not give weight to the testimony of Charles, his wife Brenda, and Margaret Kay because they “displayed much concern that their business not lose this case and face possible rate increases while at the same time finding no difficulty in creating a moralistic and legally irrelevant smoke screen regarding the character of the deceased-employee, their nephew and family grandson.” Defendants point to Bullard’s prior recorded statement as the only evidence remaining in the record after the Commission disregarded the Kays’ testimony.[**Note 1**]

However,

[a]n appellate court is . . . justified in upholding a compensation award if the accident is fairly traceable to the employment as a contributing cause or if any reasonable relationship to employment exists. 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.

Pollock v. Reeves Bros., Inc., 313 N.C. 287, 292, 328 S.E.2d 282, 285 (1985) (citations and quotations omitted).

Defendants did not assign error to all of the Full Commission’s findings of fact, and those findings are therefore binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Among the findings of fact at our disposal are the following: (1) “The deceased-employee’s work schedule for defendant-employer was Monday through Friday, usually from 8:00 a.m. to 6:00 p.m.” (2) “[W]hen work at the shop was slow, Mr. Charles Kay would instruct the deceased-employee and Mr. Bullard to mow the lawn or cut weeds at the shop, *or at his residence.*” (Emphasis added). (3) “Because work had been performed late into the evening on the previous day, there was little if any regular work to be performed at the shop on June 27, 2003. Accordingly, through Ms. Brenda Kay, Mr. Charles Kay instructed Mr. Bullard and the deceased-employee to travel to his residence and to work on the yard and lawn.” (4) “At

approximately 2:00 p.m. on the afternoon in question, Mr. Bullard decided to stop working at the residence and was in the process of returning the deceased-employee to defendant-employer's shop when he veered to avoid a collision with a van, ran off the road and crashed into a tree." We hold that based upon these facts, the accident is "fairly traceable" to David's employment.

Defendants next argue that, even if we agree with the Full Commission that David Kay was working in his capacity as an Excel employee at the time of his death, his death should not be compensable because it "fits squarely within the well-established 'coming and going' rule." The "coming and going" rule states that "[a]n employee is not engaged in the business of the employer while driving his or her personal vehicle to the place of work or while leaving the place of employment to return home." *Stanley v. Burns Int'l Sec. Servs.*, 161 N.C. App. 722, 725, 589 S.E.2d 176, 178 (2003) (citing *Ellis v. Service Co., Inc.*, 240 N.C. 453, 456, 82 S.E.2d 419, 421 (1954)). Thus, "the general rule in this State is that 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." *Id.* (citing *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996)) (alteration omitted).

However, "North Carolina adheres to the rule 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." *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 370, 616 S.E.2d 403, 408 (2005) (citation omitted). There is competent evidence that David Kay traveled to his uncle's residence at the request of his employer and as a condition of his employment. Therefore, he was still within the course of his employment at the time of the wreck because he was traveling from the work site back to his employer's premises. Accordingly, the "coming and going" rule does not apply.

Defendants next object to the Full Commission's finding that, at the time of his death, David Kay was performing a "special errand" for his boss. "The 'special errand' exception allows an employee to recover for injuries sustained while traveling to or from work if the injuries occur while the employee is engaged in a special duty or errand for his employer." *Id.* at 383, 616 S.E.2d at 416 (citations omitted). "[I]n those cases applying the special errand rule, the action undertaken by the employee bestowed some benefit upon the employer other than the employee merely coming to work." *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 188, 585 S.E.2d 264, 269 (2003) (citing *Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E.2d 473 (1982)).

Defendants submit that no such benefit was conferred upon David Kay's employer as a result of his trip to Charles and Brenda Kay's home because the rule does not "apply to *duties of the employment typically performed by the employee*, notwithstanding that the duty involves travel off the employer's premises." (Emphasis added). By this argument, defendants admit that yard work at the Kay residence was within the normal purview of David's employment at Excel.

Confusion appears to have arisen from the Full Commission's use of the term, "special errand," in its finding of fact No. 13 and conclusion of law No. 2. The finding and conclusion both state that, "at the time of his death, the deceased-employee was an employee of defendant-employer while he was performing this special errand for his bosses and defendant-employer." The conclusion is not determinative of the compensability of David's death, [Note 2] and the opinion and award's use of "this special errand" is a misapplication of the term. The "special errand" exception applies only when an employee is traveling to and from work, and is an exception to the "coming and going" rule. *Royster*, 343 N.C. at 283, 470 S.E.2d at 32. Having

already determined that the “coming and going” rule does not apply in this case, we can safely say that the “special errand” exception to that rule also does not apply.

Finally, defendants argue that the Full Commission erred by finding and concluding that Chelsey Inman was David’s child and thereby entitled to receive death benefits. David and the child’s mother, Candice Inman, were not married at the time of Chelsey’s birth on 14 June 2003.[**Note 3**]

N.C. Gen. Stat. §97-2(12) includes an “acknowledged illegitimate child” in the Workers’ Compensation Act’s definition of “child”. N.C. Gen. Stat. §97-2(12) (2005). A child is conclusively presumed to be wholly dependent for support upon a deceased employee. N.C. Gen. Stat. §97-39 (2005). “[T]o qualify for survivor’s benefits under the Act, an illegitimate child must be acknowledged in sufficient fashion by the father.” *Tucker v. City of Clinton*, 120 N.C. App. 776, 779, 463 S.E.2d 806, 809 (1995). One such method of proof is “through actions or conduct of a party, which rise to the level of parental cognizance.” *Id.* This “standard is intentionally malleable, so as to encompass realities inherent in the acknowledgment of an illegitimate child.” *Id.* at 780, 463 S.E.2d at 809 (citation omitted). Our Supreme Court stated that,

our General Assembly has continually enacted and modified legislation to establish legal ties binding illegitimate children to their biological fathers and to acknowledge the rights and privileges inherent in the relationship between father and child. These provisions operate even where the father acknowledges paternity but fails to have his child judicially legitimated or to seek a judicial determination of paternity.

Rosero v. Blake, 357 N.C. 193, 201, 581 S.E.2d 41, 46 (2003). The *Rosero* Court cited N.C. Gen. Stat. §7B-1111(a)(5) as an example. This statute enumerates four ways by which a father may

acknowledge an illegitimate child, including, “[p]rovided substantial financial support or consistent care with respect to the juvenile and mother.” N.C. Gen. Stat. §7B-1111 (2005).

Here, David Kay was alive for only thirteen days of Chelsey’s life, and the Full Commission’s determination had to encompass this reality. Candice Inman testified that David lived with her both before and after Chelsey’s birth, spending a few nights per month with his grandmother. After Chelsey’s birth, David spent every night but one with Candice and Chelsey. The medical records from Chelsey’s birth show that David Kay is listed as the father. Photographs show David Kay holding Chelsey shortly after her birth. Also, while not dispositive, Candice Inman went into labor at Margaret Kay’s house.

Given the particular circumstances of Chelsey’s birth and her father’s death only thirteen days later, we hold that the Full Commission did not err by concluding that Chelsey Inman was the acknowledged illegitimate child of David Kay and is thereby entitled to receive death benefits.

For the reasons stated above, we affirm the opinion and award of the Full Commission.

Affirmed.

Judges MCGEE and STEPHENS concur.

Report per Rule 30(e).

NOTES

1. Bullard gave a recorded statement, and then, after “visits” from Charles Kay, gave a contradictory deposition .

2. Conclusion of law No. 3, which states that David “sustained an injury by accident arising out of and in the course of his employment with defendant-employer that resulted in his death,” supports the Full Commission’s award. Conclusion of law No. 3 is adequately supported by the unchallenged findings of fact summarized above.

3. Defendants assert that David is not listed as Chelsey's father on her birth certificate. No birth certificate was included with the exhibits, so we cannot confirm or address this claim.