Affirmed
Author, Bolch
Concurring: Ballance

NO. COA00-931

NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2001

RONNIE LINKER,
Employee/Plaintiff,

v.

N.C. Industrial Commission
I.C. No. 646299

COY'S AUTO PARTS,
Employer/Defendant,

and

AIG INSURANCE COMPANY,
Carrier/Defendants.

Appeal by defendant from Opinion and Award of the North Carolina Industrial Commission entered 20 October 1999 by Commissioner Thomas J. Bolch. Heard in the Court of Appeals 23 May 2001.

Golding, Holden, Cosper, Pope & Baker, L.L.P., by Lawrence M. Baker, for defendant-appellant.

Bollinger & Piemonte, PLLC, by George C. Piemonte, for plaintiff-appellee.

BIGGS, Judge.

Defendant, Coy's Auto Parts, appeals from a decision of the North Carolina Industrial Commission (Commission) awarding benefits to plaintiff. For the reasons stated herein, we affirm the Commission.

The evidence before the deputy commissioner tended to show the following: Defendant hired Ronnie Linker (plaintiff) in September 1995. On 17 June 1996, plaintiff was sent to the home of Coy

Honeycutt (Honeycutt), defendant's owner, to remove a refrigerator and transport it to his place of business. Upon returning to the shop, plaintiff was told by Honeycutt to load the truck for further deliveries. While loading the truck, plaintiff noticed the refrigerator sitting in the middle of the floor unplugged. He then went into the office to tell Honeycutt that the refrigerator needed to be plugged in or the food inside would thaw, at which point an argument ensued between plaintiff and Honeycutt. Upon leaving the office, plaintiff told his co-workers that Honeycutt reprimanded him for no reason and if he (Honeycutt) cussed at him again, he would "whip [Honeycutt's] g-----n a--." One of the co-workers went to Honeycutt's office and told him what plaintiff said.

Plaintiff was in the shop for approximately one half hour following the argument before Honeycutt came out of his office to tell plaintiff, "if you think you can whip my a--, get up." Plaintiff got up from the creeper he was sitting on and began walking towards Honeycutt laughing. Honeycutt then drew a pistol from his pocket and fired three shots. The first shot missed plaintiff and hit the floor. The second shot hit plaintiff in the side of his right lower leg. Plaintiff was shot again as he fell to the floor. This bullet entered plaintiff's back, exited his shoulder, and struck plaintiff's ear. He was taken to Carolinas Medical Center where he underwent approximately six surgeries, before being discharged.

Plaintiff filed a Notice of Accident with the Commission on 20 June 1996. The deputy commissioner denied plaintiff's claim on 7

May 1997, on the ground that plaintiff's injury was the proximate result of his own willful intent to injure another, pursuant to N.C.G.S. § 97-12(3) (1999). Plaintiff gave Notice of Appeal to the Commission on 8 December 1998.

In an opinion and award filed 2 May 2000, the Commission reversed the deputy commissioner's decision, holding that there was no willful intent to injure another by plaintiff, such that plaintiff's claim was not barred by G.S. § 97-12(3). The opinion and award ordered defendant to pay disability compensation, all medical expenses incurred by the plaintiff and reasonable attorney fees. Defendant gave Notice of Appeal to this Court from the Commission's decision on 2 June 2000.

I.

Defendant first contends that the Commission erred in refusing to affirm the opinion and award of the deputy commissioner. He argues that the Commission ignored substantial, uncontroverted portions of the evidence by disregarding findings of fact and conclusions of law of the deputy commissioner. We find defendant's contention without merit.

The statutory provision which governs the appeal of an award by the deputy commissioner to the full Commission is N.C.G.S. § 97-85 (1999) which provides, in pertinent part:

> If application is made to the Commission within 15 days from the date when notice of the award shall have been given, 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.

G.S. § 97-85. The determination of whether "good ground" has been shown to amend the award under G.S. § 97-85 is within the discretion of the Commission and will not be reviewed on appeal absent a showing of manifest abuse of discretion. *Keel v. H & V Inc.*, 107 N.C. App. 536, 541-42, 421 S.E.2d 362, 366-67 (1992). The Commission is the fact finding body under the Workers' Compensation Act and thus the deputy commissioner's findings of fact are not conclusive; only the full Commission's findings of fact are conclusive. *Adams v. AVX Corporation*, 349 N.C. 676, 680 509 S.E.2d 411, 413-14 (1998), *see also Keel*, 107 N.C. App. at 542, 421 S.E.2d. at 365; *Robinson v. J.P. Stevens*, 57 N.C. App. 619, 627, 292 S.E.2d. 144, 149 (1982). The Commission may weigh the evidence presented to the deputy commissioner and make its own determination as to the weight and credibility of the evidence. *Keel*, 107 N.C. App. at 542, 421 S.E.2d. at 367. "The Commissioner may strike the deputy commissioner's findings of fact even if no exception was taken to the findings." *Id.*

Defendant has not shown nor do we find manifest abuse of discretion by the Commission in declining to adopt specific findings and conclusions of the deputy commissioner. Accordingly, we overrule this assignment of error.

II.

Defendant next contends that the Commission erred in concluding as a matter of law that plaintiff's claim was not barred

by his willful intent to injure another as required by G.S. § 97-12(3). We disagree.

Under G.S. § 97-12(3) of the Workers' Compensation Act (the Act), an employee may not recover

> . . . if the injury or death to the employee was proximately caused by. . . . (3) His willful intention to injure or kill himself or another.

The statute requires a finding that (1) the claimant had the willful intention to injure or kill himself or another and (2) the intention was the proximate cause of the claimant's injury. *Rorie v. Holly Farms*, 306 N.C. 706, 709, 295 S.E.2d 458, 460 (1982). G.S. § 97-12(3) sets forth an affirmative defense, thus the burden is on the employer to establish that compensation should be denied. *Id.* at 710, 295 S.E.2d at 461. A finding by the trier of fact of intent or the lack thereof, will not be disturbed unless there is no evidence to support such a finding; this is true even if the evidence may support a contrary finding. *Id.*

In addition, it is well settled that this Court is limited to two questions upon appellate review of an Industrial Commission's opinion and award: (1) whether the Commission's findings are supported by competent evidence; and (2) whether the Commission's findings justify its conclusions. *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App 23, 25, 514 S.E.2d 517, 520 (1999) (citation omitted); *Grantham v. R.G. Barry Corp.*, 115 N.C. App. 293, 298-99, 444 S.E.2d 659, 662 (1994). The findings of the Industrial

Commission are conclusive on appeal if supported by competent evidence. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998). However, the Commission's conclusions of law are reviewable *de novo*. *Grantham*, 127 N.C. App. at 534, 491 S.E.2d at 681.

In the case *sub judice*, the Commission made the following findings pertinent to whether the plaintiff had the willful intent to injure Honeycutt:

> 5. . . . [t]he plaintiff was in the shop approximately [30] minutes [after the original altercation] . . . when Mr. Honeycutt approached him.
>
> . . . .
>
> 7. Plaintiff was on a creeper on the floor pulling parts when Mr. Honeycutt approached and called to him. When plaintiff answered, Mr. Honeycutt said, "if you think you can whip my a--, get up." [P]laintiff dropped his tools as he got up . . . and then started laughing as he walked towards Mr. Honeycutt.
>
> 8. Mr. Honeycutt then drew a pistol . . . and fired three shots. The first shot missed the plaintiff and hit the concrete floor. The second shot hit plaintiff in the side of [his] right lower leg and the plaintiff said his leg gave way as he tried to take a step. The plaintiff said he was shot again as he fell or just as he hit the floor. This bullet entered the back, exited the shoulder, and struck the plaintiff's ear.
>
> 9. Mr. Dwiggins, Sr. testified that he heard similar talk (like the verbal exchange between plaintiff and Honeycutt) among the employees

> in the past and just considered it to be shop talk. Mr. Dwiggins, Sr. also stated that Mr. Honeycutt was loud and boisterous and yelled a lot.

The Commission found that there was no willful intent to injure by the plaintiff. Further the Commission concluded "but for" Honeycutt having gone after plaintiff with his pistol, no altercation or shooting would likely have occurred. We are bound by these findings unless there is no evidence in the record to support them. Testimony of both James Dwiggins, Jr. and James Dwiggins, Sr., who were both present during the shooting, support these findings as follows:

> James Dwiggins, Jr.
>
> Q. Mr. Dwiggins, did you ever see Mr. Linker threaten physically Mr. Honeycutt in any way prior to the first shot?
>
> A. No.
>
> Q. Did you ever see Mr. Linker threaten Mr. Honeycutt physically in any way prior to the second shot?
>
> A. No, because I was hiding.
>
> Q. Did you ever see Mr. Linker threaten Mr. Honeycutt physically in any way prior to the third shot?
>
> A. No, because I was hiding.
>
> Q. Did you ever see Mr. Linker have a weapon in his hand?

A. No.

Q. Did you ever see Mr. Linker threaten Mr. Honeycutt with a weapon in any way?

A. No.

James Dwiggins, Sr.

Q. Mr. Linker wasn't doing anything in any direction toward Mr. Honeycutt after he came out to the shop until Mr. Honeycutt called him out, correct?

A. He just called his name.

Q. Right.

A. And then Ronnie got up and was walking towards Mr. Honeycutt.

Q. Right. But before Mr. Honeycutt called him, he was down there working with you.

A. Yes.

MR. PIEMONTE: That's all. Thanks.

MR. BAKER: I've got nothing further.

THE COURT: Thank you, sir. You may step down.

In addition, both witnesses testified that plaintiff had a tool in his hand when Honeycutt came into the shop but that he dropped it before approaching Honeycutt. Accordingly, we hold that there was competent evidence in the record to support the findings of the Commission, therefore, the findings are conclusive on appeal.

Further, the findings support the Commission's conclusion of law that there was no willful intent by plaintiff to injure another. Our Supreme Count in *Rorie v. Holly Farms*, a case of first impression construing G.S. § 97-12(3), set forth the following guidance in determining whether G.S. § 97-12(3) applies:

> In order for the affirmative defense provided by G.S. [§] 97-12(3) to apply there must have been a willful intention to injure. A willful act is done intentionally and purposely, rather than accidentally or inadvertently. *See*, Black's Law Dictionary, 1434 (5th ed. 1979). The willful intention must be directed toward injury to the actor or to another. Neither acts by the claimant, nor mere words spoken by the claimant and unaccompanied by any overt act, will be sufficient to bar compensation unless the willful intent to injure is apparent from the context and nature of the physical or verbal assault. . . . The intent of the actor must be discerned by a careful examination of the evidence presented. Intent is usually proved by circumstantial evidence and is therefore reversed for the trier of fact. A finding by the trier of fact of intent, or the lack thereof, will not be disturbed unless there is no evidence to support such a finding.

Rorie, 306 N.C. at 710, 295 S.E.2d at 461 (citations omitted). In addition, the Court in *Rorie* recognized that, the Workers' Compensation Act should liberally be construed to benefit the employee. *Rorie*, 306 N.C. at 709, 295 S.E.2d at 460. Applying *Rorie* to the Commission's findings in the case *sub judice*, we hold that the findings support the Commission's conclusion that defendant has failed to meet its burden under G.S. § 97-12 and is therefore not relieved of its duty to pay compensation under the Workers' Compensation Act.

III.

Defendant argues next that the Commission erred in its conclusion that plaintiff was an employee at the time of his injury. We disagree.

An injured person is entitled to compensation under the Act only if he was an employee of the alleged employer at the time of the accident. *Lucas v. Stores,* 289 N.C. 212, 221 S.E.2d 257 (1976); *see also, Dockery v. McMillan,* 85 N.C. App 469, 355 S.E.2d 153, *disc. review denied,* 320 N.C. 167, 358 S.E.2d 49 (1987). Thus, whether an employer-employee relationship existed between plaintiff and defendant at the time of the injury (within the meaning of the Act) is a jurisdictional question. *Lucas,* 289 N.C. at 218, 221 S.E.2d at 261. The claimant has the burden of proof on that issue. *Id.* When issues of jurisdiction arise, "the jurisdictional facts found by the Commission, though supported by competent evidence, are not binding on this Court," and we are required to make independent findings with respect to jurisdictional facts. *Cook v. Norvell-Mackorell Real Estate Co.,* 99 N.C. App. 307, 309, 392 S.E.2d 758, 759 (1990) (citations omitted); *Perkins v. Arkansas Trucking Servs., Inc.,* 351 N.C. 634, 637, 528 S.E.2d 902 (2000).

We agree with the finding by both the deputy commissioner and the full Commission that at the time of the shooting, the employment relationship between plaintiff and defendant had not been terminated for purposes of the Act. Our courts have held that

an employer-employee relationship may exist for purposes of the Act even where the employee has been terminated by the employer. In *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982), this Court held that the plaintiff who sought damages for injuries inflicted by employer's president immediately after plaintiff tendered her resignation, was still an employee for purposes of workers' compensation. Likewise, in *McCure v. Manufacturing Co.*, 217 N.C. 351, 8 S.E.2d 219 (1940), the Supreme Court held that the Workers' Compensation Act provided the exclusive remedy for a supervisor's assault on an employee who had just been fired by the supervisor, *reversed on other grounds*, 234 N.C. 727, 69 S.E.2d 6 (1952). Further in *Byrd v. George W. Kane, Inc.*, 92 N.C. App. 490, 374 S.E.2d 480 (1988), this Court found that the employer-employee relationship continued to exist where plaintiff's foreman after discharging him told him to return after 1:00 p.m. that same day to get his paycheck. The Court held for purposes of the Act that the employment relationship still existed when plaintiff returned to the job site around 1:30 p.m. to pick up his check.

Defendant concedes that had plaintiff been injured as he was leaving the premises, or before he was given a reasonable opportunity to leave, the employer-employee relationship would still have existed. He contends however that plaintiff was terminated, given his paycheck and given a reasonable opportunity to leave, and thus the employment relationship came to an end.

A review of the record indicates the following: that

plaintiff had not left defendant's work place and was doing the work for which he was employed minutes before the shooting. Though defendant contends that he fired defendant while in the office prior to the shooting, witnesses present testified that they did not hear defendant terminate plaintiff. Further, while there appears to be some evidence of the existence of a check with plaintiff's name on it, it is clear from the record that the check was not in plaintiff's possession at the time of the shooting. Nor does the record suggest it was ever given to plaintiff. Moreover, plaintiff's actions immediately following the altercation do not suggest that he believed he had been fired. He went into the shop and began helping a co-worker do the work of defendant and continued to work for approximately 30 minutes before the shooting took place. In addition, plaintiff never mentioned anything to his co-worker about being fired though he did discuss his argument with Honeycutt. We hold that at the time of the shooting, the employer-employee relationship between plaintiff and defendant had not been severed for the purposes of the Act.

Finally defendant contends that even if it is determined that plaintiff was an employee at the time of the shooting, the Act is nevertheless unavailable to plaintiff because the shooting did not arise in the course of his employment so as to be compensable. We disagree.

In order to be compensable, an injury must result from an accident arising out of and in the course of employment. *Gallimore*

v. *Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977). Generally, the phrase "in the course of" refers to the time, place and circumstances under which an accident occurs; and if plaintiff's injury occurred during the hours of employment, at the place of employment, while he was engaged in the performance of his duties, the injury therefore occurred "during the course" of the employment. *Id.* at 402, 233 S.E.2d at 531-32. In *Byrd v. Kane*, 92 N.C. App. at 493, 374 S.E.2d at 482-83, this Court stated that an accident

> arises in the course of employment when the injury occurs during the period of employment at a place where an employee's duties are calculated to take him, and under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further directly or indirectly, the employer's business.

(quoting *Fortner v. J.K. Holding*, 319 N.C. 640, 643-44, 357 S.E.2d 167, 169 (1987)).

It is uncontroverted that at the time of the shooting the plaintiff was in the shop area of defendant's business where he normally worked, assisting a co-worker in doing what he (plaintiff) was hired to do.

Having carefully reviewed the entire record, we find substantial evidence establishing that at the time of the shooting, plaintiff was an employee of defendant within the meaning of the Workers' Compensation Act and that the shooting arose out of and in the course of plaintiff's employment.

Accordingly, we find no error and affirm the opinion and award of the Commission.

Affirmed.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).