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NO. COA99-807

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2000

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NORTH CAROLINA COURT OF APPEALS
CLERK OF APPELLATE DIVISION

JAMES MORRISON,
Employee,
Plaintiff

v.

SAGEBRUSH STEAKHOUSE,
Employer,

TRAVELERS INSURANCE COMPANY,
Carrier,
Defendants

From the North Carolina
Industrial Commission
I.C. No. 652124

Court of Appeals Slip Opinion

Appeal by defendants from an opinion and award entered 5 February 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 April 2000.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by C. Scott Whisnant and Michelle C. Pritchard, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe, for defendant-appellants.

HUNTER, Judge.

Defendant-appellants Sagebrush Steakhouse ("defendant") and Travelers Insurance Company appeal the opinion and award filed by the North Carolina Industrial Commission ("the Commission") on 5 February 1999, granting workers' compensation benefits to plaintiff-appellee James Morrison ("plaintiff"). Because the Commission's findings of fact are supported by competent evidence within the record, and because its conclusions of law are supported

by its findings of fact, we affirm the Commission's award in favor of plaintiff.

The facts of this case are undisputed and those relevant to defendant's appeal are as follows. On 17 July 1996, the day in question, plaintiff was working as an assistant manager for defendant. Plaintiff's mode of transportation to and from work was his motorcycle which, during times of inclement weather, defendant (by way of its General Manager, Patrick Pasco ("Mr. Pasco")) allowed plaintiff to park inside the back of defendant's building to keep the motorcycle from being exposed to the weather.

Upon arriving at work that morning, plaintiff parked his motorcycle in the employee lot outside the building. However, that afternoon, with defendant's permission, plaintiff moved his motorcycle into the building because a severe thunderstorm was approaching. Later that day, after the storm had passed, Mr. Pasco requested that plaintiff move his motorcycle back outside so that the back room where the motorcycle was parked could be cleaned.

Subsequently, plaintiff backed the motorcycle out of the building, started it and proceeded to drive it across the parking lot. As plaintiff pulled into a parking space, he attempted to stop the motorcycle but its brakes were unresponsive. Plaintiff attempted to turn but then panicked, thereby inadvertently causing the motorcycle to accelerate in speed. In an attempt to lay the motorcycle down, plaintiff broke his leg and was then thrown from the bike down an embankment landing against a tree, further injuring himself. The hospital diagnosed plaintiff with an open

fracture of the femur, which required surgery. After the accident, plaintiff's wife and Mr. Pasco found the motorcycle's right front brake pad in the parking lot.

The matter was heard by Deputy Commissioner Margaret Morgan on 7 November 1997. On 27 March 1998, Deputy Morgan filed her opinion and award finding that:

> 1. . . . The plaintiff *usually* . . . parked [his motorcycle] either in the designated employee area . . . or on a concrete pad next to the rear door of the restaurant. . . . [Defendant's] manager would often allow the plaintiff to park his motorcycle in the restaurant's back storage room during inclement weather.
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> 2. On 17 July 1996, . . . [i]n the afternoon, a storm came up and the plaintiff moved his motorcycle [from the employee lot] into the restaurant storage room. Approximately an hour and a half later, the rain stopped and the plaintiff was *asked to move* his motorcycle from the storage room so that the storage room could be cleaned. . . .
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> . . .
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> 5. There was no appreciable benefit to the defendant-employer in allowing the plaintiff to park his motorcycle inside during inclement weather.
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> 6. There was no reasonable relationship between the accident and the plaintiff's employment with the defendant-employer. Moving his motorcycle in and out of the restaurant during inclement weather was not a risk or hazard incident to the plaintiff's employment. Neither brake failure on the plaintiff's motorcycle nor the plaintiff's accidental acceleration were risks or hazards incident to the plaintiff's employment. The plaintiff's accident resulted from hazards to which he was equally exposed apart from his employment.

(Emphasis added.) Deputy Morgan therefore concluded that although plaintiff sustained an injury by accident during the course of his employment, the accident "did not arise out of his employment," thus plaintiff was not entitled to workers' compensation benefits.

Plaintiff appealed Deputy Morgan's decision to the Full Commission; and on 4 February 1999, the Commission reversed Deputy Morgan's opinion and award and rendered an opinion and award on behalf of plaintiff, finding that:

> 1. . . . The restaurant manager would allow the plaintiff to park his motorcycle in the restaurant's back storage room during inclement weather *so that the seat would not get wet.*
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> 2. On 17 July 1996, the plaintiff . . . parked in the employee area of the parking lot . . . . [However, fearing hail damage] from an approaching storm . . . *[plaintiff] moved [the motorcycle] into the storage room with the permission of his supervisor.* Approximately an hour and a half *later,* the rain stopped and *the plaintiff was asked by his supervisor to move his motorcycle* from the storage room so that the storage room could be cleaned. . . .
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> 3. *The moving of the motorcycle* in and out of the storage room as inclement weather came and went *normally happened during regular business hours* as it did on 17 July 1996.
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> . . .
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> 5. The accident and injury occurred as the employee was moving his motorcycle at the request of his employer and thus the removal of the motorcycle from the storage room was a requirement of his job on that day and the resulting accident and injury arose out of his employment. There was an appreciable benefit to the defendant-employer from the plaintiff's removing his motorcycle from the storage room so that the room could be cleaned. Under these circumstances, the accident arose out of

> plaintiff's employment and is a compensable accident under the Workers' Compensation Act.
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> 6. There was [a] reasonable relationship between the accident and the plaintiff's employment with the defendant-employer. Under the circumstances of this case, moving his motorcycle in and out of the restaurant during inclement weather was a risk or hazard incident to the plaintiff's employment.
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> . . .
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> 10. When the accident occurred the employee was on the clock; the accident occurred in the parking lot premises of the employer; the injured worker had the permission of the general manager to park his motorcycle in the storeroom and was ordered by his supervisor to remove it so the storeroom could be cleaned.

(Emphasis added.) Thus the Commission concluded that:

> Under the circumstances of this case, where the employee was regularly permitted to move his motorcycle into a storage room during inclement weather and where he was required to remove it when the storage room needed cleaning, the injury that occurred while moving the motorcycle during working hours at the insistence of a supervisor and on the parking lot of the employer was "a natural and probable consequence or incident of the employment and a natural result of one of its risks." *Bartlett vs. Duke University*, 284 N.C. 230, 200 S.E.2d 193 (1973); N.C. Gen. Stat. § 97-[2(6)].
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> [Therefore,] [p]laintiff is entitled to total temporary disability benefits from 17 July 1996 until 16 November 1996 when he returned to work. N.C. Gen. Stat. § 97-25.

Defendant brings forward only one argument. It contends that plaintiff's injury did not arise out of his employment with the company; thus, the Commission erred in awarding plaintiff benefits in that its findings of facts were erroneous and not supported by

competent evidence and its conclusions of law were not supported by the findings of fact. We find defendant's argument unpersuasive.

It is well established that only those injuries arising out of and in the course of employment are compensable under the N.C. Workers' Compensation Act. N.C. Gen. Stat. § 97-2(6) (1998). It has further been established that:

> In reviewing an Opinion and Award of the Commission, this Court must determine whether there is any competent evidence in the record to support its findings of fact and whether those findings support the conclusions of law. *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 129, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). The Commission has the "exclusive authority to find facts necessary to determine workers' compensation awards," *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 264, 423 S.E.2d 532, 535 (1992), and its findings are conclusive on appeal if supported by any competent evidence, even though there may be evidence which would support contrary findings, *id.*

Barber v. Going West Transp., Inc., 134 N.C. App. 428, 434, 517 S.E.2d 914, 919-20 (1999). Therefore, in the case at bar, this Court must look to see whether there is *any* competent evidence in the record to support the Commission's findings of fact, and whether those findings justify its conclusion of law that the plaintiff's injuries arose out of and in the course of his employment with the defendant. *Shaw v. Smith & Jennings, Inc.*, 130 N.C. App. 442, 503 S.E.2d 113, *disc. review denied*, 349 N.C. 363, 525 S.E.2d 175 (1998).

> "The term 'arising out of' refers to the origin of the injury or the causal connection of the injury to the employment, while the term 'in the course of' refers to the time, place and

circumstances under which the injury occurred." *Schmoyer v. Church of Jesus Christ of Latter Day Saints*, 81 N.C. App. 140, 142, 343 S.E.2d 551, 552, *disc. review denied*, 318 N.C. 417, 349 S.E.2d 600 (1986) (citations omitted). Further, "[w]hether an injury arises out of and in the course of a claimant's employment is a mixed question of fact and law, and [this Court's] review is thus limited to whether the findings and conclusions are supported by the evidence." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 481 (1997) (citation omitted).

This Court has held that if the employee's injury is "fairly traceable to the employment" or "any reasonable relationship to employment exists," then it is compensable under the Act. *White v. Battleground Veterinary Hosp.*, 62 N.C. App. 720, 723, 303 S.E.2d 547, 549, *disc. review denied*, 309 N.C. 325, 307 S.E.2d 170 (1983) (citation omitted). An employee is injured in the course of his employment when the injury occurs "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." *Powers v. Lady's Funeral Home*, 306 N.C. 728, 730, 295 S.E.2d 473, 475 (1982) (citations omitted).

Moreover, "[a]ctivities which are undertaken for the personal comfort of the employee are considered part of the 'circumstances' element of the course of employment." *Spratt v. Duke Power Co.*, 65 N.C. App. 457, 468-469, 310 S.E.2d 38, 45 (1983). In *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E.2d 97 (1946), our Supreme Court recognized the personal comfort doctrine by stating that "[a]n employee, while about his employer's business, may do those things which are necessary to his own health and comfort, even though personal to himself, and such acts are regarded as incidental to the employment." *Id.* at 328, 38 S.E.2d at 99 (citations omitted). . . .

[T]he fact that the employee is not engaged in the actual performance of the duties of his job does not preclude an

> accident from being one within the course of employment. . . .
>
> *Harless v. Flynn*, 1 N.C. App. 448, 456-457, 162 S.E.2d 47, 53 (1968) (emphasis added) (citations omitted).

Id. at 445-46, 503 S.E.2d at 116-17. Thus, "[i]n tending to his personal physical needs, an employee is indirectly benefiting his employer. Therefore, *the course of employment continues when the employee . . . goes on a personal errand involving temporary absence from his post of duty . . . .*" *Harless v. Flynn*, 1 N.C. App. 448, 456-57, 162 S.E.2d 47, 53 (1968) (emphasis added).

Nevertheless, defendant argues that "even though [the] accident occurred on the employer's premises at a time when the employee was within the compass of his employment, this alone is insufficient to justify a finding that the injury arose out of the employment." *Strickland v. King and Sellers v. King*, 293 N.C. 731, 733, 239 S.E.2d 243, 244 (1977). Thus, although defendant concedes that plaintiff's injury occurred "in the course of" his employment with defendant, it argues plaintiff's injury did not "arise out of" his employment with the company. We, too, find *Strickland* applicable; however, not in defendant's favor.

In *Strickland*, the plaintiff brought a cause of action against fellow employees with whom he was riding home from work when he was injured. The accident occurred on a private road owned and maintained by their employer, and defendants argued that because plaintiff's injuries "arose out of" and "in the course of" his employment, North Carolina Workers' Compensation was plaintiff's sole remedy. Concluding that plaintiff's injury did not "arise out

of" his employment (and thus, his claim against defendant-employees was not barred by the North Carolina Workers' Compensation Act), our Supreme Court found that: (1) in driving the plaintiff home, defendant-employees "were performing no assigned duties for their employer," *id.* at 733, 239 S.E.2d at 244; (2) "the accident occurred a *substantial* distance (one and one-half miles) from the employer's plant and parking lot on a road which differed in no significant respect from a public highway, other than its character as private property," *id.* at 734, 239 S.E.2d at 245 (emphasis in original); (3) "[t]he risks employees were exposed to in going to and coming from the plant were not materially different from those encountered on a public highway[,]" *id.* and; (4) "merely by driving their fellow employees home *under an arrangement set up among themselves,* defendants could not be said to have been conducting their employer's business." *Id.* at 734, 239 S.E.2d at 245 (emphasis added).

In the present case, the Commission found and defendant does not dispute that plaintiff was "on the clock" when he was directed by Mr. Pasco to move his motorcycle back outside and that in the process of complying, plaintiff was injured. Thus, unlike the Court in *Strickland, supra*, we cannot find that plaintiff "w[as] performing no assigned duties for [his] employer." *Id.* at 733, 239 S.E.2d at 244. On the contrary, we hold that Mr. Pasco's directive was, in fact, an assigned duty. Further, since plaintiff was injured in defendant's parking lot (and not on a road a great

distance away from defendant's place of business), we recognize that:

> Injuries in parking lots owned and maintained for employees by employers while arriving at or departing from the work site have often been held to arise out of and in the course of employment *because the risk of injury in such lots is different in kind and greater in degree than that experienced by the general public.*

Id. at 733-34, 239 S.E.2d at 244-45 (emphasis added). Finally, because plaintiff's moving his motorcycle in and out of defendant's back storage room was not only known to defendant but was, in fact, an arrangement which plaintiff had with defendant through Mr. Pasco, we conclude that when plaintiff was instructed to move his motorcycle, he was "conducting [his] employer's business." *Id.* at 734, 239 S.E.2d at 245. Thus, we hold that the record reveals substantial evidence upon which the Commission could base its findings that "the removal of the motorcycle from the storage room was a requirement of his job on that day and the resulting accident and injury arose out of his employment." That the arrangement made was solely for plaintiff's personal comfort -- to keep his seat dry and his mode of transportation to work unharmed -- does not remove it from benefitting defendant. *Harless*, 1 N.C. App. 448, 162 S.E.2d 47. Therefore, we hold that the Commission's findings, supported by competent evidence, are conclusive. *Watkins v. City of Wilmington*, 290 N.C. 276, 282, 225 S.E.2d 577, 581 (1976).

The only question remaining then is whether the Commission's findings justify its conclusions of law that the accident "arose out of" plaintiff's employment with defendant. We are persuaded

that it did. In *Watkins*, a fireman was injured during his lunch break while he was cleaning the oil breather cap of a fellow employee's car. Holding that the fireman's injuries were compensable, our Supreme Court stated

> firemen often made minor repairs to their [own] automobiles on the fire station premises during their lunch hour . . . . [T]his practice was well known to and was allowed by plaintiff's superiors. There was further competent evidence to support a finding that repairs of a minor nature to personal automobiles were to an appreciable extent a benefit to the fire department in that by keeping their automobiles in working condition the firemen could use them to report to duty . . . .
>
> [Thus, this is] a reasonable activity, and . . . the risk inherent in such activity [is] a risk of the employment. This reasonableness is attested by the fact that such practice was well known to plaintiff's superiors who made no objection but, in fact, specifically allowed firemen to make such minor repairs during their lunch hour.

Id. at 285, 225 S.E.2d at 583.

In the case at bar, defendant not only acquiesced to plaintiff's parking in their building, but had given plaintiff on-going express permission to park there whenever there was inclement weather. Furthermore, the Commission found, and it is not disputed, that plaintiff's motorcycle was his primary mode of transportation to work. Therefore, we hold that in moving his motorcycle to allow defendant to clean the storeroom, plaintiff was engaged in a reasonable activity and "the risk inherent in such activity [is] a risk of [plaintiff's] employment" with defendant. *Id.* Finding *Watkins* determinative, we hold that the Commission's

findings of fact do justify its conclusions of law. Therefore, the Commission's opinion and award is

Affirmed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

Report per Rule 30(e).