NO. COA02-1269

NORTH CAROLINA COURT OF APPEALS

Filed: 16 September 2003

FRANKLIN D. FREEMAN,
Employee

v.

North Carolina Industrial Commission
I.C. File No. 875760

TRIANGLE GRADING & PAVING, INC.,
Employer

and

ZURICH COMMERCIAL INSURANCE,
Carrier,
Defendants

Appeal by defendants from an opinion and award entered 8 May 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 June 2003.

Ledbetter & Titsworth, P.A., by Daniel B. Titsworth, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Gregory M. Willis, for defendants-appellants.

HUDSON, Judge.

Defendants Triangle Grading & Paving Inc. ("Triangle") and Zurich Commercial Insurance appeal an opinion and award entered 8 May 2002 by the North Carolina Industrial Commission that awarded plaintiff ongoing total disability compensation. We affirm.

BACKGROUND

Plaintiff was employed as a heavy equipment operator for Triangle and was working a job site in Wake County on 17 September 1998. On that day, he walked a few hundred yards from the job site to purchase refreshments at a convenience store. As he crossed the road, plaintiff was struck by a car and seriously injured.

Deputy Commissioner Edward Garner, Jr. heard the case at a special setting on 25 March 1999. The parties agreed that the sole issue before the Commission was whether plaintiff had suffered a compensable injury by accident. Deputy Commissioner Garner issued an opinion and award on 9 February 2000 in which he found and concluded that plaintiff had sustained a compensable injury by accident. On 17 February 2000, defendant gave notice of appeal to the Full Commission.

Before scheduling the case for oral argument, the Full Commission remanded the case for a deputy commissioner to determine the issue of disability. After a second hearing, Deputy Commissioner Bradley W. Houser issued an opinion and award on 22 May 2001 in which he found and concluded that plaintiff was entitled to benefits for disability due to his injury. Again defendants gave notice of appeal to the Full Commission.

In an opinion and award filed 8 May 2002, the Full Commission affirmed both opinions and awards with minor modifications. Below are some of the facts found by the Full Commission, which have not been challenged on appeal:

> 2. On 17 September 1998, plaintiff, who then lived in Raleigh, was operating heavy equipment and counting dump trucks in his employment with defendant-employer. As plaintiff was walking across a road in a construction area, he was struck by an automobile. As the result of this incident plaintiff sustained serious and permanent injuries.
>
> 3. At the time of his injury, plaintiff was working on a construction site for what is now known as Interstate 540. The job site in Raleigh, North Carolina, was more than a mile long and had

portable toilets and water available for employees at each end of the project. In addition, periodically throughout the day, defendant-employer would drive through the job site with a truck which contained a water cooler. Plaintiff, weather permitting, was working from 6:30-7:00 a.m. to 6:00 p.m. or later, Monday through Friday, and every other Saturday. Defendant provided a thirty minute lunch break daily.

4. On 17 September 1998, plaintiff was assigned to count trucks on a mid-point in the construction site. During a lull in the activity, plaintiff desired to take a break and chose to proceed to a local convenience store. The convenience store was closer to plaintiff than the water and toilet facilities provided by defendant-employer. In addition, the convenience store included products for refreshment that were not provided at defendant-employer's stations. On prior occasions plaintiff had been permitted to go to the convenience store to take care of his personal needs, including to make a personal telephone call and to get a drink. Plaintiff and other employees were often taken to the convenience store for lunch by defendant- employer during their lunch period. Other employees had gone to the convenience store from the construction site for their personal needs. The convenience store was the closest facility to the job site where food and drink could be purchased.

5. On 17 September 1998, at approximately 3:30 p.m., when there were no trucks to be loaded and counted, plaintiff walked to the convenience store, purchased an ice cream, and was returning to the construction site when he was struck by an automobile and was injured.

6. Following the incident, plaintiff was transported by ambulance to the emergency room at Wake Medical Center. Plaintiff was diagnosed as having bilateral hip dislocations, a lacerated spleen, right acetabular fracture, bilateral pneumothorax, lacerations of the right thigh and calf, multiple abrasions to the head, four broken teeth and a pancreatic contusion. Plaintiff underwent surgery for closed reduction of his bilateral hip dislocations, incision and draining of the right thigh laceration and bilateral chest tube placement.

7. Following his surgical procedures, plaintiff underwent orthopaedic and physical therapy as well as speech pathology consultations. Additionally, during his hospitalization, plaintiff developed a problem with urinary retention and the use of a Foley catheter was necessary.

8. On 28 September 1998, plaintiff was evaluated, and it was determined that he could be released from the hospital and cared for at home with home-health care. Plaintiff was discharged from Wake Medical Center on 29 September 1998. As of that date, he continued to experience problems with his speech.

9. Following his discharge from the hospital, plaintiff did not receive home- health care because he did not have health insurance or a source of income. Plaintiff was, however, able to continue treatments with Dr. Obremsky through April of 1999. During this period, plaintiff had to use a wheelchair and then a walker to get around and his speech did not improve. In April 1999, Dr. Obremsky noted that plaintiff was developing degenerative disease in his hips as a result of the injuries he sustained on 18 September 1998.

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12. Because plaintiff continued to have significant problems with hip pain, he returned to see Dr. Obremsky in March of 2000. Dr. Obremsky opined that plaintiff had previously been able to return to his prior employment, and that if he did return to work for defendant-employer, that plaintiff would be capable of only a sedentary job that required minimal standing and walking. Dr. Obremsky testified at his deposition that in his opinion, plaintiff should have been able to resume some type of sedentary type work that required minimal standing and walking approximately six months after the 18 September 1998 incident.

13. Dr. Obremsky further opined that at some time in the future, plaintiff would require total hip replacement. Dr. Obremsky assigned plaintiff a fifteen percent (15%) permanent partial disability rating to his right lower extremity and a seven percent (7%) rating to the left lower extremity. According to Dr. Obremsky, plaintiff would be out of work for three to four months after a hip replacement surgery and his impairment ratings would change.

14. During this ongoing period of medical problems and treatment, plaintiff did not have any source of income. As the result, plaintiff lost his home, had a judgment entered against him for past due rent, and lost his automobile. Unable to find affordable housing or suitable work in Wake County, plaintiff moved to Kinston, North Carolina so that family members could assist him. After moving to Kinston, plaintiff applied to numerous car

dealerships for a lot attendant or cleaning position, but was unsuccessful with this job search effort. Plaintiff also attempted to locate work at various automobile service businesses. Plaintiff submitted applications and talked with supervisory personnel in at least eight such businesses. Plaintiff did not receive a response from any of his inquiries or applications. The Full Commission finds that plaintiff's attempts to locate suitable employment were reasonable.

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20. Plaintiff has produced sufficient medical evidence upon which to find that due to the incident of 18 September 1998, he is capable of some work, but that after a reasonable effort to locate employment on his part, he has been unsuccessful.

21. Defendants have failed to produce evidence that suitable jobs were available to plaintiff or that he was capable of obtaining one given his physical and vocational restrictions which are reasonably near plaintiff's residence. Although the Commission acknowledges that an employee may not relocate in order to make his disability more likely, when the employee relocates for legitimate reason, such as in this case, vocational evidence should be relevant to the area where he is residing. The Full Commission finds that the vocational evidence tendered in this case is not relevant to the community where plaintiff is living.

22. As a result of the work related incident of 18 September 1998, plaintiff has been unable to earn wages in his former position with defendant-employer or in any other employment for the period of 18 September 1998 through the present and continuing.

23. Plaintiff's average weekly wage on 18 September 1998 was $459.32, yielding a compensation rate of $306.37 per week.

24. There is no evidence in the record that defendant-employer provided formal break times for their employees. It appears that employees were able to take a break as and when their work load permitted. Further, defendant-employer did not provide a place to take breaks, and although there was suggestion that the employees could have accepted the water offered by defendant-employer, the evidence is that employees were permitted and did go to the convenience store to obtain refreshment and to take care of their personal needs.

> 25. Although defendant-employer did provide portable toilets and water, these conveniences were not located at the station where plaintiff was working on 18 September 1998, and the convenience store was closer to the plaintiff than the defendant-employer's water and toilet facilities.

The Full Commission then made the following conclusions of law:

> 3. Plaintiff is entitled to be paid by defendants ongoing total disability compensation at the rate of $306.37 per week for the period of 18 September 1998 through the present and continuing until such time as he returns to work or until further order of the Commission. G.S. §97-29.
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> 4. Plaintiff is entitled to have defendants pay for all related medical expenses. G.S. §97-25; G.S. §97-25.1.
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> 5. Defendants are entitled to a credit in the amount of $9,276.55 for third party proceeds previously received by plaintiff and for reimbursement to plaintiff for proceeds paid to Wake Medical Center for satisfaction of its lien. G.S. §97-42.

ANALYSIS

On appeal of a worker's compensation decision, we follow what is usually referred to as a two-step process. First, we look to see if any challenged findings of fact are supported by any evidence in the record; and second, we determine whether the findings support the conclusions of law. As the Supreme Court has stated, we are "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). An appellate court reviewing a worker's compensation claim "'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's 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) (citation omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). In reviewing the

evidence, we are required, in accordance with the Supreme Court's mandate of liberal construction in favor of awarding benefits, to take the evidence in the light most favorable to plaintiff. *Id.*

The Full Commission is the "sole judge of the weight and credibility of the evidence." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Furthermore,

> the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determination and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

Id. at 116-17, 530 S.E.2d at 553. If evidence supports the findings of the Commission, they are binding on the Court, even if there is evidence from which contrary findings could have been made. *Id.* at 115, 530 S.E.2d at 552-53.

A.

In their first argument, defendants contend that plaintiff failed to prove that he sustained a compensable injury by accident because, at the time he was injured, he was performing a personal errand off the employer's premises. In support of this argument in their brief, defendants refer to assignments of error 1 and 2, which challenge only finding of fact 26 and conclusion of law 2, quoted below:

> 26. Based on the greater weight of the competent evidence, the Full Commission finds that plaintiff was in the course and scope of his employment at the time and place of his injury and that plaintiff had not deviated from his employment. North Carolina has adopted the personal convenience doctrine and recognizes that employees have not deviated from their employ while reasonably taking breaks, using toilet facilities, seeking refreshment, and otherwise taking care of their personal needs. The

> Full Commission finds that plaintiff was entitled to take a break and was permitted to go to the convenience store. Defendant-employer has not established that it had an enforced policy requiring its employees to stay on the job site; to the contrary, the evidence is that defendant-employer had permitted plaintiff and other employees to proceed to the convenience store to obtain refreshment, make personal telephone calls, and otherwise to take care of their needs. Plaintiff's job foreman, Chester Downey, did not testify that plaintiff erred in going to the convenience store. To the contrary, Mr. Downey indicated that if he knew that Plaintiff wanted to go to the convenience store that he would have arranged transportation to take him to the store. In addition, there was no evidence that plaintiff's pay was or would be docked for taking a break at the convenience store.

The Full Commission concluded as follows:

> 2. Plaintiff has sustained an injury arising out of and in the course of his employment including injury to his hips and other parts of his body as detailed in Finding of Fact No. 6. G.S. §97-2(6). Plaintiff's activity in proceeding to the convenience store and purchasing an ice cream during a lull in his employment falls within the personal convenience doctrine and thereby his injury arises out of and in the course of his employment. . . . In determining whether an off-site injury is included in the personal convenience doctrine, several factors can be considered including: (1) the duration of the break period; (2) whether the employer is paid during the break period; (3) whether the employer provides a place for employees to take breaks, including vending facilities; (4) whether the employer permits off-premises breaks; and, (5) the proximity of the off- premises location where plaintiff was injured to the employment site. . . . Under the facts of this case, there were no formal break periods, there is no suggestion that plaintiff was away from work for an unusually long period of time, plaintiff and other employees were paid during their break periods, no vending machines or refreshment other than water was made available or provided by defendant-employer, off-premise breaks were permitted by defendant-employer, and the location of the convenience store was closer to plaintiff's work station than the water coolers made available to plaintiff. Thus, this injury is incidental to plaintiff's employment and does not constitute a deviation from his employment. . . . Further, at the time and place of his injury, plaintiff had not deviated from the business of his employer. Unlike the circumstances in *Bowser v. N.C. Department of Corrections*, [147] N.C. [618], 555 S.E.2d 618 (2001), [review denied], 355 N.C. 283, 560 S.E.2d 796 (2002), and other cases,

> plaintiff was not provided with reasonable means for refreshment and comfort by his employer, and thereby his actions to cross the street for refreshment was not a deviation from his employment. . . .

Although denominated a finding of fact, number 26 is actually a mixed finding of fact and conclusion of law, which we analyze as such. To the extent that it is a finding of fact, ample evidence supports it. For example, plaintiff testified that he had been to the store on previous occasions, that his superintendent had given him permission to go to the store on one of those occasions, that the workers ate lunch at the store, and that nobody ever told him he could not go to the store. The finding of fact also includes a summary of the testimony of Chester Downey, plaintiff's job foreman, to the effect that he would have taken plaintiff to the store had he known that he wanted to go.

Next, we examine whether the findings of fact support the Commission's conclusions of law. We believe that they do. Findings of fact numbers 3, 4, 24, 25, and 26, among others, specifically describe plaintiff's work site, the manner and type of breaks that were taken, and other rules and conduct applicable to employees' personal time and comfort. These factual findings, as well as others that were not challenged on appeal -- including finding 4, which contains additional details about the plaintiff's visit to the store on 17 September 1998 -- support the conclusion of law that plaintiff was in the course and scope of his employment taking a permitted break to attend to personal needs at the time of his injury.

The remainder of defendants' first argument amounts to an assertion that, even if the findings and conclusions were supported by the record, the Full Commission improperly applied the law regarding an employee taking a personal break to go off-site. Thus, to complete our analysis of this issue, we briefly summarize the applicable cases.

Under the Workers' Compensation Act, an injury is compensable if the injury (1) is an accident and (2) is arising out of and in the course of employment. N.C. Gen. Stat. §97-2(6). "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 (citations omitted), *disc. review denied*, 318 N.C. 417, 349 S.E.2d 600 (1986).

Our State's Supreme 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, (quoting *Kiger v. Service Co.*, 260 N.C. 760, 762, 133 S.E.2d 702, 704 (1963)), *disc. review denied*, 309 N.C. 325, 307 S.E.2d 170 (1983). 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). 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, 468-69, 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 long ago 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. Further, this Court has held:

> [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. . . .
>
> In tending to his personal physical needs, an employee is indirectly [benefitting] his employer. Therefore, the course of employment continues when the employee goes to the washroom, takes a smoke break, [or] takes a break to partake of refreshment . . . .

Harless v. Flynn, 1 N.C. App. 448, 456-57, 162 S.E.2d 47, 53 (1968) (citations omitted).

"In addition to employees being compensated for injuries suffered during their lunch breaks, 'coffee breaks' or 'rest breaks' have increasingly become such a 'fixture [in] many kinds of employment,' that injuries occurring off the premises during these breaks have been held to be compensable." *Shaw v. Smith & Jennings, Inc.*, 130 N.C. App. 442, 446, 503 S.E.2d 113, 117, (citing 1 *Larson's Workers' Compensation Law*, §15.54 at 4-181 to 4-192 (1997)), *disc. review denied*, 349 N.C. 363, 525 S.E.2d 175 (1998). Often, the operative principle in these cases is whether the employer, considering all the circumstances, is deemed to have retained authority over the employee. *Id.* "If an employer is found to have retained such authority, then the Courts have tended to allow compensation." *Id.*

In making this determination, we consider several factors, all of which were noted by the Commission in conclusion of law 2:

> (1) the duration of the break period; (2) whether the employee is paid during the break period; (3) whether the employer provides a place for employees to take breaks, including vending facilities; (4) whether the employer permits off-premises breaks, or has acquiesced in such despite policies against such breaks; and, (5) the proximity of the off-premises location where the employee was injured to the employment site.

Shaw, 130 N.C. App. at 447, 503 S.E.2d at 117.

In *Shaw*, the employee was leaving the premises of his employer on a break, and a co-worker asked him to bring him a cup of coffee. *Id*. at 443, 503 S.E.2d at 115. The employee died in a car accident near the convenience store where he would have purchased the coffee. *Id.* at 444, 503 S.E.2d at 115-16. This Court affirmed the Commission's award of benefits to the plaintiff, emphasizing the following factors:

> there were no vending facilities on the premises, the employees were expressly permitted to travel off the premises to purchase refreshments; employees were paid during the break period; the break period was of a short duration; the convenience store [was nearby the] place of employment; and, the purpose of the employee's visit was [obtaining refreshments.]

Id. at 447, 503 S.E.2d at 117.

As in *Shaw*, here the Full Commission found that there were no formal break periods. There was no suggestion that plaintiff was away from work for an unusually long period of time; in fact, plaintiff testified that it would only have taken him approximately ten minutes to walk to the store, purchase refreshments, and return to the job site. Plaintiff and other employees were paid during their break period, and no vending machines or refreshment other than water was made available or provided by Triangle. Off- premises breaks were permitted by Triangle; defendants' job foreman, Chester Downey, testified that if he had known plaintiff wanted to go to the store, he would have made arrangements for plaintiff to go or driven him to the store himself. Finally, the location of the convenience store was closer to plaintiff's work station than the water coolers.

In sum, we conclude that evidence in the record supports the Commission's findings of fact, that the findings of fact in turn, support the conclusions of law, and that the Commission correctly applied the law. Thus, we reject defendants' argument and conclude that the

Commission properly determined that plaintiff's accident occurred in the course of his employment with Triangle.

B.

Defendants next argue that plaintiff has failed to prove that he is disabled. Again we disagree.

Defendants have challenged none of the findings of fact pertaining to this issue but have brought forth assignments of error to the conclusion of law and award paragraphs, which determine that the plaintiff is entitled to benefits for temporary total disability from 18 September 1999 and continuing "until such time as he returns to work or until further order of the Commission." Thus, we are bound by the pertinent findings of fact, including numbers 14, 20, 21, and 22, in which the Commission found as fact, *inter alia*, that the plaintiff's attempts to find suitable work were reasonable but unsuccessful, that defendants had failed to show that suitable jobs were available to plaintiff, and, most importantly, that "[a]s a result of the [injury], plaintiff has been unable to earn wages in his former position . . . or in any other employment for the period of 18 September 1998 through the present and continuing."

Disability under the Workers' Compensation Act is defined as "incapacity because of injury 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) (2001). The burden of proving the extent and degree of disability under the Act lies with the plaintiff. *Simmons v. Kroger Co.*, 117 N.C. App. 440, 442, 451 S.E.2d 12, 14 (1994). The plaintiff-employee may meet this burden in one of four ways:

> "(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on

> his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury."

Simmons, 117 N.C. App. at 442-43, 451 S.E.2d at 14 (quoting *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). Once the plaintiff-employee establishes his disability, there is a presumption that the disability continues until he returns to work at wages equal to those he was receiving at the time of his injury. *Id.* at 443, 451 S.E.2d at 14.

Here, the Full Commission found that plaintiff had applied for numerous positions but was unsuccessful. The Commission also found that plaintiff applied to numerous car dealerships and submitted at least eight applications at various automobile service businesses and that his attempts to locate suitable employment were reasonable. Defendants argue that eight or nine applications submitted over a one and one-half year period are not numerous and not reasonable. As indicated earlier, however, the Full Commission is the "sole judge of the weight and credibility of the evidence" and does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. We conclude that the findings of fact that were not challenged on appeal fully support the Commission's conclusions of law and award of ongoing disability benefits. This argument lacks any merit.

CONCLUSION

For the reasons set forth above, we affirm the decision of the Industrial Commission.

Affirmed.

Judges TIMMONS-GOODSON and STEELMAN concur.

Report per Rule 30(e).