NO. COA11-1110
NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2012

JAMES A. HUNT,
Employee, Plaintiff

v.

NORTH CAROLINA INDUSTRIAL COMMISSION
I.C. No. W18411

PUBLIC SCHOOLS OF ROBESON COUNTY and NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION, Employer,
SELF-INSURED (CORVEL CORPORATION, Third-Party Administrator),
Defendants.

Appeal by defendants from opinion and award entered 28 June 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 February 2012.

Hardison & Cochran, P.L.L.C., by Benjamin T. Cochran and John Paul Godwin, for the plaintiff.

Roy Cooper, Attorney General, by Lora C. Cubbage, Assistant Attorney General, for the defendants.

THIGPEN, Judge.

The Public Schools of Robeson County and the North Carolina Department of Public Instruction (collectively "Defendants") appeal from an Opinion and Award of the North Carolina

Industrial Commission ("the Full Commission") awarding temporary total disability compensation to James A. Hunt ("Plaintiff") after he was shot in his car on his way to work. We must determine whether the Full Commission erred by finding and concluding that Plaintiff's injury arose out of and in the course of his employment. After a review of the record, we affirm.

I. Facts and Procedural History

Plaintiff was the principal at Fairmont Middle School during the 2008-2009 school year. On the morning of 9 April 2009, as Plaintiff was driving his car from his home in Lumberton to his job at Fairmont Middle School, an unknown assailant in a truck pulled alongside Plaintiff and shot him in the face and hand. Plaintiff did not see who shot him. At the time Plaintiff was shot, he was talking to Terry Brown, his administrative intern and curriculum coach, on a cell phone that was provided by his employer. Plaintiff and Ms. Brown were discussing various school-related issues, including new technology for the school and a disciplinary situation. As a result of the shooting, Plaintiff sustained injuries to his face, mouth, teeth, and right hand, and underwent multiple procedures and plastic surgeries.

Plaintiff was employed as an administrator with Public Schools of Robeson County ("Employer") pursuant to a contract for the term commencing 1 July 2007 and ending 30 June 2011. Plaintiff's employment contract stated, in relevant part, "The Employee shall be paid in accordance with state salary schedule applicable to the position assigned in paragraph 4 above, together with any applicable local supplement (including travel allowance) for services rendered." The contract also stated, "This contract contains the entire agreement and understanding of the parties regarding the employment of the employee by the Board." Pursuant to his employment contract, Plaintiff was paid a travel allowance twice a year in the amount of $594.08, after taxes.

Plaintiff testified he believed he was shot due to his role as a school administrator. Plaintiff was active in the community and was involved in anti-gang activities such as participating in anti-gang rallies, a "community workday" with parents, and having an anti-gang group make a presentation at Fairmont Middle School. Plaintiff also stated he had received threats from some of the parents of his students and was suspicious of staff members whom he had to discipline. Plaintiff's shooting was investigated by Detective Dru Martin.

Although a full investigation was conducted and many school and non-school related leads were followed, no conclusive evidence was produced as to who shot Plaintiff or why he was shot.

On 4 May 2009, Plaintiff filed a workers' compensation claim. Employer denied Plaintiff's claim on 20 May 2009 because Plaintiff's injury "was not a result of an accident" and "did not arise out of and in the course and scope of . . . employment[.]" Following Plaintiff's request for a hearing, a hearing was held on 24 March 2010 before Deputy Commissioner Phillip A. Baddour, III. By an Opinion and Award filed on 10 December 2010, Deputy Commissioner Baddour concluded Plaintiff sustained an injury by accident arising out of and in the course and scope of his employment. Defendants appealed to the Full Commission. On 28 June 2011, the Full Commission filed an Opinion and Award affirming the Deputy Commissioner's decision with modifications. The Full Commission concluded, ***inter alia***, that "Plaintiff suffered a compensable injury by accident while in the course and scope of employment with Defendant-Employer on April 9, 2009" and awarded Plaintiff temporary total disability compensation. Defendants appeal from this Opinion and Award.

On appeal, Defendants contend the Full Commission erred by finding and concluding that Plaintiff's injury on 9 April 2009 arose out of and in the course of his employment. We disagree.

II. Standard of Review

"[O]n appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted), *rehearing denied*, 363 N.C. 260, 676 S.E.2d 472 (2009). "[T]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Id.* (quotation omitted). "[T]he Commission's findings of fact are conclusive on appeal when supported by any competent evidence, even though there be evidence that would support findings to the contrary and may be set aside only when there is a complete lack of competent evidence to support them." *Nobles v. Coastal Power & Elec., Inc.*, __ N.C. App. __, __, 701 S.E.2d 316, 319 (2010) (citations and quotation marks omitted). "However, the Commission's conclusions of law are reviewed de novo." *Id.* (citation omitted). "Unchallenged findings of fact by the Commission are

binding on appeal." *Davis v. Hospice & Palliative Care of Winston-Salem*, 202 N.C. App. 660, 670, 692 S.E.2d 631, 638 (2010) (citation omitted).

For an injury to be compensable under our Workers' Compensation Act, it "must be shown to have resulted from an accident arising out of and in the course of the employment." *Duncan v. City of Charlotte*, 234 N.C. 86, 90, 66 S.E.2d 22, 25 (1951) (citations omitted); *see also* N.C. Gen. Stat. § 97-2(6) (2011). "The two requirements are separate and distinct, and both must be satisfied in order to render an injury compensable." *Barham v. Food World, Inc.*, 300 N.C. 329, 332, 266 S.E.2d 676, 678 (citation omitted), *rehearing denied*, 300 N.C. 562, 270 S.E.2d 105 (1980). "The term 'arising out of' refers to the origin or causal connection of the injury to the employment; the phrase 'in the course of' refers to the time, place and circumstances under which the injury by accident occurs." *Id.* (citation omitted).

III. Arising Out of Employment

Defendants first contend the Full Commission erred by finding and concluding Plaintiff's injury arose out of his employment. Specifically, Defendants argue Plaintiff's injuries are not related to his employment as a principal. We disagree.

"Where 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.'" *Hauser v. Advanced Plastiform, Inc.*, 133 N.C. App. 378, 382, 514 S.E.2d 545, 548 (1999) (quotation omitted). "The controlling test of whether an injury 'arises out of' the employment is whether the injury is a natural and probable consequence of the nature of the employment." *Dildy v. MBW Investments, Inc.*, 152 N.C. App. 65, 69, 566 S.E.2d 759, 763 (2002) (quotation omitted). "This test has been referred to as the 'increased risk' analysis, and focuses on whether the *nature* of the employment creates or increases a risk to which the employee is exposed." *Id.* (emphasis in original) (citation omitted).

Here, Defendants argue the Full Commission's finding of fact number 17 is not supported by competent evidence. Finding of fact number 17 states, "Based upon the evidence of record, the shooting of Plaintiff was more likely than not related to his anti-gang activities conducted in the course and scope of his employment." Defendants also contend Plaintiff's anti-gang activity was "not peculiar to his role as a[] principal but was related to his role as a community resident and leader." Defendants, however, do not challenge the following findings of

fact related to Plaintiff's anti-gang activities:

> 11. At Fairgrove Middle School, Plaintiff had problems with gangs. He attempted to catalogue gang members and stop gangs from forming inside the school. Plaintiff suspended a gang leader from school and had a confrontation with another gang member, who made it clear to Plaintiff [] that he was not "backing down". Plaintiff's testimony, which is found to be credible, is that he was known throughout the community for his strong stance against gangs in schools. There were gang members and parents that did not like what he stood for, and one parent even threatened to kill Plaintiff.
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> 12. Plaintiff testified that when the students returned from Easter break, the gang "flags were flying." Plaintiff had the anti-gang group "City Crisis" make a presentation to the school the Tuesday before he was shot. Plaintiff told the students, "If you're involved in gangs, and you can't get out, then tell me you can't get out. You come to Mr. Hunt."

These unchallenged findings of fact are deemed binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Although Detective Martin had not identified who shot Plaintiff and could not "say one way or the other" if Plaintiff was "more likely than not" shot because of his work as a principal, there is competent evidence to support the Full Commission's finding that Plaintiff was shot due to his anti-

gang activities related to his work as principal. Specifically, Plaintiff testified, "Somebody did this to me . . . because of my role as a school administrator. Some decision I made or some student that I suspended or some gang member that I took some territory from didn't like it[.]" Plaintiff also stated that he felt the shooting "very strongly could be tied" to his anti-gang activities at Fairgrove Middle School. We hold Plaintiff's testimony and the unchallenged findings of fact concerning Plaintiff's anti-gang activities are competent evidence to support finding of fact number 17. *See Nobles*, __ N.C. App. at __, 701 S.E.2d at 319 (stating that "the Commission's findings of fact are conclusive on appeal when supported by any competent evidence, even though there be evidence that would support findings to the contrary and may be set aside only when there is a complete lack of competent evidence to support them") (citations and quotation marks omitted). Accordingly, we conclude this argument has no merit.

IV. In the Course of Employment

Defendants next contend the Full Commission erred by finding and concluding Plaintiff's injuries occurred in the course of his employment. Specifically, Defendants contend Plaintiff was "engaged in a casual conversation with Ms. Brown"

and not "conducting school business" at the time he was shot. We disagree.

"An injury is 'in the course of employment' when it 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." ***Rivera v. Trapp***, 135 N.C. App. 296, 301, 519 S.E.2d 777, 780 (1999) (quotation and quotation marks omitted). "This Court has stated that an injury is compensable under the Act if it is fairly traceable to the employment or any reasonable relationship to the employment exists." ***Id***. (citations and quotation marks omitted). "Where the evidence shows that the injury occurred during the hours of employment, at the place of employment, and while the claimant was actually in the performance of the duties of the employment, the injury is in the course of the employment." ***Choate v. Sara Lee Products***, 133 N.C. App. 14, 17, 514 S.E.2d 529, 532 (citation omitted), ***aff'd***, 351 N.C. 46, 519 S.E.2d 523 (1999).

Here, the Full Commission made the following findings of fact regarding Plaintiff's cell phone conversation with Ms. Brown at the time he was shot:

> 13. On April 9, 2009, Plaintiff left his house at 6:30 a.m. and proceeded on his

> normal route to Fairgrove Middle School. Plaintiff made contact on his mobile phone with a school staff member, Terry Brown, to discuss the baby chickens that had hatched at the school and what had to be done with them as the school was letting out for Easter break. Plaintiff and Ms. Brown also discussed new technology for the school and positioning of school staff when the students would be let out for the break.
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> 14. The mobile phone that Plaintiff used was paid for by Defendant-Employer. Based upon the testimony of Plaintiff and defense witness Walter Jackson, Assistant Attendant for Administration Technology for the Public Schools of Robeson County, the Full Commission finds that principals in Robeson County are on call 24 hours a day, seven days a week, and that the conversation Plaintiff had with staff member Ms. Brown was an allowable use of the cell phone to conduct school business. Plaintiff's job responsibilities required him to frequently address emergent issues and other school matters by mobile phone while out of the office, including in the morning while commuting to the school.
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> 15. During his phone conversation with Ms. Brown, Plaintiff noticed a truck approaching and heard a loud explosion and saw his finger and phone explode. . . .

Defendants cite finding of fact 14 and argue the Full Commission "misinterpreted the evidence" and "erroneously interpreted the evidence and found that Plaintiff was rendering services to his employer while traveling to work because he was on the phone with Ms. Brown speaking about school related

topics." Defendants, however, do not specifically challenge findings of fact numbers 13, 14, or 15 as not supported by the evidence; thus, these findings of fact are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

Based on the unchallenged findings of fact, specifically the finding that "principals in Robeson County are on call 24 hours a day, seven days a week, and that the conversation Plaintiff had with staff member Ms. Brown was an allowable use of the cell phone to conduct school business[,]" we conclude the findings of fact support the Full Commission's conclusion of law that "Plaintiff suffered a compensable injury by accident while in the course . . . of employment with Defendant-Employer." *See Choate*, 133 N.C. App. at 17, 514 S.E.2d at 532.

V. Coming and Going Rule

Defendants next contend Plaintiff's injuries are barred from being compensable under the "coming and going" rule and do not fall under a recognized exception to the rule. We disagree.

"As a general rule, injuries occurring while an employee travels to and from work do not arise in the course of employment and thus are not compensable." *Barham v. Food World, Inc.*, 300 N.C. 329, 332, 266 S.E.2d 676, 678 (1980) (citation omitted). "This rule is known as the 'coming and going' rule."

Stanley v. Burns Intern. Sec. Services, 161 N.C. App. 722, 725, 589 S.E.2d 176, 178 (2003) (citation omitted). The following are recognized exceptions to the coming and going rule:

> (1) an employee is going to or coming from work but is on the employer's premises when the accident occurs (premises exception); (2) the employee is acting in the course of his employment and in the performance of some duty, errand, or mission thereto (special errands exception); (3) an employee has no definite time and place of employment, requiring her to make a journey to perform a service on behalf of the employer (traveling salesman exception); or (4) *an employer contractually provides transportation or allowances to cover the cost of transportation (contractual duty exception)*.

Id. (internal citations omitted) (emphasis added). For a claim to fall within the contractual duty exception:

> the transportation must be provided as a matter of right as a result of the employment contract. If the transportation is provided permissively, gratuitously, or as an accommodation, the employee is not within the course of employment while in transit. Where the cost of transporting employees to and from work is made an incident to the contract of employment, compensation benefits have been allowed.

Hunt v. Tender Loving Care Home Care Agency, Inc., 153 N.C. App. 266, 270, 569 S.E.2d 675, 679 (internal citations omitted), *disc. review denied*, 356 N.C. 436, 572 S.E.2d 784 (2002).

In this case, the Full Commission made the following findings of fact regarding Plaintiff's travel allowance:

> 4. In each of his jobs as an administrator with Defendant-Employer, Plaintiff was required to complete an interview and sign a contract. His employment contracts provided for payment of his base salary, plus a salary supplement and a travel allowance. The travel allowance was taxed, and therefore, Plaintiff was not required to document his actual expenditures in order to receive the allowance.
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> 5. When Plaintiff moved to Fairgrove Middle School, he was paid a lower travel allowance. However, Defendant's method of computing the travel allowance, as described by Defendant's witnesses at [the] hearing, was neither stated in his contract, nor explained to Plaintiff. Specifically, Plaintiff's contract with Fairgrove Middle School provided that "[T]he Employee shall be paid in accordance with state salary schedule applicable to the position assigned in paragraph 4 above, together with any applicable local supplement (including travel allowance) for services rendered." The contract contained a merger clause that stated "[T]his [C]ontract contains the entire agreement and understanding of the parties regarding the employment of the employee by the Board."[1]
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> 9. During the 2008-2009 school year, while he was employed as principal of Fairmont Middle School, Plaintiff received a travel allowance of $688.00, paid twice a year. After taxes and other withholdings were deducted from this amount, Plaintiff

[1]We note the findings of fact in the Opinion and Award skip from number 5 to number 9.

> received a net of $594.08 twice a year.
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> 10. Plaintiff testified that he understood that the travel allowance was given to him "to do my job, to get to where I need to go, to change the oil in my car, to buy my tires when I need them, to fulfill my duties." Plaintiff was never told the travel allowance was not to be used to cover expenses of traveling to and from Fairmont Middle School. Plaintiff testified, and the Full Commission finds, that he used the travel allowance to cover expenses of traveling to and from school.

Defendants cite findings of fact numbers 5, 9, and 10, but do not specifically challenge these findings as unsupported by competent evidence. Defendants, however, do argue "[t]he Commission erroneously stated that Plaintiff testified that he was never told the travel allowance was not to be used to pay expenses for coming and going" because "Plaintiff never testified as such[.]" We interpret this argument as challenging a portion of finding of fact number 10 as unsupported by competent evidence. The remaining unchallenged findings of fact are binding on appeal. *See Pigg v. North Carolina Dept. of Corrections*, 198 N.C. App. 654, 658, 680 S.E.2d 235, 238 (2009) ("Because the Plaintiff does not challenge the trial court's

findings of fact as being unsupported by the evidence, its findings are conclusive on this appeal.") (quotation omitted).[2]

Although the Full Commission did not specifically find as fact that an exception to the "coming and going" rule applies in this case, it did find as fact that Plaintiff's employment contract with Fairgrove Middle School stated "[t]he Employee shall be paid . . . any applicable local supplement (including travel allowance) for services rendered" and that "Plaintiff testified, and the Full Commission finds, that he used the travel allowance to cover expenses of traveling to and from school." These unchallenged findings of fact are sufficient evidence that the present situation falls within the contractual duty exception to the "coming and going" rule. *See Hunt*, 153 N.C. App. at 270, 569 S.E.2d at 679. Based upon these, and other, unchallenged findings of fact, we conclude the Full Commission's findings of fact support its conclusion of law that

[2]We note Defendants also contend that "[t]he Commission correctly references the merger clause in Plaintiff's contract; however, it fails to consider the contract in its entirety." Because of our limited standard of review, *see Richardson*, 362 N.C. at 660, 669 S.E.2d at 584 (stating that "on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law"), we will not address this argument.

"Plaintiff suffered a compensable injury by accident while in the course and scope of employment[.]"

AFFIRMED.

Judges CALABRIA and ERVIN concur.

Report per Rule 30(e).