NO. COA12-1107
NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2013

McGOWEN LEE AVENT,
Employee,
Plaintiff,

v.

PLT CONSTRUCTION,
Employer,

BITUMINOUS INSURANCE COMPANY,
Carrier,
Defendants.

North Carolina
Industrial Commission
I.C. No. W77053

Appeal by plaintiff from opinion and award entered 18 May 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 February 2013.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson; and Thomas and Farris, P.A., by Albert S. Thomas, Jr., for plaintiff appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Jan N. Pittman, for defendant appellees.

McCULLOUGH, Judge.

McGowen Lee Avent ("plaintiff") appeals from an opinion and award entered by the North Carolina Industrial Commission ("the Commission") denying compensation for injuries plaintiff

sustained in an automobile accident while on his way to his assigned worksite for PLT Construction ("PLT"). On appeal, plaintiff contends the Commission erred in finding that he was commuting to a fixed worksite and concluding that the automobile accident in which he was involved therefore did not arise out of or occur within the course of his employment with PLT. In the alternative, plaintiff argues the Commission erred in failing to conclude that his traveling to his worksite was a substantial part of the services for which he was employed by PLT. After careful review, we affirm.

I. Background

PLT is a construction company headquartered in Wilson, North Carolina. PLT's business primarily involves the construction of road beds, and PLT maintains multiple projects at various worksites throughout North Carolina at any given time. A single project can last from one month to five years in duration. PLT offers three types of employment: 1) full-time, 2) part-time, and 3) temporary. Full-time employees have the opportunity to maintain their employment with PLT and move to another project at the conclusion of the particular project to which they are assigned. However, if no job is available within a drivable distance for the employee or if the employee is not

willing to travel to a newly assigned project, the employee is terminated. In some instances, PLT offers per diem expenses for employees traveling to a worksite, and some employees are provided company cars to travel to worksites.

Plaintiff first began working for PLT as a motor grader operator in 1998 and was assigned to work between Hampstead, North Carolina and Holly Ridge, North Carolina. In April 2000, plaintiff voluntarily left his employment with PLT and subsequently returned to work with PLT in October 2000. Since October 2000, plaintiff has worked for PLT during several different time periods.

Plaintiff's most recent employment with PLT began on 14 September 2009. At the time plaintiff applied for and accepted his most recent employment with PLT, he was living in Surf City, North Carolina. Plaintiff was hired by PLT as a full-time employee to perform work as a motor grader operator. Plaintiff was assigned to work on a project in Kinston, North Carolina, which was expected to last approximately three years. Plaintiff was paid on an hourly basis commencing when he arrived at the Kinston worksite and ending when he stopped working for the day. During his most recent employment with PLT, plaintiff was not separately compensated for travel to and from work and

was not provided company transportation to and from work. As a full-time employee, plaintiff expected to continue his employment with PLT following completion of the Kinston project.

On 2 November 2009, while traveling to the Kinston worksite from his home in Surf City, plaintiff was involved in a serious automobile accident that left him paraplegic. Plaintiff was driving his personal vehicle at the time of the accident.

On 12 April 2010, plaintiff filed a Form 18 Notice of Accident to Employer stating that he was injured while "driving his own vehicle to an out of town, temporary work site[.]" On 14 April 2010, PLT filed a Form 19 Report of Employee's Injury. Thereafter, on 26 April 2010, PLT and its insurance carrier, Bituminous Insurance Company (collectively, "defendants"), filed a Form 61 Denial of Worker's Compensation Claim, contending that plaintiff's injury did not arise out of or occur within the course of his employment with PLT. Accordingly, on 28 October 2010, plaintiff filed a Form 33 Request That Claim be Assigned for Hearing.

On 6 April 2011, a hearing was held before Deputy Commissioner Philip A. Baddour, III ("Deputy Commissioner Baddour"), and on 31 October 2011, Deputy Commissioner Baddour entered an opinion and award denying plaintiff's claim after

finding and concluding that plaintiff's automobile accident while driving from his home to his assigned job location did not occur within the course of his employment with PLT. Plaintiff appealed Deputy Commissioner Baddour's opinion and award to the Full Commission, and on 18 May 2012, the Full Commission entered an opinion and award affirming the deputy commissioner's opinion and award with minor modifications. On 15 June 2012, plaintiff entered timely written notice of appeal from the Commission's opinion and award to this Court.

II. Standard of Review

Appellate review of an opinion and award of the Industrial Commission is generally limited to consideration of two issues: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). "The Industrial Commission's findings of fact 'are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding.'" *Roberts v. Century Contractors, Inc.*, 162 N.C. App. 688, 691, 592 S.E.2d 215, 218 (2004) (quoting *Murray v. Associated Insurers, Inc.*, 341 N.C. 712, 714, 462 S.E.2d 490, 491 (1995)). "This 'court's duty goes no further than to

determine whether the record contains any evidence tending to support the finding.'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "This Court reviews the Commission's conclusions of law *de novo*." *Roberts*, 162 N.C. App. at 691, 592 S.E.2d at 218.

Furthermore, "[t]he Commission's determination that an accident arose out of and in the course of employment is a mixed question of law and fact." *Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006). Accordingly, when presented with an issue such as the one in the present case, "[t]his Court reviews the record to determine if the findings of fact and conclusions of law are supported by the record." *Id.*

III. Discussion

Plaintiff argues on appeal that the Commission erred in finding and concluding that he was commuting to a fixed worksite at the time of his automobile accident and that he was therefore barred from compensation for his injuries. Plaintiff contends that the "traveling salesman exception" to the "going and coming rule" applies to the facts of this case because he had no fixed

worksite or fixed working hours at the time of his automobile accident.

"For an injury to be compensable under the Worker's Compensation Act, the claimant must prove three elements: (1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment." *Hollar v. Montclair Furniture Co.*, 48 N.C. App. 489, 490, 269 S.E.2d 667, 669 (1980). "The 'going and coming' rule states that an accident occurring while an employee travels to and from work generally does not arise out of or in the course of employment." *Hunt v. Tender Loving Care Home Care Agency, Inc.*, 153 N.C. App. 266, 269, 569 S.E.2d 675, 678 (2002). Ordinarily, "[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 go home." *Id.* Therefore, "[a]ccidents falling within this rule are not compensable." *Id.*

However, our Courts have recognized multiple exceptions to the going and coming 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 [him] 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).

Stanley v. Burns Int'l Sec. Servs., 161 N.C. App. 722, 725, 589 S.E.2d 176, 178 (2003) (citations omitted). Under the "traveling salesman" exception, "'[i]f travel is contemplated as part of the employment, an injury from an accident during travel is compensable.'" *Munoz v. Caldwell Mem'l Hosp.*, 171 N.C. App. 386, 390, 614 S.E.2d 448, 451 (2005) (alteration in original) (quoting *Hunt*, 153 N.C. App. at 269, 569 S.E.2d at 678). Such claims are compensable because "'employees with *no definite time and place of employment*, . . . [] are within the course of their employment when making a journey to perform a service on behalf of their employer.'" *Hunt*, 153 N.C. App. at 270, 569 S.E.2d at 678 (ellipsis in original) (quoting *Creel v. Town of Dover*, 126 N.C. App. 547, 556-57, 486 S.E.2d 478, 483 (1997)). Thus, "[t]he applicability of the 'traveling salesman' [exception] to the facts [of a particular case] depends upon the determination of whether [the] plaintiff had fixed job hours and a fixed job location." *Id.*

In the present case, the Commission made the following two findings of fact:

> 11. *At the time of his accident, Plaintiff was permanently assigned to the Kinston job site for the duration of the project*. He was not assigned to work, nor did he work at any other job site for Defendant-Employer between September 14, 2009 and November 2, 2009. At the time of the accident, Plaintiff was not engaged in any activity or job duties for Defendant-Employer that required him to travel away from the Kinston job site. *At the time of his accident, Plaintiff had a definite time and place of employment*.
>
> 12. Based upon a preponderance of the evidence, the Full Commission finds that Plaintiff's injury on November 2, 2009 did not arise out of and in the course of his employment with Defendant-Employer. When Plaintiff accepted the job in Kinston, North Carolina, he understood he would not be paid for travel at the time and that his assigned place of employment was in Kinston. He was free to live wherever he wished, including opting to maintain his current residence in Surf City and commute back and forth from his residence to his job site. Defendant-Employer did not provide transportation to Plaintiff and did not require him to travel away from his assigned job site or to use his personal vehicle while performing his job duties. *Plaintiff's hours and place of employment were fixed for the duration of the Kinston project*. He was not required to travel to other locations to work after arriving at his assigned job site in Kinston. He never worked at Defendant-Employer's headquarters in Wilson, North Carolina.

(Emphasis added.)

First, plaintiff argues the Commission's findings that he had a fixed place of employment and fixed hours are not supported by the record evidence. Plaintiff contends the record evidence shows that as a full-time employee, he was required to report to various job sites as assigned and that his hours were subject to weather conditions and other variables, thereby undermining the Commission's findings that his place and hours of employment were fixed.

We find competent evidence in the record to support the Commission's findings of fact. At the hearing, Sonny Wooten ("Wooten"), a general superintendent for PLT, testified that because PLT's projects are "so long and so large," PLT maintains offices at each individual job site. Wooten explained that PLT hires employees for each specific job site and that the job site for which an employee is hired is that employee's "permanent job site." Wooten testified that the Kinston job site was plaintiff's "permanent workplace" and that the Kinston job was plaintiff's "permanent job as long as the job lasts." Wooten further testified that an employee is not guaranteed employment past the completion of a particular job given that PLT must bid on all of its projects, thereby making it uncertain whether PLT

would have sufficient jobs in the future to employ the employees working on current projects. Wooten testified that although it is possible that an employee may be sent to another job site for a period of time, plaintiff was never sent to another job site during his last term of employment. Wooten reiterated that the Kinston site was plaintiff's "permanent work site," not a temporary work site.

In addition, Paul Smith ("Smith"), PLT's superintendent for the Kinston project, testified that plaintiff had a fixed time to report to work on a daily basis. Smith testified that plaintiff was to report to work at 6:30 a.m. daily, Monday through Saturday. Smith testified that plaintiff was expected to work eleven hours per day on Mondays through Fridays and eight hours on Saturdays. Therefore, the testimony of Wooten and Smith support the Commission's findings of fact that plaintiff's hours and place of employment were permanent, definite, and/or fixed "for the duration of the Kinston project."

Plaintiff next argues that the Commission's findings of fact, as detailed above, do not support the Commission's conclusion of law that "the Kinston job site was Plaintiff's fixed place of employment and, depending on weather, he had

fixed hours." Plaintiff contends that his place of employment could not be "fixed" if it only lasted for the duration of any one project and that his hours could not be "fixed" if they were subject to variable weather conditions.

First, we note that although the Commission indicated that plaintiff's working hours "depend[ed] on weather," such a variable in working hours is customary in construction operations and does not alter the fact that a construction employee has a usual or fixed schedule of hours. *Cf. Jackson v. Highway Commission*, 272 N.C. 697, 701, 158 S.E.2d 865, 868 (1968) (noting that extra working hours were "customary" when adverse weather conditions required the use of equipment that the plaintiff was employed to operate). Thus, although plaintiff's hours were subject to favorable weather conditions, such a variable does not negate the fact that plaintiff's hours were fixed pursuant to the schedule testified to by Smith. Accordingly, the Commission's conclusion that plaintiff had fixed working hours is supported by the record.

Next, plaintiff argues that because the record clearly establishes that he was a full-time employee, he would have been expected to travel to a new job site at the conclusion of the Kinston project, and therefore, the Kinston job site could not

constitute his fixed place of employment. Plaintiff contends that in determining whether a particular location is a fixed job site, the Commission must consider the life of the employment relationship, rather than one particular project.

We agree that the record establishes that plaintiff was hired as a full-time employee of PLT. In addition, the record establishes that at the completion of a particular project, PLT could, and sometimes did, offer an employee a position on another project at a different location, dependent upon whether a job was available for the employee and whether the employee was interested in relocating or traveling to the new worksite.

However, Wooten testified that if PLT has no job within a drivable distance to the project for which a particular employee is hired, that employee is terminated. Wooten further testified that some employees may be offered per diem expenses for travel to particular projects, whereas other employees must decide if they wish to "move on their own" and travel to the next project. Wooten testified that no employee is guaranteed employment past completion of the particular project for which they are hired, despite the employee's employment status. In addition, Wooten stated that an employment status of "full-time" simply means that the employee is "available to work six days a week, from

early in the morning, until late in the afternoon." Thus, the record reveals that, although plaintiff was hired as a full-time employee, he was not guaranteed employment past the completion of the Kinston project.

Accordingly, the record supports the Commission's conclusion that plaintiff's place of employment was fixed at the time of the accident, as the Kinston job site was the only location to which plaintiff was required to report during his employment with PLT at that time. We cannot speculate whether plaintiff would have continued to remain employed with PLT on a future project at a different location had he not been involved in the automobile accident. In addition, to the extent plaintiff relies on examples from his past employment relationships with PLT in support of his argument that he would have been required to travel to a new worksite at the conclusion of the Kinston project, such evidence is inapposite to the issue currently presented, in which the Commission must focus only on the present employment relationship between plaintiff and PLT. Rather, the record indicates that, at the time of plaintiff's accident, he was hired to work on the Kinston project for the duration of that project, and as such, the Kinston worksite was plaintiff's fixed job location.

Although plaintiff attempts to analogize the facts of the present case to those presented in *Munoz*, 171 N.C. App. 386, 614 S.E.2d 448, we find those facts distinguishable. In *Munoz*, we held that the traveling salesman exception applied to the plaintiff in that case where the record revealed that at the time the plaintiff was involved in an automobile accident, the plaintiff had been working with her employer for only four days and had been assigned to care for patients at three different locations over those four days. *Id.* at 391, 614 S.E.2d at 452. In the present case, however, during the entire four months of plaintiff's recent employment with PLT, he reported to the Kinston worksite to which he was "permanently" assigned. Plaintiff was never assigned to work at another location. Thus, we do not find *Munoz* analogous to the circumstances presented in the present case.

Rather, we agree with the Commission's conclusion that the facts presented in the present case are more analogous to those presented in *Hunt*, 153 N.C. App. 266, 569 S.E.2d 675. In *Hunt*, we held that the traveling salesman exception did not apply to the plaintiff where the record revealed that the plaintiff had worked for her employer for over two years and had attended to the same patient at the same address pursuant to the same hourly

schedule each week during the entirety of the plaintiff's employment with her employer. *Id.* at 270, 569 S.E.2d at 678-79. Similarly, plaintiff in the present case travelled to the same job location over the entire four months that he was employed by PLT pursuant to the same hourly schedule testified to by Smith, dependent upon weather. Therefore, as the Commission concluded, the facts of *Hunt* are more analogous to the circumstances of the present case than those presented in *Munoz*. We hold the Commission's conclusion that the traveling salesman exception does not apply to the facts of the present case is supported by the record.

Finally, plaintiff argues that, even if the Commission properly concluded that his hours and place of employment were fixed, the Commission erred by failing to consider whether travel was a substantial part of the services for which plaintiff was hired to provide to PLT. Plaintiff relies on *Brewer v. Trucking Co.*, 256 N.C. 175, 123 S.E.2d 608 (1962), in which our Supreme Court stated that "[t]he rule excluding off-premises injuries during the journey to and from work does not apply if the making of that journey, whether or not separately compensated for, is in itself a substantial part of the services

for which the worker is employed." *Id.* at 179, 123 S.E.2d at 610-11 (internal quotation marks and citation omitted).

Nonetheless, this statement is correlated to the "traveling employee" rule, as opposed to the traveling salesman exception to the going and coming rule. *See Ramsey*, 178 N.C. App. at 34-35, 630 S.E.2d at 688. Under the traveling employee rule, "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." *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996). Under the traveling employee rule, the issue is not whether the job assignment entails more than one location or varying hours, but whether traveling is a necessary incident of the employment. *Ramsey*, 178 N.C. App. at 35, 630 S.E.2d at 688. As explained by this Court in *Ramsey*, the traveling employee rule ordinarily applies in cases wherein the employment requires the employee to travel overnight, or "a distance sufficient to require [the] plaintiff to find lodging at the site rather than commute from his home." *Id.* at 32, 630 S.E.2d at 686. Further, the cases discussed by our Supreme Court in *Brewer*, as well as the facts of *Brewer* itself, involved employees who were required to travel to

locations or job sites away from the employer's place of business where the employees regularly reported. *Brewer*, 256 N.C. at 179-80, 123 S.E.2d at 610-12 (discussing *Jackson v. Creamery*, 202 N.C. 196, 162 S.E. 359 (1932) and *Mion v. Marble & Tile Co.*, 217 N.C. 743, 9 S.E.2d 501 (1940)).

Here, plaintiff testified that his travel time from his home in Surf City to the Kinston worksite was approximately one hour and fifteen minutes. The record in no way indicates that plaintiff was required to stay overnight in order to maintain his employment at the Kinston worksite. Moreover, as the Commission properly concluded, "[a]t the time of his accident[, plaintiff] was not performing any job duty that required him to travel away from the Kinston jobsite." The traveling employee rule is therefore not implicated by the facts in the present case. The record establishes that plaintiff was hired to work at and reported directly to the Kinston worksite only and that in traveling to and from that worksite, plaintiff was commuting to his place of employment from his home within the definition of the going and coming rule. Consequently, the record supports the Commission's conclusion that under the facts presented in the present case, no exception to the going and coming rule applies.

IV. Conclusion

We hold the Commission's findings of fact that plaintiff's hours and place of employment were fixed for the duration of the Kinston project are supported by competent evidence in the record. These findings of fact support the Commission's conclusion of law that the Kinston worksite was plaintiff's fixed place of employment and that he had fixed work hours such that the traveling salesman exception to the going and coming rule did not apply in the present case. In addition, the Commission did not err in failing to consider whether the traveling employee rule applied in the present case, as that issue is not implicated by the facts presented here. Because the Commission properly concluded that plaintiff's claim is barred by the going and coming rule, we must affirm the Commission's opinion and award in the present case.

Affirmed.

Judges HUNTER (Robert C.) and DAVIS concur.

Report per Rule 30(e).