IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-788

Filed: 20 August 2019

Industrial Commission, No. X70584

CLAYTON BACHE, Employee, Plaintiff

v.

TIC-GULF COAST, Employer, SELF-INSURED (SEDGWICK CMS, Servicing Agent), Defendant.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission filed 1 May 2018. Heard in the Court of Appeals 13 March 2019.

Patterson Harkavy LLP, by Narendra K. Ghosh; and Wallace and Graham, P.A., by Whitney Wallace Williams, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Carl Newman and Matthew B. Covington, for defendant-appellee.

STROUD, Judge.

Clayton Bache appeals from an opinion and award of the Industrial Commission denying his claims on the grounds that at the time of his accident he "was not in the course and scope of his employment." After careful review, we affirm.

I. Background

TIC-Gulf Coast ("TIC"), a Colorado-based industrial construction company, was contracted to build a combined cycle separator at a power plant in Wayne County. TIC hired Clayton Bache as a heavy equipment operator for this job. Bache lived in Florida but agreed to relocate for this project which was anticipated to take one and a half to two years to complete. Bache agreed to an hourly rate and a $70.00 per diem to cover duplicate living expenses. Bache started the job in December 2010 and stayed in a motel for approximately two weeks. He then started living with a TIC co-worker in his recreational vehicle to save money.

On 16 January 2011, after getting off work, Bache went to look at potential rental properties with a co-worker. Afterwards Bache and the co-worker went to eat at a nearby Ruby Tuesday, and Bache later stated he had one Bud Light at dinner. After leaving the restaurant, Bache got into a single car accident. At the hospital Bache's BAC was .10.[1] As a result of the accident, Bache was paralyzed from the chest down.

Bache sought benefits under the Worker's Compensation Act for his injuries. A deputy commissioner denied Bache's claim on the grounds that Bache "was not in the course and scope of his employment at the time of his accident, and therefore his accident is not compensable." Bache appealed to the Full Commission. After a hearing, the Full Commission denied Bache's claim. Bache timely appealed.

[1] The Industrial Commission noted that Bache challenges the validity of the test.

II. Standard of Review

Review of an opinion and award of the Industrial Commission "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. "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) (citations and quotation marks omitted). "The Commission's determination that an accident arose out of and in the course of employment is a mixed question of law and fact. This Court reviews the record to determine if the findings of fact and conclusions of law are supported by the record." *Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006) (citation omitted). "This Court reviews the Commission's conclusions of law *de novo*." *Id.*

III. Traveling Employee

Bache challenges several findings of fact as unsupported by the record. Bache also argues that he met the definition of a traveling employee and the accident arose out of travel necessitated by his employment.

An injury is compensable under the Workers Compensation Act only if that injury "aris[es] out of and in the course of the employment[.]" N.C. Gen. Stat. § 97-

2(6) (2017). North Carolina recognizes a distinction for the "course of employment" between traveling employees and non-traveling employees:

> North Carolina adheres to the rule that 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. The rationale underlying this rule is that an employee on a business trip for his employer must eat and sleep in various places in order to further the business of his employer.

Ramsey, 178 N.C. App. at 30-31, 630 S.E.2d at 685-86 (citation and quotation marks omitted). The employee has the burden of proving that the accident arose out of and in the course of the employment. *Ramsey*, 178 N.C. App. at 30, 630 S.E.2d at 685.

Plaintiff challenges portions of findings of fact 7, 8, and 15 as unsupported by competent evidence:

> 7. Plaintiff was not separately compensated for travel to and from work and was not provided company transportation to and from work. Plaintiff did receive a non-taxable "subsistence" amount of $70.00 per day that was provided for duplicative living expenses of lodging and meals because Plaintiff maintained a home in Florida.

Plaintiff argues that he was "compensated for travel to and from work" because the per diem payment would help cover his travel expenses. But the relevant portion of this finding is the word "separately." This finding acknowledges the per diem as a subsistence payment, and the record contains evidence tending to support the

challenged finding. Plaintiff was free to use the per diem payment in any manner he wished.

> 8. Plaintiff was considered employed at the Wayne County project, and his job duties did not require any travel from the Wayne County project site. Plaintiff never reported to work at any location other than the Wayne County site.

Plaintiff does not really challenge the facts in this finding as unsupported by the evidence but instead argues that the Commission did not apply the legal definition of a traveling employee correctly to these facts. He argues that his "employment required him to travel to restaurants and lodging in Goldsboro because he was working far away from his permanent residence and he was being paid a per diem for these expenses." But the employer's premises where Plaintiff worked was the Wayne County project site, and his work there did not require any travel at all. He had to travel to and from his local residence to the work site, just as any employee who has a local residence would travel to and from the work site. Plaintiff's work did not require travel away from the employer's premises so he was not in the course of employment during his travel from his local residence to and from the employer's premises, the Wayne County project site.

> 15. Regardless of whether Plaintiff's accident was caused by the geometry of the road, intoxication, or a combination of both, it is undisputed that at the time of the accident, Plaintiff was not traveling to or from Employer-Defendant's Wayne County job site, nor was he on a business trip away from his normal place of employment in

Wayne County.

Again, Plaintiff does not argue there was no evidence to support the facts in this finding but challenges the Commission's application of the law to these facts. Plaintiff argues that he was traveling from the project site at the time of the accident. The record indicates that Plaintiff traveled from the project site to a potential rental property and then to a restaurant where he consumed alcohol before the accident occurred. Although Plaintiff was seeking a new local residence and traveling to see it at the time of the accident, this does not transform his trip into travel to or from his job site.

While Bache generally argues that he met the definition of a traveling employee, he does not specifically challenge any findings of fact or conclusions of law beyond the three findings noted above, although as noted, these findings are actually mixed findings of fact and conclusions of law. The Industrial Commission made both findings and conclusions that Bache was not a traveling employee because he worked at the Wayne County job site on a permanent basis:

> 9. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff was an employee of Employer-Defendant with a permanent location of employment at the Wayne County job site and hours of work from approximately 7:00 a.m. to 5:00 or 5:30 p.m.

The Industrial Commission concluded:

> 4. In the present case, Plaintiff moved from

> Florida to North Carolina to accept a job offer in Wayne County, North Carolina. Upon completion of the Wayne County project, expected to last 1.5 to 2 years, Plaintiff's job would terminate. Although Plaintiff received "subsistence" payments for duplicative living expenses because he maintained a home in Florida, Plaintiff was only hired to work at the Wayne County site, and his job duties did not require travel away from the Wayne County site. Plaintiff argues his accident is compensable under the "traveling employee rule," however the appellate cases cited by Plaintiff applying this rule involve employees who were required to travel to locations or job sites away from where the employees regularly reported for work. After the business trip, the employees returned to their regular places of employment. Here, Plaintiff was not on a business trip or assigned to work away from his normal place of employment in Wayne County at the time of the accident. Rather, Plaintiff's accident occurred on a Wayne County road in the evening when he was off the clock and was not traveling to or from his place of employment. Accordingly, Plaintiff was not in the course and scope of his employment at the time of his accident, and therefore his accident is not compensable. N.C. Gen. Stat. § 97-2(6).

Again, this determination of whether an accident arose out of and in the course of employment is a mixed finding of fact and conclusion of law and our standard of review is to "determine if the findings of fact and conclusions of law are supported by the record." *Ramsey*, 178 N.C. App. at 30, 630 S.E.2d at 685.

Bache argues that he met the definition of a traveling employee and relies on *Ramsey*, where this Court considered out-of-state definitions to help define a "traveling employee," and one definition which this Court found helpful included, "A traveling employee is one whose job requires travel from place to place or to a place

away from a permanent residence or the employee's place of business." *Id.* at 31, 630 S.E.2d at 686 (citing *Olinger Constr. Co. v. Mosbey*, 427 N.E.2d 910, 912 (Ind. Ct. App. 1981)). However, in *Ramsey*, the plaintiff was a journeyman electrician who lived in Kinston and worked at a variety of sites for his Raleigh-based employer. *Id.* at 27, 630 S.E.2d at 684. At the conclusion of his work at a job site in Durham, plaintiff was transferred to a job site in Petersburg, Virginia and was offered employment "for at least the following week." He was injured at his hotel in Petersburg. *Id.* at 28, 630 S.E.2d at 684. This Court held that the record contained competent evidence that the plaintiff was a traveling employee. *Id.* at 35, 630 S.E.2d at 688.

This case presents a different factual situation from *Ramsey*. The plaintiff in *Ramsey* performed his work at various job sites and not at his employer's main office in Raleigh. *Id.* at 27, 630 S.E.2d at 684. The job in Virginia was for a longer time period than some of his other assignments and his employer required him to travel and stay there for a few days until the completion of the job. *Id.* at 28, 630 S.E.2d at 684. Here, Plaintiff accepted a significantly longer term job, lasting up to two years, at a single location. In fact, he was planning to settle in Goldsboro. During his deposition, Bache testified that "after work, I would go look at places to rent to bring my family up, you know, to live."

All of the Commission's findings of fact were supported by the evidence. *See Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) ("The findings

of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary."). In addition, on de novo review of the Commission's legal conclusion, we agree that under these facts Bache was not "was not in the course and scope of his employment at the time of his accident." Bache's argument that he was a traveling employee and that the accident arose out of travel necessitated by his employment is overruled.

IV. Coming and Going Rule

Plaintiff argues "in the alternative, Plaintiff's accident was compensable under the dual purpose and contractual duty exceptions to the coming and going rule." (Capitalization altered.)

The dual purpose exception applies

> when a trip serves both business and personal purposes, it is a personal trip if the trip would have been made in spite of the failure or absence of the business purpose and would have been dropped in the event of failure of the private purpose, though the business errand remained undone; it is a business trip if a trip of this kind would have been made in spite of the failure or absence of the private purpose, because the service to be performed for the employer would have caused the journey to be made by someone even if it had not coincided with the employee's personal journey.

Felton v. Hospital Guild, 57 N.C. App. 33, 37, 291 S.E.2d 158, 161, *aff'd*, 307 N.C. 121, 296 S.E.2d 297 (1982). The contractual duty exception is "where an employer

provides transportation or allowances to cover the cost of transportation, injuries occurring while going to or returning from work are compensable." *Hunt v. Tender Loving Care Home Care Agency, Inc.*, 153 N.C. App. 266, 270, 569 S.E.2d 675, 679 (2002) (quoting *Puett v. Bahnson Co.*, 231 N.C. 711, 712, 58 S.E.2d 633, 634 (1950)).

Bache does not challenge any findings of fact or conclusions of law related to this argument in his brief. Assuming Plaintiff's argument is properly before this Court, we do not find either exception to be applicable. Under the "dual purpose" exception, there must first be a business purpose along with the personal purpose. *Felton*, 57 N.C. App. at 37, 291 S.E.2d at 161. Here, we have already determined that Plaintiff's travel had no business purpose, so it must be entirely personal. We have already addressed and rejected Plaintiff's argument about his employer's payment of his travel expenses as part of his per diem. This argument is overruled.

V. Conclusion

The Industrial Commission's opinion and award is affirmed.

AFFIRMED.

Judges INMAN and ZACHARY concur.

Report per Rule 30(e).