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NO. COA04-838

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

Estate of ERNEST L. FORBES,
Deceased,
Employee,
Plaintiff

v.

From the North Carolina
Industrial Commission
I.C. File No. 069630

KENNETH T. GOODSON LOGGING, INC.,
Employer,
BITUMINOUS INSURANCE COMPANY,
Carrier,
Defendants

Appeal by defendants from opinion and award entered 3 March 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 March 2005.

Hall & Horne, L.L.P., by John F. Green, II, for plaintiff-appellee.

Stiles Byrum & Horne, L.L.P., by Henry C. Byrum, Jr. and Virginia Lee Bailey, for defendants-appellants.

MARTIN, Chief Judge.

Kenneth T. Goodson Logging, Inc. ("employer") and Bituminous Insurance Company ("carrier") (collectively "defendants") appeal an opinion and award by the North Carolina Industrial Commission ("Commission") in favor of the estate of Ernest L. Forbes ("plaintiff") as a result of an injury by accident resulting in his death. We affirm.

On 26 September 2000, Ernest Forbes ("decendent") was working for employer as a member of a logging crew. Wilbert Forbes ("Forbes"), decendent's brother with whom decendent frequently argued, was also a member of the logging crew. After arriving at the work site, Forbes told Ronnie Duncan ("Duncan"), a fellow worker, to "watch this[,] " and called out to decendent, "[Expletive], if you can do so much without me on Saturdays go grease the loader and change the oil." This comment apparently referred to maintenance work previously performed on the logging equipment by decendent and another employee. Decendent responded, "[W]hy do you [expletive] with me so much[?]" and began walking toward Forbes. Thereafter, decendent and Forbes engaged in a shoving match.

Duncan attempted to intervene and heard decendent tell Forbes, "If I had my knife I would cut your [expletive] throat." Decendent had his hand balled into a fist as if ready to fight, but Duncan stepped in between the two. At that point, Forbes pulled out a .38 caliber handgun, pointed it at his brother from a distance of approximately an arms length, and said to Duncan, "You don't believe I'll blow his [expletive] brains out?" Duncan told Forbes to "stop playing," but Forbes cocked the hammer on the gun and fired a single shot, which struck his brother in the nose. The injury was fatal.

Plaintiff filed a claim for workers' compensation benefits as a result of decendent's death. Although defendants denied compensability, a deputy commissioner awarded plaintiff benefits

after making findings of fact and concluding decedent sustained an injury by accident arising out of and in the course of his employment. Defendants appealed to the full Commission, which affirmed in a majority decision over Chairman Lattimore's dissent. Defendants appeal to this Court.

Our review of the Commission's opinion and award is limited to determining whether competent evidence of record supports the findings of fact and whether the findings of fact, in turn, support the conclusions of law. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). If there is any competent evidence supporting the Commission's findings of fact, those findings will not be disturbed on appeal despite evidence to the contrary. *Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965). "The Commission's conclusions of law are reviewed *de novo*." *Ward v. Long Beach Vol. Rescue Squad*, 151 N.C. App. 717, 720, 568 S.E.2d 626, 628 (2002).

In their first appellate contention, defendants assert the Commission erred in finding as fact and concluding as a matter of law that decedent's injury arose out of and in the course of his employment with employer. Although defendants assigned error to findings 3, 4, 6, 9, 10, 11, and 13 by the Commission, defendants failed to include any argument or legal authority in support of its assignments of error regarding findings 3, 4, 6, or 9 in its brief. Accordingly, these assignments of error are deemed abandoned, N.C.R. App. P. 28(b)(6), and these findings of fact are

conclusively established on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). We further note that defendants have failed to argue that decedent's death did not result from an accident as that term is used in N.C. Gen. Stat. § 97-2(6) (2003).

Defendants' remaining assignments of error pertain to findings of fact 10 (that the argument which resulted in decedent's death was motivated in part by work-related issues and decedent's death was causally related to his employment), 11 (that decedent sustained an injury by accident arising out of and in the course of his employment), and 13 (that during the time decedent and his widow lived separately and apart he delivered his paycheck to her for her support and that the couple had no plans to become legally separated or to terminate their marriage at the time of decedent's death).

We turn to defendants' challenge regarding finding of fact 10, that decedent's death was motivated in part by work-related issues and causally related to his employment. In cases involving workplace assaults by one co-worker against another our Supreme Court and this Court have held the resulting injuries arose from the employment when the assault is "directly connected with" or "rooted in" the employment. *Hegler v. Mills Co.*, 224 N.C. 669, 670-71, 31 S.E.2d 918, 919 (1944). See also *Pittman v. Twin City Laundry*, 61 N.C. App. 468, 300 S.E.2d 899 (1983). Conversely, an employee's injuries do not arise from the employment and are not compensable where the assault was not related to the plaintiff's

employment, regardless of whether the assault was committed by a co-worker or a third party. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977); *Ashley v. Chevrolet Co.*, 222 N.C. 25, 21 S.E.2d 834 (1942).

In the instant case, the Commission made an uncontested finding of fact that "Forbes indicated that the argument on the morning of 26 September 2000 was related to their work for defendant-employer." This finding is conclusively established on appeal and constitutes at least some evidence that the altercation was related to decedent's employment and, therefore, is compensable. Defendants' challenge to finding of fact 10 is overruled.

Defendants alternatively attack finding of fact 11 on the grounds that decedent's death did not occur in the course of employment because his activities were not undertaken for the purpose of furthering employer's business at the time of his injury. The requirement that an injury occur in the course of employment refers to the time, place, and circumstances giving rise to the injury. *Dodson v. Dubose Steel, Inc.*, 159 N.C. App. 1, 12, 582 S.E.2d 389, 396 (2003) (Steelman, J., dissenting), *rev'd per curiam*, 358 N.C. 129, 591 S.E.2d 548 (2004) (for reasons stated in the dissent). Here, defendants stipulated before the Commission that "while working at a logging si[te,]" Forbes and decedent engaged in an argument that terminated when Forbes shot decedent. Defendants' stipulation that Forbes and decedent were working at

the time of the fatal encounter obviates any claim that decedent's injury did not arise in the course of his employment.

By their second appellate contention, defendants argue N.C. Gen. Stat. § 97-12(3) (2003), which precludes compensation when an employee's injury or death is proximately caused by his "willful intention to injure or kill himself or another[,] " bars the award of benefits to plaintiff. However, nothing in the record indicates defendants argued to the Commission that compensability was barred on the grounds of N.C. Gen. Stat. § 97-12(3). Moreover, defendants' assignments of error do not reference this section of the statute either by number or substance, nor do they encompass whether the legal effect of N.C. Gen. Stat. § 97-12(3) precludes compensability in the instant case. Accordingly, this issue is not properly presented to this Court, N.C.R. App. P. 10(b)(1), and this contention is overruled.

In their final argument, defendants assert any benefits are payable to decedent's next of kin, not his wife, "because the couple was not living apart for justifiable cause." As a result, defendants argue, decedent's wife does not meet the definition of a widow as provided by N.C. Gen. Stat. § 97-2(14) (2003) and is not entitled to receive the award under this Court's holding in *Bass v. Mooresville Mills*, 11 N.C. App. 631, 182 S.E.2d 246 (1971). We disagree.

In *Bass*, this Court addressed the issue of whether "a husband and wife [were] living separate and apart for justifiable cause, within the meaning of G.S. 97-2(14), if they [we]re living separate

and apart as a result of a mutual agreement evidenced by a legally executed separation agreement[.]” *Id.* at 633, 182 S.E.2d at 248. In discussing “justifiable cause,” we stated “there is no reason why a separated wife who has surrendered all right to look to the husband for support while he is living, should upon his death, receive benefits that are intended to replace in part the support which the husband was providing, or should have been providing.” *Id.* at 633-634, 182 S.E.2d at 248. However, we further noted that “justifiable cause” could exist “where the separation is not intended by the parties to be permanent, the temporary living apart being merely for reasons of convenience.” *Id.* at 635, 182 S.E.2d at 249. Finally, we quoted with approval the following: “‘If the living apart of the husband and wife is merely for the mutual convenience or the joint advantage of the parties and the obligation of the husband to support her is recognized, the right of the wife to compensation exists as though they were living together.’” *Id.* (quoting 99 C.J.S., *Workmen’s Compensation*, § 140 (3), pp. 471, 472).

In the instant case, decedent and his wife lived separate and apart pursuant to a legal agreement. However, decedent’s wife testified and the Commission accepted as credible that decedent continued to “use his income to supplement [his wife’s] salary in providing for [her and her daughter.]” In addition, decedent and his wife had “no plans to become legally separated or to terminate their marriage at the time of his death,” “spent numerous weekends together in the same residence,” and “had plans to resume residing

permanently at the same residence at the time of his death." This evidence supports the proposition that decedent and his wife were living apart for justifiable cause as permitted by N.C. Gen. Stat. § 97-2(14); therefore, decedent's wife is entitled to receive the award by the Commission under N.C. Gen. Stat. § 97-39 (2003).

The opinion and award of the Commission is affirmed.

Affirmed.

Judges HUDSON and JACKSON concur.

Report per Rule 30(e).