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NO. COA11-466
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

JOEL ZAPATA QUIROZ, EMPLOYEE,
Plaintiff,

v.

North Carolina Industrial
Commission
I.C. No. W08110

METROPOLS STATUARY, INC., EMPLOYER
and ACE PROPERTY & CASUALTY
INSURANCE, CARRIER
Defendants.

Appeal by Plaintiff from Opinion and Award entered 17
December 2010 by the North Carolina Industrial Commission.
Heard in the Court of Appeals 27 September 2011.

Butler & Quinn, PLLC, by Brian R. Hochman, for Plaintiff-appellant.

Hedrick, Gardner, Kincheloe, & Garofalo L.L.P., by Paul C. Lawrence and Brandon M. Williams for Defendants-appellees.

HUNTER, JR., Robert N., Judge.

I. Factual & Procedural Background

Metropolis Statuary, Inc. ("Metropolis" or "Defendant") is a manufacturer of ornamental garden statuaries that maintains a sales lot for retail customers. Defendant is owned and operated

by Carolyn Metropol. Defendant hired Joel Zapata Quiroz ("Plaintiff") as a general laborer on 27 June 2005. Plaintiff's duties included mixing cement, creating molds, displaying and lifting statues, and general yard work including weed eating and mowing.

On Tuesday, 20 January 2009, Defendant was not open for business due to inclement weather. Defendant did not notify Plaintiff that the business would be closed that day, and Defendant has no written policy for inclement weather. However, according to Ms. Metropol, it is customary to close the business due to rain, snow, or ice, as the majority of business operations occur outdoors. Additionally, Ms. Metropol and another employee, Angela Walters, testified that Defendant commonly closes for inclement weather if the local schools are closed or delayed. On 20 January 2009, Richmond County schools were closed due to inclement weather.

In accordance with Defendant's usual practices for closing, Plaintiff did not go to work 20 January 2009. Plaintiff called Metropol at approximately noon and spoke to Ms. Walters regarding his paycheck. Metropol customarily pays employees on Tuesdays, as Tuesdays are the last day of the workweek for Metropol, which is closed on Wednesdays and Sundays. Plaintiff

speaks only Spanish, and communicated to Ms. Walters, who does not speak Spanish, that he wanted his paycheck. Ms. Walters testified while she had no official schooling in Spanish, she understood some words. Ms. Walters agreed to ask Ms. Metropol about Plaintiff's paycheck. Ms. Metropol testified that if the business was closed on a payday, it was standard practice for employees to retrieve their paychecks on the next business day. Ms. Metropol also testified she had never paid employees on a day when the business was closed.

However, Ms. Metropol agreed to place Plaintiff's paycheck in Defendant's mailbox for Plaintiff to retrieve. Ms. Metropol specified she would place the paycheck in the mailbox after 3:00 p.m., and it would be available for Plaintiff to pick up after 3:30 p.m. The mailbox is located in front of Defendant's property, outside a fence owned and maintained by the State of North Carolina and a gate owned and maintained by Defendant. After placing the paycheck in the mailbox at approximately 3:00 p.m., Ms. Metropol left the property to run personal errands.

Sometime before 4:30 p.m., Plaintiff entered the driveway outside of the fence and gate and parked his car approximately four or five feet from the mailbox. Plaintiff retrieved the check from the mailbox. As Plaintiff turned back towards his

vehicle, he began to fall but reached towards the open car door, at which point he hit his elbow against the door. Plaintiff then returned home and, after two or three hours of continuous pain, went to the emergency room at Richmond Memorial Hospital. Emergency room personnel took x-rays of his elbow, concluding it was broken.

On 22 January 2009, Plaintiff saw Dr. Mark Brenner, an orthopedic surgeon at Pinehurst Surgical Clinic. Dr. Brenner identified a complex injury to Plaintiff's elbow and referred Plaintiff to UNC Hospitals in Chapel Hill for further treatment. Plaintiff consulted Dr. Douglas Dirschl, Chairman of UNC Orthopedics at UNC Hospitals in Chapel Hill, on 28 January 2009. Upon examination, Dr. Dirschl concluded Plaintiff required surgery. Plaintiff underwent surgery on 17 March 2009, returning several times for follow-up examinations and physical therapy from 30 March 2009 to 24 June 2009. Following this initial treatment, Plaintiff had a limited range of motion in his elbow, even with physical therapy. Dr. Dirschl suggested that another surgical procedure might help increase Plaintiff's range of motion, but Plaintiff elected not to pursue further treatment. Dr. Dirschl cleared Plaintiff for work on 24 June

2009, noting that Plaintiff should expect some permanent stiffness.

Plaintiff did not initially notify Defendant of the injury after it happened. It was not until Plaintiff failed to appear at work for several days following the incident that Defendant discovered Plaintiff was injured. Ms. Walters called Plaintiff on 26 January 2009, at which point Plaintiff communicated that he injured his arm, it might be broken, and that it might require surgery. At no point during this conversation did Plaintiff express how or when the injury occurred. Ms. Walters called back on several occasions to check on Plaintiff and to see if he would be able to return to work. On 29 January 2009, Plaintiff returned to Metropolis to retrieve his W2 form. It was at this point that Plaintiff asked Ms. Metropol about unemployment benefits. Plaintiff did not inform Ms. Metropol as to the origin of his injury. It was not until 4 March 2009, when Ms. Metropol received notice in a letter from Plaintiff's counsel, that she knew Plaintiff may have suffered a workplace injury.

Plaintiff filed a Form 18 on 11 March 2009 alleging that he sustained an injury to his right arm on 20 January 2009 while picking up his paycheck. Defendant filed a Form 61 Denial of

Workers' Compensation on 8 April 2009. Plaintiff filed a Form 33 requesting a hearing on 3 April 2009. Deputy Commissioner Myra Griffin heard the matter on 4 November 2009. On 2 June 2010, Deputy Commissioner Griffin entered an Opinion and Award finding Plaintiff sustained an injury within the course and scope of his employment. Defendant appealed to the Full Commission, which heard the matter on 27 October 2010. On 17 December 2010, the Full Commission entered an Opinion and Award reversing Deputy Commissioner Griffin's decision. Plaintiff filed a notice of appeal to this Court on 28 December 2010.

II. Jurisdiction and Standard of Review

An award of the North Carolina Industrial Commission is a final judgment entered upon review of a decision of an administrative agency and appeal lies to this Court pursuant to N.C. Gen. Stat. § 97-86 (2009).

In reviewing an order and award of the Industrial Commission in a case involving workmen's compensation, this Court is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings. Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, we are bound by those findings.

Barham v. Food World, Inc., 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980) (internal citation omitted).

III. Analysis

Plaintiff contends the Commission erred (1) in its finding of fact that there was no benefit to Defendant to allow Plaintiff to retrieve his paycheck; (2) in its finding of fact that the mailbox Defendant placed the paycheck in is not located on land that is owned, controlled or maintained by Defendant; (3) in its conclusion of law applying the "coming and going rule;" and (4) in its conclusion of law that Plaintiff did not sustain an injury by accident while in the course and scope of his employment. For the following reasons, we affirm the Commission's decision.

A. Findings of Fact

i. Benefit to Employer

Plaintiff argues the Commission erred in its finding of fact that there was no benefit to Defendant to allow Plaintiff to retrieve his paycheck. We disagree.

An injury is not compensable "if the acts [which caused the injury] are performed solely for the benefit or purpose of the employee." *Lewis v. W.B. Lea Tobacco Co.*, 260 N.C. 410, 412, 132 S.E.2d 877, 879 (1963). An employee's retrieval of a

paycheck on payday ordinarily benefits the employer, as it is a part of the contract for employment.

The contract of employment is not fully terminated until the employee is paid, and accordingly an employee is in the course of employment while collecting his pay. This rule was laid down in an early English case in support of an award to an employee who, discharged on Wednesday, had returned on Friday, *the regular pay-day*, and was then injured.

Byrd v. George W. Kane, Inc., 92 N.C. App. 490, 493, 374 S.E.2d 480, 482 (1988) (quotation marks omitted) (citation omitted) (emphasis added). However, in the present case, the employer was not open for business on the day Plaintiff received his paycheck, and the payday was postponed.

The standard practice when Defendant was closed on a payday was for employees to receive their paychecks on the next business day; receiving a paycheck on a day the business was closed was not part of the implied employment contract. Defendant did not ask Plaintiff to pick up his paycheck; Plaintiff requested the paycheck. Although Defendant approved of Plaintiff picking up his check, it was of no benefit to Defendant, as Defendant had no responsibility to pay Plaintiff early. *Cf. Lewis* 260 N.C. at 412, 132 S.E.2d at 880 (finding it possible for an act to not benefit the employer "even if the

acts are performed with the consent of the employer and the employee is on the payroll at the time"). We hold the Commission was within its authority in finding as a fact that Defendant did not benefit in allowing Plaintiff to retrieve his paycheck.

ii. Owning, Operating, & Maintaining of Land

Plaintiff argues the Commission committed error in its finding of fact that the mailbox Ms. Metropolis placed the check in is not located on land that is owned, controlled, or maintained by Ms. Metropol. We disagree.

Evidence showed the State of North Carolina owned the land where Plaintiff sustained his injury. The State retained responsibility for maintenance of the area, which included mowing. In fact, the State prohibited Defendant from altering the land, requiring Defendant to remove gravel after an attempt to make a parking area outside the fence where the mailbox is located. The finding of fact that Defendant did not own, control, or maintain the land where the accident occurred that gave rise to Plaintiff's injury is supported by competent evidence despite evidence that Defendant sometimes performed maintenance around the mailbox. *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.").

B. Conclusions of Law

i. The "Coming and Going Rule"

Plaintiff argues the Commission committed error in its conclusion of law applying the "coming and going rule." We disagree.

An injury sustained by an employee while going to or coming from work does not arise out of and in the course of employment and is thus not compensable. *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996). The basis for this rule is that "[a]n employee is not engaged in the prosecution of his employer's business while operating his personal car to the place where he is to perform the duties of his employment, . . . nor while leaving his place of employment to go to his home." *Ellis v. Am. Serv. Co.*, 240 N.C. 453, 456, 82 S.E.2d 419, 421 (1954). Because Plaintiff was coming from the act of picking up his paycheck when he fell, the coming and going rule would bar recovery, as the injury was not sustained in the scope of employment.

A limited exception to the coming and going rule applies when an employee is injured when going to or coming from work but is on the employer's premises. *Barham*, 300 N.C. at 332, 266 S.E.2d at 679. This Court has stated that "the 'premises' exception to the 'coming and going' rule applies when an employee is injured while going to and coming from work on the employer's premises." *Jennings v. Backyard Burgers of Asheville*, 123 N.C. App. 129, 131, 472 S.E.2d 205, 207 (1996). "There are numerous cases dealing with parking lot injuries and the vast majority which permit recovery do so on the ground that the employer owned, maintained, provided, controlled, or otherwise exercised dominion over the parking lot, walkway or other area in question." *Barham*, 300 N.C. at 333, 266 S.E.2d at 679. There must be a responsibility for maintenance. *Glassco v. Belk-Tyler Co. of Goldsboro, Inc.*, 69 N.C. App. 237, 239, 316 S.E.2d 334, 335 (1984).

The evidence of record is sufficient to show that the State owned, operated, and maintained the land where the accident occurred. Plaintiff was not on land owned by Defendant when the accident occurred, thus the application of the "coming and going rule" is supported by the findings. The Commission did not err in its conclusion of law that Plaintiff was barred by the

"coming and going rule" as Plaintiff's accident occurred on land that was not owned, operated, or maintained by Defendant.

ii. Scope of Employment

Based on the application of the "coming and going rule," Plaintiff's injury was not in the course and scope of employment, and the findings of fact support the Commission's conclusion that the injury was not in the scope of employment.

IV. Conclusion

For the foregoing reasons, the Order and Award of the Industrial Commission is

Affirmed.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).