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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-242

Filed: 17 October 2017

From the North Carolina Industrial Commission IC No. 14-723669

PAULA MARTIN, Widow, and BRANDON MARTIN, Minor Child (By and Through His Guardian ad Litem PAULA MARTIN), of WILLIAM D. MARTIN, Deceased Employee, Plaintiffs,

v.

ORANGE WATER AND SEWER AUTHORITY, Employer, NCIRMA, Carrier, Defendants.

Appeal by plaintiffs from opinion and award entered 18 November 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 September 2017.

*Law Offices of James Scott Farrin, by Michael F. Roessler, for plaintiffs-appellants.*

*Teague Campbell Dennis & Gorham, LLP, by Dayle A. Flammia and Lindsay A. Underwood, for defendants-appellees.*

ZACHARY, Judge.

On 21 February 2014, William Martin, an employee of Orange Water and Sewer Authority (hereafter OWASA), died in an automobile accident. The present appeal arises from the Industrial Commission's denial of the claim for workers'

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compensation death benefits filed by Paula and Brandon Martin, Mr. Martin's widow and minor child (plaintiffs). On appeal, plaintiffs argue that the Commission erred by finding and concluding that plaintiffs failed to meet their burden of proving by the preponderance of the evidence that the accident arose out of and in the course of Mr. Martin's employment. After careful review of plaintiffs' arguments, in light of the record on appeal and the applicable law, we conclude that the Commission did not err and that its opinion and award should be affirmed.

Factual and Procedural Background

In February 2014, Mr. Martin was employed by OWASA, a public nonprofit agency that provides water and sewer services in Chapel Hill and Carrboro, North Carolina. Mr. Martin was a supervisor at the Jones Ferry Road OWASA facility, in Carrboro. At around 9:30 a.m. on 21 February 2014, Mr. Martin checked out a company-owned vehicle. At approximately 10:30 a.m., Mr. Martin was killed in a single-vehicle accident near the intersection of Gorman Street and I-40 in Raleigh. On 3 April 2014, plaintiffs filed an Industrial Commission Form 18 claim for workers' compensation death benefits, pursuant to N.C. Gen. Stat. § 97-38 (2016). Mr. Martin's employer, OWASA, and OWASA's insurance carrier, NCIRMA, (collectively defendants) filed an Industrial Commission Form 61 denying plaintiffs' claim on the grounds that Mr. Martin's death did not result from an accident arising out of and in the course of his employment with OWASA.

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A hearing was conducted on plaintiffs' claim before Industrial Commission Deputy Commissioner Phillip A. Baddour, III on 29 April 2015. The witnesses' testimony tended to show, in relevant part, the following: Mr. Martin was one of four supervisors at the Jones Ferry Road OWASA site, and was a well-respected professional employee. Mr. Martin's job sometimes required him to purchase supplies and, as a supervisor, Mr. Martin could use his judgment in the choice of vendors from which to purchase items. Supplies were generally obtained from local hardware stores, although on one occasion, about six years before Mr. Martin's death, a tank was purchased in Garner, North Carolina.

Mr. Martin was a member of OWASA's Spill Response Team, which was responsible for addressing spills of toxic materials. As a member of this group, Mr. Martin was required to obtain a biannual physical examination in order to qualify to use a respirator. In 2014, OWASA had an arrangement with the Concentra Urgent Care facility to conduct these examinations. An employee who failed to pass the examination could seek treatment from a personal physician and then retake the respirator test. Mr. Martin had several chronic health problems, including diabetes and heart disease, and had sometimes failed this test. An employee who failed the test was not disciplined or fired, but instead was assigned tasks that did not require the use of a respirator.

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At 9:30 a.m. on 21 February 2014, Mr. Martin left OWASA in a company-owned vehicle. Mr. Martin was not required to make a written record of his travel plans, or to inform his co-workers where he was going; nevertheless, he typically let someone know where he was driving and when he expected to return. On this occasion, Mr. Martin did not tell any of plaintiffs' witnesses where he was going. However, Mr. Martin was carrying a manila envelope when he left OWASA, and several of Mr. Martin's co-workers testified that the paperwork associated with the physical examination at Concentra was typically issued to an employee in a manila envelope. As a result, employees generally assumed that a co-worker who left OWASA carrying a manila envelope was leaving for a physical examination.

The deadline for Mr. Martin to undergo the physical examination was 21 February 2014, and as of that date he had not yet had the physical. Mr. Martin had undergone physical examinations at Concentra on several occasions, and the uncontradicted evidence was that there was a simple, direct route from OWASA to Concentra. Furthermore, OWASA provided employees with directions to the facility. However, Mr. Martin never checked in at Concentra, and the accident that claimed Mr. Martin's life occurred at a location that was 30 miles from OWASA and 14 miles from Concentra, and at a place that was not between OWASA and Concentra or near a route between the two. Mr. Martin's supervisor testified that he was surprised that

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Mr. Martin had been in Raleigh and that he was not aware that Mr. Martin had plans to be there.

On 22 October 2015, Deputy Commissioner Baddour issued an opinion and award denying plaintiffs' claim for workers' compensation benefits. Plaintiffs appealed to the Full Commission, which conducted a review of the matter on 31 March 2016. On 18 November 2016, the Commission, by means of an order entered by Commissioner Tammy R. Nance with the concurrence of Commission Chairman Charlton L. Allen, ordered that plaintiffs were not entitled to workers' compensation death benefits because they had failed to establish that Mr. Martin's death arose out of and in the course of his employment. Commissioner Bernadine S. Ballance dissented from the order. Plaintiffs noted an appeal to this Court from the Commission's decision.

Standard of Review

The standard of review of an order of the Industrial Commission on a claim for workers' compensation benefits is well-established:

Appellate review of a Commission order is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law," with the Commission having sole responsibility for evaluating the weight and credibility to be given to the record evidence. "[F]indings of fact which are left unchallenged by the parties on appeal are 'presumed to be supported by competent evidence' and . . . [are] 'conclusively established

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on appeal.’” However, the “Commission’s conclusions of law are reviewed *de novo*.”

*McCrary v. King Bio, Inc.*, 225 N.C. App. 378, 381, 737 S.E.2d 761, 763 (2013) (quoting *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000), *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (quoting *Johnson v. Herbie’s Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003)), and *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004)).

“Because the Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence[,] [w]e have repeatedly held that the Commission’s findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.” *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) (internal quotation omitted). “On appeal, this Court may not reweigh the evidence or assess credibility. Findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them[.]” *Kelly v. Duke Univ.*, 190 N.C. App. 733, 738-39, 661 S.E.2d 745, 748 (2008) (internal quotation omitted).

Requirements for Workers’ Compensation Benefits

N.C. Gen. Stat. § 97-2(6) (2016) defines an “injury” for purposes of entitlement to workers’ compensation benefits as including “only injury by accident arising out of and in the course of the employment[.]” “Whether an employee’s injury arose out of and in the course of his employment is a mixed question of law and fact.” *Roman v.*

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*Southland Transp. Co.*, 350 N.C. 549, 551, 515 S.E.2d 214, 216 (1999) (citation omitted). Thus, in order to “establish compensability under the North Carolina Workers’ Compensation Act (the Act), a claimant must prove three elements: (1) [t]hat the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in the course of employment.” *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (internal quotation omitted). It is also well established that the “claimant in a workers’ compensation case bears the burden of initially proving each and every element of compensability . . . by a greater weight of the evidence or a preponderance of the evidence.” *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (2005) (internal quotations omitted). “The phrases ‘arising out of’ and ‘in the course of’ one’s employment are not synonymous but rather are two separate and distinct elements[,] both of which a claimant must prove to bring a case within the Act.” *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977).

Each of these phrases has been defined differently. The term “arising out of” employment “relates to the origin or cause of the accident.” *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 735, 699 S.E.2d 124, 126 (2010) (internal 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.” *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 532-33. Accordingly, “the

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employment must be a contributing cause or bear a reasonable relationship to the employee's injuries." *Rivera v. Trapp*, 135 N.C. App. 296, 301, 519 S.E.2d 777, 780 (1999) (citation omitted). In contrast, "[t]he words 'in the course of' refer to the time, place, and circumstances under which an accident occurred. The accident must occur during the period and place of employment." *Ross v. Young Supply Co.*, 71 N.C. App. 532, 536-37, 322 S.E.2d 648, 652 (1984). Therefore:

An accident arising in the course of the employment is one which occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing; or one which occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed.

*Hoyle v. Isenhour Brick And Tile Co.*, 306 N.C. 248, 251-52, 293 S.E.2d 196, 198 (1982) (citation omitted).

Discussion

On appeal, plaintiffs challenge the evidentiary support for specific language in some of the Commission's findings of fact. Plaintiffs also urge us to apply the holdings of various appellate cases to the facts of this case, and contend that the "proper findings of fact compel the conclusion that [Mr. Martin's] death occurred in the course and scope of his employment." We note that the evidence is undisputed that Mr. Martin was a valued and trusted employee, and his death was tragic. However, the inescapable and crucial fact that precludes plaintiffs' entitlement to workers'



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compensation benefits is this: the record contains no direct or circumstantial evidence that explains why Mr. Martin was in Raleigh on 21 February 2014. As a result, there was no evidence that would allow a reasonable fact-finder -- in this case, the Industrial Commission -- to find by the preponderance of the evidence that Mr. Martin's accident arose out of and in the course of his employment.

In reaching this conclusion, we have carefully considered plaintiffs' challenges to certain aspects of the Commission's findings of fact. Plaintiffs first contend that no competent evidence supported the statement in Finding No. 1 that Mr. Martin's job "was not one which required routine, regular travel away from the plant site[.]" Plaintiffs note that Mr. Martin sometimes left the facility in order to purchase supplies, to attend professional meetings, or to teach classes. Plaintiffs thus challenge the description of the regularity of Mr. Martin's travel as not being "routine" or "regular." However, regardless of whether Mr. Martin's off-campus travel was best described as occasional or regular, there was no evidence tending to show that Mr. Martin made regular trips to Raleigh or that he was on a work-related errand in Raleigh on 21 February 2014.

Plaintiffs contend on appeal that Mr. Martin "likely traveled to Raleigh to secure medical records from his doctor's office relevant to his physical" or to "pick up supplies for work"[.] We presume that plaintiffs' defense of this theory is the reason for their challenge to the statement in Finding No. 7 that it "was neither required nor

standard practice for OWASA employees to obtain documentation or clearance from a personal physician before they saw the doctor at Concentra[.]” Plaintiffs challenge this finding only to “the degree [that it] . . . suggests or states” that at the time of the accident “Mr. Martin was not attempting to secure paperwork or information from his personal physician that would be relevant to his work physical[.]” Thus, plaintiffs are not challenging the existence of evidence to support this finding, but instead argue that the finding does not support an inference regarding Mr. Martin’s purpose for being in Raleigh. We conclude that this finding was supported by record evidence.

Plaintiffs similarly challenge the evidentiary support for the statements in Finding No. 18 that it was “unlikely that Decedent would have attended an appointment with his personal physicians until after the physical at Concentra had been completed” and that “[t]he assertion[] that Decedent was in Raleigh for reasons related to his physical is purely speculative and is not supported by a preponderance of the competent, credible evidence of record.” Plaintiffs note that one of Mr. Martin’s personal physicians had an office a few miles from the site of the accident, and speculate that Mr. Martin might have driven to Raleigh to obtain unspecified documents from this physician prior to his examination at Concentra. However, the uncontradicted evidence was that employees generally did not know what medical records might be required from a personal physician until after the examination at Concentra. We conclude that Finding No. 18 was supported by competent evidence,

and that there was no evidence that Mr. Martin planned to visit his personal physician.

Plaintiffs also challenge the statement in Finding No. 8 that OWASA employees “were not permitted to use an OWASA vehicle to go to see their personal physicians[.]” Plaintiffs do not dispute the existence of evidence that supports this finding, but challenge it only as “a conclusion of law that the employer’s policy regarding the use of company vehicles can serve as a means of contracting around the Workers’ Compensation Act[.]” The basis of this challenge is not readily apparent, and plaintiffs do not identify any findings or conclusions suggesting that OWASA had “contract[ed] around the Workers’ Compensation Act” or that this issue played a part in the Commission’s decision. We conclude that this argument lacks merit.

Finally, plaintiffs challenge the following findings of fact, both of which bear on the dispositive question of whether plaintiffs produced evidence, direct or circumstantial, that Mr. Martin had an employment-related reason to drive to Raleigh on 21 February 2014:

20. Based upon a preponderance of the evidence of record, the Full Commission finds that Plaintiffs have failed to establish that Decedent was driving in Raleigh to obtain supplies for Defendant-Employer at the time of his accident on February 21, 2014.

21. The preponderance of the evidence of record fails to establish that Decedent’s accident near the intersection of I-40E and the Gorman Street exit in Raleigh on February 21, 2014 occurred while he was engaged in an authorized

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activity in furtherance of Defendant-Employer's business, or an activity incidental thereto, or that he was acting for Defendant-Employer's benefit at the time of the accident. While the accident occurred during the hours of his employment, the evidence of record fails to establish that Decedent was at a place where he may reasonably be during that time, or that the circumstances were such that he was doing what a man so employed may reasonably do during work hours.

We have carefully reviewed the record and conclude that there was ample evidentiary support for these findings. Finding No. 20 is supported, first, by the absence of any credible evidence that Mr. Martin went to Raleigh to buy supplies for OWASA. In addition, although Mr. Martin sometimes purchased supplies on behalf of OWASA, this was generally at local hardware stores. On only one occasion in the previous six years had Mr. Martin bought an item from a vendor near Raleigh. After Mr. Martin's death, OWASA was not contacted by any merchants regarding items that had been set aside for Mr. Martin. We are aware that one of Mr. Martin's co-workers, Ms. Fearrington, recalled Mr. Martin saying that he was going to Raleigh for "supplies." However, because the Commission found her testimony not to be credible, we do not consider this testimony.

Finding No. 21 is also supported by record evidence. None of plaintiffs' witnesses testified to personal knowledge of Mr. Martin's itinerary on 21 February 2014. There was circumstantial evidence suggesting that Mr. Martin may have intended to go to Concentra; nonetheless, he never checked in at the facility, and

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plaintiffs have not disputed that the accident occurred at a location miles from Concentra and not on any logical route between OWASA and Concentra. Therefore, the fact that the accident occurred in Raleigh was *inconsistent* with other evidence pertaining to Mr. Martin's employment. Mr. Martin may have had a personal physician whose office was near the accident location, but no evidence was introduced that he had an appointment there. We conclude that the Commission did not err by finding that plaintiffs failed to establish by the preponderance of the evidence that Mr. Martin's accident arose from and occurred in the course of his employment.

In urging us to reach a contrary conclusion, plaintiffs direct our attention to several appellate cases, which we have carefully reviewed. Plaintiffs cite *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 368 S.E.2d 582 (1988), and assert that we should apply the "*Pickrell* presumption" that, upon a showing that an accident occurred in the course and scope of a deceased employee's employment, he is entitled to the presumption that the accident caused his death. In this case, plaintiffs have *not* established that the accident arose out of and in the course of Mr. Martin's employment, making *Pickrell* inapplicable. Plaintiffs also contend that the holding of *Smith v. Central Transport*, 51 N.C. App. 316, 276 S.E.2d 751 (1981), is "directly on point." However, in *Smith*, it was undisputed that the deceased employee had driven to another city in the course of his employment, and the issue was the compensability of an injury that occurred after the deceased finished his work in that

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city and before he drove home. In the present case, there was no competent evidence explaining why Mr. Martin drove to Raleigh, and thus no evidence that Mr. Martin's trip to Raleigh arose out of and in the course of his employment.

Plaintiffs also argue that the following circumstances, if considered together, constitute adequate circumstantial evidence to support plaintiffs' theory that Mr. Martin drove to Raleigh either to obtain documents that he needed for his physical examination with Concentra, or to purchase supplies for OWASA. These circumstances include the facts that (1) Mr. Martin was authorized to use a company vehicle for OWASA business; (2) the accident occurred during working hours; (3) Mr. Martin previously had difficulty passing the physical examination; (4) one of Mr. Martin's personal physicians had an office a few miles from the site of the accident; (5) another employee, who was an amputee, had been encouraged to bring unspecified documentation with him to the Concentra examination; (6) Mr. Martin was a conscientious employee who generally adhered to company rules; (7) Mr. Martin had corresponded with OWASA's human resources department about the effect that his medical conditions might have upon his ability to pass the physical examination; and (8) Mr. Martin's medical condition and unspecified medical documents were relevant to his employment by virtue of the required physical examination. These circumstances pertain to general features of Mr. Martin's employment and, whether considered singly or together, fail to provide support for a finding that Mr. Martin's

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accident in Raleigh on 21 February 2014 arose out of and in the course of his employment.

Plaintiffs have alleged two additional circumstances that we conclude are not supported by the evidence. Plaintiffs assert that “Mr. Martin told fellow employees he was going to get his physical[.]” In support of this contention, plaintiffs cite the testimony of a co-worker, Terry Burkhardt. However, examination of Mr. Burkhardt’s testimony establishes that he did not testify that Mr. Martin said he was leaving for Concentra, but only that Mr. Burkhardt assumed as much, based on the fact that Mr. Martin was carrying a manila envelope. Plaintiffs have not identified any other witnesses to whom Mr. Martin stated that he was driving to Concentra, and we have not found any such testimony.

Plaintiffs also contend that “Mr. Martin had previously been required to produce notes and records from his doctors before he was cleared at his employer-required physicals[.]” The evidence included testimony that on previous occasions, *after* Mr. Martin failed the physical examination, he would seek treatment with a personal physician and then return to Concentra. There was no evidence that Mr. Martin was directed to bring documents to the Concentra facility *before* the examination. Moreover, plaintiffs stress that Mr. Martin followed OWASA’s rules, and it would have been a violation of OWASA policy for Mr. Martin to make a side trip to his personal physician in a company vehicle. We conclude that there is no

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evidence that Mr. Martin previously brought medical records to the examination at Concentra, or that he drove to Raleigh to visit his personal physician.

Conclusion

In the present case, no evidence was presented from which a reasonable factfinder could find by the preponderance of the evidence that Mr. Martin's death resulted from an accident that arose out of and in the course of his employment. It is well-established that a claimant is not entitled to workers' compensation benefits if he is injured during the course of a personal errand unrelated to his employment. *See Horn v. Furniture Co.*, 245 N.C. 173, 95 S.E.2d 521 (1956) (collecting cases and holding that the claimant was not entitled to workers' compensation benefits where he was injured while crossing the street on a lunch break). *See also, e.g., White v. Battleground Veterinary Hosp.*, 62 N.C. App. 720, 303 S.E.2d 547 (1983) (reversing award of workers' compensation benefits where employee was injured while on a personal errand to purchase a newspaper). In this case, the testimony offered at the hearing failed to establish why, after Mr. Martin left OWASA possibly to have a physical examination at Concentra, he was in Raleigh an hour later, at a location for which no explanation was proffered and that was not on the way to Concentra. Having failed to offer evidence of the reason for Mr. Martin's presence in Raleigh, plaintiffs were unable to establish their entitlement to workers' compensation death



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benefits. As a result, the Commission did not err by denying plaintiffs' claim and we conclude that its opinion and award should be

AFFIRMED.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).