IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-459

No. COA20-592

Filed 7 September 2021

North Carolina Industrial Commission, No. 17-807422

JAMES ROBERT BARRIER, Employee, Plaintiff,

v.

CITY OF KANNAPOLIS, Employer, SELF-INSURED (Compensation Claims Solutions, Third-Party Administrator), Defendants.

Appeal by Defendants from Opinion and Award entered 29 January 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 April 2021.

DeVore, Acton & Stafford, P.A., by William D. Acton, Jr., and Law Offices of W. Daniel Grist, PLLC, by W. Daniel Grist, for Plaintiff-Appellee.

McAngus Goudelock & Courie, PLLC, by Jason E. Toups, for Defendants-Appellants.

GRIFFIN, Judge.

¶ 1 Defendant City of Kannapolis appeals from an opinion and award of the North Carolina Industrial Commission granting a workers' compensation claim by Plaintiff James Robert Barrier. Defendant argues that the Industrial Commission erred by finding that Plaintiff's injuries arose out of and in the course of his employment with

Defendant. We disagree and affirm the Opinion of the Industrial Commission.

¶ 2 Defendant also argues that there are insufficient facts to determine when Plaintiff returned to work and that Defendant is unable to comply with the Industrial Commission's Award. We agree and remand for further findings of fact to determine the date that Plaintiff returned to work.

I. Factual and Procedural History

¶ 3 Plaintiff worked as a seasonal employee in Defendant's Parks and Recreation department. He worked as a Park Attendant during the summers and school breaks from 2015 through 2017. Plaintiff's official job description included performing "light custodial and beautification work" and "manual labor assistance with special events, including concerts [and] movies." These duties included maintenance of the park grounds, trash collection, and lawn mowing.

¶ 4 Defendant provided a Bobcat ATV to assist Park Attendants with tasks associated with general maintenance work. Park Attendants utilized the Bobcat to dispose of loose trash and grass clippings by transporting them to a collection of dumpsters located in a gravel lot at Baker's Creek Park. This park is also managed by Defendant. Park employees regularly used the Bobcat to dispose of trash at Baker's Creek Park.

¶ 5 On the evening of 21 July 2017, Plaintiff was providing assistance for a special event hosted by Defendant at Village Park. The special event was a movie night in

the park. Park employees who worked special events were assigned various duties associated with the event. Laura Evans was Plaintiff's supervisor that evening. Ms. Evans assigned Plaintiff his tasks for the event. These included assembling the movie screen and assisting park visitors with parking. Plaintiff finished his assigned tasks and then positioned himself behind the movie screen where three other park employees were congregating. This group of park employees were waiting for the movie to end and the visitors to leave before they could begin their cleanup responsibilities. It was generally understood among the park employees and Ms. Evans that the employees were to avoid idle time when assisting with special events.

¶ 6 With roughly thirty minutes remaining until the movie ending, a decision was made among the group of four park employees to ride the Bobcat, travel to Baker's Creek Park, and return in time to begin cleanup work once the movie ended. Three park employees, including Plaintiff, sat on the front seat of the Bobcat. Plaintiff was in the passenger position on the right side with a coworker sitting between him and the driver. The fourth employee rode in the flatbed located on the back of the Bobcat. All employees acknowledged in testimony that they were not authorized to travel in the Bobcat in this manner.

¶ 7 When they arrived at the gravel lot leading to the dumpsters at Baker's Creek Park, the driver of the Bobcat was driving at a high rate of speed, swerved several times, and lost control of the vehicle. The Bobcat overturned and landed on Plaintiff's

right hand causing serious injuries. Plaintiff was hospitalized and underwent several surgeries. The injuries and treatment resulted in amputations of four fingers and part of his right palm. Plaintiff now requires a prosthetic to maintain the use of his right hand.

¶ 8 The three other park employees gave statements to police. They stated that the purpose of the trip to the Baker's Creek Park dumpsters was to dispose of a small amount of trash and grass clippings that were located in the bed of the Bobcat. A report filed by Tara Payne, a health compliance officer with the North Carolina Department of Labor, included testimony from Plaintiff and at least two of the other park employees who were part of the accident. According to that testimony, the purpose of the trip to Baker's Creek Park was to dispose of loose trash and to fill the idle time remaining until the movie concluded.

¶ 9 However, John Yoos, Risk Manager for Defendant, testified that the park employees changed their description of the events when he pressed them several days later. According to Mr. Yoos, Plaintiff's coworkers provided verbal accounts that contradicted the written statements to the police and Ms. Payne that the purpose of the trip was to dispose of trash. Although Mr. Yoo did not record the statements, he testified that at least one employee "definitely said that they weren't up there to take trash."

¶ 10 On 1 August 2017, Plaintiff filed a notice of accident and claim with the

Industrial Commission. Pending further investigation, Defendant initially authorized emergency treatment, including four surgeries, and paid temporary total disability benefits to Plaintiff.

¶ 11 On 29 August 2017, Defendant denied Plaintiff's claim, agreeing to pay for previously authorized treatment but no further treatment. Defendant denied that Plaintiff's injury arose out of his employment because Plaintiff was not acting for the benefit of Defendant at the time of the incident.

¶ 12 Plaintiff filed a request for a hearing with the Industrial Commission on 9 January 2018. On 11 January 2019, following a two-day evidentiary hearing, the Deputy Commissioner entered an Opinion and Award finding that the trip to the Baker's Creek Park dumpsters arose out of Plaintiff's employment because the trip was a means of filling idle time.

¶ 13 Defendant filed an appeal to the full Industrial Commission. Oral arguments took place before the Commission on 10 July 2019. On 29 January 2020, the Commission entered an Opinion and Award affirming the decision by the Deputy Commissioner.

¶ 14 The Commission found that "[t]he accident occurred at a place where Plaintiff's duties were calculated to take him, while Plaintiff was engaged in an activity that was calculated to further, directly or indirectly, Defendant's business." The Commission concluded that Plaintiff's "injury by accident arose out of and in the

course of his employment." Further, the Commission found that even if evidence failed to show that the trip to the Baker's Creek Park dumpsters was for the purpose of disposing of trash, "Plaintiff's injury nonetheless arose out of and in course of his employment because Plaintiff's injury also occurred while he was filling idle time, as he was expected to do, as part of his job." The Commission concluded that Plaintiff's injury was compensable because it arose out of and in the course of his employment with Defendant.

¶ 15 Defendant timely appealed the Commission's Opinion and Award.

II. Analysis

¶ 16 Defendant argues that the Opinion and Award by the Industrial Commission is not supported by the evidence or relevant case law. Specifically, Defendant argues that Plaintiff's actions constituted an unsanctioned activity that was an unreasonable or extraordinary deviation from regular work requirements such that Plaintiff's injuries did not arise out of and in the course of his employment. We disagree and affirm the Opinion and Award of the Industrial Commission.

¶ 17 Defendant further contends that, if the Opinion and Award is affirmed, this matter should be remanded for further findings of fact because the Industrial Commission failed to determine the date on which Plaintiff returned to work, thereby making it impossible for Defendant to comply with the Opinion and Award. We agree and remand for the Industrial Commission to identify a specific date when Plaintiff

returned to work.

¶ 18 Our review of decisions by 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." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted).

¶ 19 If a finding of fact is not challenged, it is binding on this Court. *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 706, 654 S.E.2d 263, 265 (2007). In the case of a challenged finding of fact, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citation omitted). This Court need only find competent evidence to support a challenged finding of fact "even when there is evidence to support a finding to the contrary." *Bass v. Morganite, Inc.*, 166 N.C. App. 605, 608, 603 S.E.2d 384, 386 (2004) (citation omitted). Therefore, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's duty goes no further than to determine whether the record contains any evidence to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965) (citation omitted). Conclusions of law from the Industrial Commission's Opinion and Award are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

¶ 20 N.C. Gen. Stat. § 97-2(6) provides that a compensable injury is one which occurs "by accident arising out of and in the course of the employment[.]" N.C. Gen. Stat. § 97-2(6) (2019). "[T]he phrase 'arising out of the employment' refers to the origin or cause of the accidental injury while the words 'in the course of the employment' refer to the time, place, and circumstances under which an accidental injury occurs." *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988) (citation omitted). For an accident to arise out of employment, "[t]here must be some causal connection between the employment and the injury." *Bolling v. Belk-White Co.*, 228 N.C. 749, 751, 46 S.E.2d 838, 839 (1948) (citations omitted). In addition, an injury occurs "in the course of [the] employment" when it occurs "under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." *Shaw v. Smith & Jennings, Inc.*, 130 N.C. App. 442, 446, 503 S.E. 2d 113, 116 (1998) (citation omitted). Therefore, "[an injury] is compensable under the Act" if it is "fairly traceable to the employment or any reasonable relationship to [the] employment exists[.]" *Id.* at 445-46, 503 S.E.2d at 116 (citation and internal quotation marks omitted).

¶ 21 In the present case, the unchallenged findings of fact are sufficient to support the Commission's conclusions of law. The Commission's Finding of Fact No. 3 notes in part that "Plaintiff and other park employees regularly used the Bobcat to

transport trash to the dumpsters at Baker[']s Creek Park, which was approximately one mile from Village Park. It was common for multiple park employees to ride in the Bobcat at the same time." Finding of Fact No. 10 states, "It was customary for Plaintiff and other Bobcat operators to drive trash to the dumpsters at Baker[']s Creek Park without asking permission. . . . Plaintiff's actions . . . bore a reasonable relationship to the accomplishment of a task for which Plaintiff was hired." Finding of Fact No. 14 states that "the trip in the Bobcat was for the dual purpose of taking trash to the Baker[']s Creek Park Dumpsters (part of Plaintiff's regular job duties) and filling idle time between work assignments (which was customary and expected of the part-time employees)."

¶ 22 Defendant urges us to consider additional circumstances arguably overlooked by the Commission that would suggest: (1) Plaintiff's actions were unauthorized and that the benefit to the employer was too remote and immeasurable to fall within the legal bounds of a compensable injury; or (2) Plaintiff's actions were an unreasonable, extraordinary deviation from customary duties. However, this Court may not reweigh the evidence, as our review is limited to "whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson*, 362 N.C. at 660, 669 S.E.2d at 584.

¶ 23 Defendant also challenges several portions in Findings of Fact Nos. 4, 6, 10, and 11. Specifically, Defendant argues that several of the Commission's findings are

"merely restatements of parts of the testimony obtained, without subsequent adoption by the commission or a finding of credibility of declarants." Defendant presents no relevant case law to support this argument aside from a reference to *Weaver v. Dedmon*, 253 N.C. App. 622, 801 S.E.2d 131 (2017), claiming this Court "took exception" to the Commission restating testimony of the plaintiff without finding such testimony to be credible. Even assuming *arguendo* that restatements of testimony should not have been included in the challenged findings of fact, the unchallenged findings of fact are sufficient to support the Commission's conclusions of law.

¶ 24 Defendant challenges the Commission's Finding of Fact No. 9 based on an alleged discrepancy in Ms. Payne's records regarding whether trash was present in the Bobcat at the time of the accident. Defendant argues that this discrepancy establishes that the Commission lacked competent evidence to support its finding that the disposal of grass (or trash) was the purpose behind the trip. However, there is competent evidence to support the finding that the purpose of the trip was to dispose of trash. Photos taken at the site the day after the accident show piles of grass clippings and loose debris scattered among the tracks left by the Bobcat. This Court may not reweigh the evidence under our standard of review. *Richardson*, 362 N.C. at 660, 669 S.E.2d at 584.

¶ 25 Defendant also claims this it is not able to comply with the Opinion and Award

because the exact date that Plaintiff returned to work as a camp counselor in Asheville is not included in the Award. The Commission awarded Plaintiff temporary total disability from 21 July 2017 through 12 June 2018 or until the date he returned to work, whichever was earlier. The Commission did not include the date that Plaintiff returned to work in its findings. In order for Defendant to properly calculate payment of benefits, it needs to know whether Plaintiff began work before or after 12 June 2018. Defendant cannot comply with the Opinion and Award until that date is determined. We remand this matter for further findings on the precise date of Plaintiff's return to work.

III. Conclusion

¶ 26 We affirm the Commission's Opinion and Award and remand for the limited purpose of further clarification on the exact date on which Plaintiff returned to work.

AFFIRMED IN PART, REMANDED IN PART.

Judges INMAN and GORE concur.

Report per Rule 30(e).