Riggsbee; Affirmed
Concurring: Mavretic
Bolch

NO. COA99-1603

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2000

GLORIA J. WATTS,
Employee-Plaintiff,

v. N.C. Industrial Commission
I.C. No. 492160

LONNIE LYNWOOD NORRIS,
Employer, Defendant-Appellant,

MICHIGAN MUTUAL INSURANCE CO./
AMERISURE,
Carrier, Defendant-Appellee.

Appeal by employer from opinion and award of the North Carolina Industrial Commission entered 27 July 1999. Heard in the Court of Appeals 8 November 2000.

Soles, Phipps, Ray, Prince & Williford, by Sherry Dew Prince, for defendant-appellant Lonnie Lynwood Norris.

Young Moore and Henderson P.A., by Joseph W. Williford and Terryn D. Owens, for defendant-appellee Amerisure Insurance Company.

McGEE, Judge.

The North Carolina Industrial Commission (Commission) concluded that defendant employer's workers' compensation policy with defendant carrier did not cover plaintiff employee's work-related accident, and that carrier was therefore not responsible

for indemnification to employer of employee's workers' compensation award. The Commission also assessed penalties against employer for willfully refusing or neglecting to provide workers' compensation insurance for employee. Employer appeals.

The Commission found that at the time of employee's injury, employer owned and operated two businesses located across the street from each other, (1) a land clearing business which employer had operated for thirty years and (2) a country store which had been in business for about four years. The two businesses had different federal tax identification numbers, checking accounts, and telephone numbers, but shared a common bookkeeper who paid employees of both businesses from whichever checking account had available funds.

The Commission further found that employee was hired to work in the country store where her primary responsibility was running the cash register. However, employee did occasionally assist the bookkeeper with work related to the land clearing business. Employee and employer were both injured during an armed robbery of employer's country store at around 9:00 p.m. on 23 November 1994, while employee was loading the store's drink machine. Employer's land clearing business was closed at the time.

Employer alleges that carrier's 1994-95 insurance contract

with employer provides workers' compensation coverage for employer's country store. Item 1 of the insurance policy's Information Page, labeled "Name of Insured and Address," lists employer's name and states that the named insured is an "INDIVIDUAL." However, Item 1 also lists the mailing address and federal tax identification number of the land clearing business, which according to employer's 1993 and 1994 federal tax returns differ from those of the country store, and expressly states that the policy covers "NO ADDITIONAL LOCATIONS." Item 2 establishes the policy period as being from 12 June 1994 to 12 June 1995. Item 3.A. lists North Carolina as the state to which the workers' compensation portion of the policy applies.

The record shows that the "Miscellaneous Information Schedule" on page two of the policy's Information Page lists the telephone number of the land clearing business as the insured's telephone number. The "Schedule of Operations" on page three of the Information Page classifies operations as excavation and clerical office work, and the sum of the listed payroll values closely approximates the wages employer actually paid with respect to the land clearing business alone in 1993 and 1994, as described in employer's 1993 and 1994 federal tax returns.

The insurance policy provides in Part A of its General Section

that it "is a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page)." Part B states: "You are insured if you are an employer listed in Item 1 of the Information Page." Part E states that the policy "covers all of your workplaces listed in Items 1 or 4 of the Information Page; and it covers all other workplaces in Item 3.A. states unless you have other insurance or are self-insured for such workplaces."

Employer testified that the address listed in Item 1 of the insurance policy is in fact the address of both the land clearing business and the country store, and that all of his employees help the bookkeeper with the businesses' clerical work. Employer also testified that his 1993-94 workers' compensation policy with carrier specifically listed the land clearing business as the insured employer, and that along with the change in the name of the insured to that of employer himself, the 1994-95 policy included a much higher premium.

Although employer's 1993-94 insurance policy was never introduced into evidence, carrier challenges employer's characterization of that policy. Employer's 1993 application for workers' compensation insurance from carrier, dated 11 June 1993, refers solely to employer's land clearing business, yet provides

only employer's own name as the employer. Carrier also introduced employee's 1994 W-2 forms for income from employer's land clearing business and employer's country store, both of which list only employer's name as the employer. Finally, the 1993 application for insurance provides an estimated annual premium in excess of the premium actually charged under the 1994-95 policy.

Employer's insurance agent testified that he provided an insurance quote on 28 June 1993 for workers' compensation coverage by carrier for the country store and sent a follow-up note on 30 July 1993 reminding employer that he was required by law to carry the insurance. The insurance agent also produced evidence of a telephone quote for workers' compensation insurance by carrier for the country store which was provided by the agent's secretary to employer's bookkeeper on 12 July 1994.

Employer's bookkeeper testified that in June 1994 she received an insurance quote for workers' compensation coverage by North Carolina Transportation and Industry (NCTI) for the country store which was less expensive than similar coverage by carrier. Shortly after employee and employer were injured, the bookkeeper arranged for a workers' compensation policy with NCTI for the country store. The bookkeeper entered into the new workers' compensation policy around the end of November or the first of December 1994.

On 4 January 1995, apparently immediately after he returned from the hospital, employer gave a recorded statement over the telephone in which he stated that carrier provided workers' compensation insurance only for employer's land clearing business, and that NCTI provided workers' compensation insurance for his country store through a policy effective as of 1 October 1994. Employer stated that he had never really talked about workers' compensation coverage for the country store with the insurance agent who had provided him his policy with carrier, and that he had thought about getting workers' compensation coverage for the country store through carrier but that NCTI was cheaper. The NCTI policy number that employer provided during the recorded telephone conversation was the number of the policy employer's bookkeeper had purchased shortly after the accident occurred.

I.

Employer contends that his 1994-95 workers' compensation insurance contract with carrier is either unambiguous in favor of employer or is ambiguous and therefore must be interpreted in employer's favor. We find that the language of the contract is ambiguous on its face but find no reasonable interpretation that favors employer. We therefore find no error in the Commission's ruling.

"The interpretation of language used in an insurance policy is a question of law[.]" *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94, 518 S.E.2d 814, 816 (1999), *disc. review denied*, 351 N.C. 350, __ S.E.2d __ (2000). Conclusions of law by the Commission are reviewable *de novo* by this Court, *see Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998) (citations omitted). We therefore review *de novo* the Commission's conclusion of law that carrier's policy did not provide workers' compensation coverage for employer's country store.

A.

An insurance policy "is subject to judicial construction only where the language used in the policy is ambiguous and reasonably susceptible to more than one interpretation. . . . [I]f the language of the policy is clear and unambiguous, the court must enforce the contract of insurance as it is written." *Allstate*, 135 N.C. App. at 94-95, 518 S.E.2d at 816 (citations omitted). We find that the language of the policy is ambiguous on its face as to whether it provides coverage for employer's country store.

Employer points out that the policy states, "You are insured if you are an employer named in Item 1," and that Item 1 names employer by name and provides that he is an individual. The policy

further states that it covers all workplaces listed in Item 1 and in the states listed in Item 3.A., which unquestionably includes the locations of both the land clearing business and the country store. Employer argues that the policy therefore unambiguously covers all of employer's sole proprietorships in North Carolina, including both the land clearing business and the country store.

Carrier counters that Item 1 further lists the address of the land clearing business only and provides the land clearing business's federal tax identification number instead of employer's own social security number. Item 1 also expressly states that no additional locations are included. In addition, the policy lists the telephone number of only the land clearing business and describes the operations of the insured as only excavation and clerical office work, with payroll estimates in accord with the land clearing business alone. Carrier argues that the policy unambiguously covers only employer's land clearing business.

Employer responds that the address listed in Item 1 of the policy is the address of both the land clearing business and the country store, and that the form provides space for only one federal tax identification number. Because both businesses shared a single bookkeeper, there was no need to list any additional telephone numbers. Because all employees assisted with the

clerical work for employer's businesses, the Schedule of Operations did not necessarily exclude the employees of the general store. The fact that only the payroll for the land clearing business was included is not determinative of coverage, *see Williams v. Stone Co.*, 232 N.C. 88, 91, 59 S.E.2d 193, 195 (1950).

We conclude that, on its face, the language of the policy is not clear and unambiguous in favor of either employer or carrier.

B.

When an insurance policy is potentially ambiguous,

> a contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, since the company prepared the policy and chose the language.

Grant v. Insurance Co., 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978) (citations omitted). We must therefore determine whether the policy is reasonably susceptible to different constructions, given a reasonable person in the position of employer. We conclude that the only reasonable construction of the policy favors carrier.

Employer contends that because Item 1 of the policy's Information Page names employer in his individual capacity, and because all of employer's businesses in fact share the same

address, the policy must apply to all of employer's businesses under Parts B and E of the policy's General Section. Employer argues that had carrier wished for the policy to apply only to the land clearing business, carrier should have named the land clearing business specifically under Item 1 as the insured under the policy. According to employer, the previous year's policy did indeed list the land clearing business specifically as the insured, and when the renewal policy arrived with employer's own name listed as the insured and with a greatly increased premium, employer reasonably assumed that the new policy covered all of his businesses.

The question of intent underlying a written instrument as determined from extrinsic evidence is a question of fact, *see Runyon v. Paley*, 331 N.C. 293, 305, 416 S.E.2d 177, 186 (1992), and the findings of fact of the Commission are conclusive on appeal as long as they are supported by any competent evidence, *see Grantham*, 127 N.C. App. at 534, 491 S.E.2d at 681. The Commission, considering employer's 1993 application for insurance from carrier and employee's 1994 W-2 forms along with employer's testimony, found no credible evidence that any prior policy obtained by employer specifically named employer's land clearing business as insured and found that employee's testimony as a whole lacked credibility and should be given no weight. We conclude that

competent evidence in the record supports those findings of fact of the Commission.

We agree with carrier's contention that it could not have been more precise in providing coverage only to employer's land clearing business under the policy, given the information the record shows was supplied to carrier by employer. We do not agree with employer's contention that carrier could and should have been more precise in its limitations of coverage. We therefore hold that carrier's construction of the policy is the only reasonable construction and find no error in the Commission's determination.

II.

Employer next contends that the Commission committed error in imposing a penalty upon him under N.C. Gen. Stat. § 97-94 for willfully refusing or neglecting to provide workers' compensation insurance for employee on the date that employee was injured. We disagree and find that the Commission did not err.

N.C. Gen. Stat. § 97-94(b) (1999) provides that "[a]ny employer required to secure the payment of compensation under [the Workers' Compensation Act] who refuses or neglects to secure such compensation shall be punished" in accordance with the statute. Employer does not challenge the Commission's finding that he was required to secure coverage for his country store under the Act,

and as stated in Part I above, employer did not in fact secure workers' compensation coverage for employer's country store. We find no error in the Commission's findings that employer's 1993 application for workers' compensation coverage did not include and was not intended to include the country store and that employer did not pay for and did not intend to obtain workers' compensation coverage for employees of the country store. We disagree with employer's contention that he reasonably believed that he had secured coverage. Therefore, employer is subject to the penalties described under N.C. Gen. Stat. § 97-94(b). *See Harrison v. Tobacco Transp., Inc.*, ___ N.C. App. ___, ___, 533 S.E.2d 871, 877 (2000).

N.C. Gen. Stat. § 97-94(d) (1999) provides that "[a]ny person who, with the ability and authority to bring an employer in compliance with [the employer's requirement to carry workers' compensation insurance], willfully fails to bring the employer in compliance . . . may be assessed a civil penalty" in accordance with the statute. Employer contends the record includes no evidence of employer's willful failure to secure workers' compensation insurance on employer's country store. However, presented with evidence of specific insurance quotes provided to employer, employer's bookkeeper's securing of workers' compensation

insurance for the country store after employee's injury, and employer's own subsequent recorded statement by telephone, the Commission found that employer willfully refused or neglected to secure workers' compensation insurance for his country store employees. We conclude that the Commission's finding is supported by competent evidence, and therefore that the Commission did not err in assessing a penalty against employer for willful failure to secure coverage for his country store. *See Rivera v. Trapp*, 135 N.C. App. 296, 304, 519 S.E.2d 777, 782 (1999).

In summary, we hold that the Commission did not err in concluding that carrier did not provide workers' compensation coverage for employee's accident and in penalizing employer for willfully refusing or neglecting to secure coverage for the country store. We therefore affirm the opinion and award of the Commission.

Affirmed.

Judges LEWIS and HORTON concur.

Report per Rule 30(e).