NO. COA11-1603
NORTH CAROLINA COURT OF APPEALS

Filed: 17 July 2012

JEFFREY PARKER,
Employee,
Plaintiff,

v.

BIG ROCK TRANSPORTATION, EMPLOYER ALTERNATIVES, LLC, EMPLOYER ALTERNATIVES OF PENNSYLVANIA, LLC, and W.H. SERVICES,
Employer,

FIRST COMP INSURANCE COMPANY and NCME FUND c/o ISURITY INSURANCE SERVICES,
Carrier,
Defendants,

North Carolina
Industrial Commission
I.C. No. 709432

FRANKLIN TODD BECK,
Employee,
Plaintiff,

v.

EMPLOYER ALTERNATIVES, LLC,
Employer,

NCME FUND c/o ISURITY INSURANCE SERVICES,
Carrier,

BIG ROCK TRANSPORATION,
Employer,

FIRST COMP INSURANCE COMPANY,
Carrier,

North Carolina
Industrial Commission
I.C. No. 888417

and

W.L. HARLAN/W.H. SERVICES,
Employer,

NONINSURED,
Defendants.

Appeal by defendants Employer Alternatives and NCME Fund c/o iSurity Insurance Services from opinion and award entered 4 October 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 May 2012.

The Hodgman Law Firm, PA, by Robert S. Hodgman, for plaintiff-appellee Jeffery Parker.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Thomas W. Page, and M. Duane Jones, for defendant-appellees Big Rock Transportation and First Comp Insurance Company.

Orbock Ruark & Dillard, PC, by Jason P. Burton, for defendant-appellants Employer Alternatives and NCME Fund c/o iSurity Insurance Services.

STROUD, Judge.

Defendants Employer Alternatives[1] and NCME Fund c/o iSurity Insurance Services appeal Full Commission of the North Carolina

[1] The parties stipulated "that Employer Alternatives, LLC and Employer Alternatives of Pennsylvania, LLC are one and the same and that the workers' compensation insurance coverage of NCME Fund c/o iSurity Insurance Services is for Employer Alternatives, LLC as well as Employer Alternatives of Pennsylvania, LLC." Accordingly, we will refer to both

Industrial Commission opinion and award requiring them to pay "indemnity and medical compensation due" to plaintiff.[2] For the following reasons, we affirm.

I. Background

This is a workers' compensation case, but unlike many of our workers' compensation cases it does not concern the compensability of plaintiff's injuries sustained as a truck driver; instead, we are asked to determine who plaintiff's employers are. In other words, this Court is asked to determine who is ultimately liable to pay plaintiff's uncontested workers' compensation benefits. On 4 October 2011, the Full Commission of the North Carolina Industrial Commission ("Commission") issued an opinion and award. The Commission determined that defendant Big Rock Transportation ("Big Rock") was not plaintiff's employer, and thus, it was not required to compensate plaintiff; plaintiff was an employee of defendant W.H. Services; W.H. Services hired defendant Employer

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defendants Employer Alternatives LLC and Employer Alternatives of Pennsylvania, LLC simply as "Employer Alternatives."

[2] The Full Commission awarded worker's compensation benefits from defendants Employer Alternatives, LLC and NCME Fund c/o iSurity Insurance Services to *two* plaintiffs. However, only plaintiff Jeffrey Parker's benefits are contested on appeal. Accordingly, we will use the word "plaintiff" to refer solely to plaintiff Jeffrey Parker.

Alternatives to secure workers' compensation insurance; and defendant Employer Alternatives procured workers' compensation insurance from defendant NCME Fund c/o iSurity Insurance Services ("iSurity"). The Commission's determination was based in part on the following findings of fact:

> 5. . . . W.H. Services was responsible for providing the workers' compensation insurance for the drivers.
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> . . . .
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> 7. . . . There is no evidence that iSurity conducted a payroll audit at the conclusion of the first policy period on September 15, 2007. Instead, they issued another policy to Employer Alternatives . . . .
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> . . . .
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> 11. With regard to the day-to-day control of the drivers, W.H. Services gave the drivers their assignments, trip packets, trip sheets, and fuel sheets, and did all of the dispatching. The drivers used one of Mr. Harlan's fuel cards to pay for fuel for their trucks, and they parked their trucks at the W.H. Services terminal. Plaintiff Parker testified that he thought of Mr. Harlan as his supervisor.
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> 12. Big Rock did not interact with or control the drivers . . .
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> . . . .
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> 15. There was no contract of hire, express or implied, between Big Rock Transportation and . . . Plaintiff Parker .

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17. . . . [T]he evidence of record is insufficient to support a finding that Employer Alternatives exercised sufficient control over the drivers' work to be deemed an employer of the drivers.

18. At the time of their respective injuries, the employer-employee relationships existed between Plaintiffs and W.H. Services.

. . . .

20. W.H. Services paid substantial sums and undertook in good faith to insure and keep insured its liability under the Workers' Compensation Act by engaging the services of Employer Alternatives. W.H. Services relied on the fact that iSurity was providing workers' compensation coverage to its drivers, and would have undertaken to secure other worker's compensation coverage if it had known that iSuirty would question its liability for injuries to the drivers[,]

and conclusions of law:

2. An employment relationship, joint or otherwise, did not exist between Plaintiff[] and Big Rock Transportation or Employer Alternatives. In order to establish a joint employment under N.C. Gen. Stat. § 97-51, it must be shown that (1) the employee made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work. *Collins v. James Paul Edwards, Inc.*, 21 N.C. App. 455, 459, 204

> S.E.2d 873, 876 (1975). At least two of these three elements is missing in the cases at bar.
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> . . . .
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> 4. As an employer, W.H. Services complied with the obligation to "insure and keep insured" its liability under the Workers' Compensation Act as set forth in G.S. Section 97-93 by hiring Employer Alternatives to administer payroll and secure workers' compensation coverage.
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> . . . .
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> 6. Because it accepted payment of premiums from Employer Alternatives, iSuirty is estopped from denying coverage for the injuries sustained by Plaintiff[] Parker[.]

The Industrial Commission awarded plaintiff "all indemnity and medical compensation due" from defendants Employer Alternatives and iSurity. Defendants Employer Alternatives and iSurity appeal.

II. Standard of Review

> [R]eview of a decision of the Industrial Commission is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law. The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. This Court reviews the Commission's conclusions of law *de novo*.

Egen v. Excalibur Resort Prof'l, 191 N.C. App. 724, 728, 663 S.E.2d 914, 918 (2008) (citation omitted). However,

> [t]he question whether an employer-employee relationship existed is a jurisdictional one, and the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. Thus, the reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.

Hughart v. Dasco Transp., Inc., 167 N.C. App. 685, 689, 606 S.E.2d 379, 382 (2005) (citations, quotation marks, and brackets omitted).

III. Plaintiff's Employer

Defendants Employer Alternatives and iSurity make three arguments on appeal; all of defendant Employer Alternatives' and defendant iSurity's arguments are similar in that they assert that (1) defendants Big Rock and W.H. Services were plaintiff's employers, and/or (2) defendant Employer Alternatives was not plaintiff's employer. While much of defendant Employer Alternative's and defendant iSurity's arguments direct this Court's attention to evidence which they argue shows why defendants Big Rock and W.H. Services should be found to be plaintiff's employers, defendant Employer Alternatives' and

defendant iSurity's actual purpose behind making these arguments seems to be to establish that defendant Employer Alternatives is not an employer of plaintiff. Defendants Employer Alternatives and iSurity argue that defendant "Employer Alternatives should not be liable for workers' compensation benefits when it does not otherwise satisfy the accepted definition of 'employer.'" In summary, defendants Employer Alternatives and iSurity are attempting to establish that defendants Big Rock and W.H. Services are plaintiff's employers and that defendant Employer Alternatives is not because, according to defendants Employer Alternatives and iSurity, only "employers" are liable for workers' compensation benefits.

A. Defendant W.H. Services

We first note that defendant Employer Alternative's and defendant iSurity's arguments that defendant W.H. Services was plaintiff's employer are irrelevant as this is exactly what the Commission has already determined. Accordingly, we need not address these arguments. To the extent that defendant Employer Alternative and defendant iSurity argue that there was a joint employment situation with defendant W.H. Services as one of the joint employers, we will address these arguments below.

B. Defendant Big Rock

Defendants Employer Alternatives and iSurity argue that defendant Big Rock was plaintiff's actual employer, statutory employer, and/or joint employer.

1. Actual Employer

Defendants Employment Alternatives and iSurity contend that plaintiff was defendant Big Rock's employee. "The term employee means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written[.]" N.C. Gen. Stat. § 97-2(2) (quotation marks omitted) (2005). Mr. William Harlan, owner and president of W.H. Services, testified that either he or his son hired plaintiff and that either way it was with his "approval." Defendants Employer Alternatives and iSurity fail to direct this Court's attention to any evidence that defendant Big Rock contracted to hire plaintiff. Furthermore, defendants Employer Alternatives and iSurity concede in their brief that defendant "W.H. Services hired the drivers[;]" defendant Employer Alternatives "served as a . . . conduit for the payroll for truck drivers and other personnel of W.H. Services[;]" and defendant "W.H. Services would run trucks for Big Rock with the trucks being operated by W.H. Services and the drivers being hired and provided by W.H. Services[.]" While defendants

Employer Alternatives and iSurity direct our attention to evidence which shows defendant Big Rock's involvement with defendant W.H. Services, none of this evidence shows that defendant Big Rock through "appointment or contract of hire or apprenticeship" employed plaintiff. *Id.* Accordingly, defendant Big Rock was not the actual employer of plaintiff. *See id.*

2. Statutory Employer

Defendant Employer Alternative's and defendant iSurity's argument that defendant Big Rock is a statutory employer of plaintiff is quite confusing. Defendant appears to be arguing that N.C. Gen. Stat. §§ 97-19 and 97-19.1, read in conjunction, establish that defendant Big Rock, as a principal contractor of defendant W.H. Services, must have obtained proof of insurance at the time it contracted with defendant W.H. Services or else it is liable for the workers' compensation benefits of defendant W.H. Services' employees.

However, N.C. Gen. Stat. § 97-19

> is an exception to the general definitions of employment and employee set forth in N.C.G.S. § 97-2, and provides that a principal contractor, intermediate contractor, or subcontractor may be held liable as a statutory employer where two conditions are met. First, the injured employee must be working for a subcontractor doing work which has been contracted to it by a principal contractor, and, second, *the*

> *subcontractor does not have workers' compensation insurance coverage covering the injured employee.*

Putman v. Alexander, 194 N.C. App. 578, 584-85, 670 S.E.2d 610, 616 (2009) (emphasis added) (citations, quotation marks, and brackets omitted). Thus here, even assuming *arguendo* that defendant W.H. Services is a subcontractor of defendant Big Rock, N.C. Gen. Stat. § 97-19 is still inapplicable as defendant W.H. Services had workers' compensation insurance covering plaintiff. *See id.*

3. Joint Employer

Defendants Employer Alternatives and iSurity also argue that defendant Big Rock was a joint employer of plaintiff pursuant to N.C. Gen. Stat. § 97-51. However, "joint employment as to one employer cannot be found in the absence of a contract with that employer." *Hughart*, 167 N.C. App. at 690, 606 S.E.2d at 383 (citation and quotation marks omitted). As we have already noted, the evidence shows that plaintiff did not have a contract with defendant Big Rock, and thus any analysis regarding joint employment is inapplicable. *See id.*

C. Defendant Employer Alternatives

Defendants Employer Alternatives and iSurity argue that defendant Employer Alternatives cannot be liable for workers'

compensation benefits because defendant Employer Alternatives was not plaintiff's employer. N.C. Gen. Stat. § 97-93(a)(1) provides that "[e]very employer subject to the provisions of this Article relative to the payment of compensation shall . . . [i]nsure and keep insured his liability under this Article in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized[.]" N.C. Gen. Stat. § 97-93(a)(1) (2005). Mr. Harlan testified that he hired defendant Employer Alternatives to secure workers' compensation coverage. Thus, the evidence shows, as the Commission determined, that defendant W.H. Services, as plaintiff's employer, complied with N.C. Gen. Stat. § 97-93 "by hiring Employer Alternatives to . . . secure workers' compensation coverage." Mr. Harlan also testified that through defendant Employer Alternatives he obtained workers' compensation coverage from defendant iSurity. Thus, the evidence shows, as the Commission determined, that workers' compensation insurance was procured from defendant iSurity on behalf of defendant W.H. Services. Defendants Employer Alternatives and Surety fail to direct this Court's attention to any evidence demonstrating that defendant W.H. Services did not comply with N.C. Gen. Stat. § 97-93 by hiring defendant Employer

Alternatives to procure workers' compensation insurance which they so did from defendant iSurity. Accordingly, it is inconsequential that defendant Employer Alternatives is not plaintiff's employer, as it was hired by plaintiff's employer, defendant W.H. Services, to procure worker's compensation insurance and did so from defendant iSurity.

As to the workers' compensation insurance provided by defendant iSurity, defendants Employer Alternatives and iSurity contend that though defendant "iSurity issued a policy of workers' compensation to Employer Alternatives[,]" defendant

> iSurity did not write a policy of workers' compensation insurance for Employer Alternatives to cover a long-haul trucking operation. . . .
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> . . . iSurity maintains they were never paid a sufficient premium to cover a workers' compensation insurance policy for a long-haul trucking operation and the truck drivers, mechanics, dispatchers, or office personnel that a long-haul trucking operation would involve.
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> . . . iSurity maintains that the premiums they accepted were based on Employer Alternatives and Forms and Fixtures and not on Plaintiff as a long-haul truck driver working for W.H. Services and Big Rock. . . . iSurity maintains they never accepted premiums on behalf of Plaintiff as a long-haul truck driver.

However, "if an insurance carrier accepts workers' compensation insurance premiums for an individual, it cannot deny liability for coverage." *Carroll v. Daniels & Daniels Constr. Co.*, 327 N.C. 616, 622, 398 S.E.2d 325, 329 (1990). While defendants Employer Alternatives and iSurity attempt to explain what actions defendant iSurity intended its insurance policy to cover and how the premiums it accepted were not a sufficient amount for the type of workers' compensation benefits being claimed, defendants Employer Alternatives and iSurity do not deny that defendant iSurity did in fact accept workers' compensation insurance premiums from defendant Employment Alternatives which were made on behalf of defendant W.H. Services in order to cover its employees, including plaintiff.

The Commission found unchallenged by defendants Employer Alternatives and iSurity that

> [a]t the time of Plaintiff Parker's . . . injuries, Employer Alternatives had in place a workers' compensation policy which it obtained from iSurity. On its application for workers' compensation coverage, Employer Alternatives indicated that it was a vanity manufacturing business. It did not disclose that it was a PEO that was paying the salaries of truck drivers and providing workers' compensation coverage for a trucking company. iSurity would not have written a policy for Employer Alternatives had it known the true facts.

Thus, it appears that all of defendant iSurity's issues would be more properly addressed to defendant Employer Alternatives as the party who failed to disclose material information to it. In any event, defendant iSurity, by accepting premiums covering plaintiff from defendant Employer Alternatives made on behalf of defendant W.H. Services is estopped from now denying coverage. *See id.*

D. Liability

In summary, defendant W.H. Services was plaintiff's sole employer. Defendant W.H. Services hired defendant Employment Alternatives to secure workers' compensation insurance on its behalf. Defendant Employment Alternatives secured the workers' compensation insurance from defendant iSurity on behalf of W.H. Services; as such, defendants Employment Alternatives and iSurity are liable for plaintiff's workers' compensation claim.

IV. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges HUNTER, Robert C. and ERVIN concur.

Report per Rule 30(e).