Affirmed
Author, Ballance
Concurring, Mavretic
Riggsbee

NO. COA00-929

NORTH CAROLINA COURT OF APPEALS

Filed: 17 July 2001

MATTHEW L. COLLIER,

Employee,
Plaintiff,

v.

J.T. PARKER d/b/a
J.T. PARKER CONSTRUCTION,
NON-INSURED,

Employer,
Defendant.

N. C. Industrial
Commission
I.C. No. 727745

Appeal by defendant from Opinion and Award of the North Carolina Industrial Commission entered 1 May 2000. Heard in the Court of Appeals 23 May 2001.

Farris & Farris, P.A., by Robert A. Farris, Jr., Thomas J. Farris, and Caroline F. Quinn, for the plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Heather L. Aberle, for the defendant-appellant.

WYNN, Judge.

Defendant-employer, J.T. Parker, appeals from an Opinion and Award of the North Carolina Industrial Commission wherein defendant was ordered to pay the plaintiff-employee, Matthew Collier, disability compensation for injuries plaintiff sustained while working for defendant. Defendant brings forth thirteen assignments of error on appeal; however, he has abandoned assignments 1-7, 9, and 11-13 by failing to argue them in his brief. *See* N.C.R. App. P. 28 (2001); *see also State v. Rhyne*, 124 N.C. App. 84, 478 S.E.2d

789 (1996). We further note that defendant has failed to comply with Rule 28 by failing to follow the question in his brief with "a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." N.C.R. App. P. 28(b)(5). Nonetheless, we exercise our discretion to suspend the requirements of Rule 28(b) and decide this case on its merits pursuant to N.C.R. App. P. 2 (2001).

Plaintiff was injured on 24 June 1997 when he fell through the roof of a tobacco warehouse and landed on the concrete floor below. Plaintiff brought a claim for hearing before the Industrial Commission, which was heard before Deputy Commissioner John A. Hedrick on 11 December 1998. Deputy Commissioner Hedrick entered an Opinion and Award on 25 March 1999 wherein he found that defendant's business regularly employed two persons, plaintiff and Jed Colely; and, defendant and Leonard Collier, III, were partners in defendant's construction business. Deputy Commissioner Hedrick concluded that defendant did not regularly employ three or more employees and, therefore, was not subject to the provisions of the North Carolina Workers' Compensation Act; consequently, he dismissed plaintiff's claim for lack of jurisdiction. Plaintiff appealed to the Full Commission.

On review, the Full Commission filed an Opinion and Award on 1 May 2000, wherein it made findings of fact tending to show the following: (1) Plaintiff worked for defendant sporadically for four to five years prior to the hearing before Deputy Commissioner

Hedrick in December 1998; (2) Plaintiff worked for defendant primarily during the summer months when he was not attending school; (3) Defendant's business consisted of construction work, primarily small building and repair projects; (4) In May 1997, plaintiff's uncle, Leonard Collier, III, received a telephone call from defendant, following which Leonard Collier informed plaintiff that he could begin working with defendant; (5) Plaintiff began working for defendant's construction business the day after that telephone call; (6) In June 1997, a work crew consisting of plaintiff, Leonard Collier, defendant and Jed Colely began performing roof repair on a tobacco warehouse; (7) Defendant negotiated the terms of the repair work, and the owner of the warehouse compensated defendant based on the hours worked by the work crew; (8) On 24 June 1997, plaintiff sustained severe injuries when he fell through a skylight in the warehouse roof and landed on the concrete floor inside the warehouse; (9) Plaintiff's injuries arose out of and in the course of his employment with defendant; (10) On 24 June 1997, Leonard Collier and Colely were also working on the warehouse roof and were regularly employed by defendant; and (11) Defendant had three employees regularly employed in his construction business at the time of plaintiff's injury on 24 June 1997.

The Full Commission found that defendant's testimony that his construction business was a partnership with Leonard Collier, and that Leonard Collier was therefore not an employee of the business, was not credible. The Commission concluded that defendant was

operating his business as a sole proprietor and that he regularly employed three or more employees; consequently, the Commission concluded that defendant was subject to the provisions of the North Carolina Workers' Compensation Act. Additionally, the Commission concluded that plaintiff's injury arose out of and in the course of his employment with defendant, thereby entitling plaintiff to payment by defendant for all medical expenses arising from his injury.

The sole question presented in defendant's brief, corresponding to assignments of error 8 and 10, is whether the Commission erred in finding and concluding that defendant regularly employed at least three employees and was therefore subject to the Workers' Compensation Act, N.C. Gen. Stat. §§ 97-1 *et seq.* (1999). Defendant argues that this finding is not supported by any competent, credible evidence of record and that there are no additional findings supported by competent, credible evidence that would support this conclusion. We conclude that the Commission committed no error.

The North Carolina Workers' Compensation Act applies only to those private employers "in which three or more employees are regularly employed in the same business or establishment[.]" N.C. Gen. Stat. § 97-2(1) (1999). The Act does not define the phrase "regularly employed," but this Court has determined that it "connotes employment of the same number of persons throughout the period with some consistency." *Patterson v. L.M. Parker & Co.*, 2 N.C. App. 43, 48-49, 162 S.E.2d 571, 575 (1968); *see Cousins v.*

Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970); *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E.2d 3 (1982). The question of whether an employer "regularly employs" the requisite number of employees is a question of jurisdictional fact, and "the reviewing court is required to review and consider the evidence and make an independent determination" thereon. *Durham*, 59 N.C. App. at 170, 296 S.E.2d at 6.

Defendant argues in his brief that plaintiff, Leonard Collier and Colely were not his employees but rather were independent contractors pursuant to the eight-factor test discussed by this Court in *Williams v. ARL, Inc.*, 133 N.C. App. 625, 516 S.E.2d 187 (1999). In *Williams*, this Court stated that "[t]he question of whether a relationship is one of employer-employee or independent contractor turns upon 'the extent to which the party for whom the work is being done has the right to control the manner and method in which the work is performed.'" 133 N.C. App. at 630, 516 S.E.2d at 191 (quoting *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74, 79, 511 S.E.2d 9, 13 (1999)). In determining the degree of control exercised by the hiring party, we must consider eight factors, no one of which is determinative, including whether the alleged employee:

> (a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other

> contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Hayes v. Elon College, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944); *see Fulcher*, 132 N.C. App. at 77, 511 S.E.2d at 12; *Williams*, 133 N.C. App. at 630, 516 S.E.2d at 191.

In the instant case, plaintiff presented testimony before Deputy Commissioner Hedrick that: (1) Plaintiff was employed by defendant at the time of his injury; (2) Prior to his injury, plaintiff had worked for defendant off and on for four or five years and had worked continuously on various jobs for about a month prior to his injury; (3) Plaintiff could not have worked for defendant without defendant's approval; (4) In June 1997, Leonard Collier and Jed Colely were also employed by defendant; (5) Like plaintiff, Leonard Collier and Colely had worked for defendant off and on for some time; (6) Plaintiff was paid in cash weekly by defendant; (7) Defendant routinely worked alongside the other employees; (8) As far as plaintiff knew, Leonard Collier worked for defendant; and (9) Plaintiff was not hired by Leonard Collier but instead by defendant.

Defendant presented testimony on his own behalf as follows: (1) Defendant is not in business and is not a contractor but instead is "self-employed"; (2) Defendant "pick[s] up odd people" as needed but does not "hire that many"; (3) Defendant operates "just a small business" but is not a "big contractor"; (4) Like defendant, Leonard Collier is "in business," and "he hires--he hires, picks up--when we need something, he picks up a couple [of workers] if we

need them"; and (5) Defendant left the decision to hire plaintiff up to Leonard Collier.

On cross-examination, defendant testified that there was no written agreement or estimate for the work being performed when plaintiff was injured and reiterated that his was just "a small business." Defendant indicated that the people working with him were supposed to look after their own insurance and taxes and that he typically had workers sign a form to that effect; however, he did not have a signed form for plaintiff. Defendant testified that Colely was also on the payroll at the time of plaintiff's injury but that Colely was a "hit and run" type of worker. According to defendant, no specific stopping day was discussed with plaintiff; rather, defendant's workers would typically continue working until work slowed, at which time workers "would get laid off" until work picked up again.

The evidence presented to Deputy Commissioner Hedrick does not support defendant's contention that plaintiff, Leonard Collier, and Colely were independent contractors according to the eight-factor test discussed in *Williams*. There is no indication that plaintiff or Colely were "engaged in an independent business, calling or occupation"; that plaintiff, Leonard Collier or Colely had "the independent use of [] special skill[s], knowledge, or training in the execution of the work"; that plaintiff, Leonard Collier or Colely were "doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis"; that the workers had discretion to "adopt[] one method of doing the work rather than

another"; that plaintiff and Colely were "not in the regular employ of" defendant; that plaintiff, Leonard Collier or Colely were "free to use such assistants as [they] may think proper"; that the workers "ha[d] full control over such assistants"; or that plaintiff, Leonard Collier and Colely selected their own working hours. *See Williams*, 133 N.C. App. at 630, 516 S.E.2d at 191.

To the contrary, there was ample evidence that plaintiff, Leonard Collier and Colely were all employed by defendant; that they had little or no specialized skills, knowledge or training; that they were regularly paid weekly based on the hours they had worked; that they performed their work under defendant's supervision and according to his direction; that workers were hired or laid off at defendant's direction; and that the workers showed up to work at the appropriate time and place as dictated by defendant. *See id.* Accordingly, we conclude that the Full Commission committed no error in finding and concluding that defendant regularly employed three or more employees and is therefore subject to the provisions of the Workers' Compensation Act. The defendant's assignment of error is without merit.

Affirmed.

Judges CAMPBELL and BIGGS concur.

Report per Rule 30(e).