

NO. COA99-1613

NORTH CAROLINA COURT OF APPEALS

Filed: 29 December 2000

GERRI JAMES, WIDOW, AND CASEY  
AND DALTON JAMES, MINOR CHILDREN  
OF DAVID C. JAMES, Deceased.  
Employee, Plaintiffs,

v.

COMMUNICATION SERVICES, INC.  
Employer

North Carolina  
Industrial Commission  
I.C. No. 741010

SELF-INSURED/KEY RISK MANAGEMENT  
SERVICES, INC.  
Servicing Agent, Defendant.

Appeal by plaintiff from the Opinion and Order filed 14 September 1999 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 8 November 2000.

On 2 July 1997, David C. James was installing a telephone line in Lexington, North Carolina, when he was accidentally electrocuted and killed. At the time of his death, Mr. James was performing the telephone line installation on behalf of Communication Services, Inc. (CSI). Mr. James' wife, Mrs. Gerri James, filed a Notice of Accident to Employer on 5 September 1997, seeking death benefits under the North Carolina Workers' Compensation Act for herself and two minor children. CSI denied Mrs. James' claim on the grounds that Mr. James was not its employee at the time of his unfortunate death. A Deputy Commissioner of the North Carolina Industrial Commission concluded that the Commission lacked jurisdiction to hear Mrs. James' claim because Mr. James was an independent

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Court of Appeals Slip Opinion

contractor at the time of his death and thus was not subject to the Workers' Compensation Act. Mrs. James appealed to the Full Commission, which adopted the Deputy Commissioner's Opinion and Order, with one Commissioner dissenting. Plaintiffs now appeal from the Full Commission's decision.

*McCall Doughton & Blancato, P.L.L.C., by Thomas J. Doughton, for plaintiff appellants.*

*Womble Carlyle Sandridge & Rice, P.L.L.C., by Clayton M. Custer and Christina U. Douglas, for defendant appellees.*

HORTON, Judge.

Plaintiffs contend that the Industrial Commission erred in dismissing plaintiffs' claim for lack of subject matter jurisdiction and maintain that, at the time of his fatal accident, Mr. James was an employee rather than an independent contractor. In support of their argument, plaintiffs note that Mr. James worked regularly for CSI and performed essentially the same work throughout his relationship with CSI. Moreover, plaintiffs point out that CSI provided valuable equipment to Mr. James and required him to abide by a dress code. Plaintiffs argue that these factors, among others, establish Mr. James' status as an employee of CSI. We do not agree.

In order for a claimant to receive benefits under the Workers' Compensation Act, an employee-employer relationship must exist at the time of the injury or death. *McCown v. Hines*, \_\_ N.C. App. \_\_, \_\_, \_\_ S.E.2d \_\_, \_\_\_ (filed 7 November 2000). The existence of an employee-employer relationship is a jurisdictional issue.

*Barber v. Going West Transp., Inc.*, 134 N.C. App. 428, 430, 517 S.E.2d 914, 917 (1999). Because independent contractors are excluded from the provisions of the Workers' Compensation Act, the Industrial Commission has no jurisdiction to hear cases concerning such workers. *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437, reh'g denied, 322 N.C. 116, 367 S.E.2d 923 (1988). Findings of jurisdictional fact by the Commission are not conclusive upon appeal; rather, this Court reviews the evidence of record and makes an independent determination of decedent's employment status at the time of his death. *Barber*, 134 N.C. App. at 430, 517 S.E.2d at 917. Ordinary common law principles guide the Court in its determination. *Id.*

An independent contractor is defined at common law as "one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." *Youngblood*, 321 N.C. at 384, 364 S.E.2d at 437. A relationship of employer and employee may be created, however, where the party for whom the work is being done retains the right to control and direct the manner in which the details of the work are to be executed. *Id.* To determine the status of independent contractor, our courts generally apply the following factors, no one of which is determinative:

The person employed (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.

*McCown*, \_\_\_ N.C. App. at \_\_\_, \_\_\_ S.E.2d at \_\_\_. Moreover, the intent of the parties may also be helpful in determining the existence of an employee-employer relationship. *State ex rel. Employment Security Comm. v. Paris*, 101 N.C. App. 469, 472, 400 S.E.2d 76, 78, affirmed per curiam, 330 N.C. 114, 408 S.E.2d 852 (1991).

After reviewing the evidence of record and applying the foregoing factors in the instant case, we agree with the conclusion of the Full Commission that Mr. James was an independent contractor at the time of his death. First, and most notably, there was strong evidence before the Commission to indicate that Mr. James was engaged in an independent business. Testimony revealed that Mr. James had been a regular employee of CSI until May 1995, at which time he left the company and started a business called "James Trenching." For that purpose, Mr. James printed business cards, opened a business bank account, and purchased commercial general liability insurance from North Carolina Farm Bureau Mutual Insurance Company. He also obtained workers' compensation insurance, but elected not to cover himself. Mr. James also bought his own truck and equipment, including a pager and cellular telephone. Mr. James, doing business as James Trenching and using

his own equipment, then began performing work on a contract basis for CSI. As a result, Mr. James' income from CSI increased from approximately \$19,000 to \$60,000 a year.

Second, it is clear that Mr. James independently utilized his own skill and training in performing his work. He was free to choose the manner and method of scheduling and completing his work according to his own judgment. Mr. James was also responsible for absorbing the costs of any substandard work. The President of CSI, Mr. Victory, testified that any mistakes at the job site would have been "deducted . . . from Mr. James' pay[,] " adding that "[i]f [Mr. James] had not done [the work] correctly and had to redo it, he would have paid for it." Mr. Victory also testified that Mr. James was paid a fixed rate, which was determined based on Mr. James' method of installation. Finally, Mr. James hired his own assistants without any input from CSI.

We find that Mr. James deliberately chose to become -- and considered himself to be -- an independent contractor. From 1995, he declared himself as self-employed on his income tax returns and claimed depreciation and other business expenses as deductions. When Mr. James stopped working for CSI as an employee and became an independent contractor, he gave up numerous benefits, such as company-provided health and dental insurance, a 401(k) plan, and paid vacation and holidays. In return, Mr. James enjoyed a substantial increase in his gross pay.

In light of the evidence of record and the intent of the parties as shown by that evidence, we find that the Industrial

Commission correctly determined that Mr. James was an independent contractor at the time of his death. Accordingly, we affirm the Full Commission's dismissal of the case for lack of subject matter jurisdiction. Because we find that the parties are not subject to the Workers' Compensation Act in this matter, we need not address plaintiffs' further argument that defendant failed to comply with the requirements of such Act.

The Opinion and Order of the Industrial Commission is  
Affirmed.

Judges LEWIS and MCGEE concur.

Report per Rule 30(e).