NO. COA11-759
NORTH CAROLINA COURT OF APPEALS

Filed: 17 January 2012

PAUL MOOSE, Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. Nos. 804798 and PH-1959

DIANE WATKINS,
Employer, Non-Insured,

and

DIANE WATKINS,
Individually,
Defendants.

Appeal by plaintiff from opinion and award entered 29 April 2011 by North Carolina Industrial Commission. Heard in the Court of Appeals 15 November 2011.

Roger W. Rizk for plaintiff appellant.

Mullen Holland & Cooper, P.A., by James R. Martin and Jason R. Shoemaker, for defendant appellees.

McCULLOUGH, Judge.

Paul Moose ("plaintiff") appeals the Full Commission's opinion and award dated 29 April 2011, in which the Full Commission denied plaintiff's claim for disability benefits

arising out of an injury supposedly suffered on 25 November 2006 while working for Diane Watkins, employer and individual, (collectively "defendant"). For reasons discussed herein, we affirm the opinion and award of the Full Commission.

I. Background

Defendant is a registered nurse who owns five mill houses in Cramerton, North Carolina. The houses served as places for her relatives to live rent free, but defendant and her husband hoped that down the road the houses might provide some retirement funds. According to defendant, the houses occasionally needed renovations and repair work. However, she did not have a business related to the repair of the mill houses. In September 2006, plaintiff needed some HVAC work done on one of the houses, so a friend, Eddie Bingham, introduced her to plaintiff. Mr. Bingham served as defendant's general contractor and set his own hours, weekly schedule, and oversaw other people working for him. Mr. Bingham also controlled how he produced his final product in any project.

Defendant met with plaintiff and his wife where she told them that she had a small project that she would pay by the hour and another one in a different house that plaintiff could submit a bid on. Plaintiff and defendant agreed that plaintiff would be paid $30.00 an hour for the small project, which would be

split between plaintiff and his son because plaintiff was limited due to a neck injury. Plaintiff told her that he had a pending workers' compensation claim and could not be seen working. As a result of the agreement, plaintiff would receive $20 an hour to mainly supervise his son, who would receive $10 an hour. He would be paid every Friday at 4:00 p.m. after submitting time sheets to defendant. Defendant had initially given money to Mr. Bingham to pay the workers, but Mr. Bingham was not very trustworthy which resulted in defendant having to pay the workers directly. Defendant did not withhold federal or state income taxes or social security from any of the workers' pay.

Plaintiff claims that he only provided his tool belt and hammer with defendant supplying all the other tools and materials. Defendant, on the other hand, claims that contractors typically provided their own tools. She did admit to having acquired some tools during the process of renovating the mill houses and that she would occasionally lend out these tools through a friend, Don Martin. Mr. Martin would sometimes even lend out his own tools if he felt that they would not be stolen or broken. Mr. Bingham also had a majority of the necessary tools. Defendant further noted an instance in which she purchased a nail gun for a worker, but on his approval, she

docked his pay for reimbursement and the worker kept the nail gun upon satisfaction.

Plaintiff also claims that he was to follow the specific instructions of defendant. He contends defendant would show up every day to supervise, direct, and inspect. Defendant, on the other hand, claims she would show up just to make sure workers were physically present so she would know that they were filling out their time sheets accurately.

Occasionally, plaintiff's work would not pass inspection and the building inspector would have him redo it. On or about 25 November 2006, plaintiff had asked for more work and was helping other workers build a deck on one of the houses. The deck did not meet the inspector's requirements, so it had to be ripped off and redone. The workers were setting a girder A brace across the bottom of the deck, and plaintiff was holding one end of it when it hit the top of his head, bouncing off onto his shoulder. He said that he was stunned, but unaware of any immediate damage to his neck. However, two days later he could not move his arm and could barely pick anything up, so he went to the emergency room. He received an MRI, which showed three herniated discs and one torn disc with a pinched nerve. Plaintiff then went to Dr. Herman Gore, an orthopedic surgeon with Carolina Spine, Pain and Rehabilitation, where he received

epidural injections. Dr. Gore recommended physical therapy, but due to a lack of Medicaid, plaintiff could not afford it. In 2007, plaintiff saw Dr. Lee D. Barro, a primary physician, who prescribed him medications. Dr. Barro told plaintiff that he could not continue to treat plaintiff until plaintiff saw a pain specialist, but plaintiff could not afford one. Plaintiff eventually went to Gaston Primary Care on 1 April 2008. He went there for fourteen months, paying $60.00 a month for care. Plaintiff had not been able to work since the MRI on 21 January 2007.

Plaintiff filed a Form 18 Employee Notice of Accident with the Industrial Commission on 31 October 2007, almost a year after the accident. Defendant claims that plaintiff was not even working on 26 November 2006, which was a Saturday. She said that he continued working for a little over a month after the alleged accident and that he then just disappeared. She was under the impression that he had to stop working due to diabetes. Plaintiff filed a Form 33 on 7 November 2007, requesting a hearing to award temporary total, partial, or permanent disability benefits with appropriate medical care. On 21 April 2008, defendant filed a Form 33R, arguing that no employment relationship existed. Defendant then filed a motion to dismiss on the eve of the 16 November 2008 hearing, which the

deputy commissioner granted on 9 December 2008 after declining to hear testimony.

Plaintiff subsequently filed an application for review to the Full Commission on 10 December 2008. On 26 August 2009, the Full Commission reversed the 9 December 2008 opinion and award and remanded the case for the taking of evidence. The deputy commissioner held a hearing on 11 February 2010 and entered a new opinion and award on 14 July 2010, concluding defendant was subject to the jurisdiction of the Commission; an employer/employee relationship did exist; awarding benefits; and fining defendant for failing to procure workers' compensation insurance. Defendant filed an application for review and on 29 April 2011, the Full Commission entered another opinion and award denying plaintiff's claim based on the reasoning that defendant was an owner of or builder on the property and not an employer. Plaintiff filed his notice of appeal on 19 May 2011.

II. Analysis

Plaintiff raises two issues on appeal. Plaintiff's first issue is more of a preliminary one in arguing that the Full Commission erred in determining defendant was merely the owner of the property on which plaintiff suffered his injury and not subject to the jurisdiction of the North Carolina Workers' Compensation Act (the "Act") pursuant to N.C. Gen. Stat. § 97-19

(2009) (establishing liability on any "principal contractor, intermediate contractor, or subcontractor" who sublets a contract to another without requiring the showing of a certificate of workers' compensation insurance). Plaintiff contends the issue should be whether or not defendant was his employer and thus whether or not plaintiff was defendant's employee or an independent contractor. We agree with plaintiff.

> Because this [issue] raises the jurisdictional question of whether an employment relationship within the Act existed between plaintiff and [defendant] at the time of the accident, the jurisdictional facts found by the Commission, though supported by competent evidence, are not binding on this Court. *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 364 S.E.2d 433 (1988) (and cases cited therein). Instead, we are required to review the evidence of record and make independent findings of jurisdictional facts established by the greater weight of the evidence with regard to plaintiff's employment status. *Id.*

Cook v. Norvell-Mackorell Real Estate Co., 99 N.C. App. 307, 309, 392 S.E.2d 758, 759 (1990).

Plaintiff contends the Full Commission erred in relying on our decision in *Purser v. Heatherlin Properties*, 137 N.C. App. 332, 527 S.E.2d 689 (2000), in finding defendant to be solely the owner of the property and not a general contractor or statutory employer. Rather, plaintiff argues *Purser* is misapplied because his argument is not that defendant was a

general contractor and that he was a subcontractor, but that defendant was an employer and he was her employee.

Our decision in *Purser* applies to "the issue of whether the owner of a piece of property may also be its general contractor for purposes of N.C. Gen. Stat. § 97-19." *Id.* at 336, 527 S.E.2d at 692. However, we also stated that "[t]his statute does not apply to a situation wherein an employer directly hires an independent contractor." *Id.* The Full Commission misapplied our reasoning in *Purser* in relying on our holding that "[w]e have consistently rejected the concept that the owner of property may also be the general contractor for that property." *Id.* While this may be true, the analysis in the case at hand does not end there. The Full Commission was correct in determining defendant was not a general contractor and that plaintiff was not a subcontractor, but it failed to address the issue of whether plaintiff was an independent contractor or an employee of defendant. Thus, we must shift the discussion to plaintiff's second argument.

Plaintiff's overarching argument, as stated above, is that the Full Commission erred in determining that plaintiff was an independent contractor and not an employee of defendant. In Conclusion of Law 4, the Full Commission stated "[t]his engagement is nothing more than the owner of real property

hiring the services of an independent contractor to make improvements upon such real property." While we agree with the Full Commission's conclusion that defendant did have an independent contractor relationship with plaintiff, the Full Commission failed to go through the full analysis of whether defendant was an employee or an independent contractor.

"The term 'employment' includes . . . all private employments in which three or more employees are regularly employed in the same business or establishment[.]" N.C. Gen. Stat. § 97-2(1) (2009). "[T]he central issue in determining whether one is an independent contractor or an employee is whether the hiring party 'retained the right of control or superintendence over the contractor or employee as to details.'" *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74, 76-77, 511 S.E.2d 9, 11 (1999) (quoting *Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944)). In *Hayes,* our Supreme Court expressed a list of factors to weigh in determining whether a person is an employee or independent contractor. *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140. A person is generally an independent contractor if

> [t]he 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.

Id.

The factors tend to weigh in favor of considering plaintiff to be an independent contractor. We will briefly discuss our analysis of each factor. First, plaintiff worked in an independent occupation as noted by the fact that on the day before plaintiff's accident he had been to the hospital for chest pain where he listed M&M Custom Builders as his employer. He testified to this entity being a partnership with his son, but that it never reached fruition. Either way it tends to show that plaintiff was under the impression that he had an independent business. Next, plaintiff had independent use of his skills and knowledge in reaching the final products requested by plaintiff. Plaintiff presented himself as a "heating and air person – a technician" and he used his special skills to repair defendant's HVAC system, as well as to do some framing work. While defendant did check plaintiff's final product for satisfaction, she did not review how he went about producing the

ultimate product. The third factor is the only one that could possibly go either way. The testimony shows that defendant mostly worked on an hourly basis which would make him an employee, but he did have the opportunity to bid on a project for a fixed price. We do not believe this single factor is enough to outweigh the other seven.

In reviewing the fourth factor, defendant was clearly not subject to discharge for choosing one method of work over another. Defendant testified that she was unfamiliar with construction work and just desired that the final product be to her liking. On a few occasions she had to ask defendant to redo something because it did not pass inspection, but she did not threaten to fire him. She merely told him that he would not be paid for the rebuilding. Under the fifth factor, we cannot see how plaintiff could be considered a regular employee of defendant. "Regularly employed" is generally interpreted to mean the employment of the same number of employees throughout a period, with consistency. *Patterson v. Parker & Co.*, 2 N.C. App. 43, 49, 162 S.E.2d 571, 575 (1968). Plaintiff did not present any evidence that anyone else was an employee of defendant. The evidence tends to show that most of the people working on defendant's properties were employees of Mr. Bingham, the general contractor. They would not be considered regular

employees of defendant. Also, plaintiff only worked for defendant for approximately two to three months and he was only hired to work on two specific projects. This does not meet the burden of proof placed on plaintiff of showing that defendant regularly employed three or more employees. *See Cain v. Guyton*, 79 N.C. App. 696, 698, 340 S.E.2d 501, 503, *aff'd*, 318 N.C. 410, 348 S.E.2d 595 (1986).

Finally, the last three factors are fairly straight forward. Plaintiff contends that he did not have any assistants nor could he hire any, yet he had his son doing most of the work for him and earning a third of their pay. While he could not hire separate assistants, plaintiff's son could certainly be considered an assistant. Furthermore, plaintiff had control over how his son did the work. Plaintiff was the more experienced one who made sure his son did everything properly. Lastly, plaintiff did not present any evidence that defendant controlled his hours. He was asked to work forty hours a week, but he could decide when he arrived, when he took lunch, and when he left. Occasionally, defendant would stop by to check on the progression of work and make sure people were not sleeping on the job, but she did not specify when people were required to come and go. She did make plaintiff submit time sheets, but that was merely so she could verify his number of hours worked and

pay him the correct amount since Mr. Bingham failed at the task. Consequently, besides the one issue of having to submit time sheets and getting paid hourly, the evidence greatly favors finding plaintiff to have been an independent contractor while working for defendant. Thus, the Full Commission did not err in concluding that defendant hired plaintiff as an independent contractor.

III. Conclusion

Based on the foregoing, we affirm the decision of the Full Commission in concluding plaintiff was an independent contractor hired by defendant. Although the Full Commission erred in its reasoning in determining plaintiff was an independent contractor because defendant was merely the owner of the real property, it does not alter the final outcome of the case in that plaintiff was not an employee of defendant, but merely an independent contractor. Nonetheless, the Full Commission lacked jurisdiction because no employment relationship existed between plaintiff and defendant under the Act.

Affirmed.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).