NO. COA12-73
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

CYNTHIA PUTNAM,
Employee,
Plaintiff,

v.

SWEEP RITE INC., Alleged Uninsured Employer, and RANDALL S. JAMES and CHARLES HESS, III, Individually; and EXCEL PAYROLL PLUS, INC., Alleged Employer, HARTFORD UNDERWRITERS INSURANCE CO., Carrier,
Defendants.

North Carolina Industrial Commission
I.C. Nos. 893717 & PH-2076

Appeal by defendants Excel Payroll Plus, Inc. and Hartford Underwriters Insurance Co. from opinion and award entered 6 October 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 May 2012.

David Gantt, for plaintiff-appellee, Cynthia R. Putnam.

Leicht & Associates, by Gene Thomas Leicht, for defendant-appellees, Sweep Rite, Inc., Randall S. James, and Charles Hess, III.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Shelley W. Coleman and M. Duane Jones, for defendant-appellants Excel Payroll Plus, Inc. and Hartford Underwriters Insurance Co.

STROUD, Judge.

Defendants Excel Payroll Plus, Inc. and Hartford Underwriters Insurance Co. appeal opinion and award requiring Hartford Underwriters Insurance Co. to pay disability benefits to plaintiff and medical treatment for plaintiff. For the following reasons, we remand for further findings of fact and conclusions of law consistent with those findings.

I. Background

On 6 October 2011, the Full Commission of the North Carolina Industrial Commission ("Commission") issued an opinion and award finding that in 2006 defendant Sweep Rite, Inc. ("Sweep Rite") entered into a contract with Excel Employment Services whereby Excel Employment Services would obtain workers' compensation coverage on behalf of Sweep Rite's employees. Excel Employment Services assigned the responsibility of obtaining the workers' compensation coverage to defendant Excel Payroll Plus, Inc. ("Excel"). Excel obtained insurance from Hartford Underwriters Insurance Co. ("Hartford").

Plaintiff claimed that she sustained a compensable injury on 13 August 2007 while working for Sweep Rite. However, the Commission found that plaintiff did not begin "training" with Sweep Rite until "late August 2007[.]" The Commission further found that plaintiff was injured "the next night after

training." The Commission concluded that "[o]n or about August 22, 2007, Plaintiff sustained a compensable injury by accident[;]" plaintiff was employed by defendants Sweep Rite and Excel "at the time of her injury[;]" and because plaintiff was employed by Excel, Hartford "shall provide workers' compensation coverage[.]"

The Commission ordered defendant Hartford to pay plaintiff disability benefits "effective August 22, 2007 and continuing at the rate of $134.00 per week until Plaintiff has returned to suitable employment" and for her "necessary and reasonable medical treatment for Plaintiff's back and mental injuries, including bills already incurred from her injuries so long as such treatment tends to provide relief, effect a cure and lessen Plaintiff's period of disability." Defendants Excel and Hartford (collectively "defendants") appeal.

II. Defendants' Appeal

> On review of a decision of the Commission, we are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law. An appellate court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.
>
> The Full Commission is the sole judge of the weight and

> credibility of the evidence. Moreover, the Commission must make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends.

Furthermore,

> it is impossible to exaggerate how essential the proper exercise of the fact-finding authority of the Industrial Commission is to the due administration of the Workmen's Compensation Act. The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. It is obvious that the court cannot ascertain whether the findings of fact are supported by the evidence unless the Industrial Commission reveals with at least a fair degree of positiveness what facts it finds. It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend.

. . . For an injury to be compensable under the Worker's Compensation Act, the claimant must prove three elements: (1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury

> arose out of the employment; accordingly, findings of fact regarding these elements are crucial facts upon which the question of plaintiff's right to compensation depends.

McAdams v. Safety Kleen Systems, Inc., ___ N.C. App. ___, ___, 720 S.E.2d 896, 898-99 (2012) (citations, quotation marks, ellipses, and brackets omitted).

Defendants Excel and Hartford argue that "the Full Commission erred in concluding [(1)] plaintiff sustained a compensable injury by accident" and (2) "plaintiff was an employee of defendant-appellant" Excel. (Original in all caps.) Both of defendants' arguments focus on when plaintiff began employment in relation to when she was injured. Here, the Commission did not find that plaintiff was either employed or injured on any specific date. Due to the Commission's non-specific findings of fact, we are unable to determine if defendants' arguments have any merit as they require knowledge of the date of employment in relation to the date of injury; even if the dates are not specifically provided by the Commission, this Court would, at the very least, need findings of fact asserting that plaintiff was indeed injured after the date of her employment, particularly in a case such as this, where there was wildly conflicting evidence regarding the dates

of employment and injury.[1] *See McAdams* at ___, 720 S.E.2d at 898-99; *contrast Gregory v. W.A. Brown & Sons*, 192 N.C. App. 94, 664 S.E.2d 589 (2008) (determining the plaintiff need not prove a specific date of injury wherein it was uncontested that she was an employee at the time of the injury), *rev'd in part on other grounds and remanded*, 363 N.C. 750, 688 S.E.2d 431 (2010); *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 449 S.E.2d 233 (1994) (determining the plaintiff need not prove a specific date of injury wherein it was uncontested that he was an employee at the time of the injury), *cert. denied*, 339 N.C. 737, 454 S.E.2d 650 (1995).

III. Conclusion

For the foregoing reasons, we remand for further findings of fact and conclusions of law consistent with those findings.

REMANDED.

Judge HUNTER, Robert C.concurs.

Judge ERVIN dissents in a separate opinion.

Report per Rule 30(e).

[1] As we have concluded that we must remand this case we need not address defendants' second argument on appeal. We do however note that were we to consider this issue, we agree with the dissent in concluding "that Defendant Excel was liable to Plaintiff for workers' compensation benefits and that Defendant Hartford must pay those benefits."

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Defendants.

ERVIN, Judge dissenting.

After a careful review of the record in light of the applicable law, I am unable to agree with my colleagues that the Commission erred by failing to "find that plaintiff was either employed or injured on any specific date" or determine "that plaintiff was indeed injured after the date of her employment" given the "wildly conflicting evidence regarding the dates of employment and injury." As a result, given my conclusion that the Commission's findings of fact adequately address the issue about which my colleagues are concerned, that the record evidence supports the Commission's determination that Plaintiff

was injured during the course and scope of her employment with Defendant Sweep Rite, and my conclusion that the Commission did not err by holding that Plaintiff was entitled to workers' compensation benefits under the coverage procured by Defendant Excel, I would affirm the Commission's order.

I. Adequacy of the Commission's Compensability Determination

Appellate review of a Commission order in a workers' compensation proceeding is "limited to [determining] whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law[,]" with the Commission serving as the sole judge of the weight and credibility of the evidence. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "[I]f the totality of the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission's findings, these findings are conclusive on appeal even though there may be plenary evidence to support findings to the contrary." *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390-91 (1980) (citations omitted). The Commission's conclusions of law, on the other hand, are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004). After examining the Commission's order utilizing this

standard of review, I conclude that the Commission adequately determined that Plaintiff sustained a compensable injury to her back at a time when she was employed by Defendant Sweep Rite.

According to well-established North Carolina law, "'[t]he Commission must make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends.'" *McAdams v. Safety Kleen Systems, Inc.*, __ N.C. App. __, __, 720 S.E.2d 896, 898 (2012) (emphasis omitted) (quoting *Sheehan v. Perry M. Alexander Constr. Co.*, 150 N.C. App. 506, 510-11, 563 S.E.2d 300, 303 (2002)).

> "For an injury to be compensable under the Worker[]s['] Compensation Act, the claimant must prove three elements: (1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment[;]" accordingly, findings of fact regarding these elements are "crucial facts upon which the question of plaintiff's right to compensation depends."

Id. at __, 720 S.E.2d at 899 (quoting *Hollar v. Furniture Co.*, 48 N.C. App. 489, 490, 269 S.E.2d 667, 669 (1980), and *Sheehan*, 150 N.C. App. at 511, 563 S.E.2d at 303). "[T]he . . . Commission ha[s] a duty to make findings of fact which [a]re 'more than a mere summarization or recitation of the evidence,' and which resolve[] any conflicting testimony." *Munns v. Precision Franchising, Inc.*, 196 N.C. App. 315, 318-19, 674

S.E.2d 430, 434 (2009) (quoting *Lane v. American Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008)).

In support of its determinations that, "[o]n or about August 22, 2007, Plaintiff sustained a compensable injury by accident to her back" and that "[a]n employment relationship existed between Plaintiff and Defendant[s] . . . at the time of her injury . . . ," the Commission made the following findings of fact:

> 7. In late August 2007, Plaintiff met Ronnie Roland, supervisor for Defendant Sweep Rite, Inc., and Andrew Horton in a Walmart parking lot in Sylva, North Carolina to receive training on the use of the equipment and cleaning the large parking lots, which included instructions on the snow shovel that removed trash from a sweeper to a dumpster. . . .
>
> 8. Plaintiff was trained to crank the equipment, blow trash out of the parking lots, change trash cans, and shovel debris. Plaintiff began her duties at 9:00 p.m. and completed her night of work at 2 a.m.
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> 9. [Charles] Hess testified that he thought Plaintiff was hired "around the date of August 24th" by Mr. Roland. . . .
>
> . . . .
>
> 14. Plaintiff began working the next night after training. Plaintiff was working alone and was unable to get a machine working. Plaintiff called her husband to come assist her. While Plaintiff waited for her husband, she emptied the trash cans and

blew trash off the parking lots. Plaintiff had completed cleaning the fifth parking lot when she lifted too much with the snow shovel and felt a painful sensation extend from her buttocks down from her legs to her feet.

15. Plaintiff testified that immediately after her injury, she reported it to Mr. Ronnie Rowland, who was the supervisor for Sweep Rite, Inc. . . .

16. Mr. Hess testified that around September 21, 2007, he received a phone call from Plaintiff reporting that she hurt her back while working for Sweep Rite. . . .

. . . .

19. On August 22, 2007, Plaintiff went to the Haywood Regional Medical Center complaining of acute lower back pain that had persisted for two weeks before worsening.[2] Plaintiff had previously complained of back and neck pain to her family physician, Dr. Michael Brown at Hazelwood Family Medicine, prior to her injury in August 2007. . . .

20. . . . . Plaintiff explained to Dr. Brown that she had injured her back when she was sweeping and shoveling trash with a sweeper. . . .

. . . .

22. Dr. Brown's expert medical opinion was that Plaintiff's injury by accident in mid-August 2007, "significantly contributed" to her back problems. . . .

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[2]Although the record appears to suggest that Plaintiff indicated that her pain had existed for three rather than two weeks on this occasion, I do not believe that this minor error has any effect on the proper resolution of this case.

> 23. . . . . The intake sheet of [Plaintiff's 17 September 2007 appointment with Dr. Jeffrey Albea of Mountain Spine] indicated that Plaintiff's severe back pain began in August of 2007. . . .
>
> 24. . . . . Dr. Miller [of Mountain Spine] opined that Plaintiff's back problem was a chronic problem and that any twisting motion such as the injury by accident of August 2007 that Plaintiff sustained, would have aggravated Plaintiff's chronic back pain.
>
> . . . .
>
> 29. Susan Marks, M.S.W., . . . with the Life Counseling Center, P.A., began working with Plaintiff on December 20, 2007. Plaintiff told Ms. Marks that she had been injured at work, but was not specific on the details. . . .

As the record reflects, Plaintiff testified that she began working for Defendant Sweep Rite in late July 2007 and that she was injured on 13 August 2007, which was the last night on which she worked. At that time, Plaintiff was "shoveling . . . trash [when she] lifted too much [and] felt a sensation go down [her] right buttocks, down [her] leg, and into [her] foot," putting her "in a lot of pain[.]" Although Plaintiff concedes that she "listed several dates of injury and treatment that are inconsistent with the [r]ecord[,]" she notes that she "is a horrible historian" because of her "extensive pre-existing mental history of Bipolar and Personality Disorder ailments" and

that the date of injury given in her testimony should only be treated as an approximation.

In remanding the Commission's decision, the Court has concluded, consistently with a contention advanced by Defendants Excel and Hartford, that the Commission failed to make sufficient findings of fact to the effect that "[P]laintiff was indeed injured after the date of her employment." In addition, Defendants Excel and Hartford also contend that Plaintiff failed to prove that her "injury arose out of her employment with Defendant[] Sweep Rite." In support of their challenges to the Commission's decision, Defendants Excel and Hartford assert that (1) the Commission merely made general findings of fact concerning the date upon which Plaintiff began working for Defendant Sweep Rite; (2) the only competent evidence in the record concerning the date upon which Plaintiff became an employee of Defendant Sweep Rite supports a finding that this employment relationship began on 24 August 2007; (3) Plaintiff's testimony concerning the date of her injury and the date of her employment is incompetent and insufficient to support a determination that Plaintiff was employed by Defendant Sweep Rite prior to 24 August 2007; (4) the Commission made no findings of fact to the effect that Plaintiff was employed by Defendant Sweep Rite on 22 August 2007; and (5), given all these

deficiencies in its order, the Commission erred by concluding that Plaintiff suffered a compensable injury by accident during the course and scope of her employment with Defendant Sweep Rite. I am not persuaded that any of these arguments are valid.

N.C. Gen. Stat. § 97-2(6) provides, in pertinent part, that "'[i]njury and personal injury' shall mean only injury by accident arising out of and in the course of the employment," including, "[w]ith respect to back injuries, . . . any disabling physical injury to the back aris[ing] out of and causally related to . . . [a specific traumatic] incident [of the work assigned.]" "'[T]he case law interpreting the specific traumatic incident provision of N.C. Gen. Stat. § 97-2(6) requires the plaintiff to prove an injury at a cognizable time, [but] this does not compel the plaintiff to allege the specific hour or day of the injury.'" *Crane v. Berry's Clean-Up & Landscaping, Inc.*, 169 N.C. App. 323, 329, 610 S.E.2d 464, 468 (2005) (quoting *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 708, 449 S.E.2d 233, 237 (1994) (holding that evidence that the plaintiff's injury occurred during a specific three to four week period was sufficient to support an award of workers' compensation benefits), *cert. denied*, 339 N.C. 737, 454 S.E.2d 650 (1995)); *see also Gregory v. W.A. Brown & Sons*, 192 N.C. App. 94, 102-03, 664 S.E.2d 589, 594-95 (2008) (holding that the

Commission did not err by determining that an employee's back injury occurred during a "judicially cognizable time" given that, even though the plaintiff's employment records established that she did not injure her back on the date set out in her testimony, the record did support a determination that her injury occurred in a specified range of time), ***rev'd in part on other grounds***, 363 N.C. 750, 688 S.E.2d 431 (2010). The term "[j]udicially cognizable does not mean 'ascertainable on an exact date[;]' [i]nstead, the term should be read to describe a showing by [the] plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred." ***Fish***, 116 N.C. App. at 709, 449 S.E.2d at 238 (emphasis omitted). As a result, contrary to the implications of the Court's decision, there simply is no requirement that "the Commission . . . find that [P]laintiff was either employed or injured on any specific date."[3]

Although the record does not paint a consistent picture concerning the exact date upon which Plaintiff was initially employed by Defendant Sweep Rite or the date upon which

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[3]The Court appears to believe that ***Gregory*** and ***Fish*** are distinguishable from this case because "it was uncontested [in those cases] that [the plaintiff] was an employee at the time of the injury. I have not, however, found anything in either ***Gregory*** or ***Fish*** tending to suggest that the fact upon which my colleagues rely made any difference in the outcome reached in either of those cases.

Plaintiff was allegedly injured, the Commission found as a fact that "Plaintiff began working the . . . night after training [and that, after she] had completed cleaning the fifth parking lot . . . [,] she lifted too much with the snow shovel and felt a painful sensation extend from her buttocks down from her legs to her feet." Thus, the Commission clearly found Plaintiff's testimony concerning the circumstances which led to her alleged injury to be credible.[4] As a result, although there would have been ample record support for a Commission determination that Plaintiff was injured prior to the beginning of her employment with Defendant Sweep Rite, Plaintiff's testimony "tends directly or by reasonable inference to support the Commission's findings [as to how Plaintiff's injury occurred and], these findings are conclusive on appeal . . . ." *Click*, 300 N.C. at 166, 265 S.E.2d at 390-91 (holding that, even though the plaintiff gave conflicting stories concerning the cause of his injury, the fact that one of the plaintiff's descriptions of the circumstances which led to his injury adequately supported the Commission's determination that the plaintiff had sustained an injury by accident in the course and scope of his employment sufficed to

[4]Although Defendants appear to argue that Plaintiff's testimony was incompetent for what seem to be credibility-related reasons, I see no justification, in light of the evidence contained in the record, for holding that the Commission was not entitled to credit and base factual findings upon Plaintiff's testimony.

require affirmance of the Commission's decision with respect to that issue).

In addition, although Plaintiff may not have been able to show that the 13 August 2007 date specified in her initial filings with the Commission was the exact date upon which her alleged injury occurred, as Defendants appear to suggest that she was required to do, the record contained sufficient evidence to permit the Commission to "determine when, within a reasonable period, the specific injury occurred." *Fish*, 116 N.C. App. at 709, 449 S.E.2d at 238. In its order, the Commission determined that Plaintiff had sustained a compensable injury by accident "on or about [22] August [] 2007." Even if Plaintiff's injury did not occur on 13 August 2007, as Plaintiff initially alleged, or on 22 August 2007, as Defendants contend that the Commission found, the record permits a reasonable inference that Plaintiff was, as the Commission explicitly determined, injured "on or about" 22 August 2007 when she was employed by Defendant Sweep Rite. Although I do not, for the reasons set forth above, agree with Defendants and my colleagues that the exact "date [upon which] Plaintiff became employed, and the relationship of that specific date with the date Plaintiff injured her back, is a material fact" upon which Plaintiff's right to receive workers' compensation benefits depends, I am unable to conclude, given

its findings that Plaintiff injured her back at a specified approximate time when she was working for Defendant Sweep Rite, that the Commission has not made the essential findings that my colleagues and Defendants believe to be necessary. In other words, I believe that the Commission did, in fact, adequately find "that [P]laintiff was indeed injured after the date of her employment." As a result, unlike my colleagues, I believe that we should reject Defendants' challenge to the Commission's compensability determination and proceed to address the remaining argument advanced by Defendants Excel and Hartford.

II. Employment by Defendant Excel

In their second challenge to the Commission's order, Defendants Excel and Hartford contend that the Commission erred by concluding that Plaintiff was an employee of Defendant Excel and covered by the policy of workers' compensation insurance issued by Defendant Hartford. In support of this contention, Defendants Excel and Hartford cite ***Hughart v. Dasco Transp., Inc.***, 167 N.C. App. 685, 606 S.E.2d 379 (2005), for the proposition that, since neither Plaintiff nor Defendant Sweep Rite submitted documentation reflecting Plaintiff's employment with Defendant Sweep Rite to Defendant Excel, Defendant Excel was not obligated to obtain coverage relating to Plaintiff's alleged injury. More specifically, Defendants contend that,

"[i]n order to become an assigned employee under the contract, an employee's paperwork had to be submitted to Defendant Excel for processing" and that, since Plaintiff had not completed the required documentation, Defendant Excel was not contractually obligated to provide coverage to Plaintiff. I am unable to agree with this logic.[5]

In its order, the Commission made the following findings of fact, none of which have been challenged by Defendants Excel and Hartford, in support of its determination that Plaintiff was employed by Defendant Excel:

> 4. On November 21, 2006, Mr. Hess, on behalf of Sweep Rite, Inc. entered into a written contract with Excel Employment Services to obtain workers' compensation coverage for all of Sweep Rite['s] . . . employees. In early 2007, Excel Employment Services assigned the responsibility for the subject agreement to Defendant Excel Payroll Plus, Inc.
>
> 5. Each of Excel's client employers are responsible for the actual hiring, training, supervising, and firing of their employees. When a client employer makes the decision to hire an employee, they provide the new employee with paperwork to complete so that the employee can be added to Excel's roster. Ideally, new employee paperwork is provided, completed and submitted to Excel before the employee actually begins working.

[5]As I understand the applicable law, the question implicated by this aspect of Defendants Excel and Hartford's argument involves a jurisdictional issue subject to *de novo* review on appeal. *Hughart*, 167 N.C. App. at 689, 606 S.E.2d at 382.

6. The agreement between Sweep Rite, Inc. and Excel Payroll Plus, Inc. describes the duties and rights of Excel and the subscriber, Sweep Rite as follows:

[]IV. Duties and Rights of Excel

A. Excel Employment Services, Inc., agrees to provide the following services to Subscriber and the employees under Subscriber's supervision.

. . .

(3) Administration and payment of employee worker[s'] compensation insurance from Excel Employment Services Inc.'s [o]wn accounts.

. . .

B. Excel Employment Services, Inc., shall furnish and keep in full force and effect during the term of the Agreement workers' compensation insurance covering all employees filling Subscriber's job positions under the term of this Agreement. . . .

. . .

D. Excel Employment Services, Inc., agrees to release, defend, indemnify and hold Subscriber harmless from and all wrongful or negligent acts of Excel Employment Services, Inc., or any failure of Excel Employment Services, Inc., to act in performance of its

> duties during the term of this Agreement. . . .
>
> **[]V. Rights and Duties of Subscriber**
>
> . . .
>
> C. Subscriber agrees to maintain records of actual time worked and verify the accuracy of wages and salaries reported to and paid by Excel Employment Services, Inc., during each pay period. . . .
>
> Subscriber also agrees not to pay wages or salaries, or other forms of direct or indirect compensation, including employee benefits without informing Excel in written communication.

7. . . . . As part of the orientation process in August 2007, Plaintiff and Mr. Horton were each given a packet of materials containing, among other things, an Excel personal data sheet and a W-4 tax form. Mr. Horton and Plaintiff were instructed to complete the paperwork and return it later.

. . .

9. . . . . Plaintiff did not return her completed W-4 tax form or any other paperwork contained in the packet of materials she had been provided to either Excel or Sweep Rite. As a result, Mr. Hess paid Plaintiff $200 for her time by way of a Sweep Rite, Inc. company check. Mr. Hess paid Plaintiff with this company check on August 28, 2007. Mr. Hess testified that he had in the past submitted employee paperwork to Excel after the hiring of employees and after they had begun working for Sweep Rite.

. . .

11. There are no terms within the agreement between Excel Payroll Plus, Inc. and Sweep Rite, Inc. that precondition Excel's obligations under the contract, including the obligation to provide workers' compensation coverage, to only pay employees upon paperwork being submitted to Excel.

12. According to Ted Kazaglis, an expert in professional employer organizations, the agreement between Sweep Rite and Excel, indicated that the only employees who would receive workers' compensation benefits were those employees who met the requirements of the professional employer organization (Excel) to qualify as assigned employees.

13. Mr. Kazaglis conceded that the agreement in dispute does not define assigned employees and referred to N.C. G[en]. S[tat]. § 58-89A-5(2)[,] which defines an "assigned employee" as an employee who is performing services for a client company under a contract between a licensee and a client company in which employment responsibilities are shared or allocated. There is nothing contained within this definition that precludes Plaintiff from being considered an "assigned employee" of Excel.

. . .

15. [After receiving word of Plaintiff's injury,] Mr. Rowland informed Plaintiff that he needed to report the incident to the owner. Plaintiff testified that she did not know of Defendant Excel, and that it was reasonable that she did not submit written notice of her injury to Excel.

16. . . . . After receiving Plaintiff's [September 21, 2007] call, Mr.

> Hess notified Excel of Plaintiff's injury, and advised Excel that Plaintiff's wages had been paid with a Sweep Rite, Inc. company check.
>
> 17. Kim Lewis, owner of Excel Payroll Plus, Inc., did not report Plaintiff's accident to Hartford Underwriter's Insurance Company which carried Excel's workers' compensation coverage at the time. Ms. Lewis was "irritated" that Plaintiff's employment paperwork had not been submitted before her accident. Ms. Lewis testified that Mr. Hess had a history of submitting employee paperwork to Excel after the hiring of employees and after they began working for Sweep Rite. However, Ms. Lewis testified that as long as the paperwork was submitted for an employee, Excel would cover any injury the employee may have had prior to the paperwork being submitted to Excel.

Based upon these findings, the Commission concluded that:

> 2. . . . Plaintiff timely reported the injury to her immediate employer, [Defendant] Sweep Rite. . . . Plaintiff did not know of Defendant[] Excel, and therefore it was reasonable that she did not submit written notice of her injury to [Defendant] Excel. Defendant[] Excel, after being notified of Plaintiff's injury by Mr. Hess, intentionally failed to report the injury to its Carrier and therefore did not incur any prejudice as a result of Plaintiff's failure to submit written documentation directly to [Defendant] Excel. . . .
>
> 3. An employment relationship existed between Plaintiff and said Defendant-Employers, Sweep Rite, Inc. and Excel Payroll Plus, Inc., at the time of her injury and said Defendant-Employers were insured at that time. N.C. G[en]. S[tat]. § 97-2.

As Finding of Fact No. 6 reflects, the agreement between Defendants Sweep Rite and Excel indicates that Defendant Excel was required to provide "[a]dministration and payment of employee worker[s'] compensation insurance from [Defendant Excel's o]wn accounts" for Defendant Sweep Rite's employees. In addition, the Sweep Rite-Excel agreement obligates Defendant Excel to "furnish and keep in full force and effect . . . workers' compensation insurance covering all employees filling [Defendant Sweep Rite]'s job positions under the terms of [the] Agreement." As the Commission noted, the Sweep Rite-Excel agreement contains no indication that Defendant Excel's obligation to provide workers' compensation insurance was conditioned upon the submission of an employee's documentation to Defendant Excel.

Mr. Hess testified that Defendant Excel provided workers' compensation insurance for Defendant Sweep Rite's employees and that Defendant Sweep Rite had not procured separate workers' compensation coverage "because [Defendant Sweep Rite did not] have any employees." According to Mr. Hess, he "pa[id] [Defendant] Excel . . . [and they] carr[ied] the Workman[s'] Comp." Mr. Hess testified that Defendant Excel did not locate employees for Defendant Sweep Rite or control the identity of the individuals that Defendant Sweep Rite hired. Mr. Hess was

unaware of any requirement that he advise Defendant Excel of the identity of the individuals hired by Defendant Sweep Rite or that Defendant Excel accept Defendant Sweep Rite's employment decisions as a precondition for any obligation on the part of Defendant Excel to procure workers' compensation coverage applicable to those employees. Similarly, Mr. Hess was not aware of any requirement that he provide employee-related documentation to Defendant Excel before a new employee began work and that, on prior occasions, a new employee had begun work prior to the date upon which his or her documentation had been submitted to Defendant Excel.

Defendant Excel's owner, Kim Lewis, described the relationship between Defendants Sweep Rite and Excel as a "co-employment arrangement where [Defendant Excel was] responsible for . . . taxes [,] the reporting of taxes, and . . . Workers' Comp." According to Ms. Lewis, Mr. Hess had a history of submitting employee-related documentation to Defendant Excel after an employee had begun work and that, as long as she eventually received the necessary documentation, she would procure workers' compensation coverage for that employee effective as of his or her initial employment date. Ms. Lewis deliberately did not submit Plaintiff's claim to Defendant Hartford because she was "irritated" about Mr. Hess' failure to

provide Defendant Excel with the documentation relating to Plaintiff's employment prior to the alleged injury. Ms. Lewis admitted that the Sweep Rite-Excel agreement did not contain a clause indicating that the provision of workers' compensation coverage was dependent upon the timely submission of employment-related documentation.

In *Hughart*, we addressed the issue of the extent, if any, to which the plaintiff's decedent was a joint employee of Dasco, the defendant-employer, and SOI, the defendant-administrative services company. 167 N.C. App. at 689, 606 S.E.2d at 382. As part of that process, we determined that no contractual relationship existed between the plaintiff's decedent and defendant SOI in a situation in which the service agreement between SOI and Dasco provided "that no individual shall be hired by SOI until the individual has completed an SOI employment application, the application has been accepted and signed by Dasco and SOI, and SOI has designated the individual as an assigned employee" and in which the record contained "uncontroverted testimony that SOI received neither an application nor any payroll information regarding [the decedent] – and indeed was not aware of [the decedent]'s hiring at all." 167 N.C.App. at 690, 606 S.E.2d at 383. I do not believe that the present case is controlled by *Hughart*.

In seeking to persuade us to reach a different result, Defendants Excel and Hartford contend that, given that the Sweep Rite-Excel agreement stated that "[s]ubscriber . . . agrees Excel Employment Services, Inc.'s . . . obligation to the [s]ubscriber is limited to assigning employees . . . with certain skills and abilities . . . [,]"the agreement "clearly establish[es] a meeting of the minds as to the fact that only assigned employees were considered to be covered under the contract." I do not find this logic persuasive. The agreement at issue in ***Hughart*** clearly established that the obligations imposed upon SOI were conditioned upon the receipt of sufficient documentation to establish that the employee in question had become an "assigned employee." 167 N.C. App. at 690, 606 S.E.2d at 383. The Sweep Rite-Excel agreement contains no such provision. On the contrary, the Sweep Rite-Excel agreement requires Defendant Excel to "furnish and keep in full force and effect . . . worker[s'] compensation insurance covering all employees filling [Defendant Sweep Rite]'s job positions under the terms of [the] Agreement" without limiting the application of this contractual provision to employees whose documentation had been provided to Defendant Excel. In addition, as the Commission found, even if the Sweep Rite-Excel agreement applied exclusively to "assigned employees," the agreement never defines

what individuals would and would not be considered "assigned employees." Furthermore, nothing in the record militates against a determination that Plaintiff was an "assigned employee" of Defendant Excel for purposes of N.C. Gen. Stat. § 58-89A-5(2), which defines such an employee as one "who is performing services for a client company under a contract between a licensee and a client company in which employment responsibilities are shared or allocated." As a result, given the absence of any evidence tending to show that acceptance of an employee's documentation was required as a precondition for any obligation on the part of Defendant Excel to procure workers' compensation coverage for a particular employee, I conclude, after conducting the required *de novo* review, that the Commission correctly determined that Defendant Excel was liable to Plaintiff for workers' compensation benefits and that Defendant Hartford must pay those benefits.

III. Conclusion

Thus, for the reasons set forth above, I conclude that the Commission did not err by determining that Plaintiff sustained a compensable injury by accident in the course and scope of her employment with Defendant Sweep Rite and that Defendants Excel and Hartford are liable for Plaintiff's workers' compensation benefits. As a result, I respectfully dissent from my

colleagues' decision and believe that we should, instead, affirm the Commission's order.