NO. COA02-929

NORTH CAROLINA COURT OF APPEALS

Filed: 15 April 2003

DAVID GAINEY,
Employee-Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 915248

PGA/CREATIVE CORPORATE STAFFING
and/or ADM COCOA, INC.,
Employer-Defendant,

HARTFORD SPECIALTY RISK SERVICES,
Carrier-Defendant.

Appeal by defendants from opinion and award filed 7 May 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 February 2003.

Morris York Williams Surles & Barringer, LLP, by Stephen Kushner for PGA/Creative Corporate Staffing and Hartford Specialty Risk Services, defendant appellants.

Lawrence M. Baker for ADM Cocoa, Inc., defendant appellee.

McCULLOUGH, Judge.

On 29 January 1999, plaintiff David Gainey sustained a compensable injury at the ADM Cocoa, Inc. (ADM) plant in Charlotte, North Carolina. While operating a chocolate mixing machine, plaintiff's arm was amputated above the elbow. Plaintiff's work history leading to his employment at ADM is as follows: In late 1998, plaintiff's friend told him that his company, ADM, had a job opening. After learning that he would have to first be assigned to ADM by a

temporary employment service, plaintiff applied with and was hired by PGA/Creative Corporate Staffing, Inc. (PGA). As a routine part of his application, plaintiff agreed to a background check. While background checks were usually completed before prospective employees were placed with companies, ADM requested that plaintiff start immediately. PGA complied and assigned plaintiff to ADM as a temporary employee. Upon completion, plaintiff's background check revealed that he had been convicted of a felony three-and-one-half years earlier. PGA had a company policy which prohibited the hiring of anyone with a felony conviction within five years of applying for work. When PGA manager Mr. Ron Monteith learned that plaintiff had a felony conviction, he contacted Mr. Tim Petersen, the plant manager at ADM, to discuss the situation.

Mr. Monteith testified that he told Mr. Petersen about plaintiff's felony conviction. Mr. Petersen indicated he would give plaintiff a second chance and wanted him to remain at ADM. Mr. Monteith stated that he told Mr. Petersen that PGA would agree to that arrangement only if Mr. Petersen would sign a "hold harmless" agreement stating he was "aware of the situation" and still wanted plaintiff to work at ADM. Mr. Monteith stated he believed the arrangement meant that ADM would be solely responsible for plaintiff's workers' compensation coverage. Mr. Monteith further testified that Mr. Petersen agreed to sign such an agreement, but conceded it was never sent to ADM.

Mr. Monteith explained that PGA charged an hourly rate to its customers. That money was used to pay the employee an hourly wage and to pay taxes and insurance, including workers' compensation insurance. Any money left over after those expenditures was considered profit. PGA had previously supplied a number of employees to ADM. However, there was no written agreement between PGA and ADM setting forth which party would be responsible for paying workers' compensation coverage. When questioned, Mr. Monteith stated that PGA was usually

responsible for providing workers' compensation coverage for employees injured on the job. Mr. Monteith testified that he was the "top person in the office" and was unaware of any instance in which PGA contacted one of its customers to request contribution to the workers' compensation coverage for injuries claimed by a PGA employee, such as plaintiff. Normally PGA, through its carrier, Hartford Specialty Risk Services (Hartford), paid the claims.

Mr. Petersen testified that, when Mr. Monteith first called him with the results of plaintiff's background check, he was willing to give plaintiff a chance because he was a good worker. Mr. Petersen stated there was no mention of plaintiff's workers' compensation coverage or possible indemnification by ADM at that time. Mr. Petersen also stated he never agreed to have ADM assume responsibility for plaintiff's workers' compensation coverage. When Mr. Monteith finally sent an agreement to him (after plaintiff was injured), Mr. Petersen refused to sign it because he never promised to be responsible for plaintiff's workers' compensation coverage.

In April 2001, PGA and Hartford accepted the compensability of plaintiff's claim (without prejudice to later pursue indemnification or contribution from ADM) and entered into a settlement agreement with plaintiff. The settlement was approved by the Industrial Commission, and plaintiff received $246,350.63. On 16 November 1999, PGA and Hartford requested a hearing before a Deputy Commissioner because "ADM Cocoa, Inc. has refused to accept responsibility for Employee-Plaintiff's claim and indemnify PGA. Alternatively, a joint employment situation existed at the time of Employee-Plaintiff's injury, and PGA/Creative Corporate Staffing is entitled to contribution from ADM Cocoa, Inc. N.C.G.S. §97-51."

On 2 October 2001, the Deputy Commissioner filed an opinion and award finding that plaintiff was a joint employee of PGA and ADM at the time of his injury and that there was no

agreement between PGA and ADM regarding which entity was liable for plaintiff's workers' compensation coverage. The Deputy Commissioner concluded that both entities were equally liable for the consequences of plaintiff's injury and ordered that ADM pay one-half of plaintiff's compensation. ADM appealed to the Full Commission on 11 October 2001. PGA and Hartford cross-appealed on the sole issue of whether the Deputy Commissioner erred in determining that they were not entitled to full indemnification by ADM, but were instead entitled to contribution. On 7 May 2002, the Full Commission filed an opinion and award which upheld the Deputy Commissioner's determination that plaintiff was a joint employee of ADM and PGA and that there was no written or oral agreement regarding the parties' liability for plaintiff's injury. The Full Commission overturned the remainder of the Deputy Commissioner's opinion and award and determined that the course of dealing between the parties made PGA and Hartford solely liable for workers' compensation coverage for all joint employees of PGA and ADM. The Full Commission stated that ADM had no workers' compensation liability for plaintiff's injury, and PGA and Hartford appealed.

In their sole assignment of error, PGA and Hartford argue the Full Commission erred by determining that they were not entitled to contribution and/or indemnity from ADM for benefits paid to plaintiff pursuant to the Workers' Compensation Act. For the reasons stated herein, we disagree with the arguments of PGA and Hartford and affirm the opinion and award of the Full Commission.

> Under the provisions of G.S. 97-86, the Industrial Commission is the fact finding body and the rule under the uniform decisions of this Court is that the findings of fact made by the Commission are conclusive on appeal, both before the Court of Appeals and in [the Supreme Court], if supported by competent evidence. This is so even though there is evidence which would support a finding to the contrary.

Hansel v. Sherman Textiles, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981). *See also Inscoe v. Industries, Inc.*, 292 N.C. 210, 215, 232 S.E.2d 449, 452 (1977). Thus,

> [i]n passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) Whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision.

Henry v. Leather Co., 231 N.C. 477, 479, 57 S.E.2d 760, 762 (1950). *See also* N.C. Gen. Stat. §97-86 (2001).

N.C. Gen. Stat. §97-2(2) (2001) defines an employee as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . ." An individual may be an employee of two different employers at the same time. "This Court has recognized the 'special employment' or 'borrowed servant' doctrine which holds that under certain circumstances a person can be an employee of two different employers at the same time." *Brown v. Friday Services, Inc.*, 119 N.C. App. 753, 759, 460 S.E.2d 356, 360, *disc. review denied*, 342 N.C. 191, 463 S.E.2d 234 (1995). *See also Henderson v. Manpower*, 70 N.C. App. 408, 319 S.E.2d 690 (1984). In the present situation, plaintiff was hired by PGA, which served as his general employer. In turn, PGA sent plaintiff to work at ADM, which served as his special employer. At the time of his injury, plaintiff was a joint employee of both PGA and ADM. In addressing this aspect of the case, the Full Commission made the following findings of fact:

> 7. Prior to being assigned to a company by PGA, temporary employees did not earn wages. Once assigned, temporary workers were responsible for turning in their timesheets to the company at which they were working. That business would then transmit the information from the timesheets to PGA, which

> would then pay the workers and forward a bill to the company involved.
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> 8. Under certain circumstances, PGA could remove a temporary employee from an assignment. However, PGA provided no direct supervision to temporary workers once they were assigned. No temporary workers worked in the PGA facilities.
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> 9. While assigned to ADM, plaintiff was directly supervised by ADM employees and could be removed or fired at any time by ADM. ADM provided plaintiff all necessary tools and materials for the performance of his work, as well as controlling the details of his work and his hours.
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> 10. Because ADM accepted the benefit of plaintiff's work and was obligated to compensate PGA for it, an implied contract for hire existed between plaintiff and ADM.

With regard to compensation for work-related injuries suffered by joint employees, N.C. Gen. Stat. §97-51 (2001) provides:

> Whenever an employee . . . shall at the time of the injury be in joint service of two or more employers subject to this Article, such employers shall contribute to the payment of such compensation in proportion to their wages liability to such employee; provided, however, that nothing in this section shall prevent any reasonable arrangement between such employers for a different distribution as between themselves of the ultimate burden of compensation.

Joint employment does not provide the injured worker with a double recovery; rather, it provides two potential sources of recovery. *Brown*, 119 N.C. App. at 759, 460 S.E.2d at 360. *See also Pinckney v. United States*, 671 F.Supp. 405, 408 n.2 (E.D.N.C. 1987). Further, where a temporary agency (here, PGA) agrees to provide workers' compensation coverage to an employee, the special employer (here, ADM) is not required to provide separate workers' compensation coverage. *See* N.C. Gen. Stat. §97-9 (2001); *Brown*, 119 N.C. App. at 759, 460 S.E.2d at 360; and *Poe v. Atlas-Soundelier/American Trading & Prod. Corp.*, 132 N.C. App.

472, 512S.E.2d 760, *cert. denied*, 350 N.C. 835, 538 S.E.2d 199 (1999). Such an agreement need not be in writing. *Id*.

PGA and Hartford argue they are entitled to indemnity and/or contribution from ADM for the workers' compensation benefits paid to plaintiff. However, they do not present arguments regarding indemnity in their brief. We therefore deem the indemnity portion of their appeal abandoned. *See* N.C.R. App. P. 28(a) and (b)(5) (2002). "Questions raised by assignments of error but not presented and discussed in a party's brief are deemed abandoned." *State v. Wilson*, 289 N.C. 531, 535, 223 S.E.2d 311, 313 (1976).

With regard to contribution, PGA and Hartford contend they are entitled to one-half the amount paid to plaintiff in workers' compensation benefits and that the Full Commission erred in concluding otherwise. PGA further argues that there was no "course of dealing" between itself and ADM which indicated that PGA would assume full responsibility for plaintiff's workers' compensation coverage. We do not agree.

It is clear from the record that there was no written agreement between ADM and PGA as to their respective liabilities under the Workers' Compensation Act. The Full Commission relied, instead, on the "course of dealing" between the parties and made the following conclusions of law:

> 1. Plaintiff was an employee of defendant-employer ADM given that: (a) an implied contract for hire existed between plaintiff and ADM; (b) at the time of his injury by accident, the work plaintiff was performing was essentially that of ADM, and; (c) ADM directly supervised plaintiff and controlled the details of his work. *Henderson v. Manpower of Guilford County*, 70 N.C. App. 408, 319 S.E.2d 690 (1984).
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> 2. At the time of his January 29, 1999 injury by accident, plaintiff was a joint employee of the general employer PGA and the special employer ADM. *Id.* In the absence of an agreement between defendant-employer PGA and defendant-

> employer ADM regarding their liability for plaintiff's January 29, 1999 injury by accident, both would be equally liable for the consequences thereof. *Id.*; N.C. Gen. Stat. §97-51. The course of dealing between the parties made PGA solely liable for workers' compensation coverage of joint employees of PGA and ADM. Evidence as to the course of dealing between employer and employee is of value to show the interpretation that they put upon the character of the employment and their intention regarding it. *Smith v. City of Gastonia*, 216 N.C. 517, 5 S.E.2d 540 (1939). ADM met its obligations under N.C. Gen. Stat. §97-9 by paying for workers [sic] compensation coverage of its joint employees with PGA through paying bills rendered by PGA that included the cost of workers' compensation coverage.
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> 3. Corporate Staffing [PGA] and Hartford Specialty Risk Services are NOT entitled to be indemnified by defendant ADM Cocoa, Inc. for one half of the compensation paid to plaintiff 7through the agreement approved on April 17, 2001.

We agree with ADM that the Full Commission's findings were supported by competent evidence of record.

A course of dealing is defined as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." N.C. Gen. Stat. §25-1-205 (2001). A course of dealing can shed light on the intentions of the parties and may help establish a contract between them. *See Smith v. Gastonia*, 216 N.C. 517, 5 S.E.2d 540 (1939); and *GATX Logistics, Inc. v. Lowe's Cos.*, 143 N.C. App. 695, 548 S.E.2d 193 (2001).

The evidence presented at the hearing indicated that PGA and ADM had previous dealings which involved PGA assigning at least ten employees to ADM. In those instances, PGA provided workers' compensation coverage for those employees, and Mr. Petersen testified that this practice made PGA attractive to potential customers such as ADM. Mr. Monteith explained that PGA charged ADM an hourly fee. PGA used that money to pay plaintiff an hourly wage and to pay the cost of providing workers' compensation coverage for employees such as plaintiff.

Mr. Monteith, the "top person in the office[,]" testified that during his thirteen-year tenure at PGA, he was unaware of any situation in which PGA did not provide workers' compensation coverage to injured employees and that PGA had never sought contribution from its customers after paying workers' compensation benefits to an injured employee.

Mr. Petersen, ADM's manager, testified regarding another instance in which an employee who had been provided by PGA sustained an injury at ADM. The employee submitted the claim directly to PGA. PGA paid the workers' compensation benefits and did not seek indemnity or contribution from ADM. In plaintiff's case, Mr. Monteith informed Mr. Petersen that a claim had been filed, but he did not indicate that ADM might be responsible for one-half of the benefits owed to the injured employee.

Defendants PGA and Hartford seek to distinguish plaintiff Gainey's situation because he had a prior felony conviction and did not qualify to be payrolled by PGA. However, it is undisputed that PGA continued to employ plaintiff after learning of his criminal record and made no efforts to change its usual business practice of providing workers' compensation coverage to its employees who were placed with customers. We also note that Mr. Monteith testified that, had plaintiff's injury been minor, PGA would not have sought reimbursement from ADM. This admission is strong evidence that PGA and ADM engaged in a course of dealing in which PGA assumed full responsibility for providing workers' compensation coverage to employees, including plaintiff.

Upon careful review of the record and the arguments presented by the parties, we conclude there was competent evidence from which the Full Commission could find and conclude that PGA and ADM engaged in a course of dealing wherein PGA (and its carrier,

Hartford) assumed full responsibility for providing workers' compensation coverage to plaintiff. The opinion and award of the Full Commission is hereby

Affirmed.

Judges TYSON and CALABRIA concur.

Report per Rule 30(e).