NO. COA06-262

NORTH CAROLINA COURT OF APPEALS

Filed: 2 January 2007

ANDREW GILREATH,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File Nos. 917389 & PH-0324

YELLOW CAB OF CHARLOTTE,
Employer,

UNINSURED,

and/or

CAROLINA TRANSPORTATION, CO., INC.,
Employer;

CNA INSURANCE COMPANY,
Carrier,

or

UNINSURED,
Defendant(s)

Appeal by defendant from Opinion and Award entered 4 0ctober 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 September 2006.

The Law Offices of William K. Goldfarb, by William K. Goldfarb, for plaintiff-appellee.

Gilpin & Hatcher, by David W. Gilpin, for defendant-appellant.

CALABRIA, Judge.

Carolina Transportation Co., Inc. ("defendant") appeals the Order of the North Carolina Industrial Commission ("the Commission") concluding Andrew Gilreath ("Gilreath") was an employee of defendant, not an independent contractor. We affirm.

Defendant hired Gilreath on 3 December 1998 to drive The Hilton of Charlotte's ("The Hilton") guests departing and arriving from the Charlotte Douglas International Airport ("the airport"). When defendant's agent, Al Wheeler ("Wheeler"), trained Gilreath, the job requirements were explained in intricate detail. Gilreath was told to wear a suit and to drive one of defendant's Lincoln Town Cars following a particular route between The Hilton and the airport when transporting guests. In addition, Wheeler gave Gilreath specific instructions concerning his daily work schedule which included the starting and ending times and the number of days per week he was required to work. On 8 December 1998, Gilreath signed an acknowledgment that as a driver for defendant he was an independent contractor and not an employee or an agent of defendant.

On 23 December 1998, Gilreath was returning from Raleigh, North Carolina where he, per defendant's request, had driven a client from the airport to Raleigh. While driving west to Charlotte, Gilreath was involved in a severe automobile accident and sustained multiple injuries. Gilreath contends the accident arose out of and was in the course of his employment.

Gilreath timely filed a claim with the North Carolina Industrial Commission. Since the claim was denied, Gilreath requested a hearing. On 8 December 2000, the Deputy Commissioner found that Gilreath was an independent contractor and not an employee of defendant. Gilreath appealed to the Full Commission on 15 December 2000. On review, the Full Commission entered an Opinion and Award concluding Gilreath had sustained a compensable injury by accident as an employee of defendant and remanded the case to the Deputy Commissioner for

additional findings of facts regarding Gilreath's benefits award. The Deputy Commissioner entered additional findings of facts and awarded benefits on 17 March 2005. Defendant then appealed to the Full Commission. A final Opinion and Award was entered 28 October 2005. Defendant appeals from the 2002 Opinion and Award of the Full Commission finding Gilreath was an employee of defendant.

Defendant contends that the Commission erred by finding that Gilreath was an employee and not an independent contractor pursuant to the Worker's Compensation Act. We disagree.

Generally, the standard of review for an award by the Commission is whether any competent evidence supports the Commission's findings and whether those findings support the Commission's conclusions of law. *Sharpe v. Rex Healthcare*, ___ N.C. App. ___, ___, 633 S.E.2d 702, 705 (2006). However, when the question is whether an employer-employee relationship existed "[it] is a jurisdictional one, and the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding." *Hughart v. Dasco Transp., Inc.*, 167 N.C. App. 685, 689, 606 S.E.2d 379, 382 (2005) (quotations omitted). "Thus, the reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." *Id.* (quotations omitted).

To begin, we address the significance of the independent contractor agreement signed by Gilreath. Our Courts have stated that "[a] contract declaring one an independent contractor free from control and direction by the owner does not in fact establish that relationship." *Watkins v. Murrow*, 253 N.C. 652, 657, 118 S.E.2d 5, 9 (1961). "There must be further evidence to show that the work was in fact performed pursuant to that contract." *Id.* "If not so performed, a contractual provision vesting or forbidding the owner to exercise control is immaterial." *Id.* "Our

Courts generally look beyond the contract to the actual relationship of the parties to determine the question of whether or not one is an independent contractor." *Grouse v. DRB Baseball Management*, 121 N.C. App. 376, 381, 465 S.E.2d 568, 572 (1996). In the case before us, the mere fact that Gilreath signed an independent contractor acknowledgment does not, in and of itself, establish that Gilreath was an independent contractor. We must look at the actual relationship between Gilreath and defendant in order to determine whether Gilreath was an independent contractor.

"[W]hether 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." *Williams v. ARL, Inc.*, 133 N.C. App. 625, 630, 516 S.E.2d 187, 191 (1999) (quotation omitted).Factors relevant to determining the degree of control exercised by the hiring party are:

> [Whether] [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.

Hayes v. Elon College, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944). "No particular one of these factors is controlling in itself, and all the factors are not required." *McCown v. Hines*, 353 N.C. 683, 687, 549 S.E.2d 175, 178 (2001). "Rather, each factor must be considered along with all other circumstances to determine whether the claimant possessed the degree of independence necessary for classification as an independent contractor." *Id.*

Defendant argues that the extent to which it controlled Gilreath's performance of his job duties did not indicate Gilreath was an employee of defendant. Defendant contends that The Hilton, not defendant, required Gilreath to perform his job in a particular manner. Since defendant hired Gilreath to fulfill its contractual obligations to The Hilton, Gilreath had to comply with certain requirements such as wearing a suit, driving the most expedient route to and from the airport, and charging the passengers fares based upon The Hilton's fee structure. If Gilreath did not comply with the requirements, defendant could not fulfill its contractual obligations to The Hilton. Defendant appears to accept the benefits but avoids the responsibilities of its contractual relationship with The Hilton. The responsibilities of the contract required controlling the manner in which the drivers defendant hired performed their jobs.

More importantly, the relationship between defendant and Gilreath indicated the existence of an employer-employee relationship, not an independent contractor relationship. Gilreath did not have special skills or training and had no experience driving taxicabs prior to his employment with defendant. Gilreath neither worked for a lump sum nor was paid on a quantitative basis. Gilreath was paid on commission based upon the amount of fares he collected each day. Gilreath was subject to discharge if he failed to perform his duties in a manner other than what was described to him. Gilreath was in the regular employ of the defendant because he was required to report to work by 7:00 a.m., six days per week. Each of these factors, considered with the circumstances, indicates that Gilreath was defendant's employee and not an independent contractor.

Defendant relies upon *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74, 511 S.E.2d 9 (1999), and *Alford v. Cab Co.*, 30 N.C. App. 657, 228 S.E.2d 43 (1976), to support its argument

that Gilreath was an independent contractor. However, the cases defendant relies upon are distinguishable from the case before us.

In *Fulcher*, this Court held that the decedent, a taxicab driver, was an independent contractor. *Id.*, 132 N.C. App. at 78,511 S.E.2d at 12. Unlike the case before us, the decedent in *Fulcher* signed a lease agreement whereby he was to "lease" a vehicle from the defendant for a specified rate, he was able to keep all the fees and tips he collected, and was able to exercise complete discretion in the operation of the leased cab. *Id.*, 132 N.C. App. at 75, 511 S.E.2d at 10. Also, the decedent was not restricted to any specific geographical location and was able to accept or refuse calls from defendant's dispatcher. *Id.*

Alford is also distinguishable from the case before us. Although the plaintiff in Alford was required to dress in a particular manner, refrain from smoking, and stay physically fit, these requirements were pursuant to the City of Charlotte Municipal Code which controlled the relationship between the plaintiff and the defendant. *Id.*, 30 N.C. App. at 658, 228 S.E.2d at 44. Further, the plaintiff in Alford was able to keep all the fares and tips collected from passengers and could refuse instructions from the defendant's dispatcher. *Id.*, 30 N.C. App. at 659, 228 S.E.2d at 45.

Unlike *Fulcher* and *Alford*, in the case before us Gilreath was required to wear a suit, work at specific times, drive a particular route, and obtain permission from defendant's dispatcher if he traveled to any destination other than the airport. Since Gilreath's vehicle was not equipped with a meter, Gilreath was required to contact defendant's dispatcher to obtain the appropriate fare for passengers. Further, unlike *Alford*, these requirements were not set by an applicable city code, but by defendant's contract with The Hilton.

A similar case to the one before us was decided in *State ex rel. Employment Security Comm. v. Faulk,* 88 N.C. App. 369, 363 S.E.2d 225 (1988). In *Faulk*, this Court held that respondent's taxicab drivers were his employees, not independent contractors. *Id.*, 88 N.C. App. at 376, 363 S.E.2d at 229. The respondent in *Faulk* operated a taxicab company in which he owned, maintained, and insured all operating vehicles. *Id.*, 88 N.C. App. at 370-71, 363 S.E.2d at 226. The drivers' work hours were set by the respondent and the drivers were required to compute passenger rates based upon a table provided by respondent. *Id.* Although some of the factors indicating an independent contractor relationship as listed in *Hayes* were present, "[o]n balance . . . respondent maintained control over the manner and method of the drivers' work and . . . the drivers did not retain that degree of independence necessary to require their classification as independent contractors rather than employees." *Id.*, 88 N.C. App. at 374, 363 S.E.2d at 228 (quotation omitted).

Similarly, in the case before us, there are "Hayes factors" that indicate an independent contractor relationship. However, the facts and circumstances of this case indicate that defendant, in order to fulfill its contractual obligations to The Hilton, maintained such a degree of control over the manner and method of Gilreath's work that Gilreath was not an independent contractor. Upon considering the evidence presented in the record, we conclude that Gilreath was an employee of defendant and not an independent contractor. For the foregoing reasons, the Opinion and Award of the Full Commission is affirmed.

Affirmed.

Judges HUNTER and HUDSON concur.

The Judges participated and submitted this opinion for filing prior to 1 January 2007.

Report per Rule 30(e).