

Affirmed  
Author, Mauretic  
Concurring; Ballance  
Sellers

NO. COA01-51

NORTH CAROLINA COURT OF APPEALS

Filed: 28 December 2001

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OFFICE OF THE CLERK  
OF THE COURT OF APPEALS  
OF THE STATE OF NORTH CAROLINA

RODIN JAVIER MEJIA,  
Employee,  
Plaintiff,

v.

North Carolina  
Industrial Commission  
No. 970005

CAROL FULTON,  
Employer,

and

KEY BENEFIT SERVICES, INC.,  
Carrier; Defendants.

Appeal by defendants from opinion and award entered 2 October 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2001.

*Hedrick & Blackwell, L.L.P., by P. Scott Hedrick and Jerry L. Wilkins, Jr., for plaintiff-appellee.*

*Orbock Bowden Ruark & Dillard, PC, by Barbara E. Ruark and Stephanie Britt Woods, for defendants-appellants.*

BIGGS, Judge.

On 12 January 1999, plaintiff Rodin Javier Mejia was working in his capacity as a framer for defendant-employer Carol Fulton at a job site in Raleigh, North Carolina, when he fell from the third story of the building on which he was working, injuring his spine. As a result of his injury by accident, plaintiff is a quadriplegic with total paralysis below the waist and very limited use of his arms. Defendant-employer was a subcontractor of JJJ Contractor

Services, which was a framing-subcontractor, for general contractor State Street Construction. At the time of the accident, defendant-employer was insured through defendant-third party administrator Key Benefit Services, Inc. (Key Benefit).

Plaintiff filed a claim seeking to recover benefits under the Workers' Compensation Act of North Carolina. However, Key Benefit subsequently denied plaintiff's claim based upon plaintiff being a partner of Juan Mazanarez, the husband of defendant Fulton. According to the Claims Manager for Key Benefits, Tammy Childress, partners are not included under defendant Fulton's workers' compensation insurance policy, as provided by N.C.G.S. § 97-2(2).

This matter was heard by Deputy Commissioner Mary Moore Hoag on 29 November 1999. The sole issue for determination of the deputy commissioner was whether plaintiff was a partner or an "employee" in the business of defendant Fulton. The evidence tended to show that at the time of the hearing, plaintiff was a nineteen-year-old native of Honduras. Plaintiff moved to the United States when he was fourteen years old in order to seek employment to help his family in Honduras. He has only a sixth grade Honduran education, and speaks and understands very little English. His only job experience is as a laborer in the construction industry.

In 1998, plaintiff moved to Wilmington, North Carolina and was hired by Fulton and her husband as a laborer to do framing. Mazanarez and plaintiff had previously worked together in Atlanta, Georgia. Defendant Fulton operated the construction business solely in her name. However, both Fulton and Mazanarez testified

at the hearing that they were partners. They both testified that plaintiff was an employee, not a partner. At the hearing, the claims manager for Key Benefits, Tammy Childress, stated that she contacted Fulton a few days after plaintiff's January 1999 accident, and was told that plaintiff was a partner of Mazanarez. Plaintiff was given instructions by an older member of the crew, Steven Maldonado, as were other Spanish-speaking members of defendant-employer's crew. On occasion, if Mazanarez was not on a job site, plaintiff was responsible for the supervision of the members of the crew. Plaintiff did not, however, have the authority to enter into contracts with contractors, to solicit jobs from contractors or to hire and fire people on the construction crew. A report by an independent auditor, hired by Childress, indicated that plaintiff was listed as an employee of the business. Fulton and Mazanarez testified that defendant was paid a salary between \$500.00 and \$750.00 per week, with an average pay of \$600.00 per week. Plaintiff received less or more pay depending on the availability of work.

Deputy Commissioner Hoag filed an opinion and award on 25 February 2000, finding and concluding that plaintiff was an employee of Fulton and was therefore entitled to workers' compensation benefits. Defendants appealed to the Full Commission, and by opinion and award filed 2 October 2000, the Full Commission affirmed the decision of the deputy commissioner. Defendants appeal.

On appeal, defendants argue that the plaintiff was a partner

in defendant-employer's business, and is not covered within the terms of Key Benefit's workers' compensation policy. We disagree.

It is well settled that this Court is limited to two questions upon appellate review of an Industrial Commission's opinion and award: (1) whether the Commission's findings are supported by competent evidence; and (2) whether the Commission's findings justify its conclusions. *Grantham v. R.G. Barry Corp.*, 115 N.C. App. 293, 298-99, 444 S.E.2d 659, 662 (1994). The findings of the Industrial Commission are conclusive on appeal if supported by competent evidence. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998). Similarly, findings of the Commission, which present mixed questions of law and fact, are also conclusive on appeal, if there is sufficient evidence to sustain the facts involved. *Roman v. Southland Transp. Co.*, 350 N.C. 549, 551, 515 S.E.2d 214, 216 (1999). However, the Commission's conclusions of law are reviewable *de novo*, *Grantham*, 127 N.C. App. at 534, 491 S.E.2d at 681.

The Supreme Court in *McCown v. Hines*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 554A00 filed 20 July 2001) held that whether an employee-employer relationship existed at the time of an injury under a workers' compensation claim is to be determined by the application of ordinary common law tests. Under common law, an employee-employer relationship exists "[w]here 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." *Youngblood v*

*North State Ford Truck Sales*, 322 N.C. 380, 384, 364 S.E.2d 433, 437 (1988); see also *Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 139-40 (1944).

In *Hayes*, our Supreme Court identified eight factors to consider in determining which party retains the right of control and, thus, whether the claimant is an independent contractor or an employee:

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.

*Hayes*, 224 N.C. at 16, 29 S.E.2d at 140 (citations omitted). No particular one of these factors is controlling in itself, and all the factors are not required. 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. See *Youngblood*, 321 N.C. at 385, 364 S.E.2d at 438; *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140.

In the case *sub judice*, the facts tend to show that plaintiff has a sixth grade Honduran education, and speaks and understands very little English. Plaintiff's only job experience has been in

the construction industry. Plaintiff was approximately sixteen years old when he began to work as a construction framer for defendant Fulton. Plaintiff knew defendant Fulton's husband, Juan Mazanarez, because the two men had previously worked together. Plaintiff possessed only hand tools, such as a hammer, tool belt and square, with which to do his job. Mazanarez provided the remaining tools, including nail guns, air compressors, electrical saws and other electric equipment, and instructed plaintiff on which job to work. Mazanarez and defendant Fulton also provided plaintiff with transportation to the job sites. The independent auditor, hired by defendant third party administrator, found that plaintiff was an employee of defendant-employer. Moreover, Fulton and Mazanarez testified at hearing that plaintiff was an employee, and not a partner of defendant Fulton. Accordingly, he did not have the authority to enter into contracts with contractors, to solicit jobs with contractors, or to hire and fire construction crew members. Fulton and Mazanarez also testified that as an employee, plaintiff did not share in the profits of the business. Plaintiff was paid a weekly salary of between \$500 and \$750, depending upon the availability of work.

The Commission made some eighteen findings before concluding that plaintiff was an employee and not a partner in defendant Fulton's construction business. Significantly, the only evidence which would support a conclusion to the contrary is the testimony of Claims Manager Tammy Childress that during a January 1999 telephone conversation, Fulton indicated that plaintiff was a

partner. It is well-settled that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citation and quotations omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). As such, the Commission may accept or reject, in whole or in part, the testimony of a witness. *Blankley v. White Swan Uniform Rentals*, 107 N.C. App. 751, 754, 421 S.E.2d 603, 605 (1992), *disc. review denied*, 333 N.C. 461, 427 S.E.2d 618 (1993). Here, where there is no evidence that plaintiff shared in the profits, or had any authority whatsoever, which showed any proprietary interest in defendant Fulton's business, the Commission did not err in rejecting Childress' testimony and concluding that petitioner was an employee of defendant Fulton.

Further, contrary to defendants' rather conclusory argument, we conclude that there is sufficient evidence to support the Commission's finding as to plaintiff's average weekly wage. Defendant Fulton, Mazanarez and plaintiff testified that plaintiff's salary fluctuated depending upon the availability of work. The testimony at the hearing was that plaintiff was paid between \$500 and \$700 each week, with an average weekly pay of \$600. This finding being supported by testimony, is binding on this Court on appeal. Therefore, this argument is summarily rejected.

In light of all of the foregoing, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judges WALKER and CAMPBELL concur.

Report per Rule 30(e).