NO. COA02-997

NORTH CAROLINA COURT OF APPEALS

Filed: 2 September 2003

PATRICIA BEDDINGFIELD,
Widow and Guardian ad Litem for
BRITTANY M. BEDDINGFIELD, HEATHER
R. BEDDINGFIELD, and JULIE BEDDINGFIELD,
Minor Children of Alvin Mitchell
Beddingfield (Deceased).
Employee, Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 988156

LEO MORGAN,
Employer,

NON-INSURED,

and/or

WNC PALLET AND FOREST PRODUCTS,
Employer,

SELF-INSURED (KEY RISK MANAGEMENT
SERVICES, Serving Agent),
Defendants.

Appeal by plaintiff from opinion and award filed 26 April 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 April 2003.

William L. Gardo, II, for plaintiff appellant.

Adams Hendon Carson Crow & Saenger, P.A., by E. Thomison Holman, for Leo Morgan defendant appellee.

Law Offices of Gene Thomas Leicht, by Gene Thomas Leicht, for WNC Pallet and Forest Products defendant appellees.

McCULLOUGH, Judge.

Decedent Alvin Mitchell Beddingfield was killed while logging trees on 16 August 1999 when a tree fell on him. Decedent was 35 years old at the time he died, and left behind a wife and three children. He had worked in logging most of his life.

Defendant WNC Pallet and Forest Products, Inc., (WNC) is a corporation involved in logging and production of wooden pallets. It is a large operation, employing approximately 125 employees.

As WNC requires timber for its business, it employs three full-time timber buyers who search for timber to buy and cut. Once bought, WNC cuts logging roads to the timber for the loggers it has hired. According to claimant, WNC has 10 to 15 operations going at any one time and purchases approximately one million dollars worth of timber annually. Logging supervisors, WNC employees, visit the logging sites periodically. Once the logging is completed, WNC is responsible for cleaning up the logged area.

WNC has never employed loggers as employees and considers the loggers it hires as independent contractors. WNC pays the loggers by the board foot for timber that is delivered to its sawmills. Yet, claimant points out that WNC routinely makes cash advances to loggers to keep their operations going. WNC also finances equipment for the loggers and withholds said amounts from their paychecks. WNC also retains the right to fire its loggers at any time, and loggers have the right to walk away from the job, neither having any legal recourse against the other.

Defendant Leo Morgan worked as a logger doing jobs exclusively for WNC since 1987. He has been a logger all his life. His employees are his son and his brother. Morgan did not carry workers' compensation insurance.

When working for WNC, Morgan has to cut timber to WNC's specifications. He negotiates with the logging supervisors on each project. Morgan has on occasion taken cash advances and had a bulldozer financed by WNC. WNC also hauls Morgan's knuckle boom loader to each job site. All checks from WNC were made to Morgan individually, although he testified that was how he did business.

Decedent was thirty-five years old and had been a logger for most of his life. He had a logging business of his own, but it was not making enough money. Decedent called Morgan and asked if he needed any help as decedent's logging business was slow. Decedent said that he was an experienced logger and would work for $100 a day cash. Decedent would take care of taxes and insurance so nothing would have to be taken out. Morgan never reported decedent as an employee for tax purposes.

Testimony as to how long decedent worked for Morgan was at odds: Decedent had worked for Morgan either from February to August, 5 days a week, or only 29 days between April to August. He was paid $100 a day. Decedent was on probation and thus had no driver's license or way to get to work, so Morgan would pick decedent up at a local restaurant in the morning and return him after work. On some days, Morgan would not need him to work and would not stop by the restaurant. On other days, decedent would not want to work, so he would not go to the restaurant.

Decedent worked with Morgan on two different WNC projects before his death. Decedent used his own saw, but also was provided equipment (gas, hard hat) from Morgan.

Decedent pawned his saw to Morgan prior to his death, but he continued to use it to cut trees. Once on the job site, Morgan told decedent which trees to cut, as WNC had shown him but did not otherwise supervise the decedent.

According to claimant, decedent was in the full-time employment of defendants when he died and did not own his own independent business.

On 16 August 1999, defendant Morgan and decedent were working on a project on land owned by Champion International Corporation. WNC had entered into a contract on 7 June 1999 with Champion to go onto their land and cut designated timber for 18 months.

Morgan had come to an agreement with the logging supervisor as to an area of the project and the price for which he would cut the timber. WNC cut the roads and then hauled Morgan's equipment to the site. After Beddingfield was killed, Morgan was cited for OSHA violations, which he paid voluntarily.

Decedent's survivors sought death benefits pursuant to N.C. Gen. Stat. §97-38 (2001) from Morgan, or to hold WNC liable either because Morgan was its employee or that WNC had become a statutory employer pursuant to N.C. Gen. Stat. §97-19 (2001), by filing a claim on 10 February 2000. The Deputy Commissioner denied benefits in an Opinion and Award filed 2 January 2001 on the basis that decedent was found to be an independent contractor and further on the basis that WNC was not liable. The Full Commission found the same in its Opinion and Award filed 26 April 2002. In a dissent, one commissioner said that the majority had erred by ignoring competent evidence in the record to the contrary. Decedent's wife appeals as administrator for decedent's estate and guardian *ad litem* for the children.

On appeal, the following questions are presented: The Industrial Commission erred by (I) finding that decedent was an independent contractor rather than an employee of either Morgan or

WNC; (II) finding that Morgan was not an employee of WNC; (III) making its findings of fact; (IV) making conclusions of law that are not supported by the evidence; (V) finding that, in the alternative, Morgan was not a subcontractor for WNC; and (VI) denying death benefits pursuant to N.C. Gen. Stat. §97-38, *et. seq.*

I.

Claimant's first argument is that the Full Commission erred by ignoring and disregarding all evidence that established decedent as an employee of defendants instead of an independent contractor. *See Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996). There was no total disregard of a source of evidence, as the findings of fact reveal to this Court that the Full Commission considered the evidence as a whole. Rather than ignoring the evidence stressed by claimant, it appears that the Full Commission simply ruled in favor of defendants.

We will review this assignment of error, however, for error in the determination by the Full Commission that decedent was an independent contractor of defendants Morgan and WNC.

Claimant contends that decedent was an employee of WNC and that Leo Morgan was a supervisory employee of WNC. *See Scott v. Lumber Co.*, 232 N.C. 162, 59 S.E.2d 425 (1950). In the alternative, decedent was an employee of Morgan.

In *Scott*, Waccamaw Lumber Company bought standing timber and had it taken to a sawmill. *Id.* at 163, 59 S.E.2d at 425. At the sawmill, the logs were cut into lumber. *Id.* A group of men who did this work were directed by a man named Milligan. *Id.* One of these men died on the job cutting timber, and his representatives sued the timber company. *Id.* The timber company denied that the decedent was its employee, but rather that decedent was an employee of Milligan, and Milligan was an independent contractor. *Id.* at 163, 59 S.E.2d at 425-26. The Supreme Court

held that Milligan was not an independent contractor but a supervisory employee of the decedent for the company. *Id.* at 164-66, 59 S.E.2d at 426-27. While there was no express contract giving the lumber company any right to control the manner or method of performance of Milligan and the sawmill activities, the Court looked to other facts:

> That the work in question was not an independent undertaking, but constituted a part of the general business of the Waccamaw Lumber Company; that the Waccamaw Lumber Company owned and furnished the sawmill used in the work; that the Waccamaw Lumber Company controlled the premises where the work was performed; that the Waccamaw Lumber Company determined the amount of work to be done at the sawmill by the quantity of logs it delivered; that Milligan devoted all his energy and time to the service of the Waccamaw Lumber Company; that the Waccamaw Lumber Company gave Milligan specific directions at its pleasure as to the dimensions of the lumber to be sawed; that the Waccamaw Lumber Company had the right to discharge Milligan with or without cause at any time; that Milligan made no effort to procure compensation insurance covering the sawmill hands or to satisfy the Industrial Commission of his financial responsibility as a self-insurer; and that the Waccamaw Lumber Company extended credit to the sawmill hands at the commissary which it operated for the benefit of its employees.

Id. at 165, 59 S.E.2d at 427. Thus, the decedent was an employee of the lumber company, and his claim was compensable.

Scott is factually similar to the present case, however, it begins under the assumption that the decedent was an employee of Milligan. *Id.* at 164, 59 S.E.2d at 426 ("The deceased was working under the direction of Milligan at the time of his fatal injury. This being true, this proceeding turns on whether Milligan was then acting as an independent contractor or as a mere supervisory employee of Waccamaw Lumber Company."). This is not the case here. Claimant argues that a proper analysis under the law, however, reveals that decedent was indeed an employee of Morgan.

To maintain a proceeding for workers' compensation, the claimant must have been an employee of the party from whom compensation is claimed. Thus, the existence of an employer-employee relationship at the time of the injury constitutes a jurisdictional fact. As this Court explained in *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976):

> [T]he 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. 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.

Additionally, the claimant bears the burden of proving the existence of an employer-employee relationship at the time of the accident.

Whether an employer-employee relationship existed at the time of the injury is to be determined by the application of ordinary common law tests. Under the common law, an independent contractor "exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." In contrast, an employer-employee 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."

In *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140, this 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.

> *See also Youngblood*, 321 N.C. at 388-89, 364 S.E.2d at 440 (Exum, C.J., *dissenting*)(recognizing that the *Hayes* factors are assessed to facilitate the determination of which party retains the right to control and direct the details of the work). 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.

McCown v. Hines, 353 N.C. 683, 686-87, 549 S.E.2d 175, 177-78 (2001) (citations omitted).

According to claimant, several facts, supposedly "ignored" by the Full Commission, support the finding that decedent was an employee of Morgan, including: decedent was paid in cash on a per day basis; this cash came out of advances from WNC to Morgan; decedent rode with Morgan to and from work and only worked with Morgan; either party could have terminated the relationship at any time; Morgan provided decedent with equipment needed on the job, and WNC provided necessary services at the job site; Morgan directed decedent; and decedent did not have an independent business at his death.

After reviewing the record in light of the *Hayes* factors, we hold that the Full Commission was correct in concluding that decedent was an independent contractor rather than an employee of defendant Morgan. First, decedent had been engaged in the independent calling of logging. Decedent had acquired a certain degree of skill and experience over a lifetime of working in the logging business. He contracted with Morgan to supplement his income as his own business had slowed. Their arrangement was more along the lines of contract work. Decedent provided most of his own equipment, except for gas and a hard hat given to him by Morgan. The fact that decedent eventually pawned his saw to Morgan for extra money, and Morgan in turn "loaned" the saw back to decedent does not change his status. Decedent was

never trained or necessarily instructed on how to cut timber, only told where to go and use his skill. Decedent selected his own manner of cutting timber.

As to the payment arrangement between decedent and Morgan, we agree with defendants that while decedent was paid $100 a day, this does not put him into the realm of an employee. *See Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384, 364 S.E.2d 433, 437-38 (1988). Decedent was the party who suggested the terms of the arrangement. This payment did not include any deductions for social security or other taxes, and was substantially higher than Morgan's other two employees. On the days when decedent came to work, he cut trees all day. At the end of the day, he was paid. On the facts of this particular case, the specific job was completed each day for which decedent received a lump sum payment at the end of the day. It was as if each morning that decedent went to the restaurant *and* Morgan went to the restaurant, a new contract was formed.

Next, Morgan testified that he did not have the power to fire decedent because decedent did not work for him. Rather, he just would not have gone to pick him up at the restaurant in the morning. Defendants claim that this is not firing necessarily, but again under these particular facts, a decision by Morgan not to re-contract for decedent's services.

As to whether decedent was in the regular employ of Morgan, the unique arrangement between the two has been discussed above. Further evidence in the record as to the nature of their relationship stems from a previous accident that occurred prior to the fatal accident on 16 August 1999. Decedent had been struck about the head by limbs while at work with Morgan. He went to the hospital and received 30-40 stitches in his head. According to claimant, she and decedent paid for the medical services themselves and never made a workers' compensation

claim or asked for any sort of reimbursement from Morgan. While this was not any sort of waiver, it is certainly indicative of the parties' relationship.

Finally, as to whether decedent selected his own time to work, it is clear from the record that decedent worked when he wanted to work. Thus, we find that decedent was an independent contractor of Morgan when the fatal accident occurred.

Even had we found that decedent was an employee of Morgan, we believe the present case to be distinguishable from *Scott*. While the procurement of timber and lumber is necessary for the operation of defendant WNC and thus part of its general business, the actual logging is not. WNC routinely hired loggers such as Morgan to do this work. Morgan and other loggers tended to continue to work with WNC as they continued to give them work in a sort of symbiotic relationship. In *Scott*, the lumber company owned and furnished the sawmill, controlled the land it was on, and treated the employees at the sawmill as their own by giving them credit at the company store. In the present case, WNC did not own the land, only the rights to the timber. As per their policy, they cut logging roads for the logger with whom they had contracted to cut down the trees. The only control they had was defining the area to be logged. The logging was left up to Morgan and those like him. While WNC did give its loggers advances on payments and also financed larger equipment for them, the relationship does not approach that of the one present in *Scott*. Therefore, Morgan was not merely a supervisory employee, but maintained a separate identity.

This assignment of error is overruled.

II.

Claimant next contends that the Full Commission erred by failing to find that Leo Morgan was an employee of WNC. We have addressed this argument somewhat in the previous

section, but further delve into it here. Claimant argues that, under *Hayes*, defendant Morgan was an employee of defendant WNC. We disagree.

Claimant stresses the fact that Morgan has worked for WNC almost exclusively for over 15 years, and argues that while Morgan did get paid on a quantitative basis (per thousand board feet of timber) WNC made so many advances to Morgan and financed his equipment so as to cause him to lose all economic independence. Further, Morgan no longer advertised. However, evidence in the record revealed that Morgan and WNC still negotiated each new project. Morgan filed his own tax returns and paid his own employees. Morgan procured his own equipment for his business. While it is true that a bulldozer had been financed by WNC, this fact is not solely determinative of his economic independence being lost. Morgan is free to walk away from the jobs offered by WNC and contract with any other person or entity he so chooses.

As to WNC's control over Morgan, it was only to the extent of where to cut consistent with timber rights it had purchased from landowners. WNC had no operational control over how the trees were cut as Morgan solely used his independent skill and knowledge, nor could they fire him for choosing one method over another. While an employee of WNC would show up at the work site to check the work, this employee did not impose any control with respect to the manner of logging, only making sure that WNC was getting what they wanted.

It is clear from the record that while defendants had a close working relationship, Morgan was not an employee of WNC. This assignment of error is overruled.

III.

Claimant next contends that the Full Commission committed error in its findings of fact. According to claimant, many of these findings of fact are either irrelevant, unsupported by record

evidence, or should have been disregarded by the Full Commission as other evidence to the contrary was more credible.

The standard for appellate review of an opinion and award of the Industrial Commission is well settled. Review "is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World*, 300 N.C. 329,331, 266 S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980); *see also Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000); *Shah v. Howard Johnson*, 140 N.C. App. 58, 61, 535 S.E.2d 577, 580 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

In addition, "so long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.'" *Id*. at 61-62, 535 S.E.2d at 580 (quoting *Porterfield v. RPC Corp*., 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)). The *Calloway* Court went further stating that "our task on appeal is not to weigh the respective evidence but to assess the *competency* of the evidence in support of the Full Commission's conclusions." *Calloway*, 137 N.C. App. at 486, 528 S.E.2d at 401.

We hold that all the findings of fact made by the Full Commission are indeed relevant and supported by sufficient evidence. We acknowledge that there does exist evidence to the contrary on several of the findings.

However, we take special note of finding of fact number 12:

> Although the Beddingfield's tax return reflected an estimated earning of $13,970.00 from Leo Morgan, this is rejected as not being credible based upon the testimony of the tax preparer, who indicated she was instructed to estimate the earning. Rather the competent evidence in the record supports a finding that Leo

> Morgan paid decedent $2,800.00 for the logging work done from April 1999 until the date of the fatal injury.

It appears the Full Commission may have had some of the witnesses confused. The transcript indicates that the only "tax preparer" to testify was Kim Logan. She testified that she assisted in preparing the Beddingfield's 1998 tax return. This would appear to have little bearing on the 1999 earnings and what was reported on that year's tax return. According to claimant, the 1999 Beddingfield tax return was prepared by Paul Batson. This return notes that the Form 1099 from Leo Morgan reported $2,800 in income to decedent. Just below it reports $11,170, labeled as "Other Income from Leo Morgan not reported on 1099." Claimant was asked about these amounts, and she testified that it was her understanding that decedent had gone to work for defendant Morgan in early February of 1999, and was paid $100 a day or $500 a week. Thus, she testified that she informed Batson "to take the basic $500 a week and file it from the first week of February till the day he died." She was unaware that decedent did not work all those days.

The Full Commission found the testimony establishing decedent starting with defendant Morgan in April 1999, not February, and that from then until his death, he worked about 28 or 29 days instead of everyday as credible. While there might have been confusion as to whom to attribute testimony in the first sentence of the finding of fact, this error did not affect the correctness in the main point contained in the second sentence.

This assignment of error is overruled.

IV.

Claimant further contends that the conclusions of law are not supported by the evidence. As to the Full Commission's first conclusion of law that decedent was logging as an independent contractor for defendant Morgan, the previous sections of this opinion adequately explain why this conclusion is sound under the prevailing law.

The second conclusion of law states:

> In the alternative, plaintiff contends defendant WNC Pallet should be held liable. However, N.C. GEN. STAT. §97-19 does not apply in this case. *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 392 S.E.2d 758 (1990), *citing Beach v. McLean*, 219 N.C. 521, 14 S.E.2d 554 (1941), N.C. GEN. STAT. §97-19 may apply as between two independent contractors, one of whom is a subcontractor to the other; but it does not apply as between a principal, i.e., an owner, and an independent contractor.

N.C. Gen. Stat. §97-19 (2001) states in pertinent part:

> Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 [requiring employers to carry workers' compensation insurance] hereof, shall be liable, irrespective of whether such subcontractor has regularly in service fewer than three employees in the same business within this State, to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract.

Id.

Commenting on this statute, this Court has stated:

> This is the so-called "statutory employer" or "contractor under" statute. It is an exception to the general definitions of "employment" and "employee" set forth at G.S. §97-2 and was enacted by the Legislature to deliberately bring specific categories of conceded nonemployees within the coverage of the Act for the purpose of protecting such workers from "financially irresponsible subcontractors who do not carry workmen's compensation insurance, and to prevent principal contractors, intermediate contractors, and sub-contractors from relieving themselves of liability under the Act by doing through sub-contractors what they would otherwise do through the agency of direct employees." *G.S.*

> *§97-19, by its own terms, cannot apply unless there is first a contract for the performance of work which is then sublet. Consequently, G.S. §97-19 may apply as between two independent contractors, one of whom is a subcontractor to the other; but it does not apply as between a principal, i.e., an owner, and an independent contractor*.

Cook v. Norvell-Mackorell Real Estate Co., 99 N.C. App. 307, 310, 392 S.E.2d 758, 759-60 (1990) (citations omitted) (emphasis added).

Applying the above law to the facts of this case, we hold that WNC is not a statutory employer. WNC purchased standing timber from Champion pursuant to a contract dated 7 June 1999. WNC paid Champion the full lump sum purchase price on 14 June 1999. Thus, WNC was the principal/owner of the timber. Soon after, WNC contracted with Leo Morgan for the harvest of that timber. As stated in *Cook*, N.C. Gen. Stat. §97-19 does not apply to that transaction. *See Evans v. Lumber Co.*, 232 N.C. 111, 59 S.E.2d 612 (1950); *Purser v. Heatherlin Properties*, 137 N.C. App. 332, 527S.E.2d 689, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 428 (2000). Leo Morgan was not a subcontractor within the meaning of §97-19, but an original contractor. As this was the conclusion of the Full Commission, this assignment of error is overruled.

V. & VI.

We have carefully reviewed the remaining contentions of claimant, and in light of this record, the transcript, exhibits, and prevailing law, we hold them to be wholly without merit.

Affirmed.

Judges McGEE and LEVINSON concur.

Report per Rule 30(e).