IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1041

Filed: 3 May 2016

The North Carolina Industrial Commission IC File Nos. W61904 & PH-2513

KENNETH R. MCNEILL, Employee, Plaintiff,

v.

SHAWN MCNEILL and/or GARNIE MCNEILL d/b/a FERRELL'S CONSTRUCTION and/or FERRELLS' CONSTRUCTION, Employer, NONINSURED, and SHAWN MCNEILL and/or GARNIE MCNEILL, Individually, Defendants.

Appeal by Plaintiff from an opinion and award entered 24 June 2015 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 24 February 2016.

Greg Jones & Associates, Crumley Roberts, by Cameron D. Simmons, for Plaintiff-Appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Shelley W. Coleman and M. Duane Jones, for Defendant-Appellees.

HUNTER, JR., Robert N., Judge.

Kenneth McNeill ("Plaintiff") appeals from an opinion and award entered 24 June 2015 by the Full North Carolina Industrial Commission (the "Industrial Commission") that awards Plaintiff compensation and holds that Travelers Indemnity Company of America ("Travelers") did not provide workers' compensation

insurance for employer Shawn McNeill ("Defendant") on the date of the accident at issue. We affirm the Full Commission's opinion and award.

I. Factual and Procedural History

Travelers provided Defendant with a workers' compensation insurance policy that was effective from 22 July 2009 to 22 July 2010. The policy lists the insured party's name and address as "Shawn McNeill P.O. Box 3101 Pembroke, NC 28372."

After Travelers issued the policy, it required Defendant to produce a "1040 & Schedule C" tax form by 25 September 2009, which Defendant did not do. On 28 October 2009, Travelers sent Defendant a policy cancellation letter and notified him that his policy was going to be cancelled on 17 November 2009. The letter was sent to Defendant's last known address in Pembroke via certified mail with return receipt requested. Shirlean Butler signed and returned the receipt to Travelers on 12 November 2009. The receipt bears Butler's signature in addition to Defendant's name and Pembroke address.

On 30 December 2009, Plaintiff worked for Defendant's construction company and pulled plywood from a roof in Marion, South Carolina. As Plaintiff stood on the roof, the plywood broke, causing him to fall and fracture his foot. Plaintiff stayed in the hospital for three days and had surgery on his injured foot.

On 19 January 2010, Plaintiff filed a Form 18 "Notice of Accident," for the injury. Travelers denied Plaintiff's claim by filing a Form 61 "Denial of Workers'

Compensation Claim" on 6 January 2010. In the Form 61 document, Travelers alleged there was no workers' compensation insurance policy in place for Defendant on the date of the accident because the policy was cancelled on 17 November 2009.

On 28 January 2010, Plaintiff filed a Form 33 "Request that Claim be Assigned for Hearing." Travelers filed a form 33R "Response to Request that Claim be Assigned for Hearing" on 11 February 2010 and alleged Defendant's insurance policy was cancelled on 19 November 2009 "for failure to comply with an audit." Prior to the hearing the parties deposed Betty Hurst of the North Carolina Rate Bureau (the "Bureau").

Ms. Hurst testified that Defendant applied for workers' compensation insurance through the Bureau. The Bureau accepted his application and assigned the policy to Travelers, thereby binding the coverage. She testified that Travelers' request for Defendant's 1040 and Schedule C forms was a "typical" request, and such a request is allowable under the Workers' Compensation Assigned Risk Plan. She also testified, "to deem an employer ineligible for coverage does not require the insured to have received the letter of [insurance policy] cancellation [fifteen] days prior to the proposed effective date of cancellation, nor is there a requirement of proof of the [return receipt]."

This matter was first heard by Deputy Commissioner Adrian A. Phillips on 6 October 2011. On 6 October 2011, Deputy Commissioner Phillips entered an opinion

and award finding that Travelers did not cancel Defendant's workers' compensation policy by the date of the accident. Deputy Commissioner Phillips made the following conclusion of law:

> The relevant section of N.C. Gen. Stat. § 58-36-105 states that any cancellation permitted by [N.C. Gen. Stat. § 58-36-105(a)] . . . is not effective unless written notice of cancellation has been given . . . to the insured not less than 15 days before the proposed date of cancellation . . . No cancellation by the insurer shall be effective unless and until such method is employed and completed.

Thereafter, Travelers appealed to the Full Commission.

The Full Commission entered an opinion and award reversing Deputy Commissioner Phillips, and concluded Travelers had properly cancelled Defendant's policy prior to the accident. The Full Commission remanded the matter to Deputy Commissioner Phillips "for a penalty hearing . . . for [Defendant's] failure to maintain workers' compensation insurance coverage." Plaintiff timely appealed to this Court. On 21 May 2013, this Court dismissed Plaintiff's appeal as interlocutory.

Thereafter, Deputy Commissioner Phillips heard the matter on remand on 5 December 2013. At the hearing, Plaintiff was the only testifying witness. Deputy Commissioner Phillips issued an opinion and award on 26 August 2014 and incorporated the Full Commission's conclusions of law regarding Travelers' termination of the workers' compensation policy. Deputy Commissioner Phillips made findings of fact and conclusions of law regarding compensability and ordered

Defendant to pay Plaintiff $8,785.00 in temporary total disability, and $14,400.00 in permanent partial disability. Plaintiff appealed to the Full Commission.

The Full Commission issued an opinion and award on 24 June 2015 and affirmed Deputy Commissioner Phillips's conclusions of law. Plaintiff timely filed his notice of appeal on 15 July 2015.

II. Jurisdiction

The Full Commission's 24 June 2015 opinion and award is a final judgment from an administrative agency. This Court has jurisdiction to hear the appeal pursuant to N.C. Gen. Stat. §§ 7A-29(a), 97-86 (2015).

III. Standard of Review

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The Industrial Commission's conclusions of law are reviewable *de novo* by this Court." *Lewis v. Sonoco Products Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000) (citation omitted).

IV. Analysis

Plaintiff contends Travelers did not give Defendant notice of the policy cancellation under N.C. Gen. Stat. § 58-36-105(b). Consequently, Plaintiff contends the Full Commission committed error by finding and concluding that Travelers cancelled Defendant's policy before the 30 December 2009 accident. We disagree.

An insurer may cancel a workers' compensation policy before the expiration of the term without the prior written consent of the insured if, *inter alia*, the insured commits an "act or omission . . . that constitutes material misrepresentation or nondisclosure of a material fact in obtaining the policy, continuing the policy, or presenting a claim under the policy." N.C. Gen. Stat. § 58-36-105(a)(2) (2015). For an insurer to cancel a policy in this circumstance, it must follow the procedures set out in N.C. Gen. Stat. § 58-36-105(b), which states the following:

> Any cancellation permitted by subsection (a) of this section is not effective unless written notice of cancellation has been given to the insured not less than 15 days before the proposed effective date of cancellation. The notice may be given by registered or certified mail, return receipt requested, to the insured and any other person designated in the policy to receive notice of cancellation at their addresses shown in the policy or, if not indicated in the policy, at their last known addresses. The notice shall state the precise reason for cancellation. Whenever notice of intention to cancel is given by registered or certified mail, no cancellation by the insurer shall be effective unless and until such method is employed and completed. Notice of cancellation, termination, or nonrenewal may also be given by any method permitted for service of process pursuant to Rule 4 of the North Carolina Rules of Civil Procedure.

> Failure to send this notice, as provided in this section, to any other person designated in the policy to receive notice of cancellation invalidates the cancellation only as to that other person's interest.

N.C. Gen. Stat. § 58-36-105(b) (2015).

In the context of civil procedure, "[p]roper service is presumed when the provisions of Rule 4 are met." *Warzynski v. Empire Comfort Systems, Inc.*, 102 N.C. App. 222, 228, 401 S.E.2d 801, 805 (1991) (citing N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2)). Rule 4(j2)(2) provides the following for service by certified mail:

> Before judgment by default may be had on service by registered or certified mail, signature confirmation, or by a designated delivery service . . . with delivery receipt, the serving party shall file an affidavit with the court showing proof of such service . . . . This affidavit together with the return receipt, copy of the proof of delivery provided by the United States Postal Service, or delivery receipt, signed by the person who received the mail or delivery if not the addressee raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the addressee's dwelling house or usual place of abode. In the event the presumption described in the preceding sentence is rebutted by proof that the person who received the receipt at the addressee's dwelling house or usual abode was not a person of suitable age and discretion residing therein, the statute of limitation may not be pleaded as a defense . . . . Service shall be complete on the day the summons and complaint are delivered to the address.

N.C. Gen. Stat. § 1A-1, 4(j2)(2) (2015).

Here, Travelers did not provide an affidavit certifying its compliance with Rule 4. However, it sent the cancellation letter, via certified mail, to Defendant's last known address, the same address that appears on the workers' compensation policy. The recipient of the letter, Shirlean Butler, signed and returned the receipt to Travelers on 12 November 2009, though neither party presented evidence regarding Shirlean Butler's relationship with Defendant. This receipt, which also bears Defendant's printed name and address, serves as evidence that Travelers completed the policy cancellation process more than fifteen days before the 30 December 2009 accident. Defendant did not present any evidence to rebut the presumption that arose when Travelers properly served him with notice of cancellation. Lacking any rebuttal evidence, we hold service was completed.

It is well settled that the Workers' Compensation Act (1) "should be liberally construed . . . so that benefits will not be denied upon mere technicalities;" (2) "such liberality should not . . . extend beyond the clearly expressed language . . . and our courts may not enlarge the ordinary meaning of the terms used by the legislature;" (3) "it is not reasonable to assume that the legislature would leave an important matter . . . open to inference or speculation;" (4) "in all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Act as a whole—its language, purposes and spirit;" and (5) "the Industrial Commission's legal interpretation of a particular

provision is persuasive, although not binding, and should be accorded some weight on appeal and not idly cast aside, since that administrative body hears and decides all questions arising under the Act in the first instance." *Deese v. Southeastern Lawn and Tree Expert Co.*, 306 N.C. 275, 277–78, 293 S.E.2d 140, 143–44 (1982) (citations omitted). It does not offend these principles to hold that Travelers cancelled Defendant's workers' compensation policy for his failure to produce 1040 and Schedule C forms. Therefore, after review of the record, we hold the Full Commission's findings of fact are supported by competent evidence, and the findings of fact support the conclusions of law.

V. Conclusion

For the foregoing reasons, we affirm the Full Commission.

AFFIRMED.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).