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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1321

Filed: 16 August 2016

North Carolina Industrial Commission, I.C. Nos. W85154, PH-2616

DONALD EDWARD OWEN, JR., Employee, Plaintiff

v.

BRUCE HOGSED and/or TAMMY HOGSED d/b/a HOGSED LANDSCAPING & TREE SERVICE, Employer, NONINSURED, and ST. PAUL TRAVELERS/ZURICH, Carrier, and SYDNEY BRUCE HOGSED and TAMMY HOGSED, Individually, Defendants.

Appeal by plaintiff from opinions and awards entered 8 November 2012 and 24 August 2015. Heard in the Court of Appeals 12 May 2016.

Leicht & Associates, by Gene Thomas Leicht, for plaintiff-appellant.

Mullen Holland & Cooper P.A., by James R. Martin, for defendant-appellee.

DAVIS, Judge.

Donald Edward Owen, Jr. (“Plaintiff”) appeals from two opinions and awards of the North Carolina Industrial Commission (the “Commission”) determining that his employer’s workers’ compensation insurance policy had been lawfully terminated by its insurance carrier, American Zurich Insurance Company (“Zurich”), at the time of Plaintiff’s on-the-job injury and, therefore, did not provide coverage for his injury. After careful review, we affirm.

Factual Background

From 17 August 2009, Tammy Hogsed was the sole proprietor of Tammy Hogsed d/b/a Hogsed Landscaping and Tree Service (“Hogsed Landscaping”). Prior to her assuming ownership of the company, it was owned by her father, Bruce Hogsed, and was registered as Bruce Hogsed d/b/a Hogsed Landscaping and Tree Service.

On 17 August 2009, Hogsed Landscaping submitted to the North Carolina Rate Bureau (the “Rate Bureau”) an application for an assigned risk workers’ compensation insurance policy through the Hooper Insurance Agency.¹ The application stated, *inter alia*, that Hogsed Landscaping (1) had been in business for 12 years; (2) had not had a name or ownership change in the previous five years; (3) had previously possessed workers’ compensation insurance; (4) had no employees or subcontractors; and (5) was in the business of tree pruning, spraying, and repairing.

¹ N.C. Gen. Stat. § 58-36-1 provides the following overview of assigned risk insurance:

It is the duty of every insurer that writes workers’ compensation insurance in this State and is a member of the [Rate] Bureau, as defined in this section and G.S. 58-36-5 to insure and accept any workers’ compensation insurance risk that has been certified to be “difficult to place” by any fire and casualty insurance agent who is licensed in this State. When any such risk is called to the attention of the Bureau by receipt of an application with an estimated or deposit premium payment and it appears that the risk is in good faith entitled to such coverage, the Bureau will bind coverage for 30 days and will designate a member who must issue a standard workers’ compensation policy of insurance that contains the usual and customary provisions found in those policies. . . .

N.C. Gen. Stat. § 58-36-1(5)(a) (2015).

The Rate Bureau assigned coverage to Zurich, which issued a workers' compensation insurance policy (the "Policy") to Hogsed Landscaping on 3 September 2009 for the policy period encompassing 18 August 2009 to 18 August 2010. Zurich is an affiliate of Travelers Insurance Company ("Travelers"), which serviced the account.

On 3 September 2009, the same day the Policy was issued, Zurich sent Hogsed Landscaping a letter containing the following request:

Please provide the following in order to complete our underwriting file for the above captioned insured.

X Copy of last year's audit.

Application indicates you have had prior coverage. Therefore, please provide a copy of your most recent workers comp audit. Lastly, please provide a copy of your 1040 & Schedule C² (page 1 & 2) for 2008. Please send both requested items by 10/1/09.

Having received no response to its 3 September 2009 letter,³ Zurich sent Hogsed Landscaping a letter on 16 November 2009 stating that the Policy was cancelled effective 20 December 2009 because "requested underwriting information

² A Schedule C is an IRS form titled "Profit or Loss From Business (Sole Proprietorship)."

³ There is no indication in the record that Hogsed Landscaping failed to receive this letter. Nor do any of the parties to this appeal make such a contention.

has not been provided”⁴ This letter, which was sent by certified mail to Hogsed Landscaping’s address, was signed for by Linda Hogsed on 19 November 2009.

On 23 November 2009, Bruce Hogsed, who had remained an agent of Hogsed Landscaping despite relinquishing his ownership of the company, called Zurich Account Manager Cindy O’Connell (“O’Connell”). During this call, he stated that “he had not filed 2008 annual taxes” and that Hogsed Landscaping “did not maintain workers’ compensation insurance during the year prior to Zurich’s coverage period.”⁵

On that same day, O’Connell sent a letter to Hooper Insurance Agency requesting information to clarify discrepancies between the information in Hogsed Landscaping’s application to the Rate Bureau and the information Bruce Hogsed had conveyed in his phone call earlier that day. The letter stated as follows:

PLEASE REPLY BY 12/10/09:

The application signed by the insured and completed by your agency states insured in business for 12 years, and that there was prior Work Comp insurance. Mr. Hogtsed [sic] called today and advised he did not file 2008 annual taxes and did not have prior Work Comp insurance. The policy is pending cancellation 12/20/09 for not providing requested information. Before coverage can be reinstated, we need clarification from your agency regarding the inconsistencies noted above.

⁴ The cancellation notice stated that Zurich had also made a second request for information in addition to the 3 September 2009 request. However, the parties stipulated before the Commission that whether Zurich mailed one or two requests to Hogsed Landscaping before the cancellation notice was sent is immaterial to the legal validity of Zurich’s cancellation of the Policy.

⁵ It is unclear from the record whether this information was conveyed by means of a voicemail or whether O’Connell and Bruce Hogsed spoke directly.

Zurich received no response to this letter, and the Policy was cancelled on 20 December 2009.

On 19 April 2010, Plaintiff was injured when he fell from a tree in the course of his employment for Hogsed Landscaping. He initially filed a workers' compensation claim on 1 June 2010 and then filed an amended claim on 2 August 2010. Travelers denied the claim on 18 February 2011, asserting that the Policy was not in effect at the time of Plaintiff's injury.

At the parties' request, the Commission bifurcated the issues of insurance coverage and compensability of Plaintiff's injury. Based upon the stipulations and submissions of the parties, Deputy Commissioner Adrian A. Phillips issued an opinion and award on 30 April 2012 concluding that Zurich's cancellation of the Policy was valid and effective as of 20 December 2009 and, consequently, was not in effect at the time of Plaintiff's 19 April 2010 injury.

Plaintiff appealed to the Full Commission, and on 8 November 2012 the Commission issued an Interlocutory Opinion and Award, which affirmed the deputy commissioner's ruling and dismissed Zurich and Travelers from the case. Although the Commission's order was interlocutory, Plaintiff — out of an abundance of caution — filed a notice of appeal on 14 November 2012.

Proceedings were subsequently held to determine the compensability of Plaintiff's injury, and the Commission issued an Opinion and Award on 24 August

2015 — which incorporated by reference its 8 November 2012 Interlocutory Opinion and Award — concluding that Plaintiff's 19 April 2010 injury was compensable. Plaintiff filed a timely appeal seeking review of the coverage determination first made in the Commission's 8 November 2012 Interlocutory Opinion and Award and incorporated by reference in its Opinion and Award issued on 24 August 2015.

Analysis

Plaintiff's sole argument on appeal is that the Commission erred in concluding that Zurich lawfully cancelled the Policy before the expiration of the policy period. Appellate review of an opinion and award of the 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." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). The Commission's conclusions of law are reviewed *de novo*. *Id.*

As an initial matter, we note that Plaintiff does not challenge any of the Commission's findings of fact. Therefore, these factual findings are binding on appeal. *See Fields v. H & E Equip. Servs., LLC*, __ N.C. __, __, 771 S.E.2d 791, 793 (2015) ("Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal."). Instead, he asserts that the Commission's

factual findings do not support its legal conclusion that Zurich's termination of the Policy was lawful.

N.C. Gen. Stat. § 58-36-105 provides, in pertinent part, as follows:

(a) No policy of workers' compensation insurance . . . shall be cancelled by the insurer before the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured, except for any one of the following reasons:

. . . .

(2) An act or omission by the insured or the insured's representative that constitutes material misrepresentation or nondisclosure of a material fact in obtaining the policy, continuing the policy, or presenting a claim under the policy.

. . . .

(4) Substantial breach of contractual duties, conditions, or warranties that materially affects the insurability of the risk.

N.C. Gen. Stat. § 58-36-105(a)(2),(4) (2015). The Commission concluded that Zurich was permitted to cancel Hogsed Landscaping's coverage pursuant to both subsections (a)(2) and (a)(4).

Among Hogsed Landscaping's contractual duties under the Policy was the following:

F. Records

You will keep records of information needed to compute premium. You will provide us with copies of those records

when we ask for them.

According to the deposition testimony of Beth Gagliano (“Gagliano”), Senior Account Manager Underwriter for Travelers, an insurer uses information obtained from the insured under the above-quoted contractual provision to “verify information on the application and verify [its] exposure on the risk” and to “determine that the proper premium was charged.”

In its opinion and award, the Commission explained the reasoning underlying its determination that Zurich’s cancellation of the Policy was authorized by N.C. Gen. Stat. § 58-36-105(a)(4):

The items that Zurich was seeking from Hogsed Landscaping would have contained information, or revealed a lack of information, that Zurich would have used to determine whether the premium estimate from the N.C. Rate Bureau needed to be revised to reflect the proper risk presented to Zurich from insuring Hogsed Landscaping. Zurich had no source other than the insured to obtain that information; therefore, Hogsed Landscaping’s failure to respond to Zurich constituted a substantial breach of its contractual duties that materially affected the insurability of the risk, and Zurich was permitted to cancel Hogsed Landscaping’s policy prior [to] the expiration of its term. N.C. Gen Stat. § 58-36-105(a)(4).⁶

⁶ While the Commission also discussed a separate provision in the Policy authorizing Zurich to audit Hogsed Landscaping, Zurich does not rely on that provision on appeal, and we do not find it necessary to our resolution of this appeal.

This conclusion was supported by specific findings of fact, which — as noted above — Plaintiff does not challenge on appeal and are therefore binding on this Court.

5. On 3 September 2009 Zurich mailed a letter to Hogsed Landscaping requesting limited financial information, including Hogsed Landscaping’s 2008 tax returns, the previous year’s workers’ compensation audit, and the most recent workers’ compensation audit. The tax forms and prior audits would have provided payroll, classification, and employee information. Beth Gagliano, Senior Account Manager Underwriter, testified at her deposition that this information was requested in order to verify the insured’s statements in its application for insurance and to verify the extent of the carrier’s exposure on the policy, all of which would then be used to calculate premium. The carrier wanted to calculate the proper premium to ensure it had the proper exposure on its policy for the risk presented by the insured and to answer its obligations to the North Carolina Rate Bureau. Zurich requested a response by 1 October 2009.

6. Beth Gagliano further testified that the carrier did not have any way to obtain the requested information other than to obtain it from Hogsed Landscaping or their agent and that the carrier relied on the insured’s cooperation in calculating the premium.

7. As of 16 November 2009 Hogsed Landscaping had not responded in any way to the carrier. . . .

Plaintiff argues that the Commission incorrectly applied N.C. Gen. Stat. § 58-36-105(a)(4) when it concluded that Hogsed Landscaping’s “failure to respond to Zurich constituted a substantial breach of its contractual duties that materially affected the insurability of the risk[.]” The central premise of Plaintiff’s argument is

that neither a 2008 tax filing for Hogsed Landscaping nor its most recent workers' compensation insurance audit were "needed to compute premium" because computation of the appropriate premium required only information that arose *during* the policy period rather than historical information predating the policy period. Thus, Plaintiff contends, Hogsed Landscaping's failure to respond to Zurich's 3 September 2009 request for information was not a violation of Hogsed Landscaping's duty to "keep records of information needed to compute premium" and to "provide [Zurich] with copies of those records when [it] ask[s] for them." We are not persuaded by this argument.

Here, the initial premium was calculated using the historical data Hogsed Landscaping provided in its application to the Rate Bureau. After issuing the Policy, Zurich attempted to verify this information by requesting the business's most recent workers' compensation insurance audit and prior year's tax filing. These documents were needed to verify the type of work performed by Hogsed Landscaping, its prior job classifications, its number of employees or subcontractors, and other relevant information — all of which was necessary to verify that the premium was calculated accurately. The information requested was unremarkable, consisting of basic documents that would typically be requested by a workers' compensation insurer from its insured.

As Zurich notes in its brief, because of the nature of assigned risk policies, an insurer initially accepts an assignment based on nothing more than the information given by the insured to the Rate Bureau. We agree with Zurich that its request to verify the information provided by an employer to the Rate Bureau is the type of “simple due diligence that Zurich would ordinarily perform prior to writing coverage on a direct market policy, but in an assigned risk case those tasks by necessity cannot occur until after coverage is bound.” We are unable to discern any basis for holding that an insured should be held to a *lesser* standard in terms of its duty to provide appropriate information to its insurer simply because it is in the assigned risk pool rather than a participant in a direct market transaction.

We also reject Plaintiff’s argument that the specific documents requested by Zurich either did not exist or would not have been helpful in calculating the premium. Gagliano testified that the prior audit and tax return would have provided — among other things — information regarding the number of employees or subcontractors Hogsed Landscaping had. The need to verify this information was particularly significant due to the statement on Hogsed Landscaping’s application to the Rate Bureau that it did not, in fact, have any employees or subcontractors.

Moreover, Gagliano testified — and the Commission found — that Bruce Hogsed’s 23 November 2009 phone call was not responsive to O’Connell’s 3 September 2009 request for information. In his phone call, Bruce Hogsed stated that *he* did not

file 2008 taxes. However, as Gagliano testified, this statement did not address the fact that Zurich “needed the annual taxes for the business” to assist in verifying that the premium was accurately calculated. In fact, the record reflects that during discovery it was revealed that *Tammy* Hogsed’s 2008 tax return included a Schedule C relating to Hogsed Landscaping. Thus, although O’Connell had specifically requested the 2008 Schedule C for Hogsed Landscaping in her 3 September 2009 request for information, this document was not provided to Zurich despite the fact that it clearly existed. Indeed, Bruce Hogsed’s call raised more questions than it answered. It was for this reason that O’Connell sent the request on 23 November 2009 seeking clarification, but no response was received.

In sum, Hogsed Landscaping’s failure to provide an adequate response to Zurich’s 3 September 2009 request for information constituted a substantial breach of a contractual duty materially affecting the insurability of the risk. Accordingly, we conclude that the Commission did not err in its determination that Zurich lawfully cancelled the Policy as of 20 December 2009 pursuant to N.C. Gen. Stat. § 58-36-105(a)(4).⁷

⁷ Because we affirm the Commission’s determination that Zurich was authorized under N.C. Gen. Stat. § 58-36-105(a)(4) to cancel the policy, we need not determine whether cancellation was separately permissible under § 58-36-105(a)(2). See *Residences at Biltmore Condo. Owners’ Ass’n, Inc. v. Power Dev., LLC*, __ N.C. App. __, __, 778 S.E.2d 467, 470 (2015) (“Because we believe that [the appellee’s] first argument is dispositive of this appeal, we need not address the alternative grounds advanced by [the appellee] for affirming the trial court[.]”), *disc review denied*, __ N.C. __, 784 S.E.2d 474 (2016).

OWEN V. HOGSED

Opinion of the Court

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).