An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA12-1468
NORTH CAROLINA COURT OF APPEALS

Filed: 2 July 2013

MARK TATE,
Employee-Plaintiff,

v. North Carolina Industrial Commission
I.C. No. W86208

RICHARD LOFTUS & LORI LOFTUS d/b/a WEST POINT FARMS, Employer, NONINSURED, and RICHARD LOFTUS and LORI LOFTUS, Individually, Defendants.

Appeal by defendants from opinion and award entered 10 September 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 April 2013.

Law Offices of Robert J. Willis, P.A., by Robert J. Willis, for plaintiff-appellee.

The Dungan Law Firm, P.A., by James W. Kilbourne, Jr., for defendants-appellants.

HUNTER, Robert C., Judge.

Defendants-appellants Richard and Lori Loftus, individually and d/b/a West Point Farms, (collectively "defendants" or, individually, "Richard or Lori Loftus") appeal an opinion and

award by the Full Commission awarding Mark Tate ("plaintiff") temporary total disability benefits, past and future medical expenses, costs, and attorney's fees. On appeal, defendants argue that the Industrial Commission erred by: (1) concluding plaintiff was an employee of defendants at the time of the accident that caused his injury; and (2) concluding that plaintiff's injury occurred in the course of and arose out of his employment. After careful review, we affirm the Full Commission's opinion and award.

Background

Defendants own West Point Farms, an 88-acre farm business that includes three camping cabins and a fully-equipped modern lodge. The premises are open for dining, wedding events, and camping. Troy Ellis ("Mr. Ellis") began working for defendants in October 2007. Initially, he was paid hourly and did basic repair work for them on a sporadic basis. Starting in November 2008, however, Mr. Ellis's job developed into steady, seasonal work where he was responsible for general maintenance work on defendants' property. For approximately six months a year, defendants paid him $400 per month; however, he was not paid during the winter months. In addition to his salary, defendants allowed him to stay year-round in a trailer owned by them

located on their property without paying rent. Mr. Ellis never received a 1099 form from defendants.

Mark Tate testified that he first met Mr. Ellis about six to seven weeks before his accident when plaintiff went to fix a heater in Mr. Ellis's trailer (the trailer owned by defendants). After finishing the work on the heater, Mr. Ellis offered plaintiff a job in which plaintiff would help him do work for defendants at a house they owned at 1887 Union Rd., the same street where West Point Farms is located. Plaintiff testified that he was hired by Mr. Ellis as a carpenter's helper. Plaintiff and Mr. Ellis agreed that plaintiff would be paid $10 per hour. Plaintiff averaged about 3-4 days of work per week.

Each week, plaintiff would keep track of his hours, which he recorded on a piece of paper. Every Thursday or Friday, plaintiff would turn the paper in to Mr. Ellis. Mr. Ellis, in turn, submitted the hours to defendants, and plaintiff would be paid in cash. Prior to the accident on 27 February 2010, plaintiff also performed some work on the farm equipment and farm vehicles owned by defendants. All of plaintiff's assignments were given to him by Mr. Ellis. He also lived in the trailer with Mr. Ellis and Charles Wright (nicknamed "CJ"),

another individual hired to help with the work on the house being remodeled.

About two weeks before the accident, defendants hired a couple, the Hendersons, to perform other jobs at West Point Farms. Defendants agreed to allow them to move into the trailer where plaintiff, CJ, and Mr. Ellis were residing. As a result, CJ moved into one of the small cabins; plaintiff and Mr. Ellis moved into a camper inside a barn located on the West Point Farms property. Mr. Ellis and plaintiff were given permission to build an apartment in the barn. Plaintiff testified that CJ was the "carpenter in charge" of building the apartment whereas plaintiff was his assistant.

On 27 February 2010, plaintiff was marking the location for the framing of the apartment with spray paint in the barn. Plaintiff was smoking a cigarette, and the paint can exploded in his hand as he was shaking it up. Prior to plaintiff shaking the can, it had been sitting next to a heater in an effort to heat it up. Plaintiff was flown by helicopter to Baptist Medical Center in Winston-Salem where he was treated for second and third degree burns covering 28% of his body.

On 3 June 2010, plaintiff filed a Form 18 "Notice of Accident" with the Industrial Commission. Defendants responded

by filing a Form 81 arguing that plaintiff was not an employee and, thus, was not entitled to compensation. Deputy Commissioner Adrian Phillips issued an opinion and award on 24 January 2012 concluding that plaintiff's injury was compensable. Defendants appealed Deputy Phillips's opinion to the Full Commission on 10 April 2012. The matter came on for hearing before the Full Commission on 11 July 2012. The Full Commission issued an order affirming Deputy Phillips's opinion and award on 10 September 2012. Defendants timely appealed.

Arguments

Defendants first argue that the trial court erred in concluding that plaintiff was an employee at the time of his injury. We disagree.

"To be entitled to maintain a proceeding for workers' compensation, the claimant must be, in fact and in law, an employee of the party from whom compensation is claimed." *Youngblood v. N. State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988). Whether an individual is an employee is a jurisdictional issue; on appeal, the Industrial Commission's findings of fact are not binding, and this Court must "review the evidence of record and make independent findings of fact with regard to plaintiff's employment status." *Id.*

To determine whether an individual is an employee or an independent contractor, our Courts apply a common law test and look at whether that person:

> (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. Bd. of Trustees of Elon Coll., 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. 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, 687, 549 S.E.2d 175, 178 (2001).

Prior to applying the *Hayes* factors to determine plaintiff's employment status, we must determine whether Mr. Ellis was an employee or independent contractor since Mr. Ellis was responsible for hiring and supervising defendant.

Consequently, should we conclude Mr. Ellis is an independent contractor, plaintiff could not be considered defendants' employee. Here, having carefully reviewed the record, we hold that application of the *Hayes* factors tends to show that Mr. Ellis was an employee, not an independent contractor, and consider the following factors to be determinative. First, Mr. Ellis testified that he was paid a monthly salary of $400 in addition to free housing which constitutes strong evidence that he is an employee. *See Youngblood*, 321 N.C. at 384, 364 S.E.2d at 437-38 (holding that "[p]ayment of a fixed contract price or lump sum ordinarily indicates that the worker is an independent contractor, while payment by a unit of time, such as an hour, day, or week, is strong evidence that he is an employee"). Second, while the "freedom to employ such assistants as the claimant may think proper indicates contractorship[,]" *id.*, the evidence establishes that defendants provided most of the equipment, tools, and materials needed for the work completed by Mr. Ellis. "[W]hen valuable equipment is furnished to the worker, the relationship is almost invariably that of employer and employee." *Id.* Finally, Mr. Ellis did not engage in an independent business using his "special skills." *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140. We note that although the

evidence suggests that Mr. Ellis was skilled in his job so as to not require much supervision from defendants, this fact does not necessarily require a conclusion that he was an independent contractor. *See Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 819, 266 S.E.2d 35, 37 (1980) (holding that "[t]he fact that [the] plaintiff was skilled in his job so that he needed very little supervision does not make him an independent contractor"); *Youngblood*, 321 N.C. at 387, 364 S.E.2d at 439 (noting that "the fact that a claimant is skilled in his job and requires very little supervision is not in itself determinative [in concluding that he is an independent contractor]"). Accordingly, we hold that Mr. Ellis did not possess the independence necessary for classification as an independent contractor; instead, the evidence supports the conclusion that Mr. Ellis and defendants had an employee-employer relationship.

Moreover, our application of the *Hayes* factors to the evidence leads us to the conclusion that plaintiff was also an employee of defendants. First, plaintiff was paid by the hour and allowed to live on defendants' property. Both Mr. Ellis and plaintiff testified that, each week, plaintiff would calculate the hours he worked, and Mr. Ellis would submit this information to defendants for payment. Second, both Mr. Ellis and plaintiff

testified that most tools and materials necessary to perform their work were provided by defendants. These tools included defendants' truck which they used to pick up materials and carry them to the various job sites, hammers, and saws. Finally, plaintiff testified that Mr. Ellis was his supervisor which implies that Mr. Ellis maintained a great deal of control over plaintiff. *See McCown*, 353 N.C. at 686, 549 S.E.2d at 177 (noting that "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"). Accordingly, after application of the *Hayes* factors to the evidence in this case, we conclude that plaintiff was also an employee of defendants at the time of his injury.

Based on our conclusion that both Mr. Ellis and plaintiff were employees of defendants, plaintiff was "entitled to maintain a proceeding for workers' compensation." *Youngblood*, 321 N.C. at 383, 364 S.E.2d at 437. Defendants' argument is without merit.

Next, defendants argue that the Industrial Commission erred in concluding that plaintiff's injury arose out of and in the course of his employment.[1] We disagree.

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." *Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "The Commission's conclusions of law are . . . reviewed *de novo*." *Gray v. RDU Airport Auth.*, 203 N.C. App. 521, 525, 692 S.E.2d 170, 174 (2010).

Under the Workers' Compensation Act, a plaintiff is entitled to compensation for an injury "only if (1) it is caused by an accident, and (2) the accident arises out of and in the course of employment." *Gray*, 203 N.C. App. at 525, 692 S.E.2d at 174 (internal quotation marks omitted); *see also* N.C. Gen. Stat. § 97-2(6) (2011). "The phrases 'arising out of' and 'in

---

[1] It should be noted that the Full Commission did not make a specific conclusion that plaintiff's injury arose out of and in the course of his employment. Instead, it concluded that plaintiff suffered a "compensable injury." Implicit in this conclusion is that both elements are met.

the course of' one's employment are not synonymous but rather are two separate and distinct elements both of which a claimant must prove to bring a case within the Act." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977).

"'Arising out of' the employment is construed to require that the injury be incurred because of a condition or risk created by the job. In other words, [t]he basic question [to answer when examining the arising out of requirement] is whether the employment was a contributing cause of the injury." *Billings v. Gen. Parts, Inc.*, 187 N.C. App. 580, 586, 654 S.E.2d 254, 258 (2007), *writ denied* and *review denied*, 362 N.C. 233, 659 S.E.2d 435 (2008) (internal quotation marks and citations omitted). Our Supreme Court has held that, generally, "an injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment." *Robbins v. Nicholson*, 281 N.C. 234, 239, 188 S.E.2d 350, 354 (1972) (internal quotations marks omitted).

Here, the unchallenged findings of fact and record clearly establish that plaintiff's injury arose out of his employment because the construction of the living space in the barn was

necessary since he and Mr. Ellis were forced to move from the trailer into the barn. In other words, his employment was a "contributing cause of the injury." *Billings*, 187 N.C. App. at 586, 654 S.E.2d at 258. Thus, plaintiff's job exposed him to the risks associated with building the living space in the barn, and there is a causal relationship between his injury and the performance of his job duties. Accordingly, we hold that plaintiff's injury arose out of his employment.

With regard to determining whether an injury occurs "in the course of" employment, this Court has concluded that

> [t]he words [i]n the course of have reference to the time, place and circumstances under which the accident occurred. Clearly, a conclusion that the injury occurred in the course of employment is required where there is evidence that it occurred during the hours of employment and at the place of employment while the claimant was actually in the performance of the duties of the employment.

Harless v. Flynn, 1 N.C. App. 448, 455-56, 162 S.E.2d 47, 52 (1968) (internal quotation marks and citations omitted).

Here, the barn was located on West Point Farms property, the place of plaintiff's employment. Moreover, plaintiff's injury occurred during the time of his employment since plaintiff testified that he was being compensated for his work in the barn. Finally, the injury occurred in performance of

plaintiff's duties because, as discussed, the work in the barn was necessary for plaintiff to maintain free housing on the property. In other words, as the Full Commission noted in its findings, "[p]laintiff was performing repair and construction work that was needed for the business of West Point Farms . . . when this accident occurred." Thus, plaintiff's work was done during the hours of his employment, at the place of employment, and in the performance of the required duties of his employment. Accordingly, his injury arose in the course of his employment.

Based on the record, we conclude that plaintiff's injury arose out of and in the course of his employment with defendants. Therefore, we affirm the Full Commission's conclusion that plaintiff suffered a compensable injury.

Attorney's Fees and Costs

In his brief, plaintiff requests this Court award him attorney's fees and costs pursuant to N.C. Gen. Stat. § 97-88. "Pursuant to N.C.G.S. § 97-88, this Court may order that the costs to the injured employee of appeals to this Court, including reasonable attorney's fees, be paid by the *insurer* if: (1) the *insurer* brings the appeal; and (2) this Court orders the insurer to make or continue to make payments of benefits or medical expenses." *Matthews v. Petroleum Tank Serv., Inc.*, 108

N.C. App. 259, 267, 423 S.E.2d 532, 537 (1992) (emphasis added). Here, defendants are uninsured. Therefore, plaintiff is not entitled to attorney's fees pursuant to N.C. Gen. Stat. § 97-88 because the statute only authorizes this Court to award attorney's fees and costs when an appeal is brought by an insurer.[2]

Conclusion

Based on the foregoing reasons, we affirm the Full Commission's opinion and award concluding that plaintiff was an employee at the time of his injury and concluding that he suffered a compensable injury.

AFFIRMED.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).

[2] While our Courts have awarded fees and costs pursuant to this statute when an appeal is brought by a self-insured employer, *see Bass v. Mecklenburg Cnty.*, 258 N.C. 226, 235, 128 S.E.2d 570, 576 (1962) and *D'Aquisto v. Mission St. Joseph's Health Sys.*, 198 N.C. App. 674, 679, 680 S.E.2d 249, 253 (2009), here, defendants are neither self-insured nor insured by a third party.