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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-299

Filed: 5 November 2019

I.C. No. 16-742209

JORGE MACIAS, Plaintiff-Appellee,

v.

BSI ASSOCIATES, INC. d/b/a CAROLINA CHIMNEY, Employer, TRAVELERS INSURANCE COMPANY, Carrier, Defendants-Appellants.

Appeal by defendants from Opinion and Award entered 22 October 2018, and from Order entered 24 January 2019, by the Industrial Commission. Heard in the Court of Appeals 16 October 2019.

The Law Offices of John M. McCabe, P.A., by John M. McCabe and George W. Dennis, III, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones, for defendant-appellants.

YOUNG, Judge.

This appeal arises from an Industrial Commission decision that the plaintiff was defendant's employee at the time of the accident. The Full Commission did not err in concluding plaintiff was an employee of Carolina Chimney, rather than an independent contractor. As a result, we affirm in part. However, the Full

Commission lacked jurisdiction to enter the Order awarding attorneys' fees, and therefore, we vacate in part.

I. Factual and Procedural History

Plaintiff Jorge Macias ("Macias") initially worked for Carolina Chimney from February 2008 until his first on-the-job accident on 29 February 2013. The parties settled the claim and entered into an agreement that precluded Macias from returning to work for Carolina Chimney. In March 2014, Carolina Chimney's owner, Steve Sterling ("Sterling"), proposed a plan to circumvent the parties' agreement. Under Sterling's plan, Macias would start his own company, purchase the necessary insurance policies, and continue to work for Carolina Chimney as an "independent contractor." Sterling assured Macias that he would provide the vehicles, tools and supplies, and that he would make arrangements for him to secure insurance. Thereafter, at Sterling's direction, Macias obtained an insurance policy which indicated that Macias had zero employees and excluded himself from coverage.

On 21 March 2014, Macias resumed working for Carolina Chimney. Macias' work arrangements and day-to-day undertakings were similar—if not identical—to his first period of employment with Carolina Chimney. Carolina Chimney gave Macias keys to the company's office and two credit cards to purchase supplies; his job title remained the same; Carolina Chimney required Macias to report to the company's office for work from 8:00 a.m. to 5:00 p.m., Monday through Friday, which

he did continuously during the twenty-five month period; Carolina Chimney provided Macias with specific instructions on where he was to work and the specific work to perform each day; Carolina Chimney furnished vehicles, tools, equipment, and supplies; Macias was given "Carolina Chimney" business cards to hand out, was required to wear "Carolina Chimney Crew" clothing, and was required to introduce himself by saying, "Hi, my name is Jorge. I'm here with Carolina Chimney."

Carolina Chimney continued to control the order in which Macias' work was performed, directed him on how to perform the work, decided when he would take breaks, and determined which co-workers, if any, would assist Macias.

The only other work Macias did during the twenty-five month period consisted of five "side jobs" on the weekends when he was not working for Carolina Chimney. Macias never advertised that he was in business for himself, and he did not utilize his own business address, business logo, business clothing, or business cards.

Each week during that twenty-five month period, Carolina Chimney paid Macias a regular paycheck in a set amount, even when he missed work for illness, vacation, or personal leave.

On 26 April 2016, Macias fell from a scaffold and fractured his spine. Macias was working with Sterling at the time, and was performing duties pursuant to Sterling's instructions. BSI Associates, Inc., Carolina Chimney, and Travelers Insurance Company (collectively "defendants") denied Macias' workers' compensation

claim, contending there was "no evidence of an employee[-] employer relationship." Macias requested a hearing before the Industrial Commission. The hearing was held on 11 July 2017 before Deputy Commissioner J. Brad Donovan who entered an Opinion and Award concluding that Macias was an employee of Carolina Chimney and his claim was compensable. Defendants appealed to the Full Commission. The Full Commission unanimously rejected defendants' argument and affirmed Deputy Commissioner Donovan's decision, concluding Macias was an employee of Carolina Chimney at the time of his accident. Defendants subsequently appealed to this Court.

II. Employment Categorization

A. 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." *Richardson v. Maxim Healthcare/Allegis Grp.,* 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

B. *Hayes* Factors

Defendants contend that the Full Commission erred in concluding plaintiff is an employee of Carolina Chimney and not an independent contractor. We disagree.

The seminal case for determining whether a worker is an employee or independent contractor is *Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944). In *Hayes*, the Supreme Court held an "employee" is subject to the employer's "right to control and direct the manner in which the details of the work are to be executed and what the laborers shall do as the work progresses . . ." *Id.* at 15, 29 S.E.2d at 140. It is the right to control that determines if an employer-employee relationship exists, not whether that right is actually exercised. *Morse v. Curtis*, 276 N.C. 371, 378, 172 S.E.2d 495, 500 (1970) (citing *Scott v. Lumber Co.*, 232 N.C. 162, 59 S.E.2d 425 (1950)).

An independent contractor is one who:

> contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer except as to the result of the work, and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what laborers shall do as it progresses.

Hayes, 224 N.C. at 15, 29 S.E.2d at 140.

Hayes further provided factors that guide the Industrial Commission in determining whether an injured worker is an independent contractor, rather than 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.

Id. at 16, 29 S.E.2d at 140 (citations omitted).

"The presence of no particular one of these indicia is controlling," nor "is the presence of all required." *Id*. This Court subsequently held that the following factors were not determinative of whether an injured worker was an independent contractor:

> [T]hat (1) both plaintiff and defendant assumed plaintiff was self-employed; (2) plaintiff did not have regular working hours; (3) defendant did not withhold taxes from plaintiff's pay; and (4) plaintiff was skilled in his job, so that he needed very little, if any, supervision.

Durham v. McLamb, 59 N.C. App. 165, 169, 296 S.E.2d 3, 6 (1982).

C. Macias' Employment Representation

Here, Defendants contend that plaintiff was an independent contractor because he "held himself out as [an] independent contractor." Defendants argued that Macias and Carolina Chimney had an oral contract that Macias would work as an independent contractor, and that Macias obtained his own workers' compensation insurance policy and filed tax documents that indicated he was an independent contractor. However, this Court held in *Capps v. Southeastern Cable* that a worker having his own workers' compensation policy was not "particularly relevant" since it

was procured at the insistence of the employer. *Capps v. SE Cable*, 214 N.C. App. 225, 241-42, 715 S.E.2d 227, 238 (2011). We are unpersuaded by Defendants' argument that Macias should be precluded from receiving workers' compensation because he reaped the tax benefit of being an independent contractor. There is also no legal authority holding that a worker's annual tax returns are a factor in deciding whether he is an independent contractor or an employee.

Defendants cite to *Myers v. Strom Aviation*, __ N.C. App. __, 804 S.E.2d 785 (2017), arguing that while the specific issue of being an independent contractor has not been addressed, this Court has reasoned that IRS representations can affect claims for a higher average weekly wage. However, *Myers* is distinguishable from the case at issue because *Myers* dealt with a completely different and unrelated issue – whether a per diem payment can be included as part of a worker's average weekly wage. Therefore, *Myers* is not applicable to this case.

Furthermore, whether someone "holds himself out as an independent contractor" is not a factor under *Hayes*. In fact, our courts have expressly held the parties' holding a worker out as an "independent contractor" is *not* determinative of the issue. *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 585, 350 S.E.2d 83, 89 (1986). Based on the evidence in the record, it is clear that Macias was not "engaged in an independent business, calling or occupation" at the time of his accident.

D. Credible Evidence

Defendants further contend that Macias' testimony is not credible and is contradicted by his actions. Defendants argue that Macias presented no other evidence other than his own testimony to show he was an employee. Macias introduced significant evidence including check stubs, the clothing he was wearing with Carolina Chimney's logo, and text messages between Macias and Carolina Chimney that illustrated the control that Carolina Chimney exercised over Macias. However, we do not reweigh the credibility of witnesses. *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274.

Like in *Capps*, there is not a "significant credibility issue" involved in this case. Instead, the "proper resolution of the jurisdictional controversy at issue [the employee-versus independent contractor issue] hinges primarily upon the proper application of the law to essentially undisputed evidentiary facts." *Capps*, 214 N.C. App. at 228, 715 S.E.2d at 230. The evidentiary record supports the findings, and the findings support the conclusion that Macias was an employee of Carolina Chimney.

E. Additional factors

Defendants further contend that Macias was an independent contractor because he "had independent use of his special chimney and masonry repair skill and knowledge," was "not paid as an hourly employee," was "free to work for other entities," and "could choose his own work schedule."

Our courts have repeatedly held that a person's knowledge, skill, or ability to

work without close supervision does not make him an independent contractor. In *Durham v. McLamb*, this Court held that the fact that "plaintiff was skilled in his job, so that he needed very little, if any, supervision [was] not determinative of the issue of what relationship existed between plaintiff and defendant." *Durham*, 59 N.C. App. at 168-69, 296 S.E.2d at 6. Defendants' argument further fails because the actual factor contained in *Hayes* is not whether the injured worker has a special skill or knowledge, but whether the worker makes "independent use" of that skill or knowledge "in the execution of the work." *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140. In this case, the evidence shows by Macias' uncontroverted testimony that Carolina Chimney instructed Macias on what needed to be done, made suggestions about how Macias should do the work, and he always followed Carolina Chimney's instructions. Based on *Durham* and *Hayes*, this supports the Full Commission's conclusion that Macias was an employee.

Defendants contend that Macias was not paid as an hourly employee. The evidence shows that Carolina Chimney paid Macias a regular paycheck, in a set amount, every week for over two years. Carolina Chimney also paid Macias when he did not work, whether his absence was for personal leave, sickness, or vacation. This also supports the Full Commission's conclusion that Macias was an employee.

Defendants further contend that Macias was free to work for other entities. *Hayes* provides that in order to be an independent contractor, a worker must "not [be]

in the regular employ of the other contracting party." *Id.* The Commission found that Macias worked every day, Monday through Friday, exclusively for Carolina Chimney. Macias never advertised that he was in business for himself, has never had his own business logo, clothing, or business cards. All logos, clothing, and business cards were those representing Carolina Chimney. These findings and the evidence supporting them, also support the Full Commission's conclusion that Macias was an employee.

Another *Hayes* factor is whether the worker "selects his own time." *Id.* Defendants contend that they did not control Macias' work time. However, the evidence supports the Commission's finding that for the entire two-year period, Carolina Chimney set Macias' work schedule as 8:00 a.m. to 5:00 p.m., Monday through Friday, and supports the Full Commission's decision that Macias was an employee and that Carolina Chimney controlled his time.

F. Jurisdiction to Award Attorney's Fees

A. Standard of Review

"Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986).

B. Analysis

Defendants contend the Full Commission lacked jurisdiction to enter the Order awarding attorney's fees after Defendants filed their notice of appeal. We agree.

An appeal to this Court generally divests the lower court of jurisdiction, pending the appeal. *Lowder v. All Star Mills*, 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981); *see Hanks v. Southern Public Utils. Co.*, 210 N.C. 312, 319-20, 186 S.E. 252, 257 (1936) (Commission constitutes special tribunal in compensation case and must perform judicial functions). Macias agrees that the Full Commission's Order awarding attorneys' fees under N.C. Gen. Stat. § 97-88 should be vacated because it was entered after defendants filed their notice of appeal. *Andrews v. Fulcher Tire Sales and Service*, 120 N.C. App. 602, 463 S.E.2d 425 (1995). This does not preclude the Full Commission from acquiring jurisdiction after the appeal is complete for the purpose of awarding attorneys' fees. As stated in *Andrews*, "once the appeal is complete . . . the Commission is again vested with the authority to determine an amount and to award attorney fees for work performed in furtherance of an appeal from a deputy commissioner to the Commission or an appeal from the Commission to this Court. *Id.* at 606, 463 S.E.2d at 428 (citations omitted). However, during the pendency of the appeal, the Full Commission lacked the jurisdiction to enter that award and therefore we vacate the award of attorneys' fees.

AFFIRMED IN PART, VACATED IN PART.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).