IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-131

No. COA19-1079

Filed 6 April 2021

North Carolina Industrial Commission, I.C. No. 16-732039

OCTAVIO NAMBO SUAZO, Employee, Plaintiff,

v.

JUAN J. GUTIERREZ-BOJORQUEZ, Employer, NONINSURED, and ROBCO RESIDENTIAL CONSTRUCTION, Employer, and ERIE INSURANCE, Carrier, Defendants.

Appeal by Defendants from an Opinion and Award filed 17 June 2019 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 29 April 2020.

James Farrin Productions LLC, d/b/a Law Offices of James Scott Farrin, by Douglas E. Berger, for plaintiff-appellee.

McAngus Goudelock & Courie, PLLC, by Stephanie O. Gearhart, for defendants-appellants Robco Residential Construction and Erie Insurance.

MURPHY, Judge.

¶ 1 A principal contractor is the statutory employer of an injured employee when the injured employee works for a subcontractor contracted by a principal contractor and when the subcontractor does not have workers' compensation insurance coverage covering the injured employee. Here, Defendant Robco Residential Construction

("Robco") is Plaintiff Octavio Nambo Suazo's statutory employer because Robco employed an uninsured subcontractor who employed Suazo. In addition, the principal contractor can escape liability under N.C.G.S. § 97-19 if (1) the principal contractor obtains a certificate of insurance prior to subletting work to the subcontractor; (2) the subcontractor has valid workers' compensation insurance coverage on the date of the injured employee's injury; or (3) the principal contractor has a valid certificate of insurance but is unaware the coverage has expired. Appellants cannot meet any of the three affirmative defenses and therefore are liable for the payment of Suazo's workers' compensation benefits.

BACKGROUND

¶ 2 On 28 April 2016, Suazo was an employee of Defendant Juan Gutierrez-Bojorquez ("Gutierrez-Bojorquez") and had been employed by Gutierrez-Bojorquez for at least eight months. While assisting Gutierrez-Bojorquez with a construction and siding job, Suazo fell from scaffolding at the job site and fractured his ankle.

¶ 3 At the time of Suazo's fall, Gutierrez-Bojorquez was a subcontractor for Robco and had been for over six years. Robco required all subcontractors to provide certificates of workers' compensation insurance ("certificates of insurance") before they began work on any job. When a subcontractor's policy was within 30 days of lapsing, Robco would receive a notice from the insurance agency. During the previous

years Gutierrez-Bojorquez worked for Robco, he consistently carried workers' compensation insurance as required by law.[1]

¶ 4 Gutierrez-Bojorquez has been purchasing workers' compensation insurance from Peebles Insurance Agency ("Peebles") since 2012. Each year, when Gutierrez-Bojorquez would receive a notice the policy was about to lapse, he would call Peebles and pay for a new policy over the phone. When paying by phone, Peebles did not provide a receipt for payment, but rather a confirmation number. After Gutierrez-Bojorquez paid for the policy by phone, Peebles would fax Robco a certificate of insurance detailing the workers' compensation insurance policy Gutierrez-Bojorquez purchased. Gutierrez-Bojorquez never received a copy of his policy, except for the first policy he purchased in 2012. The last certificate of insurance Robco received prior to Suazo's accident was on 15 April 2015 for coverage from 15 April 2015 through 16 April 2016.

¶ 5 In April 2016, Robco notified Gutierrez-Bojorquez his policy would lapse on 15 April 2016. In response, Gutierrez-Bojorquez called Peebles to pay his bill, as he had done in the past, expecting Peebles to send the new certificate of insurance to Robco.

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[1] N.C.G.S. § 97-93 requires every employer subject to the provisions of the Workers' Compensation Act to either "(1) [i]nsure and keep insured his liability under [the Workers' Compensation Act] in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized; or . . . . (3) [o]btain a license from the Commissioner of Insurance . . . ." N.C.G.S. § 97-93 (2019).

¶ 6 On 29 April 2016, the day after Suazo's fall, Gutierrez-Bojorquez went to Peebles to report Suazo's accident. Peebles informed him he did not have insurance and there was no record of a file being opened or a policy being issued. On 2 May 2016, Gutierrez-Bojorquez provided Peebles with proof of his early April 2016 payment and Peebles "refunded [the] payment to [him] [] then reissued a new policy which was effective after the injury." A new certificate of insurance was faxed to Robco on 2 May 2016 stating Gutierrez-Bojorquez had workers' compensation insurance retroactively covering the period 15 April 2016 to 15 April 2017.

¶ 7 Suazo filed a *Notice of Accident to Employer and Claim of Employee, Representative, or Dependent* on 9 June 2016, in which he alleged he injured his left lower extremity and named Robco as his employer and Erie Insurance ("Erie") as the responsible carrier. Suazo subsequently filed an amended *Notice of Accident to Employer and Claim of Employee, Representative, or Dependent*, in which he named Gutierrez-Bojorquez as his direct employer and alleged he was uninsured. Robco and Erie were still named as the employer and responsible carrier in the amended notice.[2]

¶ 8 On 17 June 2019, the Commission issued its *Opinion and Award* finding "[o]n [2 May 2016], after [Suazo's 28 April 2016] accident, [] Robco was faxed a certificate

[2] Gutierrez-Bojorquez, Robco, and Erie are all Defendants in this case. However, only Robco and Erie appealed from the Commission's order. Therefore, we refer to Robco and Erie collectively as "Appellants."

of insurance for [] Gutierrez-Bojorquez showing workers' compensation coverage effective from [15 April 2016] to [15 April 2017]." In addition, in Finding of Fact 44, the Commission found "during the relevant periods from [28 April 2016] to [1 May 2016], [] Gutierrez-Bojorquez was uninsured at that time and did not insure its liability or otherwise comply with [N.C.G.S.] § 97-93." Finally, the Commission concluded as a matter of law:

> Robco was a principal contractor that failed to obtain a certificate of compliance from [] Gutierrez-Bojorquez. Therefore, the Full Commission concludes by a preponderance of the evidence in view of the entire record, that [] Robco became [Suazo's] [s]tatutory [e]mployer pursuant to [N.C.G.S.] § 97-19 and [] Robco and the Defendant-Carrier, [Erie] Insurance, are therefore liable for [Suazo's] compensable injuries to the same extent that [] Gutierrez-Bojorquez is liable.

Pursuant to the Commission's order, Suazo was "required to exhaust parties in the following order: [F]irst, [] Gutierrez-Bojorquez and then Defendant-Carrier Erie Insurance." Appellants timely appeal.[3]

ANALYSIS

¶ 9 Appellants challenge the Commission's finding Robco is Suazo's statutory employer within the meaning of N.C.G.S. § 97-19 and its conclusion Appellants are responsible for Suazo's compensable injuries. We hold there was competent evidence

[3] Suazo also filed a notice of appeal, but on appeal presented no issues.

in the Record to support the Commission's finding that Robco is Suazo's statutory employer and the workers' compensation benefits available to Suazo through Robco's workers' compensation carrier, Erie, constitute Suazo's exclusive remedy against Robco for his injuries.

¶ 10 Our Workers' Compensation Act provides for protection of workers uninsured by subcontractors by imposing liability on principal contractors. Specifically, N.C.G.S. § 97-19 provides, in relevant part:

> Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without obtaining from such subcontractor or obtaining from the Industrial Commission a certificate . . . stating that such subcontractor has complied with [N.C.G.S. §] 97-93 for a specified term, shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of [the Workers' Compensation Act] for the payment of compensation and other benefits under [the Workers' Compensation Act] 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. *If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at any time before subletting such contract to the subcontractor, he shall not thereafter be held liable to any employee of such subcontractor for compensation* or other benefits under [the Workers' Compensation Act] and within the term specified by the certificate.
>
> Notwithstanding the provisions of this section, any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of work *shall not be held liable to any*

> *employee of such subcontractor if either (i) the subcontractor has a workers' compensation insurance policy in compliance with [N.C.G.S. §] 97-93 in effect on the date of injury regardless of whether the principal contractor, intermediate contractor, or subcontractor failed to timely obtain a certificate from the subcontractor;* or *(ii) the policy expired or was cancelled prior to the date of injury provided the principal contractor, intermediate contractor, or subcontractor obtained a certificate at any time before subletting such contract to the subcontractor and was unaware of the expiration or cancellation.*

N.C.G.S. § 97-19 (2019) (emphasis added).

¶ 11 Whether a defendant is a plaintiff's statutory employer within the meaning of N.C.G.S. § 97-19 "raises the jurisdictional question of whether an employment relationship within the [Workers' Compensation] Act existed between [the] plaintiff and [the defendant] at the time of the accident[.]" *Cook v. Norvell-Mackorell Real Estate Co.,* 99 N.C. App. 307, 309, 392 S.E.2d 758, 759 (1990). "[J]urisdictional facts found by the Commission, though supported by competent evidence, are not binding on this Court." *Id.* (citation omitted). "Instead, we are required to review the evidence of record and make independent findings of jurisdictional facts established by the greater weight of the evidence with regard to [the] plaintiff's employment status." *Id.*

¶ 12 However, unlike the prior cases before our Court, there is no dispute as to Suazo's employment status in this case. Suazo is an employee of Gutierrez-Bojorquez, who is a subcontractor of Robco. Rather, the question before us is whether the exceptions listed in N.C.G.S. § 97-19 relieve Appellants from liability; that issue

is not jurisdictional, and we therefore decline to review the issue de novo. When reviewing the Commission's opinion and award, we are "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). In addition, we "do[] not have the right to weigh the evidence and decide the issue on the basis of its weight. [Our] duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). We are required to uphold the Commission's findings if *any* competent evidence supports its findings, even if there is evidence to support a contrary finding. *See Blalock v. Durham,* 244 N.C. 208, 212, 92 S.E.2d 758, 760 (1956) ("[I]f there is any competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would support a finding to the contrary.").

A. Application of N.C.G.S. § 97-19

¶ 13 We have previously held N.C.G.S. § 97-19 applies only when two conditions are met:

> First, the injured employee must be working for a subcontractor doing work which has been contracted to it by a principal contractor. Second, the subcontractor does not have workers' compensation insurance coverage covering the injured employee. When these two conditions

> are met, the principal contractor becomes liable to the subcontractor's employee for payment of workers' compensation benefits.

Rich v. R.L. Casey, Inc., 118 N.C. App. 156, 159, 454 S.E.2d 666, 667 (internal citation omitted), *disc. rev. denied*, 340 N.C. 360, 458 S.E.2d 190 (1995). If these conditions are met, then the principal contractor is a statutory employer and can be held liable for the payment of compensation and other benefits. *Id.* The rationale behind this rule is:

> [T]he principal contractor, as statutory employer "steps into the shoes" of the subcontractor, [the] plaintiff's immediate employer. Since the [principal] contractor is subjected to no fault liability under [N.C.G.S. §] 97-19 and is required to compensate the subcontractor's injured employee, the principal contractor becomes the injured employee's immediate employer for purposes of the [Workers' Compensation] Act and is entitled to the benefit of the [Workers' Compensation] Act's exclusivity provisions. The plaintiff is not harmed by this construction because he still receives the same workers' compensation benefits for his injuries, albeit, from the principal contractor or its carrier.

Id. at 160-61, 454 S.E.2d at 668.

¶ 14 It is undisputed Suazo was working for a subcontractor, Gutierrez-Bojorquez, who was performing work that was contracted to him by the principal contractor, Robco. Instead, at issue is whether any competent evidence supported Finding of Fact 44 that "during the relevant periods from [28 April 2016] to [1 May 2016], []

Gutierrez-Bojorquez was uninsured at that time and did not insure its liability or otherwise comply with [N.C.G.S.] § 97-93."

¶ 15 Gutierrez-Bojorquez's last workers' compensation insurance policy before Suazo's injury ran from 15 April 2015 to 16 April 2016. Robco notified Gutierrez-Bojorquez a few days before 16 April 2016 his policy was expiring soon. On 16 April 2016, Gutierrez-Bojorquez's insurance policy lapsed, after he received multiple notifications the policy would expire. In addition, when Gutierrez-Bojorquez went to report Suazo's accident the day after it occurred, he discovered the policy had lapsed. These facts support the Commission's finding that, when Suazo's injury occurred on 28 April 2016, Gutierrez-Bojorquez did not have a valid workers' compensation policy in effect.

¶ 16 Appellants contend Gutierrez-Bojorquez obtained a policy retroactively covering the date of Suazo's injury. Assuming, *arguendo*, Gutierrez-Bojorquez could obtain a policy retroactively covering the date of Suazo's injury and still comply with the statutory requirements of N.C.G.S. § 97-93, Gutierrez-Bojorquez's answers to Robco's interrogatories and his corresponding testimony reflect no insurance policy existed that applied to the 28 April 2016 injury:

> 10. Does Mr. Bojorquez contend that he purchased workers' compensation insurance which provided coverage on the date of the incident which is the subject of this claim? Please provide the basis for the response.

> ANSWER:
> Yes. I have been buying insurance at Peebles Insurance for many years. Each of my policies renew [15 April] each year. I am billed in installments for the premiums. I only receive a copy of the policy if the carrier changes. I assumed it had renewed on [15 April 2016]. Peebles issued a Certificate of Insurance but later told me that *no workers comp policy had [been] issued*. The[y] refunded a premium payment to me and then reissued a new policy which was *effective after the injury*.

(Emphasis added) (capitalization modified). Considering Robco and Gutierrez-Bojorquez discovered no workers' compensation insurance policy existed on 28 April 2016, there was competent evidence to support Finding of Fact 44, that "during the relevant periods from [28 April 2016] to [1 May 2016], [] Gutierrez-Bojorquez was uninsured at that time and did not insure its liability or otherwise comply with [N.C.G.S.] § 97-93." In turn, Finding of Fact 44 supports the Commission's conclusion that "Robco became [Suazo's] [s]tatutory [e]mployer pursuant to [N.C.G.S.] § 97-19" because Suazo worked for a subcontractor who performed work contracted to him by a principal contractor, and the subcontractor did not have workers' compensation insurance providing coverage for Suazo on the date of his injury. *See* N.C.G.S. § 97-19 (2019).

B. Defenses to Liability Under N.C.G.S. § 97-19

¶ 17 Appellants argue they are entitled to at least one of the three affirmative defenses provided to a principal contractor under N.C.G.S. § 97-19: (1) the principal

contractor obtains a certificate of insurance issued by a workers' compensation carrier prior to the subletting of the performance of any work; (2) there was valid workers' compensation insurance coverage on the date the injured employee sustained his injury; or (3) the principal contractor can show it obtained a valid certificate of insurance and was unaware the policy had expired. Appellants must only prove one affirmative defense in order to escape liability.

¶ 18 The first affirmative defense is governed by the following portion of N.C.G.S. § 97-19:

> If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate [of insurance] at any time before subletting such contract to the subcontractor, he shall not thereafter be held liable to any employee of such subcontractor for compensation or other benefits under [the Workers' Compensation Act] and within the term specified by the certificate.

N.C.G.S. § 97-19 (2019). In order for Appellants to escape liability under this defense, the certificate of insurance Robco had in its possession on 28 April 2016 must have confirmed Gutierrez-Bojorquez had a valid workers' compensation insurance policy in place for the time period the job would be performed. The Record reflects on 28 April 2016, the most recent certificate confirming Gutierrez-Bojorquez had a valid workers' compensation insurance policy was faxed to Robco on 15 April 2015 and provided coverage for the term 15 April 2015 to 16 April 2016. On 2 May 2016, approximately four days after Suazo's injury, Robco received a new certificate of

insurance from Gutierrez-Bojorquez's insurance agent claiming to certify insurance from 15 April 2016 to 15 April 2017. One of Robco's owners admitted the typical procedure for obtaining a certificate of insurance before assigning work was not followed in this instance. There is competent evidence in the Record to support the Commission's Finding of Fact 45, that "Robco did not timely obtain a valid certificate of insurance and knew that it had not and in spite of this failure, allowed [] Gutierrez-Bojorquez to continue to work on said jobsite *after* [Suazo's] [28 April 2016] injury by accident until at least the following Monday when [] Gutierrez-Bojorquez presented a new certificate of insurance to [] Robco." (Emphasis in original). The Commission's Finding of Fact 45 supports the conclusion Appellants do not escape liability under this defense.

¶ 19 The second affirmative defense is governed by the following portion of N.C.G.S. § 97-19:

> [A]ny principal contractor . . . who shall sublet any contract for the performance of work shall not be held liable to any employee of such subcontractor if . . . the subcontractor has a workers' compensation insurance policy in compliance with [N.C.G.S. §] 97-93 in effect on the date of injury regardless of whether the principal contractor . . . failed to timely obtain a certificate from the subcontractor[.]

N.C.G.S. § 97-19 (2019). As previously addressed, there is competent evidence in the Record to support the Commission's Finding of Fact 44, that "during the relevant periods from [28 April 2016] to [1 May 2016], [] Gutierrez-Bojorquez was uninsured

at that time and did not insure its liability or otherwise comply with [N.C.G.S.] § 97-93." The Commission's Finding of Fact 44 supports the conclusion Appellants do not escape liability under this defense.

¶ 20 The third affirmative defense is governed by the following portion of N.C.G.S. § 97-19:

> [A]ny principal contractor . . . who shall sublet any contract for the performance of work shall not be held liable to any employee of such subcontractor if . . . the policy expired or was cancelled prior to the date of injury provided the principal contractor . . . obtained a certificate at any time before subletting such contract to the subcontractor and was unaware of the expiration or cancellation.

N.C.G.S. § 97-19 (2019). This defense fails for two reasons: (1) as previously addressed, Robco did not obtain a certificate confirming Gutierrez-Bojorquez's workers' compensation insurance coverage prior to subletting him the construction and siding job, and (2) Robco was aware Gutierrez-Bojorquez's insurance coverage would expire on 16 April 2016. Robco notified Gutierrez-Bojorquez the policy was expiring a few days prior to the 16 April 2016 expiration date, demonstrating it was aware the policy expired before the date of Suazo's accident. There is competent evidence in the Record to support the Commission's Finding of Fact 37, that "[o]n the date of [Suazo's] injury by accident, Friday [28 April 2016], and *before* [Suazo's] injury, [] Gutierrez-Bojorquez was notified by [] Robco that he needed to provide a

certificate of insurance." (Emphasis in original). The Commission's Finding of Fact 37 supports the conclusion Appellants do not escape liability under this defense.

¶ 21 In light of Findings of Fact 37, 44, and 45, none of the defenses from N.C.G.S. § 97-19 apply to Appellants and the Commission properly concluded "Robco became [Suazo's] [s]tatutory [e]mployer pursuant to [N.C.G.S.] § 97-19 and [] Robco and the Defendant-Carrier, [Erie] Insurance, are therefore liable for [Suazo's] compensable injuries to the same extent that [] Gutierrez-Bojorquez is liable."

CONCLUSION

¶ 22 There is competent evidence in the Record to support the Commission's conclusion that pursuant to N.C.G.S. § 97-19, Appellants are liable for payment of Suazo's workers' compensation benefits. At the time of the accident, Suazo was employed by Gutierrez-Bojorquez, a subcontractor performing work that had been contracted to him by a principal contractor, and Gutierrez-Bojorquez was uninsured. Appellants do not escape liability under any of the three affirmative defenses in N.C.G.S. § 97-19. We affirm the Commission's conclusion that "Robco became [Suazo's] [s]tatutory [e]mployer pursuant to [N.C.G.S.] § 97-19 and [] Robco and the Defendant-Carrier, [Erie] Insurance, are therefore liable for [Suazo's] compensable injuries to the same extent that [] Gutierrez-Bojorquez is liable."

AFFIRMED.

Judges DIETZ and ZACHARY concur.

Report per Rule 30(e).