IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-116

No. COA21-399

Filed 15 February 2022

North Carolina Industrial Commission, I.C. No. 15-043416

NEIL THOMAS, Employee, Plaintiff,

v.

CENTURY EMPLOYER ORGANIZATION, LLC, PEO and THE COASTAL GROUP, INC. PEO-Client, Employer and Alleged General Employer; NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION for Insolvent Insurer GUARANTEE INSURANCE COMPANY; and ATLANTIC CORPORATION OF WILMINGTON, INC., Alleged Special Employer, and SENTRY CASUALTY COMPANY, Carrier for ATLANTIC CORPORATION OF WILMINGTON, INC., Defendants.

Appeal by defendants from opinion and award entered 3 May 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 January 2022.

The Law Offices of Richard Flexner, by Cameron Simmons, of counsel, for plaintiff-appellee.

Nelson Mullins Riley & Scarborough LLP, by Christopher J. Blake and Joseph W. Eason, for defendant-appellant North Carolina Insurance Guaranty Association.

Anderson & Jones, PLLC, by Matthew P. Blake, for defendants-appellants Century Employer Organization, LLC, The Coastal Group, Inc., and North Carolina Guaranty Association.

Hill, Evans, Jordan & Beatty, PLLC, by Richard T. Granowsky, for defendants-appellees Atlantic Corporation of Wilmington, Inc., and Sentry Casualty Company.

TYSON, Judge.

¶ 1 The Coastal Group, LLC ("Coastal"), and the North Carolina Insurance Guaranty Association ("NCIGA") (together "Defendants") appeal a decision by the Full Industrial Commission finding and concluding Atlantic Corporation of Wilmington, Inc ("Atlantic") and Sentry Casualty Company ("Sentry") were not special employers of Plaintiff and are not liable for compensation for Plaintiff's injuries incurred in the workplace. We affirm.

I. Background

¶ 2 Coastal and Atlantic have maintained a longstanding business relationship. Coastal received requests from Atlantic for temporary staffing, identified candidates, and called Atlantic to schedule candidate interviews. Atlantic would approve or disapprove of Coastal's tendered applicants. The approved applicants temporarily worked at Atlantic. Plaintiff was hired by Coastal to serve as a temporary employee at Atlantic. Coastal paid Plaintiff's wages and provided workers' compensation insurance and then billed Atlantic for his services at a higher rate.

¶ 3 Plaintiff knew and understood he was a temporary employee at Atlantic and understood if Atlantic wanted to fire him, Coastal would handle his discipline. Plaintiff's supervisor was a full-time Atlantic employee. Plaintiff was injured on 20

July 2015 after he fell while exiting a forklift. Plaintiff's supervisor completed an accident report, concluding Plaintiff had exited the forklift in a "wrong way." Plaintiff began to receive workers' compensation benefits from Coastal and its carrier, Guarantee Insurance Company. Guarantee paid Plaintiff's benefits until its insolvency.

¶ 4 On 24 January 2018, NCIGA began paying indemnity benefits to Plaintiff pursuant to a reservation of rights after Guarantee filed for insolvency. On 23 May 2018, Plaintiff filed a hearing request asserting Defendants had failed to pay wage and medical compensation.

¶ 5 On 22 October 2018, NCIGA filed a motion to add necessary parties, asserting Atlantic and its workers' compensation carrier, Sentry, were necessary parties to the litigation. NCIGA alleged Atlantic was a special employer of Plaintiff at the time of his injury. NCIGA's motion, filed three years and three months after the date of injury on 20 July 2015, was the first time a claim for workers' compensation liability was asserted against Atlantic. Plaintiff did not file a claim asserting Atlantic was his employer and has never asserted Atlantic was his employer in his filings or testimony.

¶ 6 Atlantic denied Plaintiff was its employee based upon a staffing agreement executed with Coastal in 2017, which states Plaintiff will be covered solely by Coastal for workers' compensation coverage to be maintained pursuant to N.C. Gen. Stat. §

97-51.

¶ 7 In March 2020, the Commission found and concluded there was insufficient evidence of a written contract between Atlantic and Coastal when Plaintiff was injured in July 2015. NCIGA appealed to the Full Commission, which found and concluded:

> Plaintiff was neither a joint employee nor a special employee of Atlantic Corporation at the time of Plaintiff's injury. Here, all the testimony elicited was that Plaintiff was an employee of The Coastal Group, not Atlantic Corporation. Plaintiff['s] . . . testimony indicate[d] that there was no meeting of the minds to the essential terms of an employment agreement between Plaintiff and the Atlantic Corporation, as neither party believed, either at the time of Plaintiff's injury or at the evidentiary hearing, that Plaintiff was an employee of Atlantic Corporation . . . Plaintiff did not proceed through Atlantic Corporation's hiring process, receive wages from Atlantic [], or get entered into Atlantic's human resources database . . . Instead, [Coastal] hired Plaintiff, paid his benefits and wages, withheld his taxes, and paid for his worker's compensation insurance. There was no meeting of the minds between Plaintiff and [Atlantic] to a contract for a new employment relationship. . . . [T]he Full Commission concludes that [Atlantic] lacked the requisite control over Plaintiff's work while at the [facility], as the staff at the facility asked him to complete specific tasks at most once a week. . . . [Atlantic] did not instruct him on how to perform such work. . . . [Atlantic] did not have the authority to either discipline or fire Plaintiff . . . As [Atlantic] did not control the manner and execution of Plaintiff's work, the Full Commission concludes that [Atlantic] was not a joint or special employer of Plaintiff at the time of his injury.

Defendants appealed.

II. Jurisdiction

¶ 8 Appellate jurisdiction is proper pursuant to N.C. Gen. Stat. §§ 7A-29 and 97-86 (2021).

III. Issues

¶ 9 Defendants argue the Commission erred in concluding that a special employment relationship did not exist, and Atlantic and its carrier, Sentry, are not liable for payment of workers' compensation benefits to Plaintiff.

IV. Standard of Review

¶ 10 "This Court reviews whether an employment relationship existed . . . under a *de novo* standard of review. The issue of whether an employer-employee relationship existed at the time of the injury . . . is a jurisdictional fact." *Whicker v. Compass Grp. USA, Inc.*, 246 N.C. App. 791, 795-96, 784 S.E.2d 564, 568 (2016) (citations and internal quotation marks omitted).

A. Jurisdiction – Special Employment

¶ 11 Coastal argues the Commission erred in finding a special employment relationship did not exist between Plaintiff and Atlantic. This Court has previously addressed this issue:

> When a general employer lends an employee to a special employer, the special employer becomes liable for work[er's] compensation only if
>
> (a) the employee has made a contract of hire, express or implied, with the special employer;

> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.
>
> When all three of the above conditions are satisfied in relation to both employers, both employers are liable for work[er's] compensation.

Id. at 797, 784 S.E.2d at 569.

¶ 12 Here, the Commission found by a preponderance of the evidence that Coastal alone had the power to hire and fire Plaintiff, Coastal had paid Plaintiff's wages, and provided workers' compensation insurance for Plaintiff from their payroll. Atlantic stated in their interrogatory "Plaintiff was a temporary employee assigned to work at [Atlantic's warehouse] by [Coastal]." Plaintiff was identified as a potential temporary employee, tendered by Coastal, and interviewed by Atlantic. Plaintiff, Coastal, and Atlantic knew his job was temporary and he was not a full-time employee on the payroll of Atlantic.

¶ 13 Further, Plaintiff's work was completed entirely at the Atlantic facility. The purpose of his employment is the very nature of a temporary position. Plaintiff's tasks included driving a forklift, and he kept himself busy with other tasks. Atlantic verified Plaintiff was assigned to drive a forklift, and he was supervised by an Atlantic employee. The nature of temporary employment requires employees to report to an entity, be supervised while on site and perform certain tasks.

¶ 14 Atlantic, like other Coastal clients, was required to direct and supervise and "provide any necessary training or information needed to properly perform the tasks assigned" to temporary employees. The extent of Plaintiff's training at Atlantic consisted of Plaintiff watching a video of how to operate a forklift.

¶ 15 The elements necessary to establish a special employee relationship are not met here. *Whicker,* 246 N.C. App. at 797, 784 S.E.2d at 569. There is no express contract. The implied contract does not rise to a level to surpass the nature of a temporary employee's general obligations. Nothing in the record indicates a contract of any kind was formed between Plaintiff and Atlantic.

¶ 16 Further, the element of control is not met. Atlantic could not hire, fire, or discipline Plaintiff. Atlantic did not and could not pay Plaintiff. Plaintiff performed various assignments and occasionally drove a forklift. Atlantic did not have control over Plaintiff on the worksite, his actions, his work, or his behavior.

¶ 17 The Full Commission did not err in holding the preponderance of the evidence supported a finding and conclusion that no special employee relationship existed between Plaintiff and Atlantic, and that Plaintiff was "solely an employee of Coastal."

B. Sentry's Liability

> Any person having a claim or legal right of recovery under any governmental insurance or guaranty program which is also a covered claim *shall be required to exhaust* first his right under such program. Any amount payable on a covered claim under this Article shall be reduced by the

> amount of any recovery under such program.

N.C. Gen. Stat. § 58-48-55(a1) (2021) (emphasis supplied).

¶ 18 The NCIGA requires all possible provider resources to be exhausted before they will begin payments to the employee. To require employers who hire temporary employees to also provide secondary insurance for their temporary employees defeats the purpose of this statute. *See id.* Sentry provides workers' compensation insurance coverage for Atlantic's employees on its payroll. Since Atlantic is not a special employer of Plaintiff, Sentry is under no obligation to pay for Plaintiff's workers' compensation benefits. *Id.*

V. Conclusion

¶ 19 The Full Commission did not err in finding Plaintiff was solely Coastal's employee and Atlantic was not a special employer of Plaintiff at the time of his at-work injury. Sentry is the workers' compensation carrier who provides coverage for Atlantic's employees on its payroll and is not liable for paying Plaintiff's workers' compensation expenses. The Full Commission's order is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge STROUD and GORE concur.

Report per Rule 30(e).