IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-977

Filed: 17 March 2015

FRANCES ATIAPO, Employee, Plaintiff,

v.

North Carolina Industrial Commission

I.C. Nos. X57890 & PH-2819

GOREE LOGISTICS, INC., and OWEN THOMAS, INC., Employer, NONINSURED, Defendants.

AND

THE NORTH CAROLINA INDUSTRIAL COMMISSION

v.

GOREE LOGISTICS, INC., and OWEN THOMAS, INC., NONINSURED Employer, and MANDIEME DIOUF, Individually, Defendants.

Appeal by defendants from opinion and award entered 20 June 2014 by Commissioner Tammy Nance in the North Carolina Industrial Commission. Heard in the Court of Appeals 4 February 2015.

Grandy & Martin, P.A., by Kenneth C. Martin, for plaintiff-appellee Frances Atiapo.

Lawrence P. Margolis for defendants-appellants Goree Logistics, Inc. and Mandieme Diouf.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, PLLC, by John F. Scarbrough, for defendant-appellant Owen Thomas, Inc.

STEELMAN, Judge.

Where the evidence supported a finding that Owen Thomas was a general contractor, the Industrial Commission did not err in holding Owen Thomas liable as a statutory employer pursuant to N.C. Gen. Stat. § 97-19.1. Where an employer failed to carry workers' compensation insurance, the Industrial Commission did not err in imposing penalties upon the employer and its principal.

I. Factual and Procedural Background

On 22 June 2011, Owen Thomas, Inc. (Owen Thomas), a licensed transportation broker, entered into a "Broker-Carrier Agreement" with Goree Logistics, Inc. (Goree). Owen Thomas was acting on behalf of its client, Sunny Ridge Farms (Sunny Ridge), to procure transportation for Sunny Ridge's goods. The agreement provided that Goree would exercise full control over the work it performed in transporting the goods, and that Goree would assume responsibility for payment of all taxes, unemployment, and workers' compensation, and other related fees.

Frances Atiapo (plaintiff) drove a tractor trailer for Goree, and was directed to drive a tractor trailer transporting Sunny Ridge's goods. At the time of plaintiff's injury, Goree did not have workers' compensation insurance.

Plaintiff was instructed to deliver the goods to Wyoming. When the goods were rejected, plaintiff was directed by Goree to drive the truck to Georgia. Plaintiff was later directed by Goree to go to Colorado. Near Ft. Collins, Colorado, plaintiff crested the peak of a hill, and came upon a string of stopped vehicles. His brakes failed and

the tractor trailer collided with another vehicle. As a result of the collision, plaintiff sustained injuries.

On 29 July 2011, plaintiff filed an IC Form 18 notice of accident. On 19 September 2011, plaintiff filed a Form 33 request for hearing on his workers' compensation claim. On 28 September 2011, Goree filed a Form 61 denial of plaintiff's claim, contending that plaintiff was not an employee of Goree, but an independent contractor, and that Goree had only two persons driving trucks for it.

Following a hearing before the deputy commissioner, Owen Thomas was added as a party defendant to this proceeding.

On 14 April 2014, the Industrial Commission filed its Opinion and Award. The Commission found, despite the presence of a written agreement between plaintiff and Goree stating that plaintiff was an independent contractor, that for purposes of Chapter 97 of the North Carolina General Statutes, plaintiff was an employee of Goree. It further found that Goree had no workers' compensation insurance. Because Goree did not regularly employ three or more employees, the Commission did not assess penalties pursuant to N.C. Gen. Stat. § 97-94. Based upon its findings of fact, the Commission concluded that Owen Thomas was a "principal contractor within the meaning of N.C. Gen. Stat. § 97-19.1(a)" and ordered that Owen Thomas pay to plaintiff temporary total disability compensation, all of plaintiff's medical expenses arising from his injury by accident, and the costs of the hearing.

On 23 April 2014, the Attorney General filed a motion for reconsideration, asserting that under the provisions of N.C. Gen. Stat. § 97-19.1(a), a "contractor, intermediate contractor, or subcontractor" contracting in the interstate or intrastate carrier industry and operating a tractor trailer licensed by the United States Department of Transportation is required to carry workers' compensation insurance, "irrespective of whether such contractor regularly employs three or more employees[.]" N.C. Gen. Stat. § 97-19(a) (2013). Therefore, it was argued that Goree and its principal, Mandieme Diouf (Diouf), were subject to penalties under § 97-94 for failure to procure workers' compensation insurance.

On 20 June 2014, the Industrial Commission filed an Amended Opinion and Award, assessing penalties of $8,800 against Goree, and $78,868.63 against Goree's principal, Diouf.

On 3 July 2014, Owen Thomas served notice of appeal from the Amended Opinion and Award. On 23 July 2014, Goree and Diouf served notice of appeal from the Amended Opinion and Award.

II. Standard of Review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). However, the Commission's "findings of jurisdictional facts are not conclusive on appeal even if

they are supported by competent evidence;" instead, "a reviewing court must consider all the evidence in the record and make an independent determination of the jurisdictional facts." *Cain v. Guyton*, 79 N.C. App. 696, 698, 340 S.E.2d 501, 503, *aff'd per curiam*, 318 N.C. 410, 348 S.E.2d 595 (1986).

III. Appeal of Owen Thomas – Jurisdiction

In its sole argument on appeal, Owen Thomas contends that the Industrial Commission lacked jurisdiction over it. We disagree.

A. N.C. Gen. Stat. § 97-19.1

In its findings of fact, the Commission recognized that Owen Thomas "is a federally licensed 'freight broker' authorized by its customers to negotiate and arrange for the transportation of shipments in interstate commerce." The Commission concluded that plaintiff was an employee of Goree. The Commission then further concluded that "the use of the word 'broker' is a distinction without a difference." It noted that Owen Thomas was able to use its own judgment in selecting a carrier for its client, and that it retained a portion of what it received for the contract. It therefore concluded that Owen Thomas was a principal contractor. Because Owen Thomas was a principal contractor, and because Goree did not carry workers' compensation insurance, the trial court held Owen Thomas liable to plaintiff pursuant to N.C. Gen. Stat. § 97-19.1.

N.C. Gen. Stat. § 97-19.1 provides, in relevant part:

> Any principal contractor, intermediate contractor, or

> subcontractor, irrespective of whether such contractor regularly employs three or more employees, who contracts with an individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by the United States Department of Transportation and who has not secured the payment of compensation in the manner provided for employers set forth in G.S. 97-93 for himself personally and for his employees and subcontractors, if any, shall be liable as an employer under this Article for the payment of compensation and other benefits on account of the injury or death of the independent contractor and his employees or subcontractors due to an accident arising out of and in the course of the performance of the work covered by such contract.

N.C. Gen. Stat. § 97-19.1(a) (2013). In order for Owen Thomas to be liable under this statute, it must be shown that (1) Owen Thomas was a principal contractor, and (2) the subcontractor did not have the proper insurance. In the instant case, there is no factual dispute that Goree did not have the required workers' compensation insurance coverage. The only question, then, is whether the Commission correctly found and held that Owen Thomas was a principal contractor.

Owen Thomas contracted with Sunny Ridge to ship its goods. Owen Thomas was to be paid by Sunny Ridge for this service and would retain any monies not paid to the trucking company it hired. It had discretion in selecting a carrier. Owen Thomas provided 1099 tax forms to Goree. Owen Thomas controlled not only the outcome of the task, namely the delivery of goods, but the method by which the task would be performed, including how frequently Goree would report to Owen Thomas,

and specifications on the temperature that would be maintained during transport. Sunny Ridge paid Owen Thomas "for insuring a delivery[.]"

Sunny Ridge paid Owen Thomas to deliver its goods. Owen Thomas then hired Goree to perform the delivery. Owen Thomas provided Goree with 1099 tax forms for the money paid by Owen Thomas.

We hold that this evidence supports the Industrial Commission's determination that Owen Thomas acted as a contractor hired by Sunny Ridge for the purpose of ensuring delivery of Sunny Ridge's goods. This in turn supports a finding that Owen Thomas employed Goree, a subcontractor without workers' compensation insurance coverage, and is therefore liable to plaintiff under N.C. Gen. Stat. § 97-19.1.

This argument is without merit.

B. Federal Preemption

Owen Thomas contends that it is exempt from N.C. Gen. Stat. § 97-19.1 due to federal preemption, and that federal law precludes states from regulating interstate commerce. Owen Thomas notes that an exception to this rule exists in 49 U.S.C. § 14501(c), but contends that the statute creates an exception only for motor carriers.

49 U.S.C. § 14501(c)(1) provides that:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a *price, route, or service* of any motor carrier (other than a carrier affiliated with a direct air

> carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (2005) (emphasis added). An exception exists to this statute, which notes that this rule

> shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to *minimum amounts of financial responsibility relating to insurance requirements* and self-insurance authorization[.]

49 U.S.C. § 14501(c)(2)(A) (emphasis added).

We note that Owen Thomas does not contend that North Carolina's workers' compensation insurance requirements constitute a "law related to a price, route, or service of any motor carrier." We see no reason why a statute requiring financial responsibility as to workers' compensation should be considered a regulation of prices, routes, or services. We further note that the exception enumerated in 49 U.S.C. § 14501(c)(2)(A) explicitly holds that the rule in § 14501(c)(1) does not apply to insurance requirements. We hold that the federal preemption established in 49 U.S.C. § 14501(c)(1) does not apply to N.C. Gen. Stat. § 97-19.1, which imposes liability upon those who employ persons or entities that fail to procure required workers' compensation insurance.

Owen Thomas contends nonetheless that the exception in 49 U.S.C. § 14501(c)(2)(A) does not apply, because while § 14501(c)(1) contains language including motor carriers and brokers, § 14501(c)(2)(A) contains language including only motor carriers. Owen Thomas contends that the exception does not apply to brokers.

In the instant case, however, Owen Thomas went beyond its role as broker and acted as a contractor. As stated in section III-A of this opinion, Owen Thomas was hired to insure shipment of Sunny Ridge's goods. Owen Thomas then employed Goree to perform its obligation. At this point, Owen Thomas was not a broker, but a general contractor who had contracted with a motor carrier. Owen Thomas was, in effect, a motor carrier, despite the fact that the company itself owned no vehicles. Even assuming *arguendo* that § 14501(c)(2)(A) did not create an exception for brokers, Owen Thomas was not acting as a broker at the time it did business with Goree, and therefore was subject to the exception, which allowed N.C. Gen. Stat. § 97-19.1 to apply.

This argument is without merit.

IV. Appeal of Goree and Diouf – Penalties

In their sole argument on appeal, Goree and Diouf contend that the Full Commission erred in imposing penalties upon Goree and Diouf for failure to procure workers' compensation insurance. We disagree.

In its original Opinion and Award dated 20 April 2014, the Full Commission did not hold Goree or Diouf liable for statutory penalties pursuant to N.C. Gen. Stat. § 97-94, because Goree was not shown to regularly employ three or more employees. Thereafter, the Attorney General filed a motion for reconsideration. In its Amended Opinion and Award, the Full Commission imposed penalties against Goree and Diouf pursuant to N.C. Gen. Stat. § 97-94. On appeal, Goree and Diouf do not dispute the Commission's finding that plaintiff was an employee and not an independent contractor; rather, they contend that they are exempt from N.C. Gen. Stat. § 97-19.1, because they do not regularly employ three or more people, and because they are not a "principal contractor, intermediate contractor, or subcontractor[.]"

The Purpose of the Workers' Compensation Act "is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers." *Riley v. DeBaer*, 149 N.C. App. 520, 523, 562 S.E.2d 69, 70 *aff'd per curiam,* 356 N.C. 426, 571 S.E.2d 587 (2002) (quoting *Johnson v. First Union Corp.*, 131 N.C. App. 142, 144, 504 S.E.2d 808, 809-10 (1998)). The argument presented by Goree and Diouf, that they are exempt from liability because the statute mentions contractors and subcontractors, but not employers, is specious. N.C. Gen. Stat. § 97-11 specifically provides that "[n]othing in this Article shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty." N.C. Gen. Stat. § 97-11 (2013). We decline to construe the provisions of N.C. Gen. Stat. § 97-19.1 to relieve an employer and its principal

from penalties for failure to perform the statutory duty of providing workers' compensation insurance for its workers.

We further note that, in the context of interstate or intrastate trucking, § 97-19.1 applies "irrespective of whether such contractor regularly employs three or more employees[.]" N.C. Gen. Stat. § 97-19.1. Goree and Diouf's contentions that they employ fewer than three employees is thus irrelevant; the provisions of § 97-19.1 apply. We hold that the Commission did not err in imposing penalties upon Goree and Diouf for failure to carry workers' compensation coverage.

This argument is without merit.

AFFIRMED.

Judges DIETZ and INMAN concur.