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NO. COA12-454
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

PAUL GRAYSON,
Employee,
Plaintiff

v.

From the North Carolina
Industrial Commission
IC No. W17631

FIRST CHARLOTTE PERFUSION
SERVICES, INC.,
Employer, NONINSURED;

and/or NOVANT HEALTH, INC., d/b/a
PRESBYTERIAN HOSPITAL,
Employer, SELF-INSURED,
Defendants.

Appeal by defendant Novant Health, Inc. (Novant) from the
Opinion and Award entered 8 February 2012 by the North Carolina
Industrial Commission. Heard in the Court of Appeals 26
September 2012.

*The Sumwalt Law Firm by Mark T. Sumwalt and Vernon Sumwalt
for plaintiff-appellee.*

*Orbock Ruark & Dillard, PC by Barbara E. Ruark for
defendant-appellant.*

STEELMAN, Judge.

The Full Commission erred in concluding that Novant was a statutory employer under N.C. Gen. Stat. § 97-19 because the evidence of record does not show that Novant was an original contractor.

I. Factual and Procedural History

Paul Grayson (plaintiff) was employed by First Charlotte Perfusion Services, Inc. (First Charlotte), which provided life support services during open-heart surgeries at Presbyterian Hospital in Charlotte. Presbyterian Hospital is owned by Novant. On 23 December 2008, plaintiff suffered a compensable injury at work. First Charlotte did not have workers' compensation coverage on the date of the accident. Plaintiff filed an amended I.C. form 18 asserting that he was injured while at work and listing First Charlotte and "Novant Health d/b/a Presbyterian Hospital" as his employer. Plaintiff contends that Novant was a statutory employer pursuant to N.C. Gen. Stat. § 97-19. In 2009, the Industrial Commission approved a partial agreement of settlement between plaintiff and First Charlotte.

On 8 February 2012, the Full Commission entered an Opinion and Award, concluding that Novant was liable as a principal contractor under N.C. Gen. Stat. § 97-19 "for its failure to procure a certificate of worker's compensation insurance prior

to the subletting of any contract for the performance of any work." The Commission ordered that Novant pay plaintiff temporary total disability benefits until further order of the Commission, pay for plaintiff's medical treatment by his authorized physicians, and pay the costs. It further declared that Novant was entitled to recover compensation paid to plaintiff from First Charlotte. Commissioner Cheatham dissented, asserting that Novant was not a principal contractor and was not liable under N.C. Gen. Stat. § 97-19.

Defendant Novant appeals.

II. Principal Contractor

In its first argument, Novant contends that the Commission erred in concluding that it was liable as a principal contractor. We agree.

A. Standard of Review

"Because this raises the jurisdictional question of whether an employment relationship within the Act existed" between plaintiff and defendant at the time of the accident, "the jurisdictional facts found by the Commission, though supported by competent evidence, are not binding on this Court." *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 309, 392 S.E.2d 758, 759 (1990). "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 plaintiff's employment status." *Id.* See also *Putnam v. Alexander*, 194 N.C. App. 578, 583-84, 670 S.E.2d 610, 615 (2009).

B. Analysis

Any principal contractor . . . who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of this Article[.]

N.C. Gen. Stat. § 97-19 (2011).

N.C. Gen. Stat. § 97-19 "cannot apply unless there is first a contract for the performance of work which is then sublet." *Cook*, 99 N.C. App. at 310, 392 S.E.2d at 760. "[W]hen the contractee is not a principal contractor but is a principal letting work by independent contract, an employee of the independent contractor cannot recover . . . against the principal[.]" *Mayhew v. Howell*, 102 N.C. App. 269, 272, 401 S.E.2d 831, 833, *aff'd*, 330 N.C. 113, 408 S.E.2d 853 (1991).

In *Mayhew*, the plaintiff was injured while working as a carpenter on houses for a partnership. Ryan Homes (Ryan) was the owner of the property, constructing homes thereon, and contracted with the partnership to do the framing work. *Mayhew*, 102 N.C. App. at 270, 401 S.E.2d at 831. This Court concluded that Ryan "had not undertaken to do anything for anyone else and thus could not be an 'original contractor.'" Therefore, § 97-19 is inapplicable." *Mayhew*, 102 N.C. App. at 273, 401 S.E.2d at 834.

Plaintiff argues that the fact that Presbyterian Hospital and Novant were separate corporations conducting a business "necessarily implies an agreement[.]" Plaintiff was an employee of First Charlotte. First Charlotte provided perfusion services to Presbyterian Hospital. In support of his argument, plaintiff cites Novant's articles of incorporation, which are not in the record. We cannot review evidence outside the record. *See, e.g., Cook*, 99 N.C. App. at 309, 392 S.E.2d at 759 (This Court is "required to review the evidence of record").

The evidence of record does not reveal a contract between Presbyterian Hospital and Novant. Novant has not undertaken to do anything for any other person or entity, and thus we cannot conclude that Novant is an "original contractor." Therefore,

N.C. Gen. Stat. § 97-19 is inapplicable. We vacate the Commission's Opinion and Award of 8 February 2012 for lack of jurisdiction over plaintiff's claim.

III. Claim for Lost Wages

Defendant next argues that, even if Novant is liable as a statutory employer, plaintiff's claim for lost wages should be denied. Because we vacate the Commission's Opinion and Award, we do not reach this argument.

VACATED.

Judges HUNTER, Robert C. and BRYANT concur.

Report per Rule 30(e).