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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-928

Filed: 5 May 2015

North Carolina Industrial Commission, I.C. No. Y16592

JILL CRABTREE, Employee, Plaintiff

v.

EVP PROPERTIES, LLC, Employer, NON-INSURED, Defendant.

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North Carolina Industrial Commission, I.C. No. PH-3192

NORTH CAROLINA INDUSTRIAL COMMISSION

v.

EVP PROPERTIES, LLC, Employer, NON-INSURED, and JAMES MALATESTA and BRIAN J. DEMPSEY, Individually, Defendants.

Appeal by defendants from Opinion and Award entered 11 June 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 January 2015.

*Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr., for plaintiff-appellee.*

*Rudisill White & Kaplan, P.L.L.C., by Stephen Kushner, for defendants-appellants.*

DAVIS, Judge.

CRABTREE V. EVP PROPERTIES, LLC

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EVP Properties, LLC (“EVP”), James Malatesta (“Malatesta”), and Brian Dempsey (“Dempsey”) (collectively “Defendants”) appeal from the Opinion and Award of the North Carolina Industrial Commission (“the Commission”) awarding Jill Crabtree (“Plaintiff”) workers’ compensation benefits for her left wrist injury. On appeal, Defendants contend that the Commission erred in (1) finding that EVP was subject to the Workers’ Compensation Act (“the Act”) at the time of Plaintiff’s injury; and (2) assessing statutory penalties against Defendants for failing to secure and maintain workers’ compensation insurance. After careful review, we reverse and vacate the Commission’s Opinion and Award.

**Factual Background**

EVP was formed on 27 January 2012 by Malatesta and Dempsey in order to purchase and “upfit”<sup>1</sup> a building (“the Building”) in Charlotte, North Carolina for the purpose of leasing and ultimately reselling the Building. Pursuant to EVP’s operating agreement, both Malatesta and Dempsey were designated as managing members of the entity. Malatesta was the day-to-day manager of EVP while Dempsey was a “silent partner,” who resided in Santa Barbara, California and provided capital.

In early February 2012, Malatesta employed Plaintiff as the project manager for EVP. Plaintiff had previously worked with Malatesta at a Handyman Matters franchise in Charlotte. According to Malatesta, Plaintiff’s duties included being “in

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<sup>1</sup> The term “upfit” was used by the parties to encompass the varying projects that were part of the overall renovation of the Building.

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charge of more or less coordinating all the vendors that [EVP] hired” and “manag[ing] the . . . work, when those vendors would come in; making sure that . . . all those projects were completed to task . . . and ideally to budget.” Plaintiff was issued a W-2 form by EVP and paid through ADP, a payroll company.

Sometime after Plaintiff was hired by Malatesta, a woman named Lynn Monk (“Monk”) began working at the Building on the upfit project. Monk, like Plaintiff, had previously worked with Malatesta at Handyman Matters. Around the same time Monk started working on the upfit, two other individuals, Jill Scurry (“Scurry”) and Ermalinda Meija (“Meija”), also began performing work on the project.

On 23 May 2012, while working at the Building, Plaintiff broke her left wrist when a stepstool she was standing on collapsed. The injury required surgery, and the doctor inserted a plate and eight screws in her wrist.

On 20 September 2012, Plaintiff filed a Form 18 “Notice of Accident to Employer and Claim of Employee.” Defendants responded by submitting a Form 61 “Denial of Workers’ Compensation Claim,” in which they claimed the Industrial Commission lacked jurisdiction over Plaintiff’s claim. EVP asserted that it did not have three or more employees on the date of Plaintiff’s injury and, therefore, was not subject to the Act. Plaintiff filed a Form 33 requesting a hearing on her claim.

The matter was heard before Deputy Commissioner Adrian A. Phillips on 17 April 2013. Deputy Commissioner Phillips filed an opinion and award on 29 August

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2013 finding that Plaintiff's injury was compensable and EVP was subject to the Act because it employed three individuals at the time of her accident — Plaintiff, Malatesta, and Monk. He determined Plaintiff was entitled to all medical expenses incurred, or to be incurred, as a result of the injury involving her left wrist, including costs associated with the hearing.

Deputy Commissioner Phillips also imposed a \$4,800.00 penalty against EVP for failing to secure workers' compensation coverage in accordance with the Act. In addition, he assessed “[a]n additional penalty of 100% of the amount of compensation due to Plaintiff . . . against James Malatesta and Brian Dempsey, individually, for failing to comply with N.C. Gen. Stat. § 97-93.”

Defendants appealed to the Full Commission. The parties stipulated that: (1) Plaintiff was injured by accident on 23 May 2012; (2) Plaintiff was an employee of EVP; and (3) EVP was not insured at the time of the accident. On 11 June 2014, the Commission issued an Opinion and Award, which affirmed and modified Deputy Commissioner Phillips' opinion and award, with one commissioner dissenting. The Commission found that Plaintiff, Malatesta, and Monk were all employees of EVP during the relevant time period and that “EVP Properties, LLC . . . is subject to the North Carolina Workers' Compensation Act, having employed the requisite number of employees to be bound under the provisions of said Act at the time of the incident.”

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In its award, the Commission ordered EVP to pay all of Plaintiff's past and future medical expenses relating to her left wrist injury. The Commission assessed civil penalties against EVP and against Malatesta and Dempsey individually for failing to bring EVP into compliance with the Act by maintaining workers' compensation insurance as required under N.C. Gen. Stat. § 97-93. Defendants filed a timely notice of appeal to this Court.

**Analysis**

Defendants contend on appeal that the Commission lacked jurisdiction to hear Plaintiff's claim because EVP did not employ the requisite number of employees at the time of Plaintiff's injury. An employer is subject to the provisions of the Act only if it regularly employs three or more employees. *See* N.C. Gen. Stat. § 97-2(1) (2013) (defining "employment" under the Act to include "all private employments in which three or more employees are regularly employed in the same business or establishment").

"It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *New Bar P'ship v. Martin*, 221 N.C. App. 302, 309, 729 S.E.2d 675, 681 (2012) (citation and internal quotation marks omitted).

The Commission has no jurisdiction to apply the Act to a party who is not subject to its provisions, therefore we first address the jurisdictional issue raised . . . regarding whether Defendant employer had the required number of

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employees to be subject to the Workers' Compensation Act.

While this Court generally reviews Commission opinions for any competent evidence in the record to support its conclusions of law, jurisdictional findings of fact are not binding and we must consider all the evidence in the record to make our own findings of fact. Thus, it is incumbent on this Court to make an independent finding.

*Woodliff v. Fitzpatrick*, 205 N.C. App. 192, 194, 695 S.E.2d 503, 505 (internal citations, quotation marks, brackets, and ellipses omitted), *disc. review denied*, 364 N.C. 617, 705 S.E.2d 378, 378-79 (2010). “In performing our task to review the record *de novo* and make jurisdictional findings independent of those made by the Commission, we are necessarily charged with the duty to assess the credibility of the witnesses and the weight to be given to their testimony, using the same tests as would be employed by any fact-finder in a judicial or quasi-judicial proceeding.” *Morales-Rodriguez v. Carolina Quality Exteriors, Inc.*, 205 N.C. App. 712, 715, 698 S.E.2d 91, 94 (2010).

The Commission focused its analysis on Monk's status, concluding that she was an employee of EVP, rather than an independent contractor, and that it possessed jurisdiction over the claim because Plaintiff, Malatesta, and Monk were all regularly employed by EVP at the time of Plaintiff's injury. However, because we conclude that the Commission erred in classifying Malatesta as an employee of EVP, the Commission lacked subject matter jurisdiction — regardless of Monk's employment status.

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As an initial matter, the parties and the Commission all appear to have operated under the assumption that Malatesta was an employee of EVP. In its Opinion and Award, the Commission noted that in their brief Defendants had “conceded” that Malatesta was an employee of EVP. Similarly, in their brief to this Court, Defendants make this same concession. However, we are not bound by such a concession and are required to make our own independent finding on this issue.<sup>2</sup> *See Woodliff*, 205 N.C. App. at 194, 695 S.E.2d at 505 (“While this Court generally reviews Commission opinions for any competent evidence in the record to support its conclusions of law, jurisdictional findings of fact are not binding and we must consider all the evidence in the record to make our own findings of fact. Thus, it is incumbent on this Court to make an independent finding.” (internal citations, quotation marks, and ellipses omitted)).

Therefore, we must make our own determination as to whether Malatesta can properly be characterized as an employee of EVP for jurisdictional purposes as a managing member of EVP, a limited liability company. This issue is controlled by N.C. Gen. Stat. § 97-2(2) of the Act:

Any . . . member of a limited liability company may elect to be included as an employee under the workers’ compensation coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his

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<sup>2</sup> We note that while the parties entered into a formal stipulation on the issue of whether *Plaintiff* was an employee, no such stipulation was entered as to Malatesta’s status. Therefore, the question of whether an actual joint stipulation — as distinguished from a mere concession by one party — as to this type of jurisdictional fact would be binding on appeal is not before us.

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election to be so included. Any . . . member of a limited liability company shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this Article[.]

N.C. Gen. Stat. § 97-2(2) (2013). Thus, a member of a limited liability company may — but is not required to — take steps to classify himself as an employee of the entity for workers’ compensation purposes, and if he so elects, the procedure set out in N.C. Gen. Stat. § 97-2(2) must be followed.

Here, the statutory requirements were not met. While Malatesta may have been actively engaged in EVP’s operations, EVP did not obtain workers’ compensation insurance coverage at all much less notify any such insurer of its election for Malatesta to be a covered employee.

Even if Plaintiff was an employee of EVP, she has failed to meet her burden of offering persuasive evidence tending to prove an employer-employee relationship existed between EVP and either Scurry or Mejia. Moreover, Dempsey cannot be deemed an employee because — as with Malatesta — the statutory procedure set out in N.C. Gen. Stat. § 97-2(2) was not followed. Therefore, even assuming, without deciding, that Plaintiff and Monk were properly classified as employees, the Commission lacked jurisdiction over Plaintiff’s claim because a minimum of three employees is required under N.C. Gen. Stat. § 97-2(1) in order for an employer to be subject to the Act. Thus, the Commission’s opinion is reversed and its award vacated. *See Hicks v. Guilford Cty.*, 267 N.C. 364, 369, 148 S.E.2d 240, 244 (1966)



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“Consequently, the Industrial Commission was without jurisdiction in this matter. The judgment of the superior court is, therefore, reversed, and the award of the Industrial Commission is vacated.”).

**Conclusion**

For the reasons set out above, we reverse and vacate the Commission’s Opinion and Award.

REVERSED AND VACATED.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).