No. COA09-460

NORTH CAROLINA COURT OF APPEALS

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STEVE F. HOJNACKI, Plaintiff, v. LAST REBEL TRUCKING, INC., non-insured Employer, CINDY BIVINS, individually, ROBY L. HENDERSON, individually, COMTRAK LOGISTICS, Employer, and GREAT WEST CASUALTY CO., Carrier, Defendants.	)	From the North Carolina Industrial Commission I.C. File Nos. 702970 and PH-1787

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PLAINTIFF-APPELLANT’S BRIEF

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PLAINTIFF-APPELLANT'S BRIEF

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QUESTIONS PRESENTED

I. IS DEFENDANT LAST REBEL, LIKE DEFENDANT COMTRAK, LIABLE AS PLAINTIFF'S EMPLOYER UNDER N.C. GEN. STAT. § 97-19.1 BECAUSE IT CONTRACTED WITH PLAINTIFF TO DRIVE A TRUCK IN INTERSTATE COMMERCE?

II. IN THE ALTERNATIVE, ARE DEFENDANTS LAST REBEL AND COMTRAK JOINT EMPLOYERS UNDER THE ACT BECAUSE LAST REBEL LENT PLAINTIFF'S SERVICES TO COMTRAK?

III. DOES THE INDUSTRIAL COMMISSION HAVE JURISDICTION OVER BOTH EMPLOYERS BECAUSE THE OUT-OF-STATE EMPLOYER, COMTRAK, USED LAST REBEL, AN UNINSURED IN-STATE EMPLOYER, TO EMPLOY PLAINTIFF?

STATEMENT OF THE CASE

Plaintiff Steve Hojnacki, who was severely injured in a fall from a tractor trailer while he was working on October 21, 2004, filed a claim for workers' compensation benefits on January 26, 2007, and requested that the claim be assigned for hearing. (R. pp. 2-4) The workers' compensation case was heard in the Industrial Commission on October 9, 2007, before Deputy Commissioner George Hall. (R. p. 21) Deputy Commissioner Hall issued an Opinion and Award on February 21, 2008, granting the claim for compensation on the grounds that both defendants were liable as employers, the Commission had jurisdiction over the claim, the claim was timely filed, and Hojnacki was totally disabled as a result of a compensable injury by accident. (R. pp. 21-37)

Defendants appealed to the Full Commission, which issued a decision on November 13, 2008. (R. pp. 49-56) The Full Commission found that defendant Comtrak Logistics ("Comtrak") was Hojnacki's employer, but that defendant Last Rebel Trucking, Inc. ("Last Rebel") was not. (R. p. 55) (citing N.C. Gen. Stat. §§ 97-2(2) and 97-19.1) The Full Commission then denied Hojnacki's claim for compensation on the grounds that the Industrial Commission did not have jurisdiction over the claim.

(R p. 56) Hojnacki timely filed a notice of appeal on December 5, 2008. (R p. 57)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The opinion and award of the Industrial Commission is a final decision pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 97-86, and appeal lies to the Court of Appeals pursuant to those statutes.

STATEMENT OF FACTS

Hojnacki is 66 years old, married, and has three children. (R. p. 52) At the time of the hearing, he was living in South Carolina, but he has previously lived in North Carolina. (T. pp. 2-3) Hojnacki was a truck driver for his entire working life. (T. p. 3) He previously owned his own truck and at one point ran his own trucking company. (T. p. 6)

Defendant Last Rebel is a North Carolina trucking company, whose president is defendant Cindy Bivens and whose vice president is defendant Roby Henderson. (T. pp. 231-32) Bivens performs the work of running the company and at the time of Hojnacki's injury, Henderson drove one of the company's trucks. (T. pp. 5, 232) Last Rebel did not have workers' compensation insurance as of the date of Hojnacki's injury. (R. p. 12)

Defendant Comtrak is a Tennessee corporation with places of

business in Charlotte, North Carolina and Charleston, South Carolina. (T. p. 184) Comtrak is in the business of transporting goods in interstate commerce through the use of tractor trailers. (T. p. 195) In order to perform its work, Comtrak acquires drivers either by hiring them directly, or through owners of tractor trailers such as Last Rebel. (T. p. 196) Comtrak calls its directly hired drivers "employees" while it calls the drivers hired through tractor trailer owners "independent contractors." (T. pp. 207-08) Comtrak maintains personnel files on all of its drivers, regardless of their employment status, and keeps the personnel files together in the same location, without differentiation as to status. (T. pp. 225-28) At the time relevant to this case, Comtrak had 11 employees at its Charlotte, North Carolina terminal. (T. p. 184) Last Rebel, according to Bivens, was "associated with" or "part of" the Comtrak Charlotte terminal. (T. p. 282)

In the summer of 2004, Hojnacki was hired by Last Rebel, through Cindy Bivens, to drive one of Last Rebel's trucks under the dispatch of Comtrak. (T. pp. 3-5) All discussions about the hiring and the essential terms of Hojnacki's employment were held in North Carolina. (T. p. 4) During these discussions, Hojnacki and Bivens agreed upon a per-mile rate of compensation for Hojnacki and agreed that Hojnacki would be based at

Comtrak's Charleston terminal. (T. pp. 5-6)

After Hojnacki was hired and Bivens had given him a truck to drive, he was required to attend Comtrak's orientation in Atlanta. (T. pp. 7-8) Thereafter Hojnacki worked for both companies, driving Last Rebel's truck under the dispatch of Comtrak.

Last Rebel paid Hojnacki directly by check at a rate of 32 cents per mile driven. (T. pp. 21-23, 247; Ex. pp. 1380-84) Hojnacki's average weekly wage was $790.15 and his workers' compensation rate was $526.79. (Ex. pp. 1380-84) Hojnacki's instructions from Bivens were that all repairs and maintenance on the truck had to take place at Bivens Diesel Service in North Carolina, and that Hojnacki was to be productive for Comtrak in order to generate revenue for Last Rebel. (T. pp. 244-45, 249)

Last Rebel had the power to fire Hojnacki from its own employ. (T. pp. 291-92) Although Bivens tried to claim that she did not have the power to fire Hojnacki, she admitted that she had the power to terminate a driver by deciding that he would no longer be allowed to drive Last Rebel's truck. (T. pp. 291-92) Bivens clarified that Comtrak could choose to continue to employ the driver if that happened, but the driver could no longer drive Last Rebel's truck or work for Last Rebel. (T. pp. 291-92)

Comtrak and Last Rebel entered into a written contract

whereby Last Rebel would supply a truck and driver to Comtrak in exchange for payments to Last Rebel. (Ex. pp. 8-45) The payments to Last Rebel were based on miles driven by Hojnacki in Last Rebel's truck, and also included a regular "recruiting fee", a per-driver fee to be paid by Comtrak as long as the Last Rebel-supplied driver continued to work for Comtrak. (T. pp. 181-84) Pursuant to the contract, Comtrak directed all the daily work activities of the driver. (Ex. p. 47) Although the contract between Last Rebel and Comtrak is labeled as an equipment lease contract, in reality it is a contract through which Comtrak subcontracts its interstate transportation work by obtaining drivers and the use of trucks without having to purchase them.

The contract specified that Last Rebel's employee-driver would "operate the equipment for the hauling and transporting of freight pursuant to the instructions from" Comtrak. (Ex. p. 47) In addition, Last Rebel's employee was obligated to unload trailers, advise Comtrak's dispatcher of status daily, and conform in any other respect to Comtrak's policies and procedures. (Id.) Finally, Comtrak had the power to terminate and require the replacement of Last Rebel's employee "with or without cause." (Ex. p. 48)

In conjunction with the Atlanta orientation, Hojnacki

filled out an "Application for Qualification" from Comtrak on August 31, 2004. (Ex. pp. 853-57) He underwent and passed a physical, drug test, and driving test. (T. pp. 8-9; Ex. pp. 857-58, 887-89) Hojnacki received an operations manual and a letter welcoming him as a member of the "Comtrak family." (T. p. 92; Ex. p. 1348)

Comtrak delivered all scheduling orders to Hojnacki by fax or directly to the truck's on-board computer. (T. pp. 13-14, 19; Ex. pp. 1366-67) Hojnacki's truck was operated under Comtrak's Department of Transportation ("DOT") license. (T. p. 8) Comtrak provided Hojnacki with trip sheets and federally-mandated log books to record all of his work activities. (T. pp. 15-16, 20-21; Ex. pp. 1350-65, 1368-79) Hojnacki was required to submit the completed sheets and log books back to Comtrak. (T. pp. 15, 20-21)

After it assigned Hojnacki to drive for Comtrak, Last Rebel did not control his day-to-day activities or his route scheduling, and received none of his daily logs or trip sheets. (T. pp. 242-43, 247-48)

Although Comtrak did not set or directly provide Hojnacki's wages, its employees had discussions with Last Rebel concerning Last Rebel's wage system, and thus knew how Hojnacki was being compensated. (T. pp. 244-45) Comtrak made payments to Last

Rebel on a bi-weekly basis. (Ex. pp. 1385-96) Earnings statements and driver "settlements" were sent to Last Rebel with the payments. (Ex. pp. 1385-96) From the mileage and recruiting payments made to Last Rebel, Comtrak deducted amounts to cover insurance and fuel costs for Hojnacki. (T. p. 246)

Neither Last Rebel nor Comtrak purchased workers' compensation insurance to cover Hojnacki in the event of an injury. (R. p. 12) Comtrak purchased a Truckers Occupational Accident Coverage plan from Old Republic Life Insurance Company that covered Hojnacki. ("the occupational accident policy"). (Id.) The policy was purchased through defendant Great West, and Comtrak paid the premiums for Hojnacki's coverage with funds deducted from the amounts that Comtrak owed to Last Rebel. (T. pp. 185-86)

Around midnight on the night of October 21, 2004, in Charleston, South Carolina, Hojnacki was in the process of preparing his truck to make a delivery for Comtrak to Chattanooga, Tennessee. (T. p. 19, 28; Ex. pp. 1366-67) In order to hook up air hoses between his truck and the trailer, Hojnacki stood on a platform located behind the cab of his truck, a task he had performed previously without incident. (T. pp. 31, 116) While hooking up the hoses, Hojnacki's right leg slid off the platform and he fell into a gap between two

platforms behind the cab of his truck. (T. pp. 28-29, 31) Hojnacki's right leg was wedged into this gap while his left leg remained on one of the platforms. (T. p. 29) Mr. Hojnacki immediately felt pain in his shoulder and was bleeding from his head, arms, and chest. (T. pp. 29-30) After two hours of effort, Hojnacki managed to extricate himself from his position. (T. p. 30) Hojnacki then cleaned off his truck, and though still in pain, made the scheduled delivery to Chattanooga that morning. (T. p. 36; Ex. p. 1357).

To treat the injuries caused by his workplace accident, Hojnacki has undergone numerous medical procedures detailed in the Deputy Commissioner's findings and not contested in the Full Commission. His surgeries included total left knee replacement, a right sternoclavicular joint resection with reconstruction, a sternoclavicular stabilization with a prosthetic device and ligament reconstruction, and a partial clavicle excision with flap reconstruction. (R. pp. 30-32) Hojnacki also received medications and necessary pain treatment. (R. p. 32) All of plaintiff's medical treatment and medications resulted from his workplace injury. (R. p. 32) Hojnacki is physically incapable of working due to the injuries he suffered in the accident. (R. p. 32)

STANDARD OF REVIEW

The issues in this appeal are whether employer-employee relationships existed between the plaintiff and defendants, and whether the Industrial Commission has jurisdiction over the case. "The question whether an employer-employee relationship existed is a jurisdictional one, and the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding." Hughart v. Dasco Transp., Inc., 167 N.C. App. 685, 689, 606 S.E.2d 379, 382 (2005) (internal citations, alteration, and quotation marks omitted). "Thus, the reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." Id. This Court may not use the "any competent evidence" standard of review when considering jurisdictional questions such as those presented in this appeal. Perkins v. Arkansas Trucking Servs., 351 N.C. 634, 637, 528 S.E.2d 902, 904 (2000).

Similarly, "the Industrial Commission's conclusions of law are reviewable de novo." Whitfield v. Lab. Corp. of Am., 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003) (citing Lewis v.

Craven Reg'l Med. Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996)).

ARGUMENT

Under N.C. Gen. Stat. § 97-19.1 – the broad remedial statute designed to bring interstate truck drivers within coverage of the Workers' Compensation Act (the "Act") – both defendants, Last Rebel and Comtrak, are liable as Hojnacki's employers for his compensable injury. Last Rebel hired and paid Hojnacki to drive its truck as an interstate carrier. Comtrak paid Last Rebel to use its truck and driver, and dispatched Hojnacki on a daily basis, in order to transport goods as an interstate carrier.

The Full Commission recognized Comtrak to be Hojnacki's employer.[1] The Commission erred, however, in failing to find Last Rebel to be an employer, even though, under N.C. Gen. Stat. § 97-19.1, Last Rebel is deemed to be liable even if it only contracted with, rather than employed, Hojnacki.

In addition, Last Rebel and Comtrak are joint employers under the Act because Hojnacki was a "lent employee" of Last Rebel to Comtrak. Therefore, under either N.C. Gen. Stat. § 97-

[1] Defendants did not cross-assign error to the Commission's conclusion that Comtrak is Hojnacki's employer. Therefore, defendants cannot contest the conclusion on appeal. See McCrary v. Byrd, 148 N.C. App. 630, 640, 559 S.E.2d 821, 828 (2002).

19.1 or the doctrine of joint employment, both Last Rebel and Comtrak are liable as employers.

Because the Full Commission erred in its findings regarding employment, it erred in its holding on jurisdiction. Although the accident occurred out-of-state and Comtrak's principal place of business is in Tennessee, Last Rebel is a North Carolina company that hired Hojnacki in North Carolina. As the defendants are joint employers engaged in a common enterprise, and at least one of the employers is a North Carolina company, the Commission has jurisdiction over the entire case.

Because both defendants are employers under the Act, Last Rebel is an uninsured North Carolina trucking company, and Comtrak used Last Rebel to obtain Hojnacki's truck-driving services, the Commission must have jurisdiction over this case. A finding of no jurisdiction would contravene the broad language of sections 97-19.1 and 97-36, and would permit any out-of-state trucking company to circumvent this state's protective statutes by using uninsured North Carolina companies as a go-between to acquire truck drivers. Such an outcome would defeat the purpose of the Act, and negate its intended broad coverage of interstate truck drivers.

I. BOTH DEFENDANTS ARE PLAINTIFF'S EMPLOYERS UNDER THE ACT.

ASSIGNMENTS OF ERROR NOS. 1, 2, 3, 4, 5, 6, 7, 8, 9 (R. pp. 67-68)

A. Because it contracted with plaintiff to drive a truck in interstate commerce, Last Rebel, like Comtrak, is liable as plaintiff's employer under N.C. Gen. Stat. § 97-19.1.

Last Rebel, like Comtrak, is liable for Hojnacki's workers' compensation as a statutory employer under N.C. Gen. Stat. § 97-19.1. This section, which became effective on October 1, 2003, was enacted to overturn "the holding in Brown v. L.H. Bottoms Truck Lines, Inc., 227 N.C. 299, 42 S.E. 71 (1947), that established that a truck driver operating a truck under another trucking company's ICC license is an employee of that trucking company." Moore v. Harris Transport, Inc., I.C. No. 170424 (Dep. Comm. Berger 2003). The statute states, in relevant part:

> An individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by a governmental motor vehicle regulatory agency may be an employee or an independent contractor under this Article dependent upon the application of the common law test for determining employment status.
>
> 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).[2] Thus, a company is deemed liable as an employer under the Act if: (a) the company is a principal contractor, intermediate contractor, or subcontractor; (b) the company contracts with an individual in the carrier industry; (c) the individual operates a truck, tractor, or truck tractor trailer licensed by the United States Department of Transportation; (d) the individual has not obtained proper workers' compensation insurance for himself personally and for his employees and subcontractors; (e) the individual, or his employees and subcontractors, suffers an injury; and (f) the injury arises out of and in the course of the performance of the work covered by the contract. Id. As the first clause makes clear, a truck driver is covered by the statute regardless of whether he is an employee or an independent contractor of the company. Id.

Based on the evidence in the record, there can be no doubt that Last Rebel formed, at least, a contractual relationship

[2] Section 97-19.1 was amended in 2006, but the amendment does not alter the provision's application in this case.

with Hojnacki to drive its truck in interstate commerce. Last Rebel agreed to and did, in fact, pay Hojnacki for driving its truck at a rate of 32 cents per mile driven. (Ex. pp. 1380-84) Records were periodically sent by Comtrak to Last Rebel that indicated how many miles Hojnacki had driven in Last Rebel's truck, and Hojnacki was paid accordingly. (Ex. pp. 1385-96) Hojnacki was not paid by Comtrak; the only payments he received for his work were issued and sent by Last Rebel. Moreover, Last Rebel could have terminated its relationship with Hojnacki at any time. As Bivens admitted, she could have fired Hojnacki, in which case he could no longer drive Last Rebel's truck, and would not be entitled to further payments by Last Rebel.

Because it formed a contract with Hojnacki, Last Rebel must be a contractor under the statute – either the principal contractor or Comtrak's subcontractor. Because Last Rebel was a contractor that contracted with Hojnacki to operate a DOT-licensed truck in interstate commerce, Hojnacki was not required to have his own workers' compensation insurance, and Hojnacki's injury arose out of and was in the scope of the contract, Last Rebel is liable as a statutory employer under N.C. Gen. Stat. § 97-19.1.

"[T]he Industrial Commission 'must make specific findings of fact as to each material fact upon which the rights of the

parties in a case involving a claim for compensation depend.'" Johnson v. Herbie's Place, 157 N.C. App. 168, 172, 579 S.E.2d 110, 113 (2003) (quoting Hansel v. Sherman Textiles, 304 N.C. 44, 59, 283 S.E.2d 101, 109 (1981)). With regard to Last Rebel, the Commission failed to make findings regarding the evidence that Bivens hired Hojnacki, Last Rebel paid Hojnacki on a weekly basis, Hojnacki was not paid by Comtrak, Last Rebel provided the truck to Hojnacki, and Bivens admitted that she had the power to fire Hojnacki. Had the Commission done so, it surely would have concluded, as this Court must, that Last Rebel is liable as a statutory employer under N.C. Gen. Stat. § 97-19.1.

B. In addition, Last Rebel and Comtrak are joint employers under N.C. Gen. Stat. § 97-2 because Last Rebel lent plaintiff's services to Comtrak.

1. Hojnacki was Last Rebel's Employee.

The existence of an employee-employer relationship is determined by the application of ordinary common law tests. McCown v. Hines, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001); see also N.C. Gen. Stat. § 97-19.1 (stating that individual in the interstate trucking industry who operates a truck "may be an employee or an independent contractor under this Article dependent upon the application of the common law test for determining employment status"). "Under the common law, an

independent contractor 'exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.'" McCown, 353 N.C. at 686, 549 S.E.2d at 177 (quoting Youngblood v. N. State Ford Truck Sales, 321 N.C. 380, 384, 364 S.E.2d 433, 437 (1988)). "In contrast, an employer-employee relationship exists 'where the party for whom the work is being done retains the right to control and direct the manner in which the details of the work are to be executed.'" Id. at 687, 549 S.E.2d at 177 (quoting same).

The Supreme Court has identified eight factors to consider in determining which party retains the right of control and, thus, whether an employed individual is an independent contractor as opposed to an employee:

> The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Id. at 687, 549 S.E.2d at 177-78 (quoting Hayes v. Bd. of Trustees. of Elon Coll., 224 N.C. 11, 16, 29 S.E.2d 137, 140

(1944)). No particular factor is controlling in itself, and not all factors are required. Id. "Rather, each factor must be considered along with all other circumstances to determine whether the claimant possessed the degree of independence necessary for classification as an independent contractor." Id.

During the period from August to October 2004, Hojnacki was Last Rebel's third employee.[3] In the summer of 2004, Bivens hired Hojnacki for the sole job of driving one of Last Rebel's trucks under the dispatch of Comtrak. Hojnacki's driving job did not require much special skill or training. Moreover, he was not engaged in an independent business and was not performing any work besides driving Last Rebel's truck. While Hojnacki had previously owned and operated his own truck, he no longer owned his truck when he went to work for Last Rebel. Instead, Last Rebel provided the truck. See Youngblood, 321 N.C. at 385, 364 S.E.2d at 438 ("Furthermore, when valuable equipment is furnished to the worker, the relationship is almost invariably that of employer and employee." (emphasis added)). Bivens paid Hojnacki by weekly check a per-mile rate of compensation for his work. (App. pp. 1380-84)

[3] Bivens and Henderson are officers of Last Rebel, and are thus also its employees under the Act because "[e]very executive officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation shall be considered as an employee of such corporation." N.C. Gen. Stat. § 97-2(2).

Bivens instructed Hojnacki that all repair work had to take place at Bivens Diesel Service. She also directed Hojnacki, like other drivers, to be productive for Comtrak in order to generate revenue for Last Rebel. As Hojnacki was required by Bivens to drive under Comtrak's dispatch, he had to follow all of Comtrak's directions for how to drive and report his work. In addition, Hojnacki could not use assistants for his work because only he had been qualified by Comtrak to drive under Comtrak's dispatch. Finally, Last Rebel had the power to fire Hojnacki. See id. ("The right to fire is one of the most effective means of control. . . . An employee . . . may be discharged without cause at any time.").[4]

"[T]he essence of the contractual relationship known as employment is that the employee surrenders to the employer the right to direct the details of his work, in exchange for receiving a wage." Woodson v. Rowland, 92 N.C. App. 38, 47, 373 S.E.2d 674, 679 (1988), aff'd in part and rev'd in part on other

[4] Again, in finding that Hojnacki was not an employee of Last Rebel under the common law test, the Commission failed to make findings regarding the evidence that Bivens hired Hojnacki, Last Rebel paid Hojnacki on a weekly basis, Hojnacki was not paid by Comtrak, Last Rebel provided the truck to Hojnacki, Last Rebel required the truck to be serviced in North Carolina, and Bivens admitted that she had the power to fire Hojnacki. See Johnson, 157 N.C. App. at 172, 579 S.E.2d at 113 (2003). Had the Commission done so, it would have concluded that Last Rebel is Hojnacki's employer.

grounds by 329 N.C. 330, 407 S.E.2d 222 (1991) (quoting Anderson v. Marathon Petroleum Co., 801 F. 2d 936, 938 (7th Cir. 1986)). As Hojnacki meets at most one or two of the Supreme Court's eight factors for being an independent contractor, was furnished with valuable equipment by Last Rebel, and could be fired without cause, it is clear that he did not possess the degree of independence necessary for an independent contractor. See McCown, 353 N.C. at 687, 549 S.E.2d at 177-78; Youngblood, 321 N.C. at 385, 364 S.E.2d at 438. Instead, having surrendered the right to direct his work in exchange for his wages, Hojnacki was a Last Rebel employee.

2. Comtrak was Hojnacki's special employer.

The Commission concluded that Comtrak was Hojnacki's employer – a conclusion not cross-assigned as error. In addition, because of the contractual relationship established between Last Rebel and Comtrak, Comtrak was a joint employer of Hojnacki, and he was injured in the course of that joint employment. "Joint employment exists when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other." Hughart v.

Dasco Transp., Inc., 167 N.C. App. 685, 689, 606 S.E.2d 379, 383 (2005) (internal quotation marks omitted). "When joint employment has occurred, both employers are liable for workers' compensation." Id.

In the usual application of the joint employer doctrine, "an employer 'loans' the services of his employee to another employer for the completion of a designated job." Pinckney v. United States, 671 F. Supp. 405, 408 (E.D.N.C. 1987). This Court has articulated the test for joint employment in such a situation:

> When a general employer lends an employee to a special employer, the special employer becomes liable for workmen'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 workmen's compensation.

Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 459, 204 S.E.2d 873, 876 (1974).

In Henderson v. Manpower of Guilford County, Inc., 70 N.C. App. 408, 319 S.E.2d 690 (1984), the Court found the joint employment test satisfied in a situation indistinguishable from this case. There, the plaintiff was paid by Manpower of Guilford County ("Manpower"), which directed him to perform

construction work for another company, Benner & Fields. Id. at 410-12, 319 S.E.2d at 692-93. The plaintiff was injured while cutting trees and clearing land, which "was entirely the work of Benner & Fields." Id. at 412, 319 S.E.2d at 693. "In doing that work, plaintiff was under the sole control and supervision of Benner & Fields, who not only controlled the details of that work, but had the right to discharge plaintiff from that work at will." Id. (emphasis in original). Manpower had no control over plaintiff's work while he was working for Benner & Fields. Id. "The control that Manpower had over plaintiff was the power to assign him to an employer interested in renting his services, to establish his rate of pay on each job, and terminate his connection with Manpower when it saw fit." Id. While Benner & Fields had no control over plaintiff's arrangement with Manpower, it had control over plaintiff's construction work when he performed it. Id. at 413, 319 S.E.2d at 693. Regarding the joint employment test, the Court of Appeals concluded:

> [The] three conditions are fully met by the facts of this case: (a) Although no express contract existed between plaintiff and Benner & Fields, an implied contract manifestly did, since they accepted plaintiff's work and were obligated to pay Manpower for it, and Manpower was obligated in turn to pay plaintiff; (b) plaintiff was doing Benner & Fields' work when injured; and (c) Benner & Fields had the right to and did control the details of that work.

Id. at 414, 319 S.E.2d at 694. Accordingly, the Court held Benner & Fields to be a joint employer of plaintiff and equally liable to compensate him. Id. at 415, 319 S.E.2d at 694.

The position of Comtrak in this case is practically identical to that of Benner & Fields in Henderson. Comtrak exerted complete control over Hojnacki in his daily trucking work, as evidenced by the contract between Comtrak and Last Rebel and the testimony below. The contract specified that Last Rebel's employee-driver would "operate the equipment for the hauling and transporting of freight pursuant to the instructions from" Comtrak. (Ex. p. 47) Last Rebel's employee was obligated to unload trailers, advise dispatch of status daily, and conform in any other respect to Comtrak's policies and procedures. Id. Comtrak had the power to terminate and require the replacement of Last Rebel's employee "with or without cause." Id. Moreover, Comtrak tested Hojnacki on how he performed his driving, delivered all scheduling orders, and provided trip sheets and a log book, both of which were the property of Comtrak. Once it had assigned Hojnacki to drive for Comtrak, Last Rebel did not have any day-to-day oversight over his work.

These facts lead inescapably to the conclusion that Comtrak is Hojnacki's joint employer. The three conditions met in Henderson are also met here: (1) Comtrak accepted Hojnacki's

work and was obligated to pay Last Rebel for it, and Last Rebel was obligated to pay Hojnacki; (2) Hojnacki was doing Comtrak's work when he was injured; and (3) Comtrak had the right to and did control the details of that work. See Henderson, 70 N.C. App. at 414, 319 S.E.2d at 694. Accordingly, Comtrak is a joint employer of Hojnacki and is equally liable to him under the Act.

II. THE INDUSTRIAL COMMISSION HAS JURISDICTION OVER THE ENTIRE CASE BECAUSE LAST REBEL, ONE OF PLAINTIFF'S JOINT EMPLOYERS, IS A NORTH CAROLINA COMPANY AND BECAUSE COMTRAK, AN INTERSTATE TRUCKING COMPANY, USED AN UNINSURED NORTH CAROLINA EMPLOYER, LAST REBEL, TO EMPLOY PLAINTIFF.

ASSIGNMENTS OF ERROR NOS. 11, 12, 13 (R pp. 68-69)

N.C. Gen. Stat. § 97-36 specifies the requirements to determine if an employee who is injured in an accident outside North Carolina is entitled to compensation under the Act. The section provides:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him . . . to compensation if it had happened in this State, then the employee . . . shall be entitled to compensation (i) if the contract of employment was made in this State, (ii) if the employer's principal place of business is in this State, or (iii) if the employee's principal place of employment is within this State.

N.C. Gen. Stat. § 97-36 (emphasis added). "In order for the Commission to assert jurisdiction over plaintiff's claim, the jurisdictional facts must show either: (1) plaintiff's 'contract

for employment was made in this State;' (2) defendants' 'principal place of business is in this State;' or (3) plaintiff's 'principal place of employment was within this State.'" Washington v. Traffic Markings, Inc., 643 S.E.2d 44, 48, 2007 N.C. App. LEXIS 785, at *10 (2005) (quoting N.C. Gen. Stat. § 97-36).

Since the Full Commission failed to consider all the facts regarding Last Rebel, and thus erred in its findings regarding Hojnacki's employment by Last Rebel, it erred in its holding on jurisdiction because it failed to consider Last Rebel in its jurisdictional analysis. As the defendants are joint employers engaged in a common enterprise, and at least one of the employers is a North Carolina company, the Commission has jurisdiction over the entire case.

A. The Commission has jurisdiction over this entire case because Last Rebel, one of two joint employers, is a North Carolina company and hired Hojnacki in North Carolina.

By its express terms, N.C. Gen. Stat. § 97-36 provides jurisdiction of the Industrial Commission over "the accident" when the "employment" satisfies one of three tests. When two companies intentionally form a joint employer relationship, the plaintiff's employment will be subject to the Commission's

jurisdiction if either employer satisfies the provisions in section 97-36.

In this case, under either N.C. Gen. Stat. § 97-19.1 or the doctrine of joint employment, both Last Rebel and Comtrak are liable as employers. While Comtrak provided the DOT license and instructed Hojnacki where to drive, Last Rebel provided him with a tractor trailer, paid his wages, and serviced his truck in North Carolina. Last Rebel meets two of the three tests in section 97-36.

First, Last Rebel's principal place of business is in North Carolina. Bivens testified that Last Rebel's principal place of business is and always has been North Carolina. Moreover, the operations of Bivens and Henderson for Last Rebel have principally been in North Carolina.

Second, Hojnacki's contract with Last Rebel was made in North Carolina. "To determine where a contract for employment was made, the Commission and the courts of this state apply the 'last act' test.'" Washington, 643 S.E.2d at 48 (quoting Murray v. Ahlstrom Indus. Holdings, Inc., 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998)). "For a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." Id. (alteration and quotation marks omitted). The essential elements of the formation of a

contract are the communication of an offer and an acceptance of its exact terms. Id.

The undisputed evidence establishes that Hojnacki's contract with Last Rebel was formed in North Carolina. Hojnacki and Bivens both testified that Hojnacki agreed to work for Last Rebel in an in-person conversation with Bivens that took place in North Carolina. As this agreement was consummated in full in North Carolina, the "last act" test is clearly satisfied, as is the contract-formation test in section 97-36. Therefore, because one of Hojnacki's employers is located in North Carolina, and at least one of his employment contracts was formed in North Carolina, section 97-36 is satisfied, and the Commission has jurisdiction over the entire case.

This case presents an entirely different set of facts than the cases in which this Court has previously found that tractor trailer companies were not subject to North Carolina jurisdiction. In those cases, there was only one employer, which was not principally based in North Carolina. See, e.g., Davis v. Great Coastal Express, 169 N.C. App. 607, 608, 610 S.E.2d 276, 278 (2005); Thomas v. Overland Express, Inc., 101 N.C. App. 90, 98, 398 S.E.2d 921, 926 (1990). In this case, by contrast, one of Hojnacki's joint employers is based in North Carolina, and formed its contract with Hojnacki in North

Carolina. Accordingly, the Commission has jurisdiction over the case under N.C. Gen. Stat. § 97-36.

B. In addition, the Commission has jurisdiction over the entire case because Comtrak used Last Rebel to obtain Hojnacki's services.

When an out-of-state employer uses an uninsured North Carolina company to hire a worker in North Carolina, the Industrial Commission must have jurisdiction over the entire case, including over both employers. Otherwise, out-of-state companies will be able to circumvent the Act, by hiring North Carolina workers using uninsured North Carolina companies as a go-between. As a result, workers hired in North Carolina would be left without coverage for workers' compensation. Such an outcome is contrary to the Act. See Gupton v. Builders Transport, 320 N.C. 38, 42, 357 S.E.2d 674, 677 (1987) (reaffirming the "fundamental rule that the Workers' Compensation Act should be liberally construed to the end that the benefits thereof derived should not be denied upon a technical, narrow and strict interpretation." (alterations omitted)).

The broadest exercise of jurisdiction is particularly called for in the context of interstate truck drivers. In enacting N.C. Gen. Stat. § 97-19.1, the legislature made clear

that interstate truck drivers must be covered by the Act, in spite of the wide variety of employment and contractual arrangements that trucking companies use to acquire the services of drivers. Out-of-state trucking companies cannot be allowed to escape North Carolina jurisdiction by using an uninsured North Carolina company to acquire its drivers.

The case of Collins v. Leviner, I.C. No. 150786 (Full Comm. 2004) illustrates how the jurisdictional requirement of section 97-36 applies to an out-of-state employer and an in-state, uninsured employer. In that case, defendant Eddings was a general contractor who subcontracted drywall work to defendant-subcontractor Leviner. Id. at Finding ¶ 17. Leviner in turn hired plaintiff Collins to perform work in South Carolina. Id. at Finding ¶ 2. The hiring itself occurred in North Carolina. Id. Leviner did not carry any workers' compensation insurance. Id. at Finding ¶ 15. The plaintiff was injured while performing drywall work for Leviner in South Carolina. Id. at Finding ¶ 5.

Defendant Leviner was liable as an employer under N.C. Gen. Stat. § 97-2. Id. at Conclusion ¶ 1. Defendant Eddings was liable as an employer under N.C. Gen Stat. § 97-19 because he was a general contractor and the subcontractor did not have workers' compensation insurance. Id. at Conclusion ¶¶ 6-8. The Full Commission found that it had jurisdiction over the entire

case under section 97-36 solely because the plaintiff's contract with the subcontractor was formed in North Carolina. Id. at Conclusion ¶ 9. The Full Commission did not impose any extra jurisdictional requirement for the out-of-state employer.

In this case, Comtrak acquired the use of an interstate truck driver that a North Carolina company hired in North Carolina. Neither Comtrak nor Last Rebel provided Hojnacki with workers' compensation insurance. And, just as employees of subcontractors are broadly protected by N.C. Gen. Stat. § 97-19, truck drivers are broadly protected by N.C. Gen. Stat. § 97-19.1. Therefore, as in Collins, the Commission must have jurisdiction over the out-of-state employer who has acquired workers through a North Carolina company in North Carolina, especially where the local company is uninsured.

There is nothing in the Act that requires Hojnacki, as a truck driver protected by section 97-19.1 and as an employee of joint employers, to meet a heightened jurisdictional burden not required of other North Carolina employees merely because one of his employers is not principally located in the state. Section 97-36 provides for jurisdiction in North Carolina "if the contract of employment was made in this State," or if "the employer's principal place of business is in this State." N.C. Gen. Stat. § 97-36. Hojnacki's initial contract of employment

was with Last Rebel, and it is undisputed that the contract was made in North Carolina and that Last Rebel's principal place of business is in North Carolina. Therefore the Commission has jurisdiction over the entire case, including both employers, under section 97-36. See Collins, I.C. No. 150786, at Conclusion ¶¶ 6-9.

CONCLUSION

For the foregoing reasons, the Court should reverse the Industrial Commission's opinion and award, find that the Commission has jurisdiction over this case, and remand for a determination of the merits of the case.

This the 24th day of July, 2009.

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