No. COA09-460

NORTH CAROLINA COURT OF APPEALS

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

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PLAINTIFF-APPELLANT'S REPLY BRIEF

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No. COA09-460

NORTH CAROLINA COURT OF APPEALS

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PLAINTIFF-APPELLANT'S REPLY BRIEF

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Pursuant to Rule 28(h)(3) of the North Carolina Rules of Appellate Procedure, having been notified that this case will be submitted without oral argument under Rule 30(f), plaintiff-appellant Steve Hojnacki hereby submits this brief in reply to defendants' briefs, which raised arguments not addressed in plaintiff-appellant's principal brief.

Defendant Last Rebel is liable as Hojnacki's statutory employer under N.C. Gen. Stat. § 97-19.1 because it hired and

paid Hojnacki to drive its truck as an interstate carrier, regardless of what the relationship between the two defendant trucking companies was called on paper, or what they elect to call it now in their briefs. Defendant Comtrak does not contest the Industrial Commission's conclusion that it was Hojnacki's employer under N.C. Gen. Stat. § 97-2, and Hojnacki's statutory employer under N.C. Gen. Stat. § 97-19.1, as Last Rebel, with whom it contracted, is an uninsured North Carolina company that hired Hojnacki in North Carolina. As the defendants are also joint employers engaged in a common enterprise, the Commission has jurisdiction over the entire case.

## I. NO MATTER HOW THE RELATIONSHIP IS NOW CHARACTERIZED BY THE DEFENDANTS, AT THE VERY LEAST PLAINTIFF CONTRACTED WITH LAST REBEL TO DRIVE ITS TRUCK IN INTERSTATE COMMERCE; THEREFORE LAST REBEL IS A STATUTORY EMPLOYER UNDER N.C. GEN. STAT. § 97-19.1.

This case involves only questions of jurisdiction. Therefore, this Court must make its own findings of jurisdictional fact, and may not defer to the Industrial Commission in doing so. (Plaintiff-Appellant Br. at 10) The undisputed facts lead to a conclusion that this case falls squarely under the purview of N.C. Gen. Stat. § 97-19.1, a broad remedial statute enacted to remedy the problem of a lack of workers' compensation coverage for injuries experienced by

trucker drivers. The Opinion and Award of the Industrial Commission erroneously ignored the full scope of this statute.

Last Rebel concedes that it paid Hojnacki by weekly check an amount based on the number of miles that he drove Last Rebel's truck. (Last Rebel Br. at 5) Contrary to defendants' characterization, though, Last Rebel was not a mere conduit for payments to Hojnacki. Comtrak periodically paid Last Rebel an amount based on Hojnacki's mileage driven (approximately 80 cents per mile), plus bonuses, with deductions for fuel, insurance, non-deliveries, and medical care. (T. pp. 181-84, 246; Ex. pp. 1385-96) This amount was not simply passed on to Hojnacki. Comtrak did not pay Hojnacki. In fact, Comtrak's representative testified before the Industrial Commission that Hojnacki's pay was handled by Last Rebel, Comtrak had no control over Hojnacki's pay, and the representative did not know how much Hojnacki was paid. (T. pp. 179-80)

Instead, Hojnacki and Last Rebel had separately negotiated a flat pay rate of 32 cents per mile for Hojnacki's work. (T. pp. 5-6, 21-23; Ex. 1380-84) Thus, in exchange for his driving, Hojnacki was paid by Last Rebel and only Last Rebel.

"[A] binding contract is created by an agreement involving mutual assent of two parties who are in possession of legal capacity, where the agreement consists of an exchange of legal

consideration (mutuality of obligation)." Creech v. Melnik, 147 N.C. App. 471, 477, 556 S.E.2d 587, 591 (2001) (citing Richard A. Lord, Williston on Contracts § 1:20 (4th ed. 1993)).

Here, Hojnacki promised to drive Last Rebel's truck under Comtrak's dispatch and to have the truck serviced by Bivens Diesel Service. (T. pp. 5-6, 244-45, 249) Last Rebel promised to pay Hojnacki a per-mile rate for his work. This arrangement was then carried out until Hojnacki was injured in October 2004. This exchange of obligations is a contract, so Hojnacki was, at least, a contractor for Last Rebel.

Last Rebel argues that it had no contractual relationship with Hojnacki because it did not withhold taxes from the payments it made to him. (Last Rebel Br. at 10) This fact is of no legal consequence. Many service providers, contractors, and even some employees, receive payments for their work without tax withholding. That does not alter the inescapable conclusion that they have a contract with the entity paying them.[1]

Comtrak contends that Last Rebel could not have formed a contract with Hojnacki because Comtrak had to approve of any

[1] Comtrak also did not issue either a 1099 or W-2 tax form to Hojnacki. (T. p. 180) Nonetheless, Comtrak is still Hojnacki's employer under N.C. Gen. Stat. §§ 97-2 and 97-19.1.

driver who drove under its dispatch. (Comtrak Br. at 29)[2] Though there was an approval requirement, this was simply a condition precedent for the contract between Hojnacki and Last Rebel. See Carson v. Grassmann, 182 N.C. App. 521, 524, 642 S.E.2d 537, 539 (2007) ("In entering into a contract, the parties may agree to any condition precedent, the performance of which is mandatory before they become bound by the contract." (quoting Cox v. Funk, 42 N.C. App. 32, 34-35, 255 S.E.2d 600, 601 (1979)). Once Comtrak did approve of Hojnacki, the contract went into effect, which is why Hojnacki drove Last Rebel's truck and why Last Rebel paid him.

Under the Workers' Compensation Act, every employee and employer as defined by its terms are presumed to have accepted the provisions of the Act to "pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment" N.C. Gen. Stat § 97-3. The presumption is rebuttable, Reece v. Forga, 138 N.C. App. 703, 706, 531 S.E.2d 881, 883 (2000), but Last Rebel has failed to rebut that presumption here.

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[2] Comtrak also contends that Bivens could not have given Hojnacki the truck at the beginning of his work for Last Rebel because Comtrak contractually had "possession" of the truck. (Comtrak Br. at 15-16). It is undisputed, however, that before Hojnacki got started, Last Rebel had its truck in North Carolina, and then Hojnacki drove the truck from North Carolina to Atlanta for the orientation. (T. pp. 7-9)

Last Rebel contracted with Hojnacki to operate a DOT-licensed truck in interstate commerce, Hojnacki did not have his own workers' compensation insurance, and Hojnacki's injury arose out of and was in the scope of the contract. Last Rebel is therefore liable as a statutory employer under N.C. Gen. Stat. § 97-19.1, and the Commission's conclusion of law that it lacked subject matter jurisdiction over this case was in error.

## II. COMTRAK AND LAST REBEL WERE JOINT EMPLOYERS DESPITE COMTRAK'S RECENT CHARACTERIZATION OF ITSELF AS THE EMPLOYER AND LAST REBEL AS ITS "RECRUITER."

In the hearing before the Industrial Commission, Comtrak's representative testified that Comtrak was not Hojnacki's employer. (T. pp. 210) In its discovery responses, Comtrak stated that Hojnacki was an employee of Last Rebel, and not an employee of Comtrak. (Ex. p. 1501) Now, in this Court, Comtrak admits that it was Hojnacki's employer and goes further, trying to persuade the Court that it was Hojnacki's sole employer, so as to avoid the jurisdiction of the North Carolina Industrial Commission.[3]

[3] Comtrak has never heretofore acknowledged Hojnacki as an employee, nor has it ever, despite how it now characterizes the relationship in its brief, paid Hojnacki workers' compensation benefits for his injury. Hojnacki was covered instead by an occupational accident insurance policy that was ultimately paid for by Last Rebel, not Comtrak. (T. pp. 185, 189)

Although the document signed by the two trucking companies is called an Equipment Lease Contract, Comtrak now calls Last Rebel not a contractor, but a "recruiter." The reason for this is apparent. If this Court should find that there is a contract between the defendants for interstate trucking, the case fits squarely within the language of N.C. Gen. Stat. § 97-19.1. If Comtrak calls Last Rebel Hojnacki's employer, as it did in the Industrial Commission, the two companies are then revealed to be joint employers, subject to the jurisdiction of the Act.

The Workers' Compensation Act does not recognize any special category of entity called a "recruiter." Under the Act, where an individual performs work and is paid for that work, he is either an employee or an independent contractor of the entity that pays him. See N.C. Gen. Stat. §§ 97-2(2),(3), 97-19, and 97-19.1. Further, the Act plainly states that:

> No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer in whole or in part, of any obligation created by this Article, except as herein expressly provided.

N.C. Gen. Stat. § 97-6. Comtrak is attempting here to cast its agreement with Last Rebel in such a manner as to relieve both companies of their obligations under the statute.

As Defendants are now calling Last Rebel a "recruiter", their primary arguments against a finding of joint employment

are (1) that Hojnacki did not have any contract at all with Last Rebel; and (2) that he was not an employee of Last Rebel. (Last Rebel Br. at 14-15; Comtrak Br. at 18-19) As discussed above and in Section I.B.1 of plaintiff-appellant's principal brief, the facts and law lead to the conclusion that Hojnacki was both an employee and a statutory employee of Last Rebel.

As both Last Rebel and Comtrak were Hojnacki's employers, the joint employment doctrine for lent employees is squarely applicable. See Pinckney v. United States, 671 F. Supp. 405, 408 (E.D.N.C. 1987); Henderson v. Manpower of Guilford County, Inc., 70 N.C. App. 408, 414, 319 S.E.2d 690, 694 (1984); Collins v. James Paul Edwards, Inc., 21 N.C. App. 455, 459, 204 S.E.2d 873, 876 (1974).

Comtrak attempts to distinguish Henderson on the grounds that the general employer in that case, Manpower, had more work for the plaintiff than the general employer in this case, Last Rebel, did. (Comtrak Br. at 20-21) Although Hojnacki's work for Last Rebel and Comtrak was cut short by his injury, he was a lent employee during the time he was working. Last Rebel employed Hojnacki, Last Rebel directed him to perform work for Comtrak, Comtrak controlled how his work was done, both companies benefitted from Hojnacki's work, and Last Rebel was ultimately responsible for paying him. Comtrak cites no

authority for the proposition that a lent employee has to have had a relationship with the general employer for some long-term period before being considered an employer under N.C. Gen. Stat. § 97-2, as there is none. Because Hojnacki was injured during his joint employment, both defendants are liable. See Collins, 21 N.C. App. at 459, 204 S.E.2d at 876.

Comtrak also relies on Suggs v. Williamson Truck Lines, 253 N.C. 148, 116 S.E.2d 359 (1960), to argue that Hojnacki did not have an employment relationship with Last Rebel. (Comtrak Br. at 22-24) At issue in that case was whether the plaintiff truck driver was an employee of the general employer, Williamson Truck Lines ("Williamson"), while he was driving on a job for a special employer, Mercury Motor Express ("Mercury"). Id. at 148-49, 116 S.E.2d at 359-60. Just prior to being injured, the plaintiff had filled in for another driver midway through a trip, and there is no indication that Williamson even knew that the plaintiff had taken over the truck. Id. There was no prior agreement between Williamson and the plaintiff about the plaintiff driving Williamson's truck for Mercury. This decision also pre-dates the enactment of N.C. Gen. Stat. § 97-19.1, so the Supreme Court did not have to consider whether Williamson had a contractual relationship with the plaintiff.

In this case, in contrast, Last Rebel had contracted with Hojnacki to have him drive its truck for Comtrak, certainly knew that he was doing so, and paid him for the work. Just like Manpower in Henderson, Last Rebel directed Hojnacki to work for a special employer, and it remains liable as the general employer, and as a trucking contractor, for Hojnacki's injury sustained during his special employment.

Finally, Comtrak relies on two cases, Godley v. County of Pitt, 54 N.C. App 324, 283 S.E.2d (1981), and Forgay v. N.C. State University, 1 N.C. App. 320, 161 S.E.2d 602 (1968), for the proposition that direct day-to-day control is necessary for an employment relationship. (Comtrak Br. at 11-14) This is clearly not a requirement, however, in joint employment situations. When there is joint employment, the special employer controls the day-to-day duties of the employee. See Henderson, 70 N.C. App. at 412, 319 S.E.2d at 693 ("In doing that work, plaintiff was under the sole control and supervision of [the special employer], who not only controlled the details of that work, but had the right to discharge plaintiff from that work at will."); Collins, 21 N.C. App. at 459, 204 S.E.2d at 876 (listing as an element of joint employment that "the special employer has the right to control the details of the work"). But, even though the general employer does not have day-to-day

control over the employee, it is still liable as an employer. Collins, 21 N.C. App. at 459, 204 S.E.2d at 876.

III. THE INDUSTRIAL COMMISSION HAS JURISDICTION OVER THE ENTIRE CASE BECAUSE ONE OF THE JOINT EMPLOYERS IS A NORTH CAROLINA COMPANY THAT HIRED PLAINTIFF IN NORTH CAROLINA.

Under both N.C. Gen. Stat. § 97-19.1 and the doctrine of joint employment, Last Rebel and Comtrak are jointly liable as employers. Together, they employed Hojnacki to drive a truck in interstate commerce and he was injured doing so. Because Last Rebel is a North Carolina company, and Hojnacki's contract with Last Rebel was formed in North Carolina, two of the three jurisdictional tests in N.C. Gen. Stat. § 97-36 are satisfied, and thus the Commission has jurisdiction over this case.

Comtrak asserts that even in a case of joint employment, section 97-36 has to be satisfied separately for each employer. (Comtrak Br. at 27-28) Comtrak, however, provides no authority for this proposition. On the other hand, there is persuasive authority from the Industrial Commission on exactly this question. In Collins v. Leviner, I.C. No. 150786, 2004 NC Wrk. Comp. LEXIS 151 (Full Comm. 2004), 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.[4] The Full Commission did not impose any extra jurisdictional requirement for the general contractor. As in Collins, the Commission must have jurisdiction over Comtrak, which, like the general contractor, has acquired a worker through a North Carolina company in North Carolina, especially because the local employer is uninsured. Otherwise, out-of-state companies will be able to circumvent our state's Act, and leave workers unprotected, by hiring North Carolina workers using uninsured North Carolina companies as a go-between.

The Commission's decision in Collins, while not binding as precedent on this Court, is grounded in solid jurisdictional principles. The Workers' Compensation Act is a remedial statute that "should be liberally construed to the end that the benefits thereof derived should not be denied upon a technical, narrow and strict interpretation." Gupton v. Builders Transport, 320 N.C. 38, 42, 357 S.E.2d 674, 677 (1987). Where employers act jointly in hiring and employing a worker, they effectively act as one entity with regard to the worker. Therefore, an employee of joint employers should be able to pursue his claim in North Carolina if either of the employers meets the requirements of section 97-36.

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[4] The Collins decision was mistakenly omitted from the appendix to plaintiff-appellant's principal brief. It is included in the appendix to this reply brief.

From Hojnacki's perspective as an employee, what he knew was that he worked for both companies. He was then injured. He knew he was hired in North Carolina by a North Carolina company and that North Carolina law requires trucking companies to carry workers' compensation coverage for their drivers. (T. p. 82) Therefore, he brought his claim in this state.[5]

The Act should require nothing further of him. To construe the statutes otherwise would defeat the purpose of both the Act and N.C. Gen. Stat. § 97-19.1, which was enacted by the legislature to broaden, not limit, coverage for injured truck drivers. It would allow Comtrak – which already has in this state a hub, employees, and workers' compensation coverage for those employees – to escape the intended reach of the statute by using an uninsured company to obtain a truck and hire a driver in this state, and then just calling the local company a "recruiter." To guarantee that the Act is enforced as intended, the Commission must have jurisdiction over this case.

[5] Workers' compensation statutes do not confer exclusive jurisdiction upon one state only. This is expressly recognized in N.C. Gen. Stat. § 97-36, which provides for a limit of total compensation should benefits from more than one state be combined.

## CONCLUSION

For the foregoing reasons, and for the reasons stated in plaintiff-appellant's principal brief, 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 13th day of October, 2009.

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