An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-144

NORTH CAROLINA COURT OF APPEALS

Filed: 19 September 2006

JOYCE GUYE,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 221884

KAT'S CLEANING,
Employer,
Defendant,

and

DEVIPRYA LLC d/b/a HOWARD JOHNSON'S EXPRESS INN
Employer,
Defendant,

Appeal by plaintiff from an opinion and award filed 5 October 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 August 2006.

Hedrick & Morton, L.L.P., by P. Scott Hedrick and Stephen E. Coble, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Cameron D. Simmons and Meredith T. Black, for defendant-appellees.

JACKSON, Judge.

Joyce Guye ("plaintiff") appeals from an order of the Full Commission of the North Carolina Industrial Commission filed 5 October 2005 denying her claim for workers'

compensation benefits against Deviprya LLC d/b/a Howard Johnsons Express Inn of Wilmington ("defendant"). For the reasons stated below, we affirm.

Defendant entered into a cleaning agreement with Kat's Cleaning Service ("Kat's") on 1 October 2001. Plaintiff, who was employed by Kat's as a laundress and housekeeper at defendant's hotel, also served as assistant supervisor to Kat's other cleaning staff. On or about 23 January 2002, plaintiff was working in the laundry room when defendant's manager told her the laundering supplies were running low and asked her to replace them. When she picked up a thirty-gallon container of washing bleach weighing approximately fifty to seventy-five pounds, she felt her back "pop." She continued working for a few days, but reported to the emergency room on or about 26 January 2002 because the pain she was experiencing continued to worsen. As a result of her injury, plaintiff was advised to seek back surgery. Kat's was terminated as defendant's cleaning service in early 2002, at which time defendant began hiring cleaning personnel directly.

Plaintiff initiated a workers' compensation claim against defendant and defendant's insurance carrier on 25 March 2002. Kathryn Brown d/b/a Kat's Cleaning Service was added as a defendant on 22 May 2002 by order of the Industrial Commission. Because of an inability to effect service of process on Kathryn Brown ("Brown"), who was believed to have relocated to an unknown location outside of North Carolina, plaintiff's claim against Kat's was dismissed without prejudice on 6 February 2003. By order filed 5 January 2004, Deputy Commissioner J. Brad Donovan found plaintiff was defendant's employee and awarded compensation for her work-related injury. Defendant made timely appeal to the Full Commission. By order filed 5 October 2005, the Full Commission reversed the opinion and award of the deputy commissioner,

finding that defendant was not plaintiff's employer and was not liable for her workers' compensation claim. Plaintiff now appeals from the opinion and award of the Full Commission.

Plaintiff argues that the Full Commission erred in finding she was not an employee of defendant and thus not entitled to workers' compensation benefits. She urges us to reverse the Full Commission and reinstate the order of Deputy Commissioner Donovan. For the reasons stated below, we affirm the decision of the Full Commission.

Ordinarily, in reviewing a decision of the Full Commission, this Court asks only whether there was competent evidence in the record to support the Commission's findings of fact and whether those findings, in turn, justify the Commission's conclusions of law. *See Perkins v. U.S. Airways*, ___ N.C. App. ___, ___, 628 S.E.2d 402, 406 (2006). However, "'[t]o be entitled to maintain a proceeding for workers' compensation, the claimant must be, in fact and in law, an employee of the party from whom compensation is claimed.'" *Hughart v. Dasco Transp., Inc.*, 167 N.C. App. 685, 689, 606 S.E.2d 379, 382 (2005) (quoting *Youngblood v. N. State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988)). It is for this Court to make such determinations.

> 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. 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. (internal citations, alteration, and quotation marks omitted). We therefore examine the entire record *de novo* to determine whether such a relationship existed.

Plaintiff asks this Court to consider her both the employee of Kat's and the employee of defendant, making both employers equally liable for her work-related injury. *See Collins v.*

James Paul Edwards, Inc., 21 N.C. App. 455, 458, 204 S.E.2d 873, 876, *cert. denied*, 285 N.C. 589, 206 S.E.2d 862 (1974) (noting that joint employers may be "jointly responsible to pay compensation if the employee is injured by accident arising out of and in the course of such 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*, 167 N.C. App. at 689, 606 S.E.2d at 383 (quoting *Henderson v. Manpower of Guilford County, Inc.*, 70 N.C. App. 408, 413.14, 319 S.E.2d 690, 693 (1984)). Such relationships frequently are found with temporary employment services, when employees are assigned to another's jobsite and the general employer retains little to no control over the employee's duties while at that site. *See, e.g.*, *Brown v. Friday Servs., Inc.*, 119 N.C. App. 753, 460 S.E.2d 356, *disc. rev. denied*, 342 N.C. 191, 463 S.E.2d 234 (1995). Indeed, in the usual application of the joint employer theory, "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) (emphasis added).

Ultimately, the test for assessing the employer-employee relationship in such circumstances was enunciated by this Court in *Collins v. James Paul Edwards, Inc.*:

> 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, 21 N.C. App. at 459, 204 S.E.2d at 876 (emphasis added) (citation and internal quotation marks omitted). As this Court later noted, "[t]he contract requirement is crucial because the employee loses certain rights along with those gained when striking up a new employment relation." *Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 607, 525 S.E.2d 471, 473 (2000) (citation and internal quotation marks omitted).

In applying the joint employment test to this case, it is clear that plaintiff at no point established an employment contract, express or implied, with defendant. Much as in *Anderson*, no argument has been made and no evidence has been presented that the injured employee entered into an express employment contract with the alleged special employer. *See id.* at 608, 525 S.E.2d at 474. It is undisputed that the only express contract for hire was between defendant and Kat's, the general employer. We therefore must determine if plaintiff and defendant, the alleged special employer, made an implied contract for employment.

First, it must be noted that an employment relationship based on an implied contract may only arise with mutual consent. Indeed, "[t]he consent may be implied from the employee's acceptance of the special employer's control and direction. But what seems on the surface to be such acceptance may actually be only a continued obedience of the general employer's commands." *Collins*, 21 N.C. App. at 460, 204 S.E.2d at 877 (citation and internal quotation marks omitted).

The facts of the present case are echoed in this Court's opinion in *Collins*:

> It is true that a casual reading of the findings of fact . . . might leave the impression that [the employee] was subject to extensive and detailed supervision and control by [the alleged special employer]. When these findings are examined more closely, however, . . . it is apparent that in actuality the supervision and control exercised by [the alleged special employer] over [the employee] was minimal.

Id. at 461, 204 S.E.2d 877.78. In the case *sub judice*, plaintiff testified that if she arrived at the hotel before the owner of Kat's, she would divide up the work among Kat's other employees, based on a daily report from hotel management indicating which rooms needed servicing. Concerning the work itself, plaintiff testified that the towels had to be folded and placed the "Howard Johnson" way and that the ashtrays, *Bibles*, soap, cups, and coffee also were to be placed the "Howard Johnson" way. The laundry machines and cleaning supplies necessary for completing the work were provided by defendant. Additionally, plaintiff, along with the other Kat's employees, was required to wear a uniform and Howard Johnson name tag, and nowhere on the name tag did the name Kat's Cleaning appear. Furthermore, plaintiff's son, who also worked for Kat's at the Howard Johnson, testified that if a job was not done correctly, defendant's manager would say, "It's either done right or you won't have a job."

Although at first blush, the facts point toward a joint employment relationship, further inquiry reveals that plaintiff was the employee of Kat's Cleaning only. Kathryn Brown, on behalf of Kat's, entered into a contract with defendant on 1 October 2001, providing that: 1) all rooms were to be cleaned according to Howard Johnson specifications; 2) rooms not cleaned properly were to be recleaned at no charge to defendant; 3) all Kat's employees were to wear Howard Johnson uniforms and name tags; and 4) Kat's was responsible for obtaining background checks on its employees. Plaintiff admitted that she was the assistant supervisor of Kat's and was helping run the business in accordance with the contract and Kathryn Brown's directions. Cherie Malpass, another Kat's employee, testified that the name tags were given to Kathryn Brown, who in turn distributed them to the employees. Malpass also testified that Brown would tell employees upon being hired what time to report to work in the mornings. Additionally, Kathryn Brown, not defendant, ordered the employee uniforms, and as the Full Commission found,

Brown could determine the make-up of the uniforms, such as the colors of the clothes, provided the uniforms met the minimum standards established by Howard Johnson. Furthermore, Malpass explained that the beds were to be made a certain way, which Brown would demonstrate to the employees when they were hired. Although the manager of the hotel would inspect some of the rooms to ensure the rooms met Howard Johnson's quality standards, ultimately it was Kathryn Brown who was responsible, pursuant to the contract between Kat's and defendant, to inspect each room on a daily basis. Malpass testified that she was hired and fired by Brown, and the Commission specifically found that Kat's hired and fired its own employees. Defendant had no power to hire or fire employees on behalf of Kat's, and the manager of the hotel would inform Kathryn Brown of the need for any disciplinary action, rather than directly disciplining Kat's employees.

In sum, Kat's and not defendant had the power over hiring, firing, disciplining, directing, inspecting, and training Kat's employees, including plaintiff. The supervision and control actually exercised by defendant was minimal, and any acceptance by plaintiff of supervision and control by defendant was in reality "only a continued obedience of the general employer's commands." *Id.* at 460, 204 S.E.2d at 877 (citation and internal quotation marks omitted).

Based on these facts, we hold no contract of employment existed between plaintiff and defendant, and absent an employer-employee relationship, plaintiff is not entitled to receive workers' compensation benefits from defendant. As we have found no error in the Full Commission's conclusion that no employment relationship existed, we decline to address plaintiff's remaining contentions. Accordingly, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).