

No. COA09-1522

NORTH CAROLINA COURT OF APPEALS

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JOHN ALLEN TAYLOR,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 TOWN OF GARNER, Employer,)
 N.C. LEAGUE OF)
 MUNICIPALITIES, Insurer,)
)
 Defendant-Appellants;)
)
 N.C. STATE UNIVERSITY,)
 Employer, KEY RISK MANAGEMENT)
 SERVICES, Servicing Agent,)
)
 Defendant-Appellees.)

From the North Carolina
Industrial Commission
 I.C. File No. 810581

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PLAINTIFF-APPELLEE'S BRIEF

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PLAINTIFF-APPELLEE'S BRIEF

* * * * *

QUESTIONS PRESENTED

- I. DID THE INDUSTRIAL COMMISSION CORRECTLY CONCLUDE THAT DEFENDANT TOWN OF GARNER IS LIABLE FOR PLAINTIFF'S COMPENSABLE INJURY UNDER N.C. GEN. STAT. § 160A-288 BECAUSE IT OCCURRED IN THE COURSE OF OFFICIAL COOPERATION BETWEEN LAW ENFORCEMENT AGENCIES?

- II. IN THE ALTERNATIVE, ARE DEFENDANTS TOWN OF GARNER AND N.C. STATE UNIVERSITY JOINTLY LIABLE FOR PLAINTIFF'S COMPENSABLE INJURY AS JOINT EMPLOYERS?

STATEMENT OF THE CASE

Plaintiff John Allen Taylor, a nineteen-year veteran of the Garner Police Force, had his thumb severed while working as a mounted patrol officer at an N.C. State University ("N.C. State") football game. He filed a claim for workers' compensation benefits and requested that the claim be assigned for hearing. (R. pp. 8, 16-19) The workers' compensation case was heard in the Industrial Commission before Deputy Commissioner Wanda Blanche Taylor. (R. p. 23) The parties stipulated that plaintiff sustained an injury arising out of and in the course of his employment on October 27, 2007, when he was working at Carter Finley Stadium during a football game. (R. p. 24)

Deputy Commissioner Taylor issued an Opinion and Award, finding defendant Town of Garner ("Garner") to be solely responsible for plaintiff's compensation because he was working pursuant to an agreement for mutual aid and assistance between defendant Garner and defendant N.C. State. (R. pp. 23-34) The Deputy Commissioner concluded that plaintiff is entitled to temporary total disability benefits for his time out of work, permanent partial disability benefits for the loss of his thumb and damage to his skin, and payment of medical expenses. (R. pp. 35-36)

Defendant Garner appealed the decision to the Full Commission. (R. p. 40) A unanimous panel of the Full Commission issued a decision on July 22, 2009, affirming in full the Deputy Commissioner's decision and similarly concluding that Garner is responsible for plaintiff's compensation because he was working pursuant to a mutual aid agreement under N.C. Gen. Stat. § 160A-288. (R. p. 44-57) Garner and its insurance carrier filed a notice of appeal on August 12, 2009. (R p. 58)

STATEMENT OF FACTS¹

I. PLAINTIFF'S EMPLOYMENT AND MOUNTED PATROL PROGRAM

Plaintiff is 50 years old and has worked as an officer for the Town of Garner Police Department since September 11, 1989. (R. p. 46) Plaintiff has served as a training officer as well as a patrol officer. (Id.) He reached the First Class ranking and has received positive evaluations for his work. (Id.) In 1997, he received a commendation from the Federal Bureau of Investigation for the apprehension of a federal fugitive. (Id.) As of October 2007, plaintiff's weekly salary was \$1261.26,

¹ The relevant facts are not in dispute. Appellants listed just two assignments of error regarding the Industrial Commission's findings of fact in the record on appeal, and one only concerned the Deputy Commissioner's Award. (R. p. 62) Moreover, appellants' arguments in their brief to this Court, which fail to refer to the assignments of error or the Commission's findings of fact, do not dispute the Commission's findings, but only its conclusions of law.

sufficient to yield the maximum workers' compensation rate of \$754.00. (R. pp. 4, 34-35, 54)

The Garner Police Department encourages community involvement for all of its police officers, including service projects such as child seat clinics and child I.D. clinics. (R. p. 46) Officers are evaluated on their participation in community service and required to participate in self-study service projects, for which they are required to train and document hours spent. (Id.)

In January 2007, plaintiff and Inspector Cathy Wood began organizing a mounted patrol division for the Town of Garner. (R. pp. 46-47) Plaintiff, who lives on a farm and owns horses, worked with Inspector Wood and Officer Rodney McGee to develop guidelines and training protocols for the horses and officers. (R. p. 47)

Chief Thomas Moss and Deputy Chief Eric Copeland gave approval for the volunteer unit and encouraged the officers to participate. (Id.) Regulations for the unit were adopted by the force. (Id.) The unit was provided with equipment and uniforms. (Id.) The Town provided insurance for any damage caused by the horses. (Id.) The officers provided the horses and for the care and upkeep of the animals. (Id.) Plaintiff provided a horse for

Officer Wood's use, as well as the trailer used in transporting the animals. (Id.)

A horse must undergo many hours of training to be used on the mounted patrol. (Id.) The horse must be desensitized to possible distractions, including crowds and unexpected noises. (Id.) Plaintiff and the other officers involved in the Garner Mounted Patrol participated in a training day at N.C. State University with twelve or more other mounted patrol units from other departments and agencies in North and South Carolina. (Id.) The training day took place in March 2007. (Id.)

Officers from the Town of Garner's Mounted Patrol and officers from N.C. State Mounted Patrol were part of a public service day for the Town of Garner in May 2007. (Id.) The officers received positive feedback for their work from the public and the department. (Id.) The mounted patrol program generated good press for the department and even additional donations. (Id.) In his official evaluations, plaintiff was specifically commended for establishing the mounted patrol. (T. p. 155)

The mounted patrol worked at the Lake Benson celebration on July 3, 2007. (Id.) Plaintiff and other mounted officers helped to control the crowd and to ensure access and egress from the event. (Id.) Mounted officers from N.C. State assisted with this

event too, providing a valuable service to the Garner department. (T. pp. 12, 106, 120)

Plaintiff was asked to work mounted patrol for Garner Magnet High School for two home football games in September 2007. (R. pp. 47-48) Plaintiff completed a secondary employment form for extra duty employment and submitted it for approval to his sergeant. (R. p. 48) The form was approved by Sergeant Mike McIver on September 18, 2007 and by Chief Moss on September 24, 2008. (Id.) Plaintiff worked a total of eight hours and was paid \$25.00 per hour for his service. (Id.)

II. TOWN OF GARNER POLICE DEPARTMENT POLICIES

Secondary employment by officers in the Garner Police Department is highly regulated. (R. p. 48; Stip. Ex. 5, App. pp. 1-5) Officers are required to submit applications for secondary employment to their direct supervisors, who then submit the forms to the chief for final approval. (R. p. 48) The officer usually submits the application form before beginning the employment; however, forms may be submitted afterwards, so long as verbal approval has been given. (Id.)

There are two types of secondary employment: off duty employment and extra duty employment. (R. p. 48; Stip. Ex. 5, App. p. 1) Off duty employment is employment that does not

require or contemplate the use of law enforcement powers, and is allowed when it does not interfere with official service. (R. p. 48; Stip. Ex. 5, App. pp. 1-2) In contrast, extra duty employment is employment that will or may require the use of law enforcement powers. (R. p. 48; Stip. Ex. 5, App. p. 1) Extra duty employment is allowed only within the jurisdiction of the Town of Garner's police department; it is specifically prohibited outside the jurisdiction of the police department. (R. p. 48; Stip. Ex. 5, App. p. 5) There is no jurisdiction for the Town of Garner police department on the campus of N.C. State University. (R. p. 48) Therefore, extra duty employment for Garner police officers would not be possible at N.C. State.

Officers who work as sworn law enforcement officers in other jurisdictions must do so pursuant to mutual aid and assistance agreements between the cooperating agencies. N.C. Gen. Stat. § 160A-288; (R. pp. 48-49). The N.C. State and Garner police departments use a number of mutual aid agreements. (T. pp. 71-72, 119) At the specific request of Inspector Wood, the Town of Garner and N.C. State University's police chiefs, Chief Younce and Chief Moss, entered into a mutual aid and assistance agreement in June 2007. (R. p. 49) Chief Moss signed the agreement on June 13, 2007, and Chief Younce signed the agreement on June 21, 2007. (Id.) Inspector Wood presented the

chiefs with the agreement for the express purpose of protecting mounted patrol officers when they worked at N.C. State. (Id.)

III. PLAINTIFF'S WORK AT N.C. STATE UNIVERSITY

Officer Andrea Foor discussed the possibility of the mounted patrol officers working with her at N.C. State's football games with her chief, Tom Younce. (Id.) Officer Foor is one of two mounted patrol officers at N.C. State. (Id.) Mounted patrol officers work N.C. State football games, where upwards of sixty thousand people can attend. (Id.) Forty thousand people congregate in the parking lots abutting the stadium. (Id.)

Mounted patrol officers have several advantages over officers who patrol on foot or officers in vehicles. (Id.) Mounted patrol officers sit high enough to have an improved vantage point and can cover ground quickly. (Id.) Horses are popular with the public and are imposing enough to control crowds effectively. (Id.)

Chief Tom Younce of N.C. State University's Police Department contacted Chief Tom Moss of the Garner Police Department by email dated September 26, 2007. (Id.) He inquired whether plaintiff would be allowed to work the September 29, 2007 football game at N.C. State's Carter Finley Stadium on mounted patrol. (Id.) Chief Younce and Chief Moss, who had known

each other for many years, corresponded and agreed that the work plaintiff performed would be pursuant to the mutual aid and assistance agreement. (Id.)

Plaintiff received an email from his sergeant, Sergeant McIver, indicating that the mounted patrol duty had been approved and congratulating him on a job well done in developing the unit. (R. pp. 49-50) Sergeant McIver indicated that plaintiff would receive overtime pay and that he did not need to complete a secondary employment application for the work. (R. p. 50)

Plaintiff worked the N.C. State game on September 29. (Id.) Plaintiff wore his Garner Police uniform and used equipment from the Garner department, including a horse blanket with the department logo. (T. p. 22) He was given personnel paperwork to complete at N.C. State and was eventually paid \$30.00 per hour for his 12-hour shift. (R. p. 50)

Chief Moss approved the payment by N.C. State. (Id.; T. p. 162) He believed that the full payment of \$30.00 per hour by N.C. State without payroll deductions from the Town of Garner would result in increased payments to plaintiff. (R. p. 50; T. p. 161) Chief Moss wanted to compensate plaintiff for the

increased costs associated with the mounted unit, most of which were borne by the mounted officers. (R. p. 50; T. p. 161)²

Plaintiff's participation at the game on September 29 demonstrates that his deployment was envisioned to require the use of law enforcement powers under the mutual aid agreement. (R. p. 50) In addition to providing security at the gate, plaintiff responded to a service call involving an assault. (Id.)

Although plaintiff knew that his work was pursuant to the mutual aid agreement and had been informed that the Town of Garner would pay him overtime, he was asked to complete a secondary employment request form following the first game. (Id.) He completed the request, noting that he would be working the remainder of the home football games at N.C. State. (Id.) The request was completed on October 1. (Id.) Sergeant McIver approved the request form on October 4. (Id.) The form was not signed by Chief Moss until October 29. (R. p. 51)

It was the understanding of Chief Moss and Chief Younce that all of Officer Taylor's participation at the home football games would be pursuant to the mutual aid and assistance

² Such a payroll arrangement is not unusual. For instance, Garner police officers regularly assist the Chapel Hill Police Department on Halloween pursuant to a mutual aid agreement. (T. p. 144) The Town of Chapel Hill reimburses the Town of Garner for the costs of the officers. (T. p. 145)

agreement. (Id.; T. pp. 83, 96, 103, 159, 163) Chief Younce and Chief Moss had developed a relationship over many years of professional association. (R. p. 51) Both Chief Moss and Chief Younce understood that Chief Younce's email request before the September 29 game constituted an adequate written request for officers to provide temporary assistance pursuant to the June 2007 mutual aid agreement. (Id.; T. pp. 88, 100, 157) No further communication was necessary for future games. (R. p. 51; T. p. 163) At no point did Chief Moss believe that the mutual aid agreement was not in effect, despite the existence of the secondary employment form. (R. p. 51; T. pp. 157-59)

If the mutual aid agreement had not been in effect, plaintiff would not have been able to work at the October 27, 2007 N.C. State game. (R. p. 51; T. pp. 25, 82, 95, 103, 157) For plaintiff to use any law enforcement powers, the Garner Police Department would have to lend him to N.C. State because Carter Finley Stadium is outside the jurisdiction of the Town of Garner. (R. p. 51; T. pp. 25, 123, 157) Both Chief Moss and Chief Younce were aware of the necessity of the mutual aid and assistance agreement for Officer Taylor's work at N.C. State games. (R. p. 51; T. pp. 70, 82, 157-59) As Chief Moss testified, "The only way that Officer Taylor could have worked at N.C. State and had powers of arrest, powers traditionally

associated with a law enforcement officer, is pursuant to mutual aid." (T. p. 161) Without those powers, plaintiff's presence at N.C. State football games would have had no purpose.

Extra duty employment outside the jurisdiction is not allowed absent an agreement for mutual aid and the provision of the officer pursuant to that agreement. (R. p. 51; T. pp. 131-33) Should an officer violate the policy, he would be subject to disciplinary action, up to and including dismissal. (R. p. 51; T. pp. 121, 133) If plaintiff had not had his assignment at N.C. State approved according to the police department's own regulations and the mutual aid agreement, he could not and would not have worked at the games. (R. p. 51)

IV. PLAINTIFF'S INJURY AND RECOVERY

On October 27, 2007, plaintiff reported to N.C. State under the direction of Officer Foor to provide mounted patrol for another football game. (R. pp. 51-52) At about 6:15 p.m., the officers decided that the horses should be exercised so that they would be thirsty and drink in order to have sufficient stamina to stand for several hours. (R. p. 52)

The field chosen by the officers to run the horses had a string of light poles in it. (Id.) Plaintiff ran his horse, Jimmy, toward the end of the field. (Id.) Neither he nor the

horse noticed the guide wire running from one pole until shortly before plaintiff was going to strike the pole. (Id.) In order to protect his head, he grabbed onto the guide wire with his left hand. (Id.) Plaintiff was jerked from the horse's back and fell to the ground. (Id.) His left thumb was detached and lay inside his left hand. (Id.) Plaintiff also sustained lacerations on his hand and little finger as well as bruising on his right arm. (Id.)

The other officers rendered assistance. (Id.) Plaintiff was taken by a Wake County deputy sheriff to Rex Hospital where he was rushed into emergency surgery. (Id.) Plaintiff's thumb was reattached. (Id.) After the five-hour surgery on October 27, 2007, plaintiff was discharged on November 6, 2007. (Id.)

On November 9, 2007, defendant Town of Garner filed a Form 19 stating that plaintiff was injured "while working mutual aid" at an N.C. State football game. (R. pp. 4, 52)

Plaintiff had additional surgery on November 19, 2008, to remove gangrenous tissue. (R. p. 52) The reattachment failed, however, and plaintiff had amputation surgery on December 3, 2007. (Id.) Further surgery to deepen the web space took place on March 13, 2007. (Id.)

Plaintiff was out of work and temporarily totally disabled from October 28, 2007 through May 26, 2008. (R. p. 53) Despite

the amputation, he was able to qualify for his firearm certification and returned to his duties as a patrol officer on May 27, 2008. (Id.)

STANDARD OF REVIEW

"The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." Goff v. Foster Forbes Glass Div., 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). "'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" Alphin v. Tart L.P. Gas Co., 192 N.C. App. 576, 583, 666 S.E.2d 160, 165 (2008) (quoting Adams v. AVX Corp., 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)). "If there is competent evidence to support the findings of fact, they are conclusive on appeal even though there is evidence to support contrary findings." Avery v. Phelps Chevrolet, 176 N.C. App. 347, 353, 626 S.E.2d 690, 694 (2006). Likewise, unchallenged findings of fact are binding on appeal. Cooper v. BHT Enters., 672 S.E.2d 748, 751, ___ N.C. App. ___ (2009).

ARGUMENT

As the Industrial Commission concluded, the Town of Garner is solely liable for plaintiff's compensable injury under N.C. Gen. Stat. § 160A-288 because it occurred during official cooperation between law enforcement agencies, pursuant to a mutual aid agreement. Everyone involved, including Garner's Chief of Police, understood the necessity of the mutual aid agreement for plaintiff's law enforcement work at N.C. State, and intended that his work fall under the agreement. Having encouraged plaintiff to establish the mounted patrol unit and work at N.C. State football games, Garner cannot now reverse course, repudiate its actions, and claim that plaintiff is not entitled to benefits based on an untenable reading of the mutual aid statute.

In the alternative, if N.C. Gen. Stat. § 160A-288 does not apply, the Court should conclude that Garner and N.C. State are jointly responsible for plaintiff's compensable injury as joint employers. Because plaintiff's injury arose out of and in the course of his employment with both employer-defendants, they are jointly liable for his compensable injury. Under either theory, plaintiff must be compensated for his workplace injury at the maximum workers' compensation rate.

Plaintiff, a nineteen-year veteran of the Garner police force, suffered an admittedly compensable injury by accident, but has still not received any benefits almost two years after he returned to work. Garner's continuing refusal to pay a clearly compensable claim is unconscionable. The Industrial Commission properly rejected Garner's arguments. This Court should reach the same conclusion.

I. GARNER IS LIABLE FOR PLAINTIFF'S COMPENSABLE INJURY UNDER N.C. GEN. STAT. § 160A-288 BECAUSE IT OCCURRED IN THE COURSE OF OFFICIAL COOPERATION BETWEEN LAW ENFORCEMENT AGENCIES.

A. Plaintiff's injury on October 27, 2007, occurred while he was working pursuant to the mutual aid agreement between Garner and N.C. State.

The parties have stipulated that plaintiff sustained an injury arising out of and during the course of his employment on October 27, 2007, when he was working at Carter Finley Stadium during a football game. The principal question in this case is which one of the employer-defendants is responsible for plaintiff's injury, or whether both are responsible. Because plaintiff was working at N.C. State as a law enforcement officer pursuant to a mutual aid agreement, Garner is responsible for his compensable injury under N.C. Gen. Stat. § 160A-288.

"In accordance with rules, policies, or guidelines officially adopted, . . . the head of any law-enforcement agency

may temporarily provide assistance to another agency in enforcing the laws of North Carolina if so requested in writing by the head of the requesting agency." N.C. Gen. Stat. § 160A-288(a). "While working with the requesting agency under the authority of this section, an officer shall have the same jurisdiction, powers, rights, privileges and immunities . . . as the officers of the requesting agency in addition to those he normally possesses." Id. "While on duty with the requesting agency, he shall be subject to the lawful operational commands of his superior officers in the requesting agency, but he shall for personnel and administrative purposes, remain under the control of his own agency, including for purposes of pay." Id. "He shall furthermore be entitled to workers' compensation and the same benefits when acting pursuant to this section to the same extent as though he were functioning within the normal scope of his duties." Id. (emphasis added).

Mutual aid agreements under N.C. Gen. Stat. § 160A-288 are necessary for officers to work as law enforcement officers in foreign jurisdictions. When acting pursuant to such an agreement, an officer gains the authority to act in a law enforcement capacity in the requesting jurisdiction. Id. Without such an agreement, municipal police officers only have law enforcement jurisdiction inside their municipality and

within one mile of the municipality. N.C. Gen. Stat. § 160A-286.³ Carter Finley Stadium is over one mile away from the Town of Garner's corporate boundaries. Therefore, plaintiff must have been acting pursuant to a mutual aid agreement in order to work as a law enforcement officer at the stadium. All of the witnesses, including N.C. State Police Chief Younce and Garner Police Chief Moss, agreed that plaintiff could only have worked as a law enforcement officer at N.C. State if he had been doing so under a mutual aid agreement.

Because all the officers in the Town of Garner and N.C. State police departments were aware of these jurisdictional requirements, they sought to comply with the mutual aid statute. Once plaintiff and Officer Wood established the mounted patrol unit, they arranged for Chief Moss and Chief Younce to execute an official mutual aid and assistance agreement in June 2007.

N.C. State had a number of standing mutual aid agreements and routinely asked for assistance from other police departments so that it would have enough mounted patrol officers for football games. Before N.C. State's September 29 game, Chief Younce contacted Chief Moss by email on September 26, 2007. He

³ There is a special provision, passed in 1963, which gives the Town of Garner jurisdiction up to three miles outside the municipal limits, but no extra jurisdiction into the City of Raleigh. 1963 N.C. Sess. Laws ch. 197, § 1; (R. p. 48).

inquired whether plaintiff would be allowed to work the football game at Carter Finley Stadium on mounted patrol. Chief Younce and Chief Moss, who had known each other for many years, corresponded and agreed that the work plaintiff performed would be pursuant to the mutual aid and assistance agreement.

Plaintiff worked the N.C. State game on September 29. He was paid by N.C. State for his work - an arrangement Chief Moss approved of and preferred. Plaintiff's work at the game demonstrates that his deployment required the use of law enforcement powers under the mutual aid agreement. In addition to providing security at the gate, plaintiff responded to a service call involving an assault.

Although plaintiff knew that his work was pursuant to the mutual aid agreement and he had been informed that the Town of Garner would pay him overtime, he was asked to complete a secondary employment request form. He completed the request on October 1, noting that he would be working the remainder of the home football games at N.C. State. Sergeant McIver approved the request form, as did the Deputy Chief on October 4. Chief Moss knew about the form and approved the work request, though he did not sign the actual form until October 29.

Plaintiff's work at these additional games was to be under the mutual aid agreement between N.C. State and the Town of

Garner. It was the understanding of Chief Moss and Chief Younce that plaintiff's participation at the home football games would be pursuant to the mutual aid agreement. Chief Younce believed that his email request before the September 29 game, made on September 26, 2007, constituted an adequate written request for plaintiff to provide temporary assistance pursuant to the mutual aid agreement for the entire season. Chief Moss shared that understanding. These factual findings, supported by the evidence in the record and unchallenged by appellants, are binding on this Court and conclusively establish that plaintiff was working on October 27, 2007, pursuant to the mutual aid agreement.

Moreover, if the mutual aid agreement had not been in effect, plaintiff would not have been able to legally work at the October 27 game. To use any of his law enforcement powers, plaintiff would have to be officially lent to N.C. State by the Garner Police Department pursuant to a mutual aid agreement because N.C. State's Carter Finley Stadium is outside the jurisdiction of the Garner Police. See N.C. Gen. Stat. § 160A-286. Without those powers, plaintiff's presence at N.C. State football games would have had no purpose. Both Chief Moss and Chief Younce were aware of the necessity of the mutual aid agreement for plaintiff's work. Had it not been effect, they

would not have allowed, nor would plaintiff have engaged in the work at N.C. State on October 27. In fact, even after plaintiff's injury, Garner maintained that plaintiff was injured "[w]hile working mutual aid at a NCSU football game" in its report of the injury to the Industrial Commission. (R. p. 4)

Therefore, plaintiff's injury while working as a mounted officer at N.C. State on October 27, 2007, occurred under the mutual aid agreement. As both Chief Younce and Chief Moss intended and understood, their correspondence in September 2007 constituted a written request for plaintiff's assistance for the remainder of the football season. Accordingly, Garner is responsible for plaintiff's compensable injury because he is "entitled to workers' compensation . . . to the same extent as though he were functioning within the normal scope of his duties." N.C. Gen. Stat. § 160A-288(a).

- B. Garner's interpretation of the mutual aid statute is not supported by the language of the statute, the past practices of the parties, the purpose of the law, and Garner's previous position, which plaintiff relied upon in working at N.C. State.**

Garner argues repeatedly that, contrary to all parties' intentions, plaintiff was not working on October 27, 2007, pursuant to the mutual aid agreement because there was not a separate written request for that football game in particular

and because N.C. State paid plaintiff for his work that day. (Appellant's Br. at 16-26) This mistaken reading of the statute should be rejected because it is not supported by the statutory language, is inconsistent with the parties' past practices, undermines the purpose of the law, and is contrary to Garner's position in October 2007, which plaintiff relied upon in working at N.C. State.

First, the mutual aid statute requires that a request for mutual aid be made "in writing by the head of the requesting agency." N.C. Gen. Stat. § 160A-288(a). It does not require a separate writing for each day of mutual assistance provided. Both N.C. State Police Chief Younce and Garner Police Chief Moss understood that Chief Younce's September 26 written request was intended to cover all of N.C. State's remaining football games, satisfying the statute's "in writing" requirement for the October 27 game. And even though the request was for multiple dates, it still only asked Garner to "temporarily provide assistance," as the statute contemplates. Id. A handful of days during the football season is a limited period of time, not of long or indefinite duration, and thus properly falls within the scope of a mutual aid agreement. Thus, Chief Younce's request of and Chief Moss's approval for plaintiff's assistance at N.C. State complied with the statute.

Second, regarding the payment of wages, the mutual aid statute states that officers working under a mutual aid agreement, "for personnel and administrative purposes, remain under the control of his own agency, including for purposes of pay." Id. Plaintiff remained under the personnel control of Garner at all times. Chief Moss knew of and approved plaintiff's work at both N.C. State games. Chief Moss also knew of and approved the financial arrangement whereby N.C. State paid for plaintiff's work on an hourly basis. Chief Moss did so because he wanted plaintiff to be paid as much as possible for his work and the extra costs he incurred. Thus, pursuant to the statute, plaintiff remained "under the control" of Garner for purposes of pay. Id.

Garner's pay arrangement with N.C. State was not unusual. For instance, Garner police officers regularly assist the Chapel Hill Police Department on Halloween nights pursuant to a mutual aid agreement. (T. p. 144) The Town of Chapel Hill ultimately pays for these officers as it reimburses Garner for the costs of the officers. (T. p. 145) Therefore, consistent with the statute's language and past practices, Garner's approval of N.C. State's paying plaintiff for his work on October 27 complied with N.C. Gen. Stat. § 160A-288(a).

Third, one of the obvious purposes of the mutual assistance statute is to guarantee that police officers assisting other police departments do not lose any of their usual benefits, including workers' compensation. As a remedial statute, designed to protect police officers as workers, it "must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained." O & M Indus. v. Smith Eng'g Co., 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006). Similarly, a fundamental rule is that the Workers' Compensation Act must be liberally construed so that benefits are not denied because of a narrow, technical, or strict interpretation. Gupton v. Builders Transport, 320 N.C. 38, 42, 357 S.E.2d 674, 677 (1987). Accepting Garner's argument would mean that plaintiff, who faithfully complied with all the rules and believed his superiors had as well, might receive less or no workers' compensation simply because someone failed to send a redundant email message. As N.C. Gen. Stat. § 160A-288 and the Act should be broadly construed to protect police officers, Garner's position is untenable.

Fourth, Garner's argument is essentially that because Garner's Chief of Police did not fully comply with the mutual aid statute, plaintiff is not entitled to workers' compensation

benefits from Garner. Garner, however, led plaintiff to believe that he was working under the mutual aid agreement on October 27. Garner cannot now repudiate its words and actions, and claim that plaintiff is not entitled to benefits.

The principle of equitable estoppel prevents Garner from taking such inconsistent positions. "Equitable estoppel arises when one party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment." Gore v. Myrtle/Mueller, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007). "There need not be actual fraud, bad faith, or an intent to mislead or deceive for the doctrine of equitable estoppel to apply." Id. The "party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party." Id. Equitable estoppel is applicable in workers' compensation proceedings. Id.; Daugherty v. Cherry Hosp., 670 S.E.2d 915, 919, __ N.C. App. __ (2009).

Here, Garner induced plaintiff to believe that he was working under a mutual aid agreement on October 27, 2007. Garner encouraged plaintiff to establish the mounted patrol unit, signed the mutual aid agreement for that purpose, and

approved his law enforcement work at the N.C. State football games, which could only have been legal under a mutual aid agreement. Plaintiff would not have worked as an officer at N.C. State games without the approval of his Garner Police Department superiors. Garner is therefore equitably estopped from asserting that the mutual aid agreement was not in effect. See Gore, 362 N.C. at 33, 653 S.E.2d at 405.

Finally, Garner appears to argue that the mutual aid agreement between Garner and N.C. State cannot override the Workers' Compensation Act's imposition of liability on "employers." (Appellants' Br. at 14-16) The agreement itself, however, does not determine liability here. Rather, it is the mutual aid statute, N.C. Gen. Stat. § 160A-288, that specifies which party is liable for workers' compensation when an officer is injured while providing mutual aid. Garner's reference to out-of-state cases is irrelevant since those states have different statutory schemes. See, e.g., N.J. Stat. § 40A:14-156.1 (providing for mutual aid agreements without any mention of how to allocate workers' compensation). It is also misleading since other state courts have consistently found police departments liable for workers' compensation when their officers are injured while working in law enforcement for another employer. See, e.g., City of Hialeah v. Weber, 491 So.2d

1204, 1206 (Fla. Ct. App. 1986); City of Manchester v. Huard, 301 A.2d 719, 720 (N.H. 1973).

The incontrovertible facts are that plaintiff's work at N.C. State must have been under the mutual aid agreement to be legal, all parties understood that requirement, and all parties acted to comply with that requirement. If any party erred, it was surely not the plaintiff, but rather Garner's Chief of Police who approved plaintiff's work at N.C. State. Garner is now trying to change its position when faced with a modest claim by a veteran officer who suffered an amputation but nonetheless successfully returned to work. Garner's about-face must be rejected. Garner is liable for plaintiff's compensable injury under N.C. Gen. Stat. § 160A-288.

II. IN THE ALTERNATIVE, THE TOWN OF GARNER AND N.C. STATE UNIVERSITY ARE JOINTLY LIABLE FOR PLAINTIFF'S COMPENSABLE INJURY AS JOINT EMPLOYERS.

CROSS-ASSIGNMENT OF ERROR NO. 1 (R. p. 64)

If the Court determines that N.C. Gen. Stat. § 160A-288 does not cover plaintiff's injury, the Court should conclude that Garner and N.C. State are jointly responsible for plaintiff's compensable injury as joint employers under the Workers' Compensation Act. Because plaintiff's injury arose out of and in the course of his employment with both employer-

defendants, they are jointly liable for his compensable injury under the Act.

"[I]t is fundamental that under some circumstances a person can be an employee of two different employers at the same time, in which event either employer or both may be liable for Workers' Compensation." Henderson v. Manpower of Guilford County, Inc., 70 N.C. App. 408, 413, 319 S.E.2d 690, 693 (1984). "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) (quoting Henderson, 70 N.C. App. at 413-14, 319 S.E.2d at 693). "When joint employment has occurred, both employers are liable for workers' compensation." Id.

N.C. State was an employer of plaintiff on October 27, 2007. Plaintiff was patrolling N.C. State's football game under the command of N.C. State officers. He had signed N.C. State personnel papers at the previous football game and was paid by N.C. State for the game. As plaintiff was injured during his patrol in an effort to fully hydrate his horse, his injury arose

out of and was in the course of his employment with N.C. State. See N.C. Gen. Stat. § 97-2(6).

Contrary to Garner's argument that N.C. State was plaintiff's only employer on October 27, 2007, (Appellant's Br. at 10-13, 26-28), plaintiff was, of course, also an employee of Garner. The relevant question is instead whether his injury arose out of and was in the course of his employment with Garner. "An injury is said to arise out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the accident and the performance of some service of the employment." Frost v. Salter Path Fire & Rescue, 361 N.C. 181, 185, 639 S.E.2d 429, 432 (2007) (quoting Taylor v. Twin City Club, 260 N.C. 435, 438, 132 S.E.2d 865, 868 (1963)). "[T]he words 'in the course of' refer to the time, place, and circumstances under which an accident occurred. The accident must occur during the period and place of employment." Ross v. Young Supply Co., 71 N.C. App. 532, 536-37, 322 S.E.2d 648, 652 (1984).

"[W]hile the 'arising out of' and 'in the course of' elements are distinct tests, they are interrelated and cannot be applied entirely independently." Culpepper v. Fairfield Sapphire Valley, 93 N.C. App. 242, 247-48, 377 S.E.2d 777, 781, aff'd per

curiam, 325 N.C. 702, 386 S.E.2d 174 (1989). "Both are part of a single test of work-connection." Id. at 248, 377 S.E.2d at 781. Because "the terms of the Act should be liberally construed in favor of compensation, deficiencies in one factor are sometimes allowed to be made up by strength in the other." Hoyle v. Isenhour Brick & Tile Co., 306 N.C. 248, 252, 293 S.E.2d 196, 199 (1982).

Plaintiff's injury arose out of his employment with Garner because, on October 27, 2007, he was providing assistance to N.C. State as part of a reciprocal agreement with encouragement from his supervisors. "[A]n injury will be deemed to 'arise out of' the employment if the employee's acts on behalf of a third person are of 'appreciable benefit' to the employer." Culpepper, 93 N.C. App. at 248, 377 S.E.2d at 781 (quoting Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 452, 85 S.E. 2d 596, 600 (1955)). If an employee reasonably believes that the acts resulting in injury are "incidental to his employment, or such as would prove beneficial to his employer's interests or was encouraged by the employer in the performance of the act or similar acts for the purpose of creating a feeling of good will," the causation requirement is met. Guest, 241 N.C. at 452, 85 S.E. 2d at 599.

Plaintiff was encouraged by his supervisors to engage in community service, and was specifically commended for establishing the mounted patrol unit. The mounted patrol was also popular with the public and generated donations and good will for the police department. In addition, Garner and N.C. State signed the mutual aid agreement whereby N.C. State provided assistance to the town for its July 3 celebration and the town provided assistance for N.C. State's football games. Thus, plaintiff's work on October 27 was incidental to his employment, encouraged by his supervisors, generated good will for Garner, and led to N.C. State providing direct assistance in return. Therefore, his injury that day arose out of his employment with Garner. See Guest, 241 N.C. at 452, 85 S.E. 2d at 599; Culpepper, 93 N.C. App. at 248, 377 S.E.2d at 781.

Plaintiff's police work on October 27 was also in the course of his employment with Garner because it was authorized law enforcement work and the town was prepared to pay him for that work. First, plaintiff's law enforcement at N.C. State was authorized by all of his superiors, including Garner Police Chief Moss, and was provided only in response to an official request from N.C. State to Chief Moss. Second, Chief Moss agreed to N.C. State paying plaintiff \$30.00 per hour only because it would result in increased payments to plaintiff.

Chief Moss wanted to compensate plaintiff for the costs associated with the mounted unit, most of which were borne by the mounted officers. Therefore, as Garner has previously recognized on its Form 19, plaintiff's work on October 27 was in the course of his employment with the town.

Accordingly, if N.C. Gen. Stat. § 160A-288 does not cover plaintiff's injury, both N.C. State and Garner are liable for his compensable injury as joint employers because plaintiff was employed by both N.C. State and Garner, was providing services to both employers on October 27, 2007, and his injury arose out of and was in the course of this joint employment. See Hughart, 167 N.C. App. at 689, 606 S.E.2d at 383.

CONCLUSION

For the foregoing reasons, the Court should affirm in full the Industrial Commission's opinion and award.

This the 10th day of February, 2010.

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N.C. R. App. P. 33(b)
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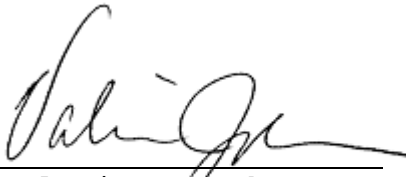
CERTIFICATE OF SERVICE

The undersigned counsel for the plaintiff-appellee hereby certifies that a copy of Plaintiff-Appellee's Brief was sent via first class mail, postage prepaid, addressed as follows:

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This the 10th day of February, 2010.


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