MEMORANDUM

TO: NCYSA Member Associations

FROM: Bob Singer

RE: Status of Referees

DATE: May 28, 2002

Two questions have been discussed with NCYSA concerning the status of referees. First, are member associations obligated to provide workers' compensation insurance for referees? Second, are referees properly characterized as independent contractors? Although the responses set forth below cannot be considered dispositive, they do represent what we believe to be the correct answers.

A. Worker's Compensation.

North Carolina's workers' compensation law is found in N.C. Gen. Stat. §97-1 *et seq*. These statutes generally require that employers with more than three employees and certain "principal contractors, intermediate contractors and subordinate contractors" are subject to potential liability for workers' compensation claims. There is no specific obligation to obtain workers' compensation insurance. There are, however, penalties ($50 to $100 per day) for a failure to pay a workers' compensation award ordered by the North Carolina Industrial Commission.

N. C. Gen. Stat. §97-19 has been noted by various member associations as a matter of concern. This statute provides that any "principal contractor, intermediate contractor or subordinate contractor" who subcontracts work to another party must obtain a certificate of workers' compensation insurance from that party or risk liability to the subcontracting party (if an individual) and its, his or her employees. The meaning of this statute has been misinterpreted by various associations and the Industrial Commission itself.

The courts have made clear that an owner who engages an independent contractor is not a "primary contractor." In *Purser v. Heatherlin Properties*, 137 N.C. App. 332, 335 (2000), the Court noted that "N.C. Gen. Stat. §97-19 ensures worker's compensation benefits when there is first a contract for work - i.e., the hiring of a general contractor - which is then sublet to a subcontractor." It stated that "[w]e have consistently rejected the concept that an owner of property may also be the general contractor for [the building] of that property." *Id.* Similarly, in *Cook v. Norvell - Mackorell Real Estate Co.*, 99 N.C. App. 307, 308 (1990), the Court held that "G.S. §97-19, by its own terms, cannot apply unless there is first a contract for performance of work which is then sublet. Consequently, G.S. §97-19 may apply between two independent contractors, one of whom is a subcontractor to the other; but it does not apply as between a principal, i.e. an owner, and an independent contractor." *Accord*, *Mayhew v. Howell*, 102 N.C. App. 269, *aff'd*., 330 N.C. 113 (1991); *Postell v. B&O Construction Co.*, 105 N.C. App. 1, *review*

denied, 331 N.C. 286 (1992). It is "unreasonable to assume that a person could contract with himself to do something for his own benefit, thereby making himself a general contractor if he should contract that job to another." *Purser*, *supra* at 335.

NCYSA's believes that member associations (and NCYSA itself with respect to state tournaments) are the equivalents of "owners" who contract with referees (i.e. independent contractors) to perform a service. In other words, members associations are not "principal contractors, intermediate contractors or subordinate contractors."

In order for member associations to continue to avoid obligations under N.C. Gen. Stat. §97-19, there are several procedures to follow:

1. Referee assigners should not engage referees to officiate matches. Referees should be engaged by member associations. Assigners may carry out their separate independent contractor responsibilities to coordinate scheduling, organize assignments to comport with certification requirements, etc.

2. Referees should be paid their independent contractor fees by the member association (recreation) or by the participating home travel team (as a pass-through of a registration fee/team fee that would otherwise be charged, collected and distributed by the member association of the home team).

3. Member associations should not withhold or deduct any sums for any purpose from amounts due to referees.

B. Independent Contractor or Employee?

NCYSA and its member associations have consistently taken the position that referees are independent contractors, not employees. This is an important matter under both workers' compensation and tax laws.

The intent of the parties to a relationship is not controlling. The actual status of the relationship is a legal question and cannot be determined by the parties' recitations. *Williams v. ARL, Inc.*, 133 N.C. App. 625, 630, 516 S.E. 2d 187, 191 (1999).

North Carolina uses the common-law "control test" to determine whether a relationship is employer-employee or "owner"/independent contractor. "An independent contractor is defined at common law as one who 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." *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384, 364 S.E. 2d 433, 437 (1988). Cases generally cite eight factors for use in determining independent contractor status, none of which is conclusive:

> 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 his 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.

McCown v. Hines, 140 N.C. App. 440, 443, 537 S.E. 2d 242, 244 (2000) (*quoting Hayes v. Elon Coll.*, 224 N.C. 11, 16, 29 S.E. 2d 137, 140 (1944)). Additionally, if valuable equipment is furnished for the use of a worker, the relationship is usually employer-employee. *Id*. 140 N.C. App. at 444, 537 S.E. 2d at 244.

Although no North Carolina cases have directly addressed the issue of whether referees are independent contractors or employees, other states have considered the issue in closely related circumstances. An excellent summary of the law is found in Darryll M. Halcomb Lewis, *After Further Review, Are Sports Officials Independent Contractors?*, 35 AM. BUS. L.J. 249 (1998).[1]

The cases holding that sports officials are independent contractors generally use reasoning similar to that under the control test. The following is a survey of a few relevant cases:

> *Snider v. Clermont Cent. Soccer Ass'n*, No. CA98-07-056, 1999 Ohio App. LEXIS 1126 (Ohio Ct. App. March 22, 1999). This appears to be the only case dealing with the independent contractor status of a referee with a private soccer association. It is a negligence case, not a tax or workers' compensation case. The Court held that the referee was an independent contractor. Thus, it was found that he voluntarily assumed the risk of playing on damp fields (versus the compelled risk that an employee would face). The Court quoted heavily from the soccer association's coaches handbook, which gave the referee broad discretion in determining when play was unsafe. In addition, the association incorporated the FIFA rulebook into its rules, which gave referees similar discretionary authority. The Court also stated that because the referee was paid only $8 for the game and because he earned his livelihood elsewhere, the economic realities of the situation did not render him like an employee that would be forced to take the risks of playing on a wet field.
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> *Farrar v. D.W. Daniel High School*, 424 S.E. 2d 543 (S.C. Ct. App. 1992) held that a high school football official was not an employee of the host high school, the league or the officials' association. It found that none of the groups had the right to direct the referee in officiating the game; the referee had complete authority to interpret the rules and exercise his judgment; the essence of the position required him to be neutral and free from control; he was paid a flat fee per game, not a fee dependent on how long the game took; the check contained no deductions or withholdings, and he was not listed on any group's payroll; he supplied his own uniform, watch, and other equipment; and no group could fire him once the game started.
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> *Brighton School Dist. V. Lyons*, 873 P. 2d 26 (Colo. Ct. App. 1993) similarly held that a high school football referee was an independent contractor. The persuasive factors were: the school sent the referee an individual contract for each game; the referee was paid in cash immediately prior to the game; the referee had special training and certification; he

1The author is a law professor and an NFL line judge.

exercised his independent judgment and had sole discretion and control over the game; the school could not fire him during the game or direct him to change a ruling; and he furnished his own uniform and equipment. The Court stated that, although the referee had no control over his pay rate or the scheduling of games, the pay and scheduling were determined by the leagues generally, not by the individual school with whom he contracted.

Lynch v. Workmen's Compensation Appeal Board, 554 A. 2d 159 (Pa. Commw. Ct. 1989), also held that a football referee was an independent contractor rather than a school district employee. The Court disregarded many of the fringe factors raised by the plaintiff and stated:

> *The critical question*, without the trappings, is whether Claimant's assignment to officiate the District's game gave the District the right to control and supervise the manner and method by which Claimant was to officiate the game after it started. In this case, the right of control of the officiating is properly tested by the manner and work of the officials during the course of the entire game. Here, in this record, there was no evidence to indicate that the District had, or exercised, any control whatsoever over the *manner* in which Claimant and the other officials performed their duties during the game. *Id.* at 162.

In *Ford v. Bonner County School Dist.*, 612 P.2d 557 (Idaho 1980), the Court used the common law control test. This appears, however, to be a poorly reasoned case. It viewed many of the above factors differently in support of employee status: the referee was assigned to the game weeks in advance and could not refuse the assignment except for good cause; the assignment was made by the league commissioner, who was paid by the member schools themselves; the coach of a school could use the rating system to reject the referee for that school's games; and the costs of the uniform and other equipment provided by the referee paled in comparison to the cost of the field, bleachers, yard markers, etc. that the school provided. This ruling appears to have been superseded by an Idaho statute. See below.

C. Possible Future Initiative.

Although the best argument is that North Carolina's workers' compensation laws do not apply to our referees, it may be that we should seek a statute that dispositively addresses this matter. Nine states have adopted statutory amendments that exclude or exempt certain classes of sports officials from coverage under their workers' compensation systems. These statutes are: Alaska Stat. §23.30.230(a)(4) (Michie 2001) (amateur sports, contractual basis); Cal. Labor Code §3352(n) (West 2001) (amateur interscholastic event or event sponsored by a non-profit, other than regular employee); Fla. Stat. Ann. §440.02(14)(d)(11) (West 2001) (amateur interscholastic event or event sponsored by a non-profit, other than regular employee); Ga. Code Ann. §34-9-2(f)(2) (2001) (interscholastic or intercollegiate event or event sponsored by a non-profit); Idaho Code §72-212(12) (2001) (secondary schools); Mo. Rev. Stat. §287.090(1)(5) (2001) (interscholastic or amateur youth programs, other than regular employee); Mont. Code Ann. §39-71-401(2)(j) (2001) (amateur athletic event); Or. Rev. Stat. §656.027(26) (2001) (youth or adult recreational soccer

match, if retained on match-by-match basis); Va. Code Ann. §65.2-101 (2001) (interscholastic or intercollegiate amateur event or amateur event sponsored by a non-profit, other than regular employee). If there is sufficient support from member associations (i.e. lobbying your local legislators), it may be possible to obtain an amendment to N.C. Gen. Stat. §97-13 (Chapter 97's exclusion provisions). It would have the following suggested language:

> This Article shall not apply to any person who serves as a sports official for an interscholastic or intercollegiate sports event or for a governmental entity or private non-profit organization that sponsors a sports event, if the services of the official are engaged on a match-by-match contractual basis, and if the official is not otherwise regularly employed by the sponsoring school, association of schools, governmental entity, or private non-profit organization. For the purposes of this section, "sports official" shall mean any neutral participant in a sports event, including, but not limited to, a referee, referee assistant, umpire, judge, timekeeper, scorekeeper or other person engaged in the enforcement, application or maintenance of the rules of participation or play to which such event is subject.

The above amendment would address the concerns of our sport (and others) but would also avoid the shortcomings of some of the statutes listed above. For example, the exemption would exclude officials who are regularly employed by the sponsoring body. Thus, a teacher who also referees high school games would not be prohibited from recovering on a claim.