No. SC88577

IN THE
SUPREME COURT OF MISSOURI

MARY JEANETTE HAGGARD D/B/A
JENNY'S HOUSECLEANING AND
JENNY'S HOUSECLEANING INC.

Appellant,

v.

DIVISION OF EMPLOYMENT SECURITY

Respondent.

Review on Transfer after opinion
from the Missouri Court of Appeals
Western District

SUBSTITUTE BRIEF OF RESPONDENT DIVISION OF EMPLOYMENT SECURITY

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JURISDICTIONAL STATEMENT

This is an appeal from the decision of the Labor and Industrial Relations Commission, which affirmed and adopted the decision of the Appeals Referee of the Missouri Division of Employment Security, that found that remuneration paid by Appellant for house cleaning services constituted wages in employment pursuant to Section 288.034.5 and 288.036 RSMo 2000. (L.F. 9-23). On June 26, 2007, this Court ordered this case transferred from the Western District Court of Appeals pursuant to Supreme Court Rule 83.04. Therefore, this Court has jurisdiction of this case under Article V, Section 9 of the Missouri Constitution.

INTRODUCTORY STATEMENT

Since this appeal involves a Petition for Judicial Review under Section 288.210 of the Missouri Employment Security Law, Chapter 288, RSMo 2000, the Administrative Transcript and Exhibits have been filed separately pursuant to Supreme Court Rule 81.12. The Administrative Transcript contains all of the evidence in this case, including the testimony given at the hearing before the Appeals Tribunal. The pages of the Administrative Transcript will be referred to in this brief as "Tr.___". Reference to exhibits will be designated as "___Ex #___, p.___". There are two legal files in this consolidated case. Reference to each Legal File will be designated as "L.F.I____", (WD 66738), or L.F. II_____ (WD66739).

At times herein, Jenny's Housecleaning, Inc., will be called "Appellant"; and Respondent, Division of Employment Security will be referred to as "Division." All statutory references hereinafter are to the Revised Statutes of Missouri 2000 unless otherwise stated.

STATEMENT OF FACTS

The Division cannot adopt the Statement of Facts of Appellant because it is incomplete and contains argument. The Division submits the following statement of facts.

Appellant maintains a business providing housecleaning services to residential customers. Appellant has individuals who perform the housecleaning services who have been designated by Appellant as independent contractors. (Tr. 96, 288-289, 293-296). Appellant's business is run out of the home of the owner, Jenny Haggard. (Tr. 95). Each individual who performs housecleaning services for Appellant signs a contract. (Tr. 98, 324, 331, 338, 362). The contract prohibits the individual from accepting a housecleaning job from any of appellant's current or former customers for one year following termination of the contract. (Tr. 324, 331, 338, 362).

Appellant gives workers a document entitled "Memo" which contains instructions on how to perform the housecleaning services. (Tr. 104, 365-366). Appellant's owner testified that the instructions in the memo were "hints" and not requirements. (Tr. 104). Appellant also gives the worker a "Refresher Course," which further instructs the workers on how to perform their services. (Tr. 367). In some instances, on a worker's first day with Appellant, another worker will go to a job with the new worker and help the new worker clean the home. (Tr. 119-120, 199).

Both the worker's contract, and the "Memo" indicate that the worker must perform the housecleaning services personally. (Tr. 324, 331, 338, 362, 365-366). Two workers testifying on behalf of Appellant stated that they have never sent anyone else to

perform their assigned services. (Tr. 201, 248). If a worker cannot perform a job that was scheduled, the owner determines what other worker will replace that worker. (Tr. 113). Workers are allowed to have assistants and must pay them from the worker's percentage earned from the job. (Tr. 201-202, 248-249).

The contract signed by the workers is open ended. (Tr. 122, 324, 331, 338, 362). Some workers have worked for appellant for several years, others for short periods of time. (Tr. 188). Some workers have customers that they clean for on a regular basis. (Tr. 138). The workers have no set hours of work. (Tr. 205). Jobs are scheduled by the owner according to what days the workers are available to work. (Tr. 105). The schedule is given out every Friday for the following week. (Tr. 194). Workers are not required to work full time for Appellant. (Tr. 135, 206, 253).

The workers perform their services in the homes of the customers. (Tr. 98, 207). Any order or sequence to the work is dictated by the customer. (Tr. 136). There are no oral or written reports required to be given by the worker. (Tr. 141-142, 207, 255).

Workers are paid a percentage of the rate charged to the customer by Appellant. (Tr. 105, 198). Rates charged to each customer are determined by Appellant. (Tr. 94). The workers' percentage ranges from 40 to 60 percent (Tr. 144). The range of rate charged varies per customer, the rates falling somewhere between $50 to $300. (Tr. 143). Workers are not guaranteed a minimum. (Tr. 143). The workers are paid for their work each Friday. (Tr. 365).

The workers incur expenses in providing their own vacuum cleaners and maintaining them. (Tr. 145). Appellant supplies all other cleaning supplies including

mops. (Tr. 149-150). Workers are not charged a fee for using Appellant's supplies. (Tr. 152). Workers may purchase their own cleaning supplies if they desire. (Tr. 145). Expenses for personal cars and cell phones are borne by the worker, but these items are not used strictly for performing the work but for personal use as well. (Tr. 229, 262). Appellant furnishes T-shirts to the workers to wear that identify them as working for Appellant. (Tr. 162). The workers are bonded and most of the workers pay a $5 per week fee to Appellant for the insurance. (Tr. 146, 238-239). The policy has a $250 deductible. (Tr. 160). Ms. Haggard testified that property damage caused by workers happens very infrequently. (Tr. 160).

Workers are not prohibited from working for other cleaning businesses. (Tr. 160). However, they are prohibited from soliciting either directly or indirectly for housecleaning jobs with current or former customers of Appellant. (Tr. 324, 331, 338, 363). One worker advertised for cleaning jobs using flyers, but did not receive any customers. (Tr. 264). Another worker made herself available through word of mouth. (Tr. 208).

Appellant could discharge a worker without incurring any legal liability. (Tr. 164, 218, 267). Similarly, a worker could quit without incurring legal liability to Appellant. (Tr. 165, 219-220, 267).

All housecleaning jobs are inspected by Appellant after completion. (Tr. 115-116). The worker will call Appellant when the job is finished so someone can come to the home and inspect the work. (Tr. 138-139). The success of Appellant's business depends

on the satisfaction of the customer. (Tr. 117). If a worker does not complete the job satisfactorily, the owner docks the compensation of the worker. (Tr. 118).

The Division issued two determinations on March 3, 2005 finding that remuneration paid to listed workers for services performed for Appellant in housecleaning was "wages" in employment pursuant to the Missouri Employment Security Law. (L.F.I 1; L.F.II 1). Appellant filed timely appeals to these determinations on April 1, 2005. (L.F.I 5-9; L.F.II 4-7). On September 23, 2005 a hearing was held on both determinations before the Appeals Tribunal. (Tr. 1). On October 17, 2005, a decision was issued on each determination by the Appeals Tribunal affirming the determinations of the Division (L.F.I 10-25; L.F.II 8-23). Appellant filed Applications for Review with the Labor and Industrial Relations Commission on November 15, 2005. (L.F.I 26-74; L.F.II 24-71). A decision was issued by the Commission on each application on February 27, 2006, affirming the decisions of the Appeals Tribunal. (L.F.I 75; L.F.II 72). Appellant filed timely appeals to the Western District on March 15, 2006 (L.F.I 76-78; L.F.II 73-75). The two appeals were consolidated by the Western District under case number WD 66738. The Western District reversed the decision of the Commission on April 24, 2007. The Missouri Supreme Court granted transfer on June 26, 2007.

POINTS RELIED ON

I.

The Labor and Industrial Relations Commission did not err in affirming the decision of the Appeals Tribunal because the Division did not act without or in excess of its powers in allowing a non-attorney to represent the Division in that Supreme Court Rule 5.29(c) specifically allows non-attorneys to represent parties before the Appeals Tribunal if the non-attorney is a managerial employee of the party. (Responds to Appellant's point V).

Supreme Court Rule 5.29(c).

Section 286.110(2) RSMo 2000.

Division of Employment Security v. Taney County District R-III, 922 S.W.2d 391, 394 (Mo. banc 1996).

KSD/KSD-TV, Inc. v. Labor and Industrial Relations Commission, 562 S.W.2d 346, 349 (Mo. banc 1978).

Smith v. Labor and Industrial Relations Commission of Missouri*,* 656 S.W.2d 812 (Mo. App. 1983)**.**

Black's Law Dictionary, Fifth Edition 1979.

II.

The Labor and Industrial Relations Commission did not err in finding that the individuals performing housecleaning services for Appellant were employees and not independent contractors because that decision was supported by competent and substantial evidence in that the Commission did not ignore relevant evidence because the testimony of the Division's witness concerning the twenty factors was based on hypothetical questions asked by Appellant's counsel and the witness' answers were not binding on the Commission and did not constitute admissions of the Division. (Responds to Appellant's points I and II).

Oventrop v. Bi-State Development Agency, 521 S.W.2d 488, 494 (Mo. App. E.D. 1975).

Hawley v. Merritt, 452 S.W.2d 604 (Mo. App. S.D. 1970).

Jockel v. Robinson, 484 S.W.2d 227 (Mo. 1972).

III

The Labor and Industrial Relations Commission did not err in finding that the individuals performing housecleaning services for Appellant were employees of Appellant because that decision was supported by competent and substantial evidence in that the twenty factor test weighed in favor of the finding that those workers were employees and not independent contractors. (Responds to Appellant's point III).

Section 288.034.5 RSMo 2000.

Veterans Services v. Labor and Industrial Relations Commission, 861 S.W.2d 781 (Mo. App. W.D. 1993).

Edward Lowe Industries. v. Division of Employment Security, 865 S.W.2d 855 (Mo. App. S.D. 1993).

Burns v. Labor & Industrial Relations Commission, 845 S.W.2d 553 (Mo. banc 1993).

Ringling Bros-Barnum & Bailey Com. Shows v. Higgins, 189 F2d 865 (2nd Cir. 1951).

I.R.S. Revenue Ruling 87-41.

IV.

The Labor and Industrial Relations Commission did not err in affirming the decision of the Appeals Tribunal because the Appeals Referee did not impermissibly act as counsel for the Division and judge in that the Appeals Referee has a duty to develop the record on the issues presented. (Responds to Appellant's point IV).

Smith v. Labor and Industrial Relations Commission, 656 S.W.2d 812 (Mo. App. W.D. 1983).

8CSR 10-5.015 (10) (A).

8CSR 10-5.015 (10) (B) (4).

ARGUMENT

Scope of Review

Judicial review of Commission decisions in employment security matters is governed by Section 288.210. This section provides in part as follows:

> Upon appeal no additional evidence shall be heard. The findings of the commission as to the facts, if supported by competent and substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the appellate court shall be confined to questions of law. The court, on appeal, may modify, reverse, remand for rehearing, or set aside the decision of the commission on the following grounds and no other:
>
> (1) That the commission acted without or in excess of its powers;
>
> (2) That the decision was procured by fraud;
>
> (3) That the facts found by the commission do not support the award; or
>
> (4) That there was no sufficient competent evidence in the record to warrant the making of the award.

It is the function of the reviewing court to decide whether the Commission reasonably could have made its findings and drawn its conclusions**. *Burns v. Labor & Industrial Com'n,*** 845 S.W.2d 553 (Mo. banc 1993). Determination of the credibility of witnesses is a function of the Commission, which may disbelieve or discount the testimony of a party's witnesses**. *Burns, Id*** at 556. "If evidence before the administrative body would warrant either of two opposed findings, the reviewing court is bound by the administrative determination, and it is irrelevant that there is supportive evidence for the

contrary finding." ***Pulitzer Pub. Co. v. Labor & Indus. Relations Com'n,*** 596 S.W.2d 413, 417 (Mo. banc 1980). The court must determine "whether, considering the whole record, there is sufficient competent and substantial evidence to support the award." ***Hampton v. Big Boy Steel Erection,*** 121 S.W.3d 220, 223 (Mo. banc 2003). A reviewing court, thus, must affirm those decisions of the Commission which are supported by substantial and competent evidence taken from the whole record.

Discussion

I.

The Labor and Industrial Relations Commission did not err in affirming the decision of the Appeals Tribunal because the Division did not act without or in excess of its powers in allowing a non-attorney to represent the Division in that Supreme Court Rule 5.29(c) specifically allows non attorneys to represent parties before the Appeals Tribunal if the non-attorney is a managerial employee of the party; Interpreting Rule 5.29(c) in the manner that the court of appeals did would lead to an unreasonable result. (Responds to Appellant's point V).

Appellant complains in Point V of its brief that the Commission's decision should be reversed because the Division acted in excess of its powers by allowing a non-attorney to represent the Division, which action constituted the unauthorized practice of law. Appellant's assertions are in error.

Supreme Court Rule 5.29(c) states as follows:

> (c) In any employment security proceeding before the state division of employment security, a corporation, partnership, or **other business**

> **entity authorized by law** may be represented by an officer of the entity or a person in the full time employment of the entity in a managerial capacity who shall be afforded the opportunity to participate in the hearing. [Emphasis added].

In accordance with Supreme Court Rule 5.29(c) the Division promulgated, 8 CSR 10-5.015 (9) (B), which states:

> A party, which is a corporation, partnership or other business entity authorized by law may be represented by an officer or a person employed full time in a managerial capacity. For purposes of this regulation, managerial capacity includes **any person who has managerial or supervisory duties as defined by the party.** [Emphasis added].

At the Appeals Tribunal hearing, Dan Schwartze, a Contributions Supervisor III, represented the Division. (Tr. 11). He was a managerial employee of the Division.

The Court of Appeals ruled that the term "business entity" as used in Rule 5.29(c) means only "private" business entities and that therefore, Mr Schwartze could not properly represent the Division.

The Commission did not err in allowing Mr. Schwartze to represent the Division, however, because, as a "business entity authorized by law," the Division was allowed to have a managerial employee represent it at the hearing.

The Division is engaged in "business" within the meaning of Rule 5.29(c). As a governmental entity, the Division conducts business. "Business" is "an activity engaged

in as normal, logical, or inevitable and usually extending over a considerable period of time." ***Division of Employment Security v. Taney County District R-III,*** 922 S.W.2d 391, 394 (Mo. banc 1996). The Division is charged with administering Missouri's unemployment insurance program. ***Section 288.220, RSMo.*** As such, the Division is engaged in a logical activity which extends over a considerable period of time, and is a "business" under Rule 5.29(c).

The Division is also an "entity," as that term "includes…governmental unit." **Black's Law Dictionary, Fifth Edition 1979 at. 477.**

As a statutorily created entity under Section 286.110(2), RSMo. the Division is also "authorized by law." Because it is a "business entity authorized by law," the Division is entitled to representation by a full time managerial employee in employment security proceedings before the Division's Appeals Tribunal, as are all other state and local governmental entities.

Taney County is instructive. That case involved the interpretation of the unemployment insurance successorship statute, Section 288.110, RSMo. The court of appeals limited Section 288.110 to only voluntary acquisitions. In overturning the court of appeals' interpretation of Section 288.110, this Court noted that the word "voluntary" did not appear in the statute and that it would not read such a voluntary requirement into the statute**.** ***Id.*** at 394.

Similarly, the word "private" does not appear in Supreme Court Rule 5.29(c). There is no case law to support the court of appeals' interpretation that the Rule only

applies to "private" business. If this Court wanted the Rule to apply to only "private" business, this Court could have easily done so by adding that word to the rule. Rule is clear as written and needs not interpretation.

Even if the rule were not clear, adopting the court of appeals' interpretation would lead to an unreasonable result**.** Just as statutes should not be given constructions that lead to unreasonable results ***KSD/KSD-TV, Inc. v. Labor and Industrial Relations Commission,*** 562 S.W.2d 346, 349 (Mo. banc 1978), neither should rules. The court of appeals reads Rule 5.29(c) as requiring the Division—but not individuals or "private" business entities—to be represented by licensed Missouri attorneys in employment security proceedings before the Division. This distinction is both arbitrary and unreasonable. Claimants and employers are often inexperienced in unemployment matters and therefore generally have greater need for legal representation in employment security proceedings than does the Division. ***See, Smith v. Labor and Industrial Relations Commission of Missouri***, 656 S.W.2d 812 (Mo. App. 1983) (recognizing need for administrative hearing officer to help develop the fact and record).[1] Claimants and employers may not fully understand the issues in employment security proceedings or

[1] While Appeals Referees are charged with creating an appropriate record in employment security proceedings, the Referees may not assist claimants and employers in presenting their cases. A Referee must observe the strictest impartiality and show no favor to either of the parties by his or her conduct, demeanor or statements**.** ***Lusher v. Gerald Harris Construction, Inc.***, 993 S.W.2d 537, 544 (Mo. App. 1999).

know the proper manner in which to present their cases. Section 288.190.5, RSMo recognizes this by allowing "[a]ny party subject to any decision of an appeals tribunal pursuant to this chapter [the] right to counsel**…."**

Despite this need, claimants and employers are rarely represented by legal counsel in employment security proceedings. Of the 170,609 appeals contained in the Division's records, employers were represented by an attorney in only 8,281 cases, and claimants in only 2,789 cases. Furthermore, only 37.7 percent of employers and 36.6 percent of claimants, are successful in unemployment insurance appeals few claimants and employers are successful in their unemployment insurance appeals. (See affidavit of Susan Poettgen attached to Motion for Rehearing).

These statistics demonstrate that it would be illogical to require the Division, which already prevails in the majority of appeals, to be represented by counsel, while allowing claimants and employers to represent themselves. Interpreting Rule 5.29(c) as mandating that the Division be represented an attorney in employment security proceedings, would create a vastly lopsided playing field in favor of the Division

The court of appeals' interpretation of Supreme Court Rule 5.29(c) would create an enormous burden on the operations of all governmental entities, as it would apply not only to the Division but to employers which include, but are not limited to, school districts, fire districts, sewer districts, and local municipalities of any size.

These governmental entities would be required to have attorney representation at any hearing held before the Division. There are 3,102 state and local government

employers with accounts with the Division, with an average of 379,532 reported workers. (See affidavit of Cindy Guthrie attached to Motion for Rehearing). Many of these employees have filed, or will file, claims for unemployment benefits.[2] Under the court of appeals' interpretation, if a governmental employer wants to contest any of these claims, it would have to obtain attorney representation. This may not be a burden for very large employers, but many governmental entities have limited resources[3]. Smaller government entities would likely be dissuaded from contesting unemployment benefit determinations, which could lead to unqualified claimants receiving benefits.

One purpose of administrative proceedings is to reduce costs. A key element in reducing costs is creating a tribunal that can act without attorneys on either side. The court of appeals' decision would thwart that purpose, by increasing the costs of contesting unemployment determinations for governmental entities.

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[2] For example, governmental employers were billed the following amounts for unemployment benefits paid to Missouri employees during the first calendar quarter of 2007: State Agencies $697,010.35; State Hospitals $204,897.75; State Schools $2,786,965.11; and Local Governments $2,130,215.90. (See affidavit of Cindy Guthrie attached to Motion for Rehearing).

[3] For example, the City of Wardsville reports two employees to the Division; Jackson Township, Chillicothe, reports one employee; Public Water Supply in Lawson, also reports two employees; and finally, Scotland County School District in Gorin, reports twenty-four workers. (See affidavit of Cindy Guthrie attached to Motion for Rehearing)

The Commission did not err in allowing the Division to proceed without attorney representation at the appeals hearing because attorney representation is not required by Rule 5.29(c), and to interpret the rule to require representation would lead to an unreasonable result. The Commission's decision should be affirmed and a decision should be issued on the merits of this case; or, in the alternative, the case should be remanded to the Western District with instructions to decide the case on the merits.

II.

The Labor and Industrial Relations Commission did not err in finding that the individuals performing housecleaning services for Appellant were employees and not independent contractors because that decision was supported by competent and substantial evidence in that the Commission did not ignore relevant evidence because the testimony of the Division's witness concerning the twenty factors was based on hypothetical questions asked by Appellant's counsel and the witness' answers were not binding on the Commission and did not constitute admissions of the Division. (Responds to Appellant's points I and II).

Appellant contends that the Commission ignored relevant evidence in that it did not consider the testimony of Division witness Dan Schwartze, of which Appellant contends constitutes "judicial admissions" by the Division that the workers in question are independent contractors. The testimony of Dan Schwartze does not contain admissions which bind the Division for the following reasons.

The cross-examination of Mr. Schwartze by Appellant's counsel consisted of a long string of hypothetical questions based on assumed "facts" postulated by Appellant's counsel. For example, the following exchange occurs on pages 43 and 44 of the transcript:

> [Mr. Krieger] Q. Do you know—if—if you don't know that then you cannot testify that you were given instructions as to how to clean a house. Am I correct about that?
>
> [Mr. Schwartze] A. That's correct, yes.

[Mr. Kreiger]. Q. And so ***if*** she was not given instructions would you agree that that militates work as an independent contractor?

[Mr. Schwartze] A. Yes.

[Mr. Krieger] Q. Okay. Do you know whether she was provided with any training prior to cleaning the houses?

[Mr. Schwartze] A. Based on her questionnaire, yes.

[Mr. Krieger] Q. Okay. But once again getting back to that questionnaire, you don't know whether the statements made in that questionnaire are true or false.

[Mr. Schwartze] A. That's correct.

[Mr. Krieger] Q. Okay. So do you have any knowledge whether or not she was provided with any training prior to going out and cleaning those houses?

[Mr. Schwartze] A. Any personal knowledge, no.

[Mr. Krieger] Q. Do you have any knowledge other than the form that she was provided—the form that you referred to a moment ago, you have any knowledge that she was provided with any training other than what's stated in that form.

[Mr. Schwartze] A. I have no other knowledge.

[Mr. Krieger] Q. Okay. And the State has no other knowledge as well.

[Mr. Schwartze] A. That is correct.

[Mr. Krieger] Q. Okay. So ***if*** she was not provided with any training would you agree with me that her status would be closer to that of an independent contractor?

[Mr. Schwartze] A. Yes.

[Emphasis added].

None of the "facts" on which these questions were based had been put into evidence at the time Mr. Schwartze testified. Appellant's counsel also at times used his questions to testify without being put under oath. A hypothetical question containing assumed facts not in evidence is improper. ***Oventrop v. Bi-State Development Agency,*** 521 S.W.2d 488, 494 (Mo. App. E.D. 1975). In ***Hawley v. Merritt,*** 452 S.W.2d 604 (Mo. App. S.D. 1970), the court held that responses made to cross-examination questions which were framed so as to assume facts not in evidence were not "admissions." The court in ***Hawley*** was highly critical of this type of questioning, calling it "improper and sometimes prejudicial" ***Id.*** at 610***.***

Mr. Schwartze was not the individual who made the determination in this case. Mr. Schwartze appeared on behalf of the Division primarily to identity Division records. Mr. Schwartze was subject to cross-examination by Appellant, and Mr. Schwartze indeed gave his opinion to the hypothetical questions posed by Appellant's counsel. Nevertheless, Mr. Schwartze's responses were just his opinion, and not statements of Division policy. Where the testimony of a party is not a positive statement of fact within his own knowledge, but is a mere estimate or opinion, it does not have the effect of a judicial admission. ***Jockel v. Robinson,*** 484 S.W.2d 227, 231 (Mo. 1972). It is clear from the testimony quoted above that Mr. Schwartze was not testifying to any facts which were peculiarly within his own personal knowledge and therefore his responses were not judicial admissions. ***See: Jockel. at 231.***

The Commission did not ignore relevant evidence and its decision was supported by competent and substantial evidence and should be affirmed by this Court.

III.

The Labor and Industrial Relations Commission did not err in finding that the individuals performing housecleaning services for Appellant were employees of Appellant because that decision was supported by competent and substantial evidence in that the twenty factor test weighed in favor of the finding that those workers were employees and not independent contractors. (Responds to Appellant's point III).

The statutes which govern the issues in this case are found at ***Section 288.036*** and ***Section 288.034.5 RSMo 2000***. ***Section 288.034.5*** states as follows**.**

> Service performed by an individual for remuneration shall be deemed to be employment subject to this law unless it is shown to the satisfaction of the division that such services were performed by an independent contractor. In determining the existence of the independent contractor relationship, the common law of agency right to control test shall be applied. The common law of agency right to control test shall include but not be limited to: If the alleged employer retains the right to control the manner and means by which the results are to be accomplished, the individual who performs the service is an employee. If only the results are controlled, the individual performing the service is an independent contractor.

The determination of an employer/employee relationship under the common law requires that all of the realities that lead one to the truth must be considered and weighed along with all other indicators as to the real substance of the arrangement between the worker and payor of the remuneration. One must look at the total situation. ***Ringling Bros-Barnum & Bailey Com. Shows v. Higgins,*** 189 F2d 865 (2nd Cir. 1951).

In interpreting Section 288.034.5, the Commission and the Division, through ***8 CSR 10-4.150 (1)***, adopted the federal 20 factor test set forth in ***I.R.S. Revenue Ruling 87-41***. ***Veterans Services v. Labor and Industrial Relations Commission***, 861 S.W.2d 781 (Mo. App. W.D. 1993).

Within the 20 factors, no one factor is dispositive, and the importance of each factor varies depending on the occupation and the factual context in which the services are rendered. ***Veterans Services, supra; Edward Lowe Ind. v. Division of Employment Security***, 865 S.W.2d 855, (Mo. App. S.D. 1993). It is also not uncommon for some of the factors to be inapplicable, depending on the occupation and the factual context in which the services are performed***. Id.***

The burden of proof on each factor rests with the employer. ***Burns v. Labor & Indus. Com'n, supra.*** Concomitant with the burden of proof is the risk of nonpersuasion. ***Id.***

The twenty (20) factors to be considered in determining control are as follows:

1. Actual instruction or direction of worker.--A worker who is required to comply with other persons' instructions about when, where and how he or she is to work is ordinarily an employee. This control factor is present if the person or

persons for whom the services are performed have the "right" to require compliance with instructions. The instructions may be in the form of manuals or written procedures that show how the desired result is to be accomplished.

Appellant's owner, Jenny Haggard, testified that she furnishes the workers a memo (Tr. 104, 365-366). While Ms. Haggard testified that the information contained in this memo is not instructions but merely "hints," her self-serving testimony is not credible given the language used in the memo. Use of the words "always" and "never" unequivocally indicates that the actions they refer to are mandatory. (Tr. 365-366). The requirements in the memo are instructions on how to perform the housecleaning services. This factor supports an employer/employee relationship.

2. Training of a worker by requiring an experienced employee working with the worker, by corresponding with the worker, by requiring the worker to attend meetings or by other methods, indicates that the person for whom the services are performed wants the services performed in a particular method or manner. An independent contractor ordinarily uses his own methods and receives no training from the purchaser of the services.

Appellant furnished the workers a document entitled "Refresher Course" (Tr. 367). Again, while Ms. Haggard downplayed the importance of the information in the document, the document clearly indicates that the workers are to act in accordance with the information contained there. Such information as what cleaning product to use on

what surface, and what items to make sure the worker cleans, indicate the worker is to perform his/her services in that manner. (Tr. 367).

Furthermore, there was evidence that many new workers have a more experienced worker go with them to clean their first house (Tr. 119-120, 199).

This factor indicates an employer/employee relationship.

3. Integration of the workers' services into a business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree on the performance of certain kinds of services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. This factor applies even though the particular workers are dispensable and could be replaced.

The services of the workers are absolutely integrated into Appellant's business operations. Appellant's business is providing housecleaning to its customers (Tr. 93). Appellant's business could not operate without workers to perform the housecleaning services.

This factor indicates an employer/employee relationship

4**. If the services must be rendered personally**, presumably the person for whom the services are performed is interested in the methods used to accomplish the work as well as the results.

Ms. Haggard testified that the worker need not perform the housecleaning services personally (Tr. 130). However, Ms. Haggard's testimony is contradicted by both the memo and the workers' contract (Tr. 324, 331, 338, 362, 365-366). Item number three (3) in the memo states: "Punctuality is crucial!!!. Customers want you there and **only you** at the scheduled time with no excuses to clean their house." (Tr. 365). [Emphasis added]. The workers' contract states: "If the customer requests that the independent contractor be replaced, he or she will be replaced **by the owner's choice**." (Tr. 324, 331, 338, 362). [Emphasis added]. Ms. Haggard testified that she determines which worker is matched up with a customer (Tr. 113). There was no evidence presented that any worker ever sent someone else to do the job in his/he place (Tr. 201, 248).

This factor indicates an employer/employee relationship.

5. **Hiring, supervising, and payments to assistants** by the person for whom the services are performed generally shows employer control over workers on the job. However, if one worker hires, supervises and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates independent contractor status. On the other hand, if he does so at the direction of the employer, he may be acting as an employee in the capacity of a foreman for or representative of the employer.

Some of the workers have used relatives to assist them (Tr. 201-202, 248-249). One worker had her sister help, and paid her sister out of her compensation for the job (Tr. 249).

This factor indicates an independent contractor relationship.

6. **A continuing relationship** between the workers and the person for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

The contract signed by the workers has no definite time period but is open ended (Tr. 122, 324, 331, 338, 362). The workers do not contract for one specific project (Tr. 124). Some workers have established relationships with specific customers and clean for them on a regular basis (Tr. 138). Some workers have performed their services for Appellant for several years (Tr. 188).

This factor indicates an employer/employee relationship.

7. **The establishment of set hours of work** by the person for whom the services are performed is a factor indicating control.

The workers do not have set hours of work (Tr. 205). Ms. Haggard schedules the worker according to when that worker is willing to work (Tr. 105).

This factor indicates an independent contractor relationship.

8. **If the worker must devote substantially full-time work** for the business of the person for whom the services are performed, such person has control over the amount of time the worker spends working and impliedly restricts the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when, and for whom he chooses. Setting a quota which requires all of the worker's time indicates full-time employment.

There is no full-time work required (Tr. 135, 206, 253).

This factor indicates an independent contractor relationship

9**. Doing the work on employer's premises** suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the services involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person for whom the services are performed has the right to compel the worker to travel a designated route, to canvass a territory within a certain time or to work at specific places as required.

The nature of the business is such that all the work is done in customers' homes (Tr. 98, 207).

This factor is neutral.

10**. If the order of the performance of services** is, or may be, set by the person for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work. Often, because of the nature of an occupation, the person for whom the services are performed does not set the order of services. It is sufficient to show control, however, if such person or persons retain the right to do so.

The customer dictates the order the services are to be performed in (Tr. 136).
This factor is neutral.

11. **The submission of regular oral or written reports** indicates a degree of control.

The workers contact Appellant when the job is finished so the work can be inspected (Tr. 115-116, 138-139)

This factor is neutral.

12**. If the manner of payment** is by the hour, week or month, an employer-employee relationship probably exists. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor. The guarantee of a minimum salary or the granting of a drawing account at stated intervals with no requirement for repayment of the excess over earnings tends to indicate the existence of an employer-employee relationship**.**

Workers are paid a percentage of the rate charged to the customer. (Tr. 105, 198). The owner sets the rate with the customer (Tr. 94). The percentage paid to the workers is a range of 40-60 percent (Tr. 144). The range of rates is from $50 to $300 (Tr. 142). Workers are not guaranteed a minimum and are not allowed to draw against expected payments (Tr. 143). Workers receive no benefits such as workers compensation or 401(k) plans (Tr. 143, 197).

This factor indicates an independent contractor relationship.

13**. Payment of the worker's business or traveling expenses** by the person for whom the services are performed indicates employment. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

Workers have incidental expenses. Workers must provide their own vacuum cleaner and pay for the maintenance of it (Tr. 143). Purchasing cleaning supplies is not required because the owner will provide those supplies (Tr. 145). Workers pay $5 per week for their share of the Appellant's bond insurance (Tr. 146, 238-239). Workers use their own cars for traveling to and from jobs, but the workers also use their cars for personal business; therefore, the cost of transportation is not a factor (Tr. 229, 262),

This factor is neutral.

14. **The furnishing of significant tools and materials**, by the person for whom the services are performed tends to show employment.

Appellant will provide all cleaning supplies except for a vacuum cleaner (Tr. 149, 211, 246). Workers are not charged a fee for using Appellant's supplies (Tr. 152). Appellant also provides t-shirts with company logo for workers to wear (Tr. 162).

This factor indicates an employer/employee relationship.

15. **A significant investment** in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party) tends to show an independent contractor status. On the other hand, lack of investment in facilities indicates dependence on the person for whom the services are performed for such facilities and, accordingly, reflects employment. Special scrutiny is required with respect to certain types of facilities, such as home offices.

Other than providing their own vacuum cleaner and paying $5 per week for bond insurance, the workers have no significant investment in Appellant's or other business (Tr. 146-147).

This factor indicates an employer/employee relationship.

16. **The possibility of profit or loss** for the worker as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) generally indicates an independent contractor status. For example, if the worker is subject to a real risk of economic loss due to significant investment or a bona fide liability for expenses, such as salary payments to unrelated

employees, that factor indicates the worker is an independent contractor. The risk that a worker will not receive payment for his services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

Workers are bonded and therefore the risk of significant loss through property damage is alleviated (T. 102, 238). Other than the risk of property damage, the workers are not subject to the risk of loss (Tr. 160).

This factor indicates an employer/employee relationship.

17. **Work for multiple persons or firms** at the same time generally indicates independent contractor status.

Workers are not prohibited from working for other businesses (Tr. 160). Workers are prohibited from taking present or former customers of Appellant (Tr. 324, 331, 338, 362). Some workers do clean houses on their own (Tr. 208, 264).

This factor slightly favors independent contractor status.

18**. Making services available to the general public** on a regular and consistent basis indicates independent contractor status. This may be evidenced by the worker having his own office and assistants, hanging out a "shingle" in front of his home or office, holding business licenses, maintaining business listings in telephone directories or advertising in newspapers, trade journals, magazines, etc.

Some workers make their services available through posting flyers and by word of mouth (Tr. 208, 264).

This factor slightly favors independent contractor status.

19. **The right to discharge** a worker is a factor indicating employment. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be "fired" so long as the contractor produces a result that meets the contract specifications.

Workers may be discharged by Appellant without incurring any legal liability (Tr. 164, 218, 267).

This factor indicates an employer/employee relationship

20**. The right to quit** without incurring liability indicates employment. An independent contractor usually agrees to complete a specific job and he is responsible for its satisfactory completion or is legally obligated to make good failure to complete the job

Workers may quit without incurring any legal liability (Tr. 165, 219-220, 267).

This factor indicates an employer/employee relationship.

Analyzing the record using the relevant factors demonstrates that sufficient control is present to reasonably find an employer/employee relationship. There are 10 factors

which indicate employment, 6 factors which indicate independent contractor, and 4 factors which are neutral. This weighing of the factors is very similar to what the Court found in ***Veterans Services v. Labor and Industrial Relations Commission***, 861 S.W.2d 781 (Mo. App. W.D. 1993). In that case the court found 13 factors in favor of employment, 6 factors in favor of independent contractor and one factor that was neutral. The court concluded that the workers in question were not independent contractors and the Division requests this Court find the workers in question are not independent contractors in this case.

IV.

The Labor and Industrial Relations Commission did not err in affirming the decision of the Appeals Tribunal because the Appeals Referee did not impermissibly act as counsel for the Division and judge in that the Appeals Referee has a duty to develop the record on the issues presented. (Responds to Appellant's point IV).

Appellant objects to the role played by the Appeals Referee in asking questions of witnesses and seeking the admissions of documents. Appellant argues that this conduct is impermissible. However, Appellant cites to no case concerning unemployment hearings to support his argument.

The issue of Appeals Referee involvement in the process of the hearing has come up before in the context of the unemployment hearing. In ***Smith v. Labor and Industrial Relations Commission,*** 656 S.W.2d 812 (Mo. App. W.D. 1983), the court of appeals reversed and remanded a case because the Appeals Referee had failed to sufficiently develop the facts of the case for the court to rule on the issues. The court stated that a duty rests upon the agency administering the unemployment laws to exercise considerable responsibility to explore the factual aspects of each situation. ***Id*** at 818**.** The court looked with favor upon and quoted a Division regulation in effect at that time, ***8 CSR 10-5.010 (8)*** which stated:

> The appeals tribunal shall follow in each case that procedure which it believes will best develop all of the pertinent facts with respect to the issues without regard to common law or statutory rules of evidence and other technical rules of procedure. The appeals tribunal may examine all parties

and witnesses and shall determine the order of procedure for each hearing." ***Id***. at 818**.**

That regulation exists today in a somewhat different form but with essentially the same meaning. ***8 CSR 10-5.015 (10)(A).*** The last sentence of the former 8CSR 10-5.010 (8) is maintained verbatim in the current regulation. The statement that the hearing need not be conducted according to the common law or statutory rules of evidence and other technical rules of procedure can now be found in ***8 CSR 10-5.015 (10)(B)(4).*** While the format of the regulations may have changed, the meaning the court in ***Smith*** approved still exists today. The Appeals Referee has a duty to question witnesses, seek documentary evidence, and develop the record fully.

The Appeals Referee did not act impermissibly and Appellant's point IV has no merit.

CONCLUSION

The Division submits that the decision of the Labor and Industrial Relations Commission is correct as a matter of law and should be affirmed.

WHEREFORE, the Division prays that the decision of the Commission be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I mailed one copy of the foregoing Brief and one diskette containing the Brief on this _____day of August, 2007, to the following:

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CERTIFICATE OF WORD COUNT
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I hereby certify the following:

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APPENDIX

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