W.D. 66738 and 66739

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JENNY'S HOUSECLEANING,
Appellant

v.

DIVISION OF EMPLOYMENT SECURITY,
Respondent.

Appealed from
the Missouri Labor and Industrial Relations Commission
Appeal Nos. E-111-05 and E-114-05
Commission No. CR-3103 & CR-3104

APPELLANT'S BRIEF

Joel I. Krieger, MO #50706
WALLACE, SAUNDERS, AUSTIN,
BROWN & ENOCHS, CHTD.
2300 Main Street, Suite 900
Kansas City, Missouri 64108
(913) 888-1000 FAX - (913) 888-1065

ATTORNEY FOR APPELLANT

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JURISDICTIONAL STATEMENT

This appeal is brought pursuant to, *inter alia*, Sec. 288.210 RSMo., which provides for appellate review of decisions of the Labor and Industrial Relations Commission regarding employment security matters. This action concerns the ruling of the Missouri Division of Employment Security, upheld on appeal to the Labor and Industrial Relations Commission, that Janet Kirby, Pam Dickey, and others engaged as house cleaners since January 1, 2002 "performed services in employment as defined in Section 288.034 of the Missouri employment security law." (L. F. 2).

STATEMENT OF FACTS

The State auditor initially determined the workers involved here were independent contractors. (Tr. 96, 273 - 274). However, on or about March 3, 2005, the Missouri Division of Employment Security notified Appellant that it determined that Janet Kirby, Pam Dickey, and others engaged as house cleaners since January 1, 2002 "performed services in employment as defined in Section 288.034 of the Missouri employment security law." (L. F. 2). Appellant appealed the decision and timely requested a hearing. (L. F. 4).

The Appeals Tribunal for the Missouri Division of Employment Security heard the appeal on September 23, 2005 (L. F. 9) and affirmed the decision.

Findings of the Tribunal

The decision of the Appeals Tribunal is attached as Exhibit A to the Appendix. The Tribunal found the following factors from 26 U.S.C. § 3306 were applicable: 1) Instruction; 2) Training; 3) Integration; 4) Services rendered personally; 5) Hiring of assistants; 6) Continuing relationship; 7) Set hours of work; 8) Full-time required; 9) Doing work on the employer's premises; 10) Set order or sequence of work; 11) Oral or written reports; 12) Method of payment; 13) Reimbursement of expenses or travel; 14) Provision of tools and materials; 15) Significant investment; 16) Realization of

profit or loss; 17) Simultaneous employment; 18) Making service available to the general public; 19) Right of discharge; and 20) Right to quit. (L. F. 17).

There are two other factors, based on Missouri law, that were not considered by the Tribunal, whether 1) there is any provision for employee benefits by the company; and 2) the tax treatment of the hired party. *Frick v. Williams*, 992 S.W.2d 375 (1999).

The Tribunal acknowledged that the workers themselves considered themselves to be independent contractors. (L. F. 10). However, the Tribunal could not "accept that Jenny's was a mere conduit for instructions from its customers," finding the contention that customers exercise control over the way the workers went about performing their services was invalid, as "a customer decides upon the products or services that it is willing to use. The business is still responsible for meeting customers' requirements, which may require a worker to comply with these requirements." (L.F. 17 - 18). And it found that the price a customer would pay for services was "determined by the business, not the workers." (L. F. 10).

The Tribunal placed heavy emphasis on a memo addressed to the contractors from Ms. Haggard that provided "notes" for the workers to the proper methods for cleaning. That memo is at pages 11 - 12 of the Record and attached as Exhibit E to the Appendix herein. The Tribunal also relied heavily upon another document

provided "for some workers." (L. F. 13 - 14). That document is included within a Division report at pages 13 - 14 of the Legal File and attached as Exhibit F to the Appendix. The Tribunal found the business supervises the workers, that the work is "frequently inspected by the business" and that "customers are assigned to workers by Jenny's."

Factors found to weigh in favor of independent contractor status

The Tribunal found the following factors weighed in favor of a finding of independent contractor status:

1) Hiring, Supervising, and Paying Assistants ("workers are free to use assistance and have done so . . . ");
2) **Set Hours of Work** ("workers' hours were scheduled according to the workers' request");
3) **Full Time Required** (full time work not required, hours "varied widely");
4) **Payment of Business and/or Traveling Expenses** (no reimbursement for);
5) **Working For More Than One Firm At A Time** ("workers can and did hold other jobs . . ."); and

6) **Making Services Available To General Public** ("some evidence" that the workers did make their services available to the general public). (LF 18-24).

Factors found to be neutral or inapplicable

The Tribunal found the following factors were either neutral or not applicable:

1) **Doing Work On Employer's Premises** (found "not truly applicable," because the "nature of the work is such that work necessarily is performed in customers' homes");

2) **Payment By Hour, Week, Month** (found to be neutral, as "it balances between the way that workers are paid and the ultimate control as to what they are paid . . ."); and

3) **Furnishing Of Tools And Materials** (found to be neutral because the business furnishes cleaning products, but the worker furnishes a vacuum cleaner and any products the worker wishes to use as supplements or replacements). (LF 18-24).

Factors found to weigh in favor of employment

The Tribunal found the following factors weigh in favor of employment:

1) **Instructions** (finding that Jenny's "provided extensive instructions to at least part of its workers" through a "Memo," mentioned above, which the Tribunal found not to be suggestions, but requirements);

2) **Training** (though finding "extensive training is not required," it found some training was provided, novice workers could be accompanied by more experienced workers on their initial visit to a home, and a "refresher course" gave the "type of materials to be used in cleaning; the products to be used; when to clean baseboards; and a plea to wear the business' T-shirts");

3) **Integration** (finding the success or continuation of the business depended on the performance of the workers, who were, therefore, "totally integrated into the Appellant's business");

4) **Services Rendered Personally** (finding the Memo states, "customers want you there and only you at the scheduled time . . . ," and the contract with the workers provides, "if the customer requests the independent contractor be replaced, he or she will be replaced by the owner's choice," indicating it is a personal service);

5) **Continuing Relationship** (finding the contract between the business and the workers had no time limits and although the nature of the business was short-term, "for all practical purposes the workers' services are ongoing and a continuing relationship exists, and that "several workers have worked for Jenny's for years");

6) **Order or Sequence Set** (though finding the workers provide the days and times they will work, "the workers' schedules were ultimately established based upon customer requirements," weighing "very slightly" in favor of employment);

7) **Oral Or Written Reports** (although no reports cited, it found workers are to "contact Jenny's when they are ready to have their work inspected and when they are not going to be able to be at work");

8) **Significant Investment** (finding no indication the workers had a significant investment in a business facility or the tools of the trade);

9) **Realization of Profit or Loss** (finding that workers "could not profit from the services that they provided other than the percentage that the business paid to them and, because they were bonded, they were "protected from truly significant losses due to property damage");

10) and 11)

The Rights to Discharge and Terminate (finding that "Jenny's had the right to discharge the workers at any time without incurring liability" and the workers "could quit at any time without liability to the business." (LF 18-24).

The Tribunal admitted "there are indicia of independent contractor status," but found that the "preponderance of the evidence" established that the services performed were performed as employees, concluding:

> Jenny's depended upon its compliance with its customers' requirements. The appellant could not ensure that compliance, and thus its continued business, if it did not have the right to exercise considerable control over the workers' activities beyond merely accepting or rejecting the results. To that end, the appellant had to ensure that the workers followed proper cleaning procedures. The business inspected the workers' cleaning and docked workers if it found something not to its liking which a worker refused to correct. The amount a worker was docked was in the control of the business.

(L. F. 22).

Appellant timely filed for appeal of this decision. (L. F. 24). The Commission, however, found the decision of the Appeals Tribunal should be affirmed because it was "fully supported by the competent and substantial evidence on the whole record"

and was "in accordance with the relevant provisions of Missouri security law." (L. F. 72). That ruling is attached as Exhibit B to the Appendix herein.

Appellant timely filed a Notice of Appeal to this Court. (L. F. 73).

POINTS RELIED ON

I. The Commission Erred In Affirming The Division's Ruling That The Workers Concerned Were Employees, Because An Administrative Agency May Not Arbitrarily Ignore Relevant Evidence Not Shown To Be Disbelieved Unless Found To Be Incredible Or Unworthy Of Belief, In That The Division Ignored Undisputed Admissions That Most Of The Factors Involved Here Militated Toward A Finding Of Independent Contractor Status Without Determining That The Evidence Was Incredible Or Unworthy Of Belief.

II. The Commission Erred In Affirming The Division's Ruling That The Workers Concerned Were Employees, Because The Division Ignored The Division's Judicial Admissions That Most Of The Factors Involved Herein Militated Toward A Finding Of Independent Contractor Status, In That The Statements Were Unequivocal Testimony By A Party Concerning Material Facts Peculiarly Within That Party's Knowledge And Which Undermined The Party's Position And, Therefore, Should Have Been Considered Conclusive On Each Point Admitted.

III. The Commission Erred In Affirming The Division's Ruling That The Workers Concerned Were Employees, Because There Was Not Substantial And Competent Evidence To Support The Decision And The Overwhelming Weight Of The Evidence Favored Independent Contractor Status, In That The Commission Improperly Focused On Control Over The Results, Rather Than the Manner And Means Of Performing The Work, The Hearsay Evidence Relied Upon Was Neither Substantial Nor Competent, The Commission Ignored The Division's Admissions, The Commission Ignored Two Other Important Factors, And The Overwhelming Weight Of The Evidence On Each Factor Supported Independent Contractor Status.

IV. The Commission Erred In Affirming The Division, Because The Hearing Officer Impermissibly Acted As Both Counsel For The Division And Judge, In That She Attempted To Establish Proof Supporting The Division's Position By Questioning Witnesses, Sought The Admission Of Documentary Evidence, Then Overruled Objections To The Evidence, And Demonstrated Bias In Ignoring Admissions And Other Uncontroverted Evidence.

V. The Commission Erred In Affirming The Division, Because The Division Acted Without Or In Excess Of Its Powers In Allowing A Non-Attorney To Represent The Division, Which Constituted The Unauthorized Practice Of Law, In That The Non-Attorney Represented The Division, Was Given The Opportunity To And Did Ask Questions Of Witnesses, And Made A Closing Statement On Behalf Of The Division.

DISCUSSION

I. The Commission Erred In Affirming The Division's Ruling That The Workers Concerned Were Employees, Because An Administrative Agency May Not Arbitrarily Ignore Relevant Evidence Not Shown To Be Disbelieved Unless Found To Be Incredible Or Unworthy Of Belief, In That The Division Ignored Undisputed Admissions That Most Of The Factors Involved Here Militated Toward A Finding Of Independent Contractor Status Without Determining That The Evidence Was Incredible Or Unworthy Of Belief.

A. Standard of Review

Decisions of the Commission "which are clearly the interpretation or application of the law, as distinguished from a determination of facts," are not binding upon this Court and fall within the Court's "province of review and correction." *Merriman v. Ben Gutman Truck Serv., Inc.*, 392 S.W.2d 292, 297 (Mo.1965). "We independently review such questions without giving any deference to the

Commission's conclusions." *CNW Foods, Inc. v. Davidson*, 141 S.W.3d 100, 102 (Mo.App. S.D.2004). Moreover, where the Commission's "finding of ultimate fact is reached by the application of rules of law instead of by a process of natural reasoning from the facts alone, it is a conclusion of law and subject to our reversal." *Merriman*, 392 S.W.2d at 297; see also *Baxi v. United Techs. Auto.*, 956 S.W.2d 340, 343 (Mo.App. E.D.1997).

Accordingly, in reviewing the Commission's act of impermissibly ignoring uncontroverted evidence, only a legal matter is involved, so no deference should be granted the Commission on this issue.

B. An Administrative Agency Is Not Free To Ignore Uncontroverted Evidence, As The Commission Did Here.

While an administrative agency may base its decision on a finding of lack of credible testimony, "[a]n administrative agency may not arbitrarily ignore relevant evidence not shown to be disbelieved. Only if it makes a specific finding that undisputed or unimpeached evidence is incredible and is unworthy of belief may it disregard such evidence." *Hay v. Schwartz,* 982 S.W.2d 295, 302 (Mo.App. W.D. 1998), citing *Knapp v. Missouri Local Govt. Retirement Assn.*, 738 S.W.2d at 913 (Mo.App. W.D. 1987); *Missouri Church of Scientology v. State Tax Comm'n,* 560 S.W.2d 837, 843 (Mo. banc 1977). See also, *Stevinson v. Labor and Industrial Relations Comm. of Missouri,* 654 S.W.2d 373, 374 (Mo.App. S.D. 1983) and *Vaughn*

v. Labor and Industrial Relations Commission, 603 S.W.2d 63, 66 (Mo.App. E.D. 1980).

1. The Division's admissions

Here, the Tribunal and the Commission completely ignored the admissions of Dan Schwartze, testifying as a representative of the Division, that each of the factors involved militated toward a finding of independent contractor status. (Appendix Exhibit C; Tr. 37-38, 43-44, 47-50, 54-60, 65-70, 72-75). He further admitted that two other recognized factors, whether there is any provision for employee benefits by the company and the tax treatment of the hired party, also militated toward a finding of independent contractor status. (Tr. 79-80). And he acknowledged that he had agreed that most of the factors would militate toward an independent contractor finding. (Tr. 75, 80). Excerpts from Mr. Schwartze's testimony relating to the specific factors at issue are contained at Exhibit C of the Appendix.

As for the specific factors at issue on appeal, he testified that the factor of "payment" militated toward a finding of independent contractor status, admitting that Ms. Benderman was paid based on 40% of the job. (Tr. 37 - 38). He testified that if the worker was not given instructions, as here, that militates toward a finding of independent contractor status. (Tr. 43).

The lack of a continuing relationship also "looks like they could have been independent," he testified. (Tr. 50). He agreed that there were not many people who had an ongoing relationship with the company, as many worked for only one quarter of the year. (Tr. 47 - 48). Many people worked less than a part of one quarter of the year, perhaps only a few weeks like Ms. Benderman, he agreed. (Tr. 49). It was "rather obvious" there was a high turnover, he agreed. (Tr. 48).

As for a "set order or sequence," Mr. Schwartze admitted that workers could clean the homes in any order they chose, which again militated toward a finding of independent contractor status. (Tr. 56 - 57). On the issue of "oral or written reports," he could not testify that the workers were required to provide any oral or written reports, and agreed that militated toward a finding of independent contractor status. (Tr. 57).

As for whether the workers made a "significant investment" in their work, Mr. Schwartze testified that they provided their own vacuum cleaner and other supplies, which leaned toward independent contractor status. (Tr. 59 - 60). He agreed that the workers were all required to supply their own vacuum cleaner. (Tr. 60). And he admitted that even a $100.00 vacuum would be a significant investment for some of the workers. (Tr. 66). He also admitted that the workers could not perform their jobs without a car and that a car was a significant investment. (Tr. 66 - 67). Likewise the

cost of gasoline and repairs, which he admitted were not reimbursed, was a significant investment that militated toward independent contractor status. (Tr. 67 - 68).

As to whether the workers could sustain a loss on a job, Mr. Schwartze admitted that if they broke an item in a home, they could sustain a loss, which militated toward an independent contractor status. (Tr. 70).

Concerning the "right to discharge" factor, Mr. Schwartze agreed that, rather than having the right to fire a worker, in this case Appellant had the right to not "give them another house to clean again," which militates toward a finding of independent contractor status. (Tr. 73 - 74). Likewise, concerning the "right to terminate" factor, he agreed workers can turn down any job they are offered, which also militates toward an independent contractor finding. (Tr. 75).

Appellant brought up two other factors recognized in *Community for Creative Non-Violence*, 490 U. S. 730, 751 - 752, 109 S. Ct. 2178, 2178 - 2179, 104 L.Ed.2d 811 (1989) and *Frick v. Williams*, 992 S.W.2d 375 (1999): 1) whether there is any provision for employee benefits by the company; and 2) the tax treatment of the hired party. Mr. Schwartze agreed that there was no provision for employee benefits involved here, which militated toward a finding of independent contractor status. (Tr. 79). As for the tax treatment of the hired party, although Mr. Schwartze was not aware of whether or not the workers received W-2's or 1099's, he agreed that if they

received 1099's, they would also militate toward being independent contractors. (Tr. 79 - 80). The workers do receive 1099s, as they testified. (Tr. 100, 221).

Mr. Schwartze acknowledged that he had agreed that most of the factors would militate toward an independent contractor finding. (Tr. 75, 80).

2. The Tribunal's failure to consider the admissions

There is nothing in the record to indicate the Tribunal ever decided this testimony was "incredible and unworthy of belief," as required to disregard such evidence. See *Hay v. Schwartz*, *supra* at 302. Therefore, the Tribunal erred by ignoring these admissions.

A party's admission against interest of a material fact relevant to an issue in the case is competent against him as substantive evidence of the fact admitted. *Gaddy v. State Bd. of Registration for Healing Arts*, 397 S.W.2d 347, (Mo.App. 1965).

Here, however, because of the Tribunal's error, the Division's admissions were not even considered, much less given the weight they deserved, as further argued next.

II. The Commission Erred In Affirming The Division's Ruling That The Workers Concerned Were Employees, Because The Division Ignored The Division's Judicial Admissions That Most Of The Factors Involved Herein Militated Toward A Finding Of Independent Contractor Status, In That The Statements Were Unequivocal Testimony By A Party Concerning Material Facts Peculiarly Within That Party's Knowledge And Which Undermined The Party's Position And, Therefore, Should Have Been Considered Conclusive On Each Point Admitted.

A. Standard Of Review

As this Court recently stated in *K & D Auto Body, Inc. v. Division of Employment Sec*., 171 S.W.3d 100, 102 (Mo.App. W.D. 2005):

> "Decisions of the Labor and Industrial Relations Commission in Employment Security Law cases which are clearly the interpretation or application of the law, as distinguished from a determination of facts, are not binding upon the appellate court and fall within its province of review and correction. [Citation omitted]. We independently review such questions without giving any deference to the Commission's conclusions."

Whether statements constitute judicial admissions clearly involves the interpretation or application of law, as distinguished from a determination of facts.

B. The Division Made Judicial Admissions Here, Admitting Repeatedly That All The Factors Involved Militated Toward A Finding Of Independent Contractor Status.

"A judicial admission is an act by a party which in effect concedes a point to be true for purposes of the judicial proceeding and which acts as a substitute for evidence and obviates the need to present evidence on the matter." *Fust v. Francois*, 913 S.W.2d 38, 46 (Mo.App.1995). It is conclusive on the party making it. *Kelly v. State*, 623 S.W.2d 65, 68 (Mo.App.1981). See, also, *inter alia*, *Francis v. Richardson*, 978 S.W.2d 70, 73 (Mo.App. S.D. 1998); *Jockel v. Robinson*, 484 S.W.2d 227, 231 (Mo.1972) and *State v. Olinger*, 396 S.W.2d 617, 621-22 (Mo.1965). ("When a defendant makes a voluntary judicial admission of fact before a jury, it serves as a

substitute for evidence and dispenses with proof of the actual fact and the admission is conclusive on him for the purposes of the case.").

Here, the Division made such judicial admissions, as previously demonstrated. Dan Schwartze, testifying as a representative of the Division, admitted each of the relevant factors here militated toward a finding of independent contractor status. (Tr. 37-38, 43, 47-48, 50, 54-60, 66-68, 70, 72-75). He further admitted that two other recognized factors, whether there is any provision for employee benefits by the company and the tax treatment of the hired party, also militated toward a finding of independent contractor status. (Tr. 79-80). And he acknowledged that he had agreed that most of the factors would militate toward an independent contractor finding. (Tr. 75, 80).

The Tribunal and the Commission, however, completely ignored these judicial admissions. Rather than being conclusive as to the issues admitted, the statements were ignored and the case analyzed as if the Division had never made these binding admissions. This was impermissible error that obviously prejudiced Appellant, as Appellant was led to believe by those admissions that it had nothing else to prove.

III. The Commission Erred In Affirming The Division's Ruling That The Workers Concerned Were Employees, Because There Was Not Substantial And Competent Evidence To Support The Decision And The Overwhelming Weight Of The Evidence Favored Independent Contractor Status, In That The Commission Improperly Focused On Control Over The Results, Rather Than the Manner And Means Of Performing The

Work, The Hearsay Evidence Relied Upon Was Neither Substantial Nor Competent, The Commission Ignored The Division's Admissions, The Commission Ignored Two Other Important Factors, And The Overwhelming Weight Of The Evidence On Each Factor Supported Independent Contractor Status.

A. Standard of Review

No deference is granted to the Commission's conclusions of law and its application of the law to the facts. *Morrison v. Labor & Indus. Relations Comm'n*, 23 S.W.3d 902, 906 (Mo.App. W.D.2000). In evaluating the issues, a two-step process is employed:

> "In the first step, the court examines the whole record, viewing the evidence and all reasonable inferences drawn therefrom in the light most favorable to the award, to **determine if the record contains sufficient competent and substantial evidence to support the award**. [I]f not, the Commission's award must be reversed. If there is competent and substantial evidence supporting the award, the court moves to the second step, where it views the evidence in the light most favorable to the award, but must consider all evidence in the record, including that which opposes or is unfavorable to the award, take account of the overall effect of all of the evidence, and **determine whether the award is against the overwhelming weight of the evidence**."

Travelers Equities Sales, Inc. v. Div. of Employment Sec., 927 S.W.2d 912, 917 (Mo.App. W.D.1996). (Emphasis added).

The Court is required, in reviewing the findings and decisions of the Commission, to determine whether or not it is supported by the whole record. *National School of Aeronautics v. Division of Employment Security*, 226 S.W.2d 93, (Mo.App. 1950) [citation omitted]. Such decisions are reviewed in the same manner

as judgments in non-jury cases. *Id*. [citation omitted]. As the Court stated there, "We should give due deference to the findings of the Commission, when based on controverted parol evidence; but if we find, on the whole record, that the decision is clearly contrary to the overwhelming weight of the evidence we should reverse the judgment affirming the decision and award." *Id*., citing *Wood v. Wagner Electric Corp*., 355 Mo. 670, 197 S.W.2d 647, 649 (Mo. 1946); *Coleman v. Brown Strauss Corp*., Mo.App., 210 S.W.2d 537, 539 (Mo.App. 1948); *Cheek v. Durasteel Company*, Mo.App., 209 S.W.2d 548 (Mo.App. 1948).

B. The Applicable Law In Analyzing This Issue

Although not binding, the intent of the parties on this subject as expressed in their written agreement, is noteworthy. See *Kirksville Pub. Co. v. Division of Employment Sec*., 950 S.W.2d 891, 895 (Mo.App. 1997). The contract signed by each of the workers states that, "this agreement is not an employment contract; all the independent contractors are responsible for their own taxes, Social Security, and other such taxes applicable," as the Tribunal found. (L. F. 10, 324, No. 9). Examples of these contracts are provided at Exhibit D of the Appendix herein. The contracts also provide, *inter alia*, the worker is given a choice of having bonding and liability insurance through the business, that the business is "obligated to pay independent contractor by Friday the week following completion of service," that property damage

is the responsibility of the worker and that the worker may use their own cleaning supplies. (L. F. 10, 324).

Missouri courts routinely apply a twenty-factor test in determining the nature of the employment relationship for purposes of tax liability. *National Heritage Enterprises, Inc. v. Division of Employment Security*, 164 S.W.3d 160, 167 (Mo.App. W.D. 2005), citing *Quality Med. Transcription, Inc. v. Woods*, 91 S.W.3d 185 (Mo.App. W.D. 2002). However, as this Court stated in *National Heritage*:

> "The twenty factors are guides or aids in determining the nature of the employment relationship, and are not the only factors to consider. [Citation omitted]. The twenty factors are not intended to serve as a bright-line rule with no flexibility, but rather are indices of control in determining employment status. No single factor is conclusive, but some may be more important than others depending upon the industry and context in which the services are performed. [citation omitted]. The focus of the inquiry must be the degree to which the employer has the "right to control the manner and means of performance." *Id.*

Additionally, as Appellant informed the court below, there are two additional factors recognized in *Community for Creative Non-Violence*, 490 U. S. at 751 - 752, 109 S. Ct. at 2178 - 2179 and *Frick v. Williams*, 992 S.W.2d 375 (1999): 1) whether there is any provision for employee benefits by the company; and 2) the tax treatment of the hired party.

C. There Was No "Right To Control," The Key Element Here.

As the Tribunal recognized, then apparently ignored, "[T]he bedrock is still the common law agency test of the right to control the manner and means of performance." *Travelers Equities Sales, Inc. v. Division of Employment Security*, 927 S.W.2d 912, 925 (Mo.App. 1996).

1. The right to control the manner and means of performance is the key, not the right to control the results.

The determination of whether a worker is an employee or an independent contractor cannot be based merely on a numerical count of factors. *Travelers Equities Sales, Inc. v. Division of Employment Security*, 927 S.W.2d 912, 925 (Mo.App. 1996). Rather, the focus is on whether the business controls "when, where and how" the work is performed. *Kirksville*, *supra* at 897, citing *Travelers*, *supra* at 921. And it is the right to control the manner and means of work that is important, not the right to control the result. As the Tribunal also stated with regard to this case, then ignored:

> "If the business had the right to control the services of the workers, these individuals are employees. **If the business could only accept or reject the results that they achieved, then these individuals are considered independent contractors**." (L. F. 17). (Emphasis added).

This is in keeping with Missouri law. As the Court noted in *National School of Aeronautics v. Division of Employment Security*, *supra*, 226 S.W.2d at 96, quoting *Atkisson v. Murphy*, 352 Mo. 644, 179 S.W.2d 27, 29 (Mo. 1944):

> 'The right of control as to the mode of doing the work is generally held to be the principal consideration in determining the relationship, but

'**retention of the right to supervise as to <u>results</u>, as distinguished from the right to supervise as to the means by which the intermediate results should be obtained, does not affect the relationship**'." (Emphasis added).

The decisions of Missouri Courts have regularly acknowledged that control over <u>results</u> is irrelevant in this analysis. In *Fritts v. Williams*, *supra*, for example, the Court held a substitute plumber was an independent contractor, where the company did not retain the right to control the manner and means by which the worker was to perform the service calls he accepted, but controlled <u>only the results</u>, as here.

Likewise, in *Kirksville Publishing Co. v. Division of Employment Security*, *supra*, this Court reversed, holding that the record did not support the conclusion that newspaper carriers were employees, finding instructions regarding when the newspapers were to be delivered indicated "control over the <u>result</u> of the carriers' work, not over the <u>manner</u> in which the carriers were to accomplish the work." *Id*. at 897. (Emphasis added).

Similarly, in the recent case of *National Heritage Enterprises, Inc. v. Division of Employment Security*, *supra*, this Court again reversed the Commission, finding the worker was an independent contractor, because "while the appellant had control over the result of Ridley's work, it did not have control over the manner in which she performed that work." 164 S.W.3d at 173.

2. The inspections performed by Appellant were directed at results, not the manner and means used to perform the work.

There was no control over the manner and means of performing the work here and only occasionally even inspection of the results. Inspections are a customer requirement, not the business's. (Tr. 166). Homes are not inspected for what products are used, but for results. (Tr. 167). The number of inspections depends upon the customer's requests, and some days not more than one or two homes are inspected. (Tr. 166). For example, no one ever inspected one of her homes, Ms. Eggers testified. (Tr. 250).

The Tribunal, however, engaged in faulty analysis, erroneously focusing on the right to control results. The summation of the Tribunal's analysis best demonstrates this. It stated:

> "Jenny's depended upon its compliance with its customers' requirements. The appellant could not ensure that compliance, and thus its continued business, if it did not have the right to exercise considerable control over the workers' activities beyond merely accepting or rejecting the results. To that end, the appellant had to ensure that the workers followed proper cleaning procedures. **The business inspected the workers' cleaning and docked workers if it found something not to its liking which a worker refused to correct.** The amount a worker was docked was in the control of the business."

(L. F. 22).

The Tribunal's logic was simply erroneous. First, every business depends on compliance with its customers requirements, so that hardly distinguishes Appellant's

situation. Second, though the Tribunal seems to understand that it is control over the manner and means of the performance of the work that is at issue, not control over the results, it then goes on to support its statement by focusing on the fact that Appellant (sometimes) inspects the results. The Tribunal obviously was confused in its analysis, first implicitly acknowledging that controlling the results was not sufficient to establish independent contractor status, then focusing on the fact that results were allegedly controlled.

D. Analysis Of The Relevant Factors

It is important to again note that determination of whether a worker is an employee or an independent contractor cannot be based merely on a numerical count of factors. *Travelers Equities Sales, Inc., supra*, 927 S.W.2d at 925.

Appellant is, obviously, not appealing the Commission's decision as it relates to those factors it found to favor independent contractor status, and is appealing only one found to be neutral. (See pp. 24-25, above). The following analysis focuses on those factors the Commission found to favor employee status.

1. Instructions

The Tribunal found that Jenny's "provided extensive instructions to at least part of its workers" through a memo, which the Tribunal found to be requirements. (L.F. 18).

a. All documents admitted were hearsay.

This finding was not supported by substantial and competent evidence, in that the documents relied upon by the Court were hearsay, admitted by the Tribunal on the erroneous assumption that hearsay is admissible in administrative hearings. Each of the exhibits admitted herein were over objection based on lack of foundation and authentication. (Tr. 15-16, 22 and 28). Foundational requirements for the admission of a document include relevancy, authentication, the best evidence rule and hearsay. *Ozark Appraisal Service, Inc. v. Neale*, 67 S.W.3d 759, 766 (Mo.App.2002). The Tribunal, though obviously understanding the basis for the objections, overruled the objections (Tr. 16, 23 and 28), stating that hearsay was admissible and the objection went to "the weight rather than to the admissibility of the documents." (Tr. 23). These documents constituted the entirety of the Division's evidence. (Tr. 28).

The Tribunal erred in admitting these documents. Although technical rules of evidence are not controlling in administrative hearings, fundamental rules of evidence apply. *Mo. Church of Scientology v. State Tax Comm.*, 560 S.W.2d 837 839[3] (Mo.banc 1977). **Hearsay evidence and conclusions based upon hearsay do not**

qualify as "competent and substantial evidence upon the whole record" essential to the validity of a final decision of an administrative body under § 22 [now § 18], art. V of the Missouri Constitution of 1945. *State v. Morris*, 221 S.W.2d 206, 209[5] (Mo.1949). *State v. Simmons*, 299 S.W.2d 540, 545[4] (Mo.App.1957). (Emphasis added). See also, *Dittmieir v. Missouri Real Estate Commission*, 237 S.W.2d 201 (1951), citing *State ex rel. De Weese v. Morris*, 359 Mo. 194, 221 S.W.2d 206 (Mo. 1949). There was, therefore, no "competent and substantial evidence" upon which the Tribunal could rely at all in arriving at its decision.

b. The overwhelming weight of the evidence

Moreover, the overwhelming weight of the evidence did not support this finding, where, first, the Division admitted this factor weighed in favor of independent contractor status. (Tr. 43).

In fact, all of the testimony demonstrated no instructions were given. Ms. Haggard testified no instructions are given to the workers on how to do their work, and the instructions they have on their schedule are not from the business, but from the homeowner, concerning what the customer wants cleaned and how they would like to have it cleaned. (Tr. 103). The business merely relays those instructions to the worker,

she testified. (Tr. 103). Likewise, Ms. Cruz testified that Appellant never gave her any instructions as to how to clean a house, although customers provide instructions on certain things they wanted done. (Tr. 189). She testified that the schedules provided to the workers do not have any instructions from Jenny's, but are the customers' instructions. (Tr. 192). Jenny's has never told Ms. Cruz she was cleaning incorrectly, nor is she aware of that happening to any other workers. (Tr. 227). In fact, it would surprise her if that occurred. (Tr. 227). And Ms. Eggers also testified that she was never provided any instructions as to how to go about cleaning a house. (Tr. 236). When she was asked if Jenny's ever gave her any directions or instructions on how to clean a house, Ms. Eggers stated, "I wish. No." (Tr. 245).

As for the memo referenced by the hearing officer (see pages 11 - 12 of the Record and Appendix Exhibit E), it does not provide "instructions" and is only occasionally provided to any workers. Ms. Haggard testified she does not provide it to every worker, only to those for whom she believes hints could help them succeed, and only when it occurs to her or a worker asks how some job should be done. (Tr. 112, 169 - 170).

Likewise, the other document referenced by the hearing officer, the "refresher course" document, is a "general overview of what some of the customers expect," not instructions, Ms. Haggard testified. (Tr. 104 - 105). The two documents are guides "for

her to remind herself to discuss with the workers so that they can be "successful in cleaning," she testified. (Tr. 108). Otherwise, Ms. Haggard might lose the worker. (Tr. 174).

Ms. Cruz has never seen either of the Memos. (Tr. 190). Ms. Eggers also testified she could not identify the Memos, because she had never seen them before. (Tr. 236-237).

As for the suggestions on what equipment or products to use, Ms. Haggard characterized them as "helpful hints" that were "for the convenience of the workers." (Tr. 112 - 113). They are simply common sense suggestions, she testified, such as removing shoes before stepping on furniture. (Tr. 104, 170). If someone disregards the memo entirely, Ms. Haggard stated, "I - I don't mind. If you know, then - if the customer is happy with their way they do things I'm happy." (Tr. 172). There are no repercussions for not complying with the Memo. (Tr. 172).

Appellant pointed each of these facts out in arguing below, noting: 1) the Tribunal's reliance on the "Memo" was misplaced, as it "provides common sense suggestions to the worker and does not provide specific details regarding the cleaning of a home" (L. F. 25); 2) there are no consequences for deviating from the suggestions; 3) the suggestion to carry a cell phone was for the workers' own safety reasons; 4) the suggestion to arrive at the scheduled time was to meet the customer's request; and 5)

suggestions regarding cleaning were merely common sense. (L. F. 25 -26). Similarly, suggestions on where to smoke and eat, and how to dress, are simply common sense suggestions, as most people understand that individuals can be very sensitive to smoke, Appellant pointed out. As for the suggestion that the worker call the designated supervisor when finished for the day, Appellant pointed out that this suggestion was only to ensure that no unfortunate events had occurred in the home or in the process of traveling (for the workers' safety), to allow the worker to efficiently remedy any complaints the homeowner may have had about the services. (L. F. 26). Appellant emphasized that there were no consequences for failure to comply and that, in fact, most workers routinely failed to comply with one or more of the suggestions. (L. F. 27).

c. Missouri courts have overturned the Commission under similar circumstances.

This Court has overturned a similar Commission finding. In *Kirksville Publishing Co. v. Division of Employment Security*, 950 S.W.2d 891 (Mo.App. W.D. 1997), this Court held the record did not support the conclusion that newspaper carriers were employees, even though the business instructed the carriers regarding the delivery of the newspapers. This Court, focusing on the right to control manifested in control over the "when, where and how" the work is completed, found instructions regarding when the newspapers were to be delivered indicated "control over the result of the carriers' work, not over the manner in which the carriers were to accomplish the work."

Id. at 897. (Emphasis added). Here, any control exercised was, as in *Kirksville*, over the results of the work, not the manner in which the workers were to accomplish the work, as demonstrated.

Likewise, in *Ray Neal Distributors, Inc. v. the Labor and Industrial Relations Commission*, 560 S.W.2d 364 (Mo.App. 1977), the court reversed the Commission, in a case also involving cleaning workers. The Court found the Commission improperly ruled the workers involved were "not free from control" because the business "made the work assignments and could change assignments in the event of unsatisfactory work," where there was no evidence the business ever made such changes and the evidence showed that the worker was free to accept or reject the assignment and "rejections often occurred." More to the point, the Court reviewed a contract with the workers that provided for a check list "to pass customer's satisfaction," which the Court found "contemplates supervision and control by the customer of each particular job." *Id.* (Emphasis added). Similarly, the suggestions offered by Appellant here simply reflects customer preferences, not company requirements, as previously demonstrated.

Even in *K & D Auto Body, Inc. v. Division of Employment Security*, 171 S.W.3d 100 (Mo.App. W.D. 2005), where this Court affirmed the Commission decision, this Court found the training factor favored independent contractor status under similar facts. Even though the business provided simple operating instructions, this Court

stated, "Any instruction or training that [K & D] did provide to the [drivers] was *de minimis*, or went to the result, timely delivery of the [tow services], and was not evidence of [K & D's] right to control the manner and means of delivery [of tow services] by the drivers." *Id*. at 107, quoting, with inserted facts, from *Kirksville Pub. Co.*, *supra*, 950 S.W.2d at 898. Here, as in *K & D Auto Body, Inc*., any instruction or training that was provided was *de minimis* or went to the result, not to the manner and means of delivery of the services provided, as demonstrated.

2. Training

Though the Tribunal found "extensive training is not required," it found some training was provided, novice workers could be accompanied by more experienced workers on their initial visit to a home, and a "refresher course" gave the "type of materials to be used in cleaning; the products to be used; when to clean baseboards; and a plea to wear the business' T-shirts." (L.F. 18).

a. No "substantial and competent evidence"

This finding was not supported by substantial and competent evidence, in that, as discussed above under "Instructions," the Tribunal here could only rely on hearsay evidence, and hearsay evidence and conclusions based upon hearsay do not qualify as "competent and substantial evidence upon the whole record" essential to the validity of a final decision of an administrative body.

b. The overwhelming weight of the evidence

The overwhelming weight of the evidence did not support this finding, where, again, the Division admitted this factor weighed in favor of independent contractor status. (Tr. 43).

Moreover, no training is provided. There is no need to train workers to clean, because they have experience cleaning their own homes, Ms. Haggard testified. (Tr. 170). There are no meetings held with workers. (Tr. 120). And, in fact, workers are free to employ any method of cleaning they desire. As Ms. Haggard stated:

> If they want to take a rag and go in the blind slat by slat they can - they can go ahead and do that too. It's just more time consuming. (Tr. 173).

Christy Eggers testified that she was never provided any instructions or memos as to how to go about cleaning the house. (Tr. 236).

As for novice workers sometimes being accompanied by others, Ms. Haggard testified this was not a requirement. Some workers simply preferred someone to go with them the first time, she testified. (Tr. 119). Moreover, when a worker is accompanied by Ms. Haggard or another worker the first time, the two clean in separate rooms, so no instruction takes place. (Tr. 120).

Ms. Cruz verified the workers receive no training, and that if a worker is uncomfortable being in a stranger's house, she would occasionally go with the worker,

but would clean in another room, and provide no instruction. (Tr. 199). Miss Eggers also testified no one ever gave her any training before she went to work.

Appellant pointed out below that workers are not provided with any training whatsoever, as most of the workers' experience comes from cleaning their own homes and it would be "rare and unusual" that a worker would need training to clean a home. (L. F. 27). Any tips provided by business are only provided to assist the worker in being as efficient as possible, counsel noted. Moreover, the workers are free to accept or reject the tips, as many do, Appellant pointed out. (L. F. 27).

As for the "refresher course" document, that has been addressed above — it is only occasionally provided to a worker, does not contain "instructions," but rather common sense suggestions as to what customers desire, and there are no ramifications if the document is ignored entirely.

c. Missouri courts have overturned the Commission under similar circumstances.

This Court, in *Kirksville, supra,* under similar facts ruled that any training provided was only directed to the overall result, not the manner and means of performing the work. There, the business "gave guidance to new workers to demonstrate how the instructions . . . must be followed," and this Court found, as here, that the instructions provided "did not require any training." This Court, therefore, ruled the business "did not control the means and manner of delivery of the paper, but

only the overall result of 'acceptable service,' or timely delivery of the paper." 950 S.W.2d at 900.

Similarly, in *Fritts v. Williams*, 992 S.W.2d 375 (Mo.App. S.D. 1999), the Court held a substitute plumber was an independent contractor, where the company did not retain the right to control the manner and means by which the worker was to perform the service calls he accepted, but controlled only the results, as here. The court found, *inter alia*, that the fact that the worker was required to work with another plumber on his first call "was not tantamount to providing instructions." *Id.* at 380-382.

As in *Kirksville* and *Frits*, Appellant here did not retain the right to control the manner and means by which the worker was to perform the services, but only the results.

3. Integration

The Commission found the success or continuation of the business depended on the performance of the workers, who were, therefore, "totally integrated into the Appellant's business." (L.F. 18).

This finding was not supported by substantial and competent evidence, in that, as discussed above under "Instructions," the Tribunal here could only rely on hearsay evidence, and hearsay evidence and conclusions based upon hearsay do not qualify as

"competent and substantial evidence upon the whole record" essential to the validity of a final decision of an administrative body.

Moreover, the overwhelming weight of the evidence did not support this finding, where the continuation of Appellant's business does not depend on these workers for anything it would not depend on any other independent contractor to do. In *Travelers Equities Sales, Inc. v. Division of Employment Security*, 927 S.W.2d 912 (Mo.App. W.D. 1996), this Court reversed a ruling that workers were employees rather than independent contractors. As to the "integration" factor, this Court discounted the fact that "[t]he continuation of TESI's business depends on the performance of the representatives . . .," where "TESI does not depend on them for anything it could not depend on an independent broker to do." Likewise, in this case, Appellant does not depend on the workers for anything it could not depend on any other independent contractor to do.

4. Services rendered personally

The Commission found this factor favored employee status, because the memo states, "customers want you there and only you at the scheduled time . . . ," and the contract with the workers provides, "if the customer requests the independent contractor be replaced, he or she will be replaced by the owner's choice." (L.F. 18-19; Appendix Exhibit E).

This finding was not supported by substantial and competent evidence, in that, as discussed above under “Instructions,” the Tribunal here could only rely on hearsay evidence, and hearsay evidence and conclusions based upon hearsay do not qualify as "competent and substantial evidence upon the whole record" essential to the validity of a final decision of an administrative body under § 22 [now § 18], art. V of the Missouri Constitution of 1945. *State v. Morris*, 221 S.W.2d 206, 209[5] (Mo.1949). *State v. Simmons*, 299 S.W.2d 540, 545[4] (Mo.App.1957).

Moreover, the Tribunal misinterpreted the hearsay memo it relied upon, as Appellant pointed out below, in that the statement, “customers want you there and only you at the scheduled time with no excuses . . .,” was meant to convey that workers should not bring their friends’ children or others not involved in cleaning the home. (L. F. 28).

Additionally, the overwhelming weight of the evidence did not support this finding, where there is no requirement that workers perform the services personally. Ms. Haggard testified workers are not required to perform their services personally, as they can send someone else in their place to clean a home. (Tr. 120 - 121).

Indeed, some of the workers have helpers, who are not approved by Ms. Haggard. (Tr. 122). A worker could have a substitute clean a home, but more likely a worker might bring someone to help, which does occur, Ms. Cruz testified. (Tr. 201). She has

brought her daughter, and other workers have brought others to assist them, she testified. (Tr. 202). When assistants are used, the worker pays them, not Appellant. (Tr. 205). Ms. Eggers also testified she was allowed to and has brought another person to assist her, without any approval by Appellant. (Tr. 248). She paid those persons out of her percentage, with Jenny's never even knowing she had assistance. (Tr. 249).

This Court has held a worker was not required to personally perform the work under similar circumstances in *National Heritage Enterprises, Inc. v. Division of Employment Security*, 164 S.W.3d 160 (Mo.App. W.D. 2005). In that case, this Court reversed the Commission, ruling that a worker who cleaned corporate suites, revised documents and provided limousine services was an independent contractor. This court found, *inter alia*, that services were not "personally rendered" where the worker's husband and son sometimes handled jobs and there was no indication the worker was required to personally perform the work. *Id.* at 168, 172. Similarly, in this case, workers sometimes have others perform their work and are certainly permitted to do so, as demonstrated above.

Even were the Commission correct in its finding, this Court has held this factor not to be controlling in *Travelers Equities Sales, Inc. v. Division of Employment Security*, 927 S.W.2d 912 (Mo.App. W.D. 1996). This Court reversed a ruling in that case that workers were employees rather than independent contractors, even though it

found, *inter alia*, that the workers involved were required to personally provide their services. *Id*. at 921-925.

5. Continuing relationship

The Commission found the contract between the business and the workers had no time limits and although the nature of the business was short-term, "for all practical purposes the workers' services are ongoing and a continuing relationship exists, and that "several workers have worked for Jenny's for years." (L.F. 19). This finding was not supported by substantial and competent evidence, in that, as discussed above under "Instructions," the Tribunal here could only rely on hearsay evidence, and hearsay evidence and conclusions based upon hearsay do not qualify as "competent and substantial evidence upon the whole record" essential to the validity of a final decision of an administrative body.

Additionally, as Appellant pointed out below, of the 54 workers hired for the years 2002 through 2004, only three worked in excess of one year for Appellant exclusively. The remaining 51 worked for less than one year, thus indicating a short-term relationship. (L. F. 32, 293-296). In fact, the vast majority, 40 workers, worked three months or less for the business. (L. F. 29, 293-296).

Moreover, the overwhelming weight of the evidence did not support this finding, where, again, the Division admitted this factor weighed in favor of independent

contractor status. (Tr. 47-50). Additionally, the evidence demonstrates the duration of the relationship between the worker and the business is never long term, as Ms. Haggard testified, and as the Division acknowledged. (Tr. 123 - 124; 47-50). No one stays very long with the business. (Tr. 137). Ms. Cruz confirmed there is a "great turnover," with some workers staying only a day or two, most workers not staying longer than three months. (Tr. 203 - 204). In fact, Ms. Benderman, who initiated the complaint, only worked for 11 days. (Tr. 42-43**)**.

6. Set order or sequence

Although the Commission affirmed the Division's finding that the worker provided the days and times that she would work, "the workers' schedules were ultimately established based upon customer requirements," weighing "very slightly" in favor of employment. (L.F. 20).

This finding was not supported by substantial and competent evidence, in that, as discussed above under "Instructions," the Tribunal here could only rely on hearsay evidence, and hearsay evidence and conclusions based upon hearsay do not qualify as competent and substantial evidence upon the whole record.

Additionally, the overwhelming weight of the evidence did not support this finding, where not only did the Division admit this factor weighed in favor of independent contractor status (Tr. 56-57), but there are no directions as to the order or

sequence in which the work is done, as Ms. Haggard testified. (Tr. 136). The customer dictates what is being done and when. (Tr. 136). Ms. Cruz also testified workers are free to clean whichever house they desire first and, once they begin a house, clean it in any order they desire. (Tr. 193). And Ms. Eggers testified workers were not required to clean all the houses on the schedule and that she had refused to clean a house in the past. (Tr. 240 - 241). Moreover, she had great latitude in terms of which house to clean first, whichever was more convenient for her. (Tr. 242 - 243).

As pointed out below, workers are free to select the days and times they are willing to work, with absolutely no control exercised over these days and times by the business, as pointed out below. Likewise, the worker can clean the homes in any order they choose, may choose not to comply with appointment times unless there is a specific appointment, and the worker sets her own order or sequence of cleaning the house. (L. F. 29 - 30).

7. Oral or written reports

Although no reports were cited, the Commission found workers are to "contact Jenny's when they are ready to have their work inspected and when they are not going to be able to be at work." (L.F. 20).

This finding was not supported by substantial and competent evidence, in that, as discussed above under "Instructions," the Tribunal here could only rely on hearsay

evidence, and hearsay evidence and conclusions based upon hearsay do not qualify as "competent and substantial evidence upon the whole record" essential to the validity of a final decision of an administrative body.

Moreover, the overwhelming weight of the evidence did not support this finding, where not only did the Division admit this factor weighed in favor of independent contractor status (Tr. 57), but the business does not require any time reports. (Tr. 141). In fact, no worker reports to the business, Ms. Haggard testified. (Tr. 138). Nor do workers provide any reports or anything written at all prior to being paid. (Tr. 142). Ms. Cruz verified the workers are not required to provide any oral or written reports. (Tr. 207).

As for the workers calling after a job is done, Ms. Haggard requests the workers do this as a precaution for the worker's safety as they are going into stranger's houses, many times with builders and contractors in the house. (Tr. 140). In the same vein, Ms. Haggard advises the workers to lock the doors behind them. (Tr. 140 - 141).

As Appellant argued below, a vast majority of homeowners do not make a request for inspection and, even for the minority of homes that request an inspection, the business only examines results, not the method used to clean the house. As for the phone calls, as Appellant pointed out below, this was only done for safety reasons, with

no consequences for failure to contact the business, and the only information supplied is that the job is completed. (L. F. 30).

8. Significant investment

The Commission found no indication the workers had a significant investment in a business facility or the tools of the trade. (L.F. 21).

This finding was not supported by substantial and competent evidence, in that, as discussed above under "Instructions," the Tribunal here could only rely on hearsay evidence, and hearsay evidence and conclusions based upon hearsay do not qualify as "competent and substantial evidence upon the whole record" essential to the validity of a final decision of an administrative body. Additionally, the worker supplies transportation and a vacuum cleaner, as well as any supplies they desire, as Appellant argued below. (L. F. 31).

Moreover, the overwhelming weight of the evidence did not support this finding, where not only did the Division admit this factor weighed in favor of independent contractor status (Tr. 66), but, given the circumstances of the workers involved, they <u>do</u> provide a significant investment, for them. Workers are expected to provide their own automobile liability insurance. (Tr. 105). Workers must also be bonded, and they may secure their own bond or pay the business for use of its insurance coverage. (Tr. 102).

Additionally, the worker supplies a vacuum cleaner, a mop, and their own cleaning supplies if they prefer, Ms. Haggard testified. (Tr. 147 - 149). About half the workers provide their own"swiffers" as well. (Tr. 152). Some of the workers also use hand vacs that they themselves provide. (Tr. 153). Workers store the equipment and the supplies in their car until the next job. (Tr. 153). Ms. Eggers confirmed that she supplied her own mop, vacuum, a toothbrush to scrub sinks, and bags. (Tr. 246). Other expenses the workers incur include vacuum bags, any cleaning supplies that they prefer, their cell phone, and car expenses. (Tr. 145).

Additionally, as Ms. Cruz testified, all the workers have their own cars and are responsible for their transportation. (Tr. 229).

In the context of these women's lives, where every dollar counts, the workers here do provide a significant investment, as the Division admitted. Mr. Schwartze acknowledged that even a $100.00 vacuum would be a significant investment for some of the workers (Tr. 66), that the workers could not perform their jobs without a car and that a car was a significant investment (Tr. 66 - 67), and that the cost of gasoline and repairs, admittedly not reimbursed, was also a significant investment that militated toward independent contractor status. (Tr. 67 - 68).

Finally, as alternatively argued below, if this Court finds a significant investment is not required, even given the circumstances of the workers involved, it should find this

factor neutral, as it is inherent in the job that a significant investment is not required. (L. F. 31).

9. Realization of profit or loss

The Commission found workers "could not profit from the services that they provided other than the percentage that the business paid to them and, because they were bonded, they were "protected from truly significant losses due to property damage." (L.F. 21).

This finding was not supported by substantial and competent evidence, in that, as discussed above under "Instructions," the Tribunal here could only rely on hearsay evidence, and hearsay evidence and conclusions based upon hearsay do not qualify as "competent and substantial evidence upon the whole record" essential to the validity of a final decision of an administrative body.

Additionally, the overwhelming weight of the evidence did not support this finding, where not only did the Division admit this factor weighed in favor of independent contractor status (L.F. 70), but a worker can incur a <u>significant</u> loss, given these workers' circumstances. A worker can incur a loss if she break an antique, as the deductible is $250.00, Ms. Haggard testified. (Tr. 160). Ms. Cruz verified that a worker could lose money if she breaks something in a customer's house. (Tr. 217).

As argued below, a worker can realize differing profits, based on her efficiency in cleaning a particular home by earning a greater hourly sum if the home is cleaned efficiently and lesser if not. Moreover, as Appellant noted below, because the worker may be required to pay a deductible of up to $250.00 for any damages, the worker can realize a loss for the entire week. (L. F. 32).

Analogously, in *National Heritage Enterprises, Inc. v. Division of Employment Security, supra*, this Court reversed the Commission, finding that the fact the only risk to the worker in performing poorly was that she would not get additional assignments favored independent contractor status. 164 S.W.3d at 168, 172. Likewise, the risk to the worker favors independent contractor status here, where workers who perform poorly do not get additional assignments. (Tr. 73-74).

10. The rights to discharge and terminate

The Commission found "Jenny's had the right to discharge the workers at any time without incurring liability" and the workers "could quit at any time without liability to the business." (L.F. 22).

This finding was not supported by substantial and competent evidence, in that, as discussed above under "Instructions," the Tribunal here could only rely on hearsay evidence, and hearsay evidence and conclusions based upon hearsay do not qualify as

"competent and substantial evidence upon the whole record" essential to the validity of a final decision of an administrative body.

Moreover, the overwhelming weight of the evidence did not support this finding, where not only did the Division admit this factor weighed in favor of independent contractor status (L.F. 72-74), but, as the Division admits, rather than having the right to fire a worker, Appellant had the right to not "give them another house to clean again," which militates toward a finding of independent contractor status. (Tr. 73 - 74). Likewise, workers can turn down any job they are offered, which also militates toward an independent contractor finding, the Division admits. (Tr. 75).

Therefore, the business does not maintain the right to fire, only the right not to offer a house to a worker and, as distinguished from an employment situation, the worker has discretion to accept or reject a particular job and still be eligible for a future job. Moreover, to the extent a worker rejects a particular job, they lose the opportunity to earn revenue, as an independent contractor would, as Appellant noted below. (L. F. 33).

Finally, the Division simply used faulty analysis in neglecting to understand the context involved here. Whereas a subcontractor on the building of a home, for example, cannot quit a job before completion without significant consequence to all, because of the skill level and lack of availability of immediate replacements, it is in the nature of

house cleaning that a house cleaner can quit in the middle of cleaning a home and be quickly and rather easily replaced. Therefore, the fact that neither Jenny's nor the workers would incur significant liability upon discharge or termination is simply the nature of the short-term, unskilled tasks involved, not an indication that the worker is an employee.

E. Two Recognized Additional Factors Favoring Independent Contractor Status That The Tribunal Simply Ignored

Appellant argued for application of two other factors below, as recognized in *Community for Creative Non-Violence*, 490 U. S. at 751 - 752, 109 S. Ct. at 2178 - 2179 and *Frick v. Williams*, 992 S.W.2d 375 (1999): 1) whether there is any provision for employee benefits by the company; and 2) the tax treatment of the hired party.

Mr. Schwartze agreed that there was no provision for employee benefits involved here, which militated toward a finding of independent contractor status. (Tr. 79). As for the tax treatment of the hired party, although Mr. Schwartze was not aware of whether or not the workers received W-2's or 1099's, he agreed that if they received 1099's would also militate toward being independent contractors. (Tr. 79 - 80).

Uncontroverted testimony from the workers demonstrates the workers did receive 1099s. The workers' income is reported on 1099's, Ms. Haggard testified, which they agree to in their contracts. (Tr. 100). Ms. Cruz testified she receives 1099's that she reports on her income tax returns. (Tr. 221). As for benefits, no benefits are provided

by the business, including workers compensation, vacation, 401K, or the like, Ms. Haggard testified. (Tr. 143 - 144). Ms. Cruz verified this, testifying that workers do not receive benefits, do not receive a 401K, do not receive workers compensation, do not receive bonuses, and do not receive overtime. (Tr. 197 - 198).

The Tribunal, while noting the "tax treatment" factor and finding the workers are furnished with Form 1099 (LF 10), included neither factor in its analysis. Inclusion of these factors further weighs in favor of independent contractor status.

In *Fritts v. Williams, supra,* the court not only examined these two additional factors, but found both of these factors indicated an independent contractor relationship. This Court made essentially the same determination of the same company, again reversing the Commission, in *Fritts v. Division of Employment Sec*., 11 S.W.3d 721, 725 (Mo.App. W.D. 1999), finding the reasoning of the Southern District dispositive.

F. The "Payment By Hour, Week, Month" Factor

As the Tribunal recognized, "Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor." (LF 20). Payment here is by the job, based on a flat percentage of the job, though paychecks for the jobs worked are distributed weekly. (L. F. 31; Tr. 190-191; 97-198). However, the tribunal found this factor to be neutral, because:

> "Payment is based on a percentage that each worker negotiates with Jenny's. Payments are made every Friday. However, the rate was set by

> the business, which collects the monies from its customers. This factor is neutral, as it balances between the way that workers are paid and the ultimate control as to what they are paid, which belongs to the business." (LF 20).

In other words, the Tribunal recognized that independent contractor status is to be judged on this factor based on whether payment is by the job (independent contractor) or by the time period worked (employee). (See LF 20). It then determined payment here was by the job, which supports independent contractor status. However, the Tribunal then went *beyond the appropriate analysis* in examining who set the rate, which is **not part of this factor's analysis**.

Even were this a part of this factor's analysis, however, the Tribunal was simply wrong as to who ultimately sets the rate. The worker, not Jenny's, sets the price at which they will clean a home, as to the extent the price is inadequate, they may reject the job. (L. F. 31). Even as to each individual job, Ms. Haggard testified sometimes a customer will tell her what they will pay and *several independent contractors have bid jobs in the past*. (Tr. 94).

Thus, the Commission erred in affirming the Tribunal as to this factor as well.

IV. The Commission Erred In Affirming The Division, Because The Hearing Officer Impermissibly Acted As Both Counsel For The Division And Judge, In That She Attempted To Establish Proof Supporting The Division's Position By Questioning Witnesses, Sought The Admission Of Documentary

Evidence, Then Overruled Objections To The Evidence, And Demonstrated Bias In Ignoring Admissions And Other Uncontroverted Evidence.

A. Standard of Review

"Administrative proceedings should be conducted in accordance with fundamental principles of justice and fairness," the Court stated in *Scheble v. Missouri Clean Water Commission*, 734 S.W.2d 541, 561 (Mo.App. E.D. 1987). "Such principles require that all parties receive a fair hearing before the administrative tribunal. A fair hearing . . . is "[o]ne in which authority is fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law." [Citation omitted]." The fair hearing requirement is "not satisfied unless the hearing is conducted by an impartial officer, free of bias, hostility, and prejudgment." *Id.*

B. The Hearing Officer Impermissibly Acted To Establish Proof To Support The Division's Position.

A "hearing examiner is free to and should interrupt witnesses on occasions when necessary to clarify testimony or understand an exhibit. However, he must be impartial

and **care must be given <u>not to attempt to establish proof</u> to support the position of any party** to the controversy." *Scheble v. Missouri Clean Water Commission*, 734 S.W.2d 541 (Mo.App. E.D. 1987). (Emphasis added). In *Scheble*, the Court found the hearing officer "came close to crossing the line" (*Id*. at 563), based on the following discussion:

> "Hearing Commissioner: Mr. Lind, I want to ask you on the record, did you receive these items [samples collected by Zeman] on September 1, 1982 at 3:30 P.M.?
>
> MR. LIND: Yes, I did.

Mr. Hammon, the attorney representing the Schebles, interposed the following objection.

> MR. HAMMON: I would like to object to the fact that the Hearing Officer is required to put into evidence to make this Exhibit admissible under the law, and I think it's improper for the Hearing Officer to be required to do that when it's the state's burden to prove its case rather than have the assistance of the Hearing Officer.

The hearing commissioner responded:

> I'm not giving any assistance at all. I want to be able to make a ruling on the objections that you all have made, and that is the purpose of my questioning.

> And I do think that a Hearing Officer or a Judge or anyone has the authority under Missouri law to ask questions of witnesses. Hearing no further objections to Exhibit 70, I'm going to allow its admission on the further condition that, if any of the parties wish to examine Mr. Lind as with respect to this Exhibit, they may feel free to call him in their case. But Mr. Zeman has already been examined on it." *Id*. at 562-563.

Although the Court found the hearing officer's remarks "improper and regrettable," it found no error, because the exhibit at issue was "fully admissible apart from the question asked" by the hearing officer. *Id.* at 563.

The Tribunal here, however, completely crossed the line, repeatedly acting to establish proof to support the position of the State, essentially acting as both counsel for the Division and judge. First, she asked questions directed at the factors involved, then allowed defense counsel to ask "anything that I did not cover." (Tr. 7, 10, 92 - 93). Then she introduced documentary evidence and ruled on the admissibility of the documents, each time overruling any objection. (Tr. 11 - 12, 15-23, 24-28).

For example, she identified Exhibit No. 1 in case E-113-05. (Tr. 11 - 12). Plaintiff's counsel had never been supplied with the documents (Tr. 12) and, therefore, objected to admission of the document on that basis. (Tr. 15). Counsel also objected to Pages 5 and 6 as lacking foundation and not being authenticated (hearsay). (Tr. 15 - 16). The appeals referee, however, overruled the objections. (Tr. 16).

Likewise, the appeals referee had 92 pages of other documents marked for identification and asked Mr. Schwartze to identify them for the record. (Tr. 16 - 21).

Appellant objected to admission of the documents because they lacked foundation and were not authenticated (Tr. 22), but the referee again overruled the objection, stating that hearsay was admissible and the objection went to "the weight rather than to the admissibility of the documents." (Tr. 23).

This process occurred again with regard to another 87 pages of exhibits. (Tr. 24 - 28). Appellant made the same objections and the Referee provided the same response, overruling the objections. (Tr. 28). As for the foundation for the documents, the State admitted that it did not know if the statements by Ms. Benderman, who worked less than 11 days, were true. (Tr. 42-43). These documents constituted the entirety of the Division's evidence. (Tr. 28).

Under these circumstances, the hearing officer was not acting impartially, but as an advocate, questioning the witnesses and introducing evidence. Nor was the hearing officer exercising care so as "not to attempt to establish proof to support the position of any party to the controversy," where the only proof was admitted by the hearing officer and all objections to admission were overruled by the hearing officer.

Admittedly, in a different context, the court in *Shephard v. South Harrison R-II School Dist.*, 718 S.W.2d 195, 199 (Mo.App. W.D. 1986), stated:

> "[U]nder the statutory scheme providing for termination hearings the Board and its representatives will be involved both in prosecuting and judging cases. This combination of roles has been held not to result in a denial of fair trial unless the Board is prejudiced, so that it has

> predetermined to reach a particular result no matter what the evidence. [Citation omitted]. The record in this case does not reveal any predetermination by the Board to disregard the evidence."

To the extent this logic applies in the instant case, the record here does reveal a predetermination by the Tribunal and Commission to disregard the evidence. As previously demonstrated, the Tribunal admitted hearsay, ignored the two additional factors raised by Appellant and, most importantly, ignored uncontroverted admissions by the Division that each of the factors involved militated toward a finding of independent contractor status. Under these circumstances, a predetermination to disregard the evidence is amply demonstrated.

V. The Commission Erred In Affirming The Division, Because The Division Acted Without Or In Excess Of Its Powers In Allowing A Non-Attorney To Represent The Division, Which Constituted The Unauthorized Practice Of Law, In That The Non-Attorney Represented The Division, Was Given The Opportunity To And Did Ask Questions Of Witnesses, And Made A Closing Statement On Behalf Of The Division.

A. Standard of Review

This court may modify, reverse, remand for rehearing, or set aside the decision of the Commission upon the ground that the commission acted "without or in excess of its powers." Sec. 288.210 RSMo. When the facts are undisputed, the case involves primarily the application of the law to facts, and the court of appeals gives no deference to the Labor and Industrial Relations Commission, even if the significance of facts can be viewed in different ways. In such cases, review is de novo. *Stover Delivery Sys., Inc. v. Div. of Employment Sec*., 11 S.W.3d 685, 688 (Mo.App.1999).

B. Mr. Schwartze, A Non-Attorney, Represented The Division.

Mr. Schwartze is a "Contribution Supervisor 3," not an attorney. (Tr. 11, 41). Yet he represented the Division in the proceedings before the Tribunal. No attorney for the Division was present for the proceedings. (Tr. 2, 5). As the hearing officer stated, Mr. Schwartze was "participating for the Division of Employment Security." (Tr. 5). Although, as discussed previously, the hearing officer asked most of the questions on behalf of the Division, Mr. Schwartze was given the opportunity to and did ask questions of the witnesses on behalf of the Division. (Tr. 183-184, 230, 271, 276). Moreover, he was given the opportunity to and did make a final statement on behalf of the Division. (Tr. 277).

Mr. Schwartze was the Division's counsel. This, Appellant believes, was impermissible, which the hearing officer should have recognized and consequently dismissed the case.

C. Missouri Law Regarding The Unauthorized Practice Of Law.

It is the responsibility of the judiciary to determine what constitutes the practice of law, both authorized and unauthorized. *Division of Employment Sec. v. Westerhold*, 950 S.W.2d 618, 620 (Mo.App. E.D. 1997). The legislature may assist the Supreme Court by providing penalties for the unauthorized practice of law, but the legislature can in no way hinder, interfere or frustrate the Supreme Court's inherent power to regulate the practice of law. *Id.*

The "practice of law" is defined in Sec. 484.010 RSMo as:

> ". . . appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies." (Emphasis added).

This definition corresponds closely with the Missouri Supreme Court's definition, as stated in *Reed v. Labor and Indus. Relations Comm'n*, 789 S.W.2d 19, 21 (Mo. banc 1990) (quoting *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977, 982 (1937). Under the definition, Missouri courts have held that appearing on behalf of a person or corporation at a hearing amounts to the practice of law. *Strong v. Gilster Mary Lee Corp.*, 23

S.W.3d 234, 239 (Mo.App. E.D. 2000). Similarly, Mr. Schwartze's appearance on behalf of the Division of Employment Security should be deemed the practice of law, as he appeared "as an advocate in a representative capacity" at the hearing.

Just as a layman may not represent another, and a corporation may not represent itself (*Strong v. Gilster Mary Lee Corp.,* 23 S.W.3d 234 (Mo.App. E.D. 2000)), the Division here could act only through licensed attorneys. Mr. Schwartze, a non-attorney, should not have been allowed to represent the Division in this case.

Admittedly, in *Westerhold, supra*, the court ruled that a Division of Employment Security employee who drafted a "Certificate of Assessment" and a request for garnishment was not engaging in the unauthorized practice of law, because these acts "did not require any special legal skill or knowledge." 950 S.W.2d at 621. However, the acts of representing a party, questioning witnesses and making a closing statement, as Mr. Schwartze did here, do require special legal skills. To hold otherwise would be to state to the world that the skills of trial attorneys do not meet the definition of "special legal skill or knowledge."

D. The Hearing Officer Should Have Dismissed The Case.

The unauthorized practice of law is not subject to waiver, consent or lack of objection by the victim. *Bray v. Brooks*, 41 S.W.3d 7, 13 (Mo.App. W.D. 2001).

"The normal effect of a representative's unauthorized practice of law is to dismiss the cause or treat the particular action taken by the representative as a nullity." *Schenberg v. Bitzmart, Inc*., 178 S.W.3d 543, 544 (Mo.App. E.D. 2005). [Citations omitted]. Thus, the hearing officer should have dismissed the cause, but, as that did not occur, this Court should declare the particular action taken a nullity.

CONCLUSION

For all the above and forgoing reasons, Appellant prays this Court reverse the ruling of the Commission and find the workers concerned were independent contractors and not employees.

WALLACE, SAUNDERS, AUSTIN,
BROWN & ENOCHS, CHARTERED

By_____
Joel I. Krieger, MO #50706
James L. MowBray MO #53228
2300 Main Street, Suite 900

Kansas City, MO 64108
913-888-1000; FAX: 913-888-1065

ATTORNEYS FOR DEFENDANT

I hereby certify that a copy of the
above and foregoing brief, as well as a disk
containing an exact copy of the brief,
was mailed this _____ day of June, 2006 to:

Cynthia A. Quetsch
Department of Labor and Industrial Relations
Division of Employment Security
421 East Dunklin Street
Jefferson City, MO 65101

_____
Joel I. Krieger
James L. MowBray
For the Firm

CERTIFICATION
AS TO WORD COUNT, VIRUS SCAN AND THAT DISK IS VIRUS FREE

Pursuant to Rule 84.06, Defendant/Appellant hereby certifies that the word count herein, as calculated by the word count system employed, is 12,928 words and does not exceed the 31,000 word limit provided by the rule. Additionally, Defendant/Appellant certifies that the disks submitted to the Court have been scanned for viruses and are virus-free.

_____

Joel I. Krieger
James L. MowBray
For the Firm