
No. SC94464

In the

Supreme Court of Missouri

GATEWAY TAXI MANAGEMENT,

Appellant,

v.

MISSOURI DIVISION OF EMPLOYMENT SECURITY,

Respondent.

Appeal from the Missouri Labor and Industrial Relations Commission

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APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant appeals a Decision issued by the Missouri Labor and Industrial Relations Commission issued on August 22, 2013. Appellant timely filed its Notice of Appeal with the Commission within twenty (20) days after the Decision was issued. On July 29, 2014, the Missouri Court of Appeals, Western District, issued its Opinion in Appeal Number WD76886 which reversed the decision of the Missouri Labor and Industrial Relations Commission. On November 25, 2014, this Court sustained Respondent Missouri Division of Employment Security's application for transfer, and ordered the cause transferred to this Court.

Consequently, this Court has jurisdiction over this Appeal pursuant to Article V, Section 10 of the Missouri Constitution and Rule 83.04 of the Missouri Rules of Civil Procedure.

STATEMENT OF FACTS

A. Procedural history

A deputy of the Division of Employment Security ("Division") determined that beginning January 1, 2009, that certain taxicab drivers for Laclede Cab performed services for wages in employment. L.F. 001. Laclede Cab timely appealed and a hearing was held before Referee James Vezeau on August 27, 2012. L.F. 035-036. On October 9, 2012, Referee Vezeau reversed the deputy's determination and concluded that the taxicab drivers were independent contractors. L.F. 037-043. The Division then timely appealed to the Labor & Industrial Relations Commission ("Commission") in accordance with R.S.Mo. § 288.200. L.F. 044-046.

On August 22, 2013, the Commission reversed the decision of Referee Vezeau and found that the taxicab drivers were employees pursuant to R.S.Mo. § 288.034.5. L.F. 047-057. However, Member Avery, Jr. issued a dissenting opinion in which he found that the taxicab drivers were independent contractors because the facts did not show that Laclede Cab exercised pervasive control that significantly exceeded the control imposed by the Metropolitan Taxicab Commission Vehicle for Hire Code. L.F. 057. Laclede Cab then timely filed an appeal of the Commission's decision. L.F. 058-060.

B. Factual overview

Appellant Gateway Taxi Management does business as Laclede Cab. T.R. 008. Throughout the testimony before the Division Appellant was referred to as Laclede Cab. T.R. 008. Accordingly, to be consistent with cited testimony, Appellant will similarly refer to Laclede Cab throughout this Brief, as opposed to Gateway Taxi Management d/b/a Laclede Cab.

Three (3) key witnesses testified before the appeals tribunal: Laclede Cab's Chief Executive Officer, Mr. David McNutt, and two (2) former Laclede Cab taxicab drivers, Gregory Parent and Mario Berry, who were called as witnesses *by the Division*. However, despite their divergent legal interests, each of these witnesses' testimony was consistent on all material facts with regard to this appeal.

i. Testimony of David McNutt: Laclede Cab's CEO

Mr. David McNutt is Laclede Cab's Chief Executive Officer, and has worked for Laclede Cab for twenty (20) years. T.R. 041. Mr. McNutt has owned Laclede Cab since 1996 after purchasing the company from bankruptcy. T.R. 042. Laclede Cab is in the business of leasing taxicabs to drivers, and operating a dispatch system to assist the drivers in obtaining fares. T.R. 041-042.

Laclede Cab is regulated by the Metropolitan St. Louis Taxicab Commission ("Taxicab Commission"), and its Vehicle for Hire Code. T.R. 042-043, and Exhibit A-1 thereto (T.R. 0148-0220). Previously the City of St. Louis and St. Louis County separately regulated taxicab drivers, but in 2002 the Missouri General Assembly enacted

Legislation, R.S.Mo. § 67.1800 – 67.1822 which authorized the creation of the Taxicab Commission.

The Taxicab Commission was created in order to create a uniform system of regulations in St. Louis City and County. R.S.Mo. § 67.1812 ("In promulgating the taxicab code, the commission shall seek, to the extent reasonably practical, to preserve within the code provisions similar to those contained in chapter 8.98 of the city's municipal ordinance and chapter 806 of the county ordinances, both relating to taxicab issues such as licensing, regulation, inspection, and enforcement while avoiding unnecessary overlaps or inconsistencies between the ordinances."); T.R. 042-043. Specifically, the Missouri General Assembly empowered the Taxicab Commission to:

> Adopt a taxicab code to license and regulate taxicab companies and individual taxicabs within the district consistent with existing ordinances, and to provide for the enforcement of such code for the purpose of improving the quality of taxicab service within the district.

R.S.Mo. § 67.1808(8).

In general, the Taxicab Commission increased the level of regulation on taxicab companies and taxicab drivers from what previously existed, in an effort to improve the level of taxicab service to customers in the Metropolitan St. Louis area. T.R. 043.

Laclede Cab was required to obtain a Certificate of Convenience and Necessity ("CCN") from the Taxicab Commission, and each driver that operates under Laclede Cab's CCN is also required to be separately licensed by the Taxicab Commission. T.R. 044-046; 050.

In order to obtain a driver's license from the Taxicab Commission, each driver must comply with the following requirements:

- Be at least eighteen (18) years of age;
- Be able to speak and understand directions in the English language;
- Be able to read and understand maps of the St. Louis metropolitan area;
- Possess a valid Class E chauffeur's license;
- Provide a statement from a licensed physician that the taxicab driver is physically capable of safely operating a taxicab, and providing reasonable assistance to disabled, elderly, or frail passengers;
- Provide a driver record report from the Missouri Department of Revenue; and
- Pass an annual drug test.

T.R. 171-172 - § 401B.

The taxicab drivers bear the cost of the physical, drug test, etc.; they are not paid for, or reimbursed by, Laclede Cab. T.R. 066-067.

* * * *

The means and manner by which the taxicab driver performs his or her job is dictated by the Vehicle for Hire Code promulgated by the Taxicab Commission. For instance, the Vehicle for Hire Code requires taxicab drivers to "use the most direct route to the passenger's destination or at the passenger's option, a route of their choosing." T.R. 052-053, and Ex. A-1 thereto at § 503O T.R. 177. The Vehicle for Hire Code also

imposes the following requirements on taxicab companies and drivers that operate within its jurisdiction:

- Imposes requirements on the physical appearance of the vehicles being operated as taxicabs (T.R. 045, and Ex. A-1 thereto at § 503 – T.R.177) (i.e. no offensive odors, trunk kept free of articles to allow for luggage storage, requires display of vehicle licenses and driver's licenses, etc.);
- Includes enforcement provisions in the event that a taxicab company or driver violates its provisions, and this includes the ability to issue citations/tickets (T.R. 045-046, and Ex. A-1 thereto at § 1101 – T.R. 195-199);
- Required taxicab drivers to wear black slacks, a solid white button up shirt, and black closed-toe shoes and socks (Ex. A-1 at § 504B – T.R. 178), and it is the taxicab driver's responsibility to obtain these items; they are not provided by Laclede Cab (T.R. 065);
- Prohibits taxicab drivers from sleeping in their vehicles (Ex. A-1 at § 504C – T.R. 178);
- Prohibits taxicab drivers from using mobile phones while customers are present, or while their vehicle is moving or otherwise on a public thoroughfare (Ex. A-1 at § 504D – T.R. 178);
- Prohibits taxicab drivers from using scanners or radar detectors (Ex. A-1 at § 504G – T.R. 179);

- Prohibits taxicab drivers from being a distance greater than ten (10) feet away from their taxicab while on duty and parked, except in emergencies (Ex. A-1 at § 504E – T.R. 179);
- Prohibits smoking in vehicles (Ex. A-1 at § 504H – T.R. 179);
- Requires taxicab drivers to allow passengers to (i) be accompanied by service animals, and (ii) to transport small animals when the animal is enclosed in a box or cage designed for holding such animal and capable of being held on the passenger's lap (Ex. A-1 at § 505 T.R. 180); and
- Requires taxicab drivers to accept credit cards as a form of payment (T.R. 049, and Ex. A-1 thereto at § 501M – T.R. 176).

Licenses issued by the Taxicab Commission are non-transferable, which effectively precludes a taxicab driver from subcontracting his duties to another driver. Ex. A-1 at § 401A – T.R. 171. The Taxicab Commission also only issues drivers' licenses for a specific CCN holder, which likewise effectively precludes a taxicab driver from driving for more than one company. Ex. A-1 at § 401A – T.R. 171.

* * * *

Laclede Cab's taxicab drivers sign an Independent Contractor Agreement which clearly states that they are independent contractors. T.R. 050, T.R. 310-311("It is intended by the parties that the status of Driver is solely that of an independent contractor exercising the discretion and judgment of an independent contractor in the performance of his/her work. . . . The Driver understands that s/he is not an employee of Laclede for

the purposes of unemployment insurance laws or worker's compensation laws of the State of Missouri"). The Independent Contractor Agreement is terminable at will, provided the party terminating the Agreement provides the other with two weeks of advance notice. L.F. 313.

Laclede Cab's taxicab drivers pay the company a flat fee known as a "pro" which constitutes the fee that Laclede Cab charges the drivers as daily rent for its vehicles. T.R. 047-049. Laclede Cab leases approximately one hundred forty (140) vehicles for use as taxicabs. T.R. 047.

Taxicab drivers have two options regarding the amount of the daily pro. The first option is known an "open lease". This option allows the taxicab drivers to pay Laclede a flat fee (which is presently $82/day) for use of the taxicab twenty four (24) hours per day for six (6) days per week. T.R. 048.

Alternatively, the taxicab drivers can choose to lease a vehicle from Laclede Cab for only twelve (12) hours per day for six (6) days per week, and pay a lower daily lease rate for this reduced time period. T.R. 048. This kind of lease is generically referred to as a "shift lease".

In addition, a few of Laclede Cab's taxicab drivers own their own vehicles, and these individuals pay Laclede Cab a weekly fee of $295.00 in order to operate under its CCN. T.R. 048. This reduced amount reflects the lower overhead costs that Laclede Cab has when the driver owns the vehicle.

Laclede Cab does not pay its taxicab drivers for sick days, vacation days, holiday pay, etc, although the pro is reduced on holidays. T.R. 068. Laclede Cab provides

insurance on the taxicabs; drivers are not required to provide insurance for the vehicles. T.R. 081.

* * * *

The Vehicle for Hire Code requires Laclede Cab to "develop and implement a training program . . . [which] should deal with general street knowledge, basic customer service skills, and safety." T.R. 048, and Ex. A-1 thereto at § 211 – T.R. 165. Pursuant to this requirement, Laclede Cab requires the drivers to watch a training video and has a supervisor drive with them for a half-day before allowing them to operate a taxicab on their own. T.R. 048.

It is up to the taxicab driver's discretion as to whether to accept any given fare. T.R. 053. It is also the taxicab driver's discretion as to the hours they work. T.R. 053; 069, 311 ("The number of hours to be worked by Driver are to be determined at the sole discretion of Driver, and it is understood that Laclede does not require Driver to work any particular hours or any hours whatsoever. It is agreed that Laclede shall have no control over Driver's hours worked or scheduling."). In fact, so long as Laclede Cab receives its "pro", it doesn't make any difference to it if a taxicab driver chooses to not pick up any fares on a given day. T.R. 064. Mr. McNutt's testimony in this regard went as follows:

Q. . . . you indicated that during a shift or when he's out with his cab, he could choose not to pick up any fares?

A. That's correct.

Q. And as long as he pays the pro-forma does he satisfy his obligation to the company?

A. Yes.

Q. And the company would have provided him with a cab. Company has satisfied its obligation to him.

A. Correct.

. . . .

Q. Would it be fair to say that as long as the driver pays his pro and operates in compliance in terms of his conduct with the code that you don't really – or really care as to how they perform their job?

A. Yes, that's true.

T.R. 063-064; 069-070.

Each of Laclede Cab's taxicabs have a global positioning system, which allows the dispatcher to assign a request for a taxicab to the driver that is closest to the particular location. T.R. 053. The taxicab driver is free to accept or reject any dispatched call. T.R. 054; 067. If a taxicab driver rejects a dispatched call then the call is reassigned to the next closest driver. T.R. 054.

Laclede Cab's taxicab drivers are not required to keep track of any fares that they pick-up, maintain a log book, etc. T.R. 054-055, 312 ("The Driver is not required to report or account for the fares or other amounts collected by Driver to Laclede . . .").

* * * *

The taxicab drivers' income is the amount of revenue that he or she generates from customer fares less the pro, various expenses incurred while operating the vehicle (i.e. gasoline, car wash, etc.), and also less a 10% administrative fee that Laclede Cab charges

to its drivers for processing credit card transactions in the event that a customer does not pay their fare in cash. T.R. 047-049. Drivers did not have to use Laclede Cab to process credit card payments and could use a different company of their choosing. T.R. 064. For example, if a taxicab driver generates $100.00 in credit card charges during a given shift, Laclede Cab would deduct $10.00 for the administrative fee, and $82.00 for the pro, and provide the driver with $8.00 in cash. T.R. 049-050. Due to the way the relationship between Laclede Cab and its taxicab drivers is structured, Laclede Cab can be viewed as providing its drivers with "change" in exchange for the credit card receivables. T.R. 051; 059.

If customers pay the taxicab driver in cash, then the driver simply retains any such funds. T.R. 050.

However, if the taxicab driver does not generate sufficient revenue during a shift to cover the pro plus any expenses incurred, then he or she would have to utilize personal funds to cover the amount of Laclede Cab's pro; in other words, the taxicab driver would "lose" money on this shift. T.R. 051. Similarly, if a customer pays the taxicab driver with a bad check, or if an individual hops out of a taxicab without paying the fare, then these are the driver's responsibility. T.R. 064.

The taxicab drivers do not receive any compensation (i.e. wages) from Laclede Cab for services that the drivers render to the customers. T.R. 051; 059. Laclede Cab does not require its taxicab drivers to report the amount of revenue that they generate, and therefore has no idea whether a driver has made or lost money, or the amount of same. T.R. 058.

ii. The former drivers' testimony

Mr. Gregory Parent drove a taxicab for Laclede Cab for only two (2) weeks. T.R. 022. Mr. Parent chose to work as a "shift driver," which meant that he rented a vehicle from Laclede Cab for a twelve (12) hour period of time. T.R. 017. Mr. Parent paid a seventy five dollar ($75.00) fee to Laclede Cab for daily use of its vehicle, and he rented the vehicle from Laclede Cab for six (6) days per week. T.R. 011. Mr. Parent paid for the fuel that he used while operating the taxicab from his personal funds. T.R. 018.

Mr. Parent would retain any money that he generated in fares/tips on a given shift in excess of the amount he incurred for use of the cab and expenses associated therewith. T.R. 030 ("Q. If you had $100 in fares that day all cash, then you would pay your $75.00 pro-forma, and then you would receive – you would keep the difference. A. Yes, correct."). Mr. Parent corroborated Mr. McNutt's testimony that Laclede Cab did not pay him any money, other than simply providing "change" for the credit card fares that he received from customers:

Q. . . . The money that you would receive back from Laclede was simply change of your money, wasn't it?

A. It was money I collected, yes, from passengers, correct.

Q. Any other than the change you received back, Laclede didn't pay you any other money did it?

A. No.

TR. 031.

Upon entering into an Independent Contractor Agreement with Laclede Cab, Mr. Parent received, in his own words, a "minimal amount of training," which consisted of a few hours of classroom instruction and another individual riding in the taxicab with him for a day in order to show him how to use the credit card machine. T.R. 014-015. Laclede Cab did not require him to keep any logs of customers that he drove around town. T.R. 017.

Laclede Cab assisted Mr. Parent in locating fares by use of its dispatch system which would assign a fare to the driver that is closest to the customer. T.R. 026. However, Mr. Parent admitted that he was permitted to decline to respond to a dispatched call at his sole and complete discretion. T.R. 032-033 ("Q. You could have declined calls if you wanted too or simply not responded to the dispatch. A. Correct."), and T.R. 036 ("A. They told us we could reject them if we wanted to . . .").

Mr. Parent also admitted that Laclede Cab did not impose any restriction on his ability to pick up fares on his own without any assistance of the dispatcher. T.R. 026 ("Q. So you were not restricted to only going to dispatch fares, is that right? A. Correct.").

Mr. Parent testified that the means and manner by which he performed the details of his job were dictated by the Taxicab Commission, and not by Laclede Cab. T.R. 033 ("Q. Now in terms of the way in which you conducted yourself, the clothes that you wore, did you understand that that was all dictated by the Metropolitan Taxi Commission? A. Yes."). Mr. Parent paid the fee that the Taxicab Commission charges in order to issue licenses to drivers from his personal funds. T.R. 033. Mr. Parent

admittedly understood that the Taxicab Commission imposed the dress code that he was required to comply with (i.e. white shirt and black slacks), as opposed to being required by Laclede Cab. T.R. 037.

* * * *

Mr. Mario Berry drove a taxicab for Laclede Cab from November 2011 - April 2012 (i.e. approximately 6-months). T.R. 093-094. Mr. Berry was what is referred to as an "open shift" driver, meaning that he paid a slightly higher fee to rent the taxicab, but in exchange he was permitted to keep the vehicle for twenty four (24) hours at a time (as opposed to only twelve (12) hours for a shift driver).

It was completely Mr. Berry's discretion as to how many hours he chose to operate the vehicle as a taxicab during this twenty four (24) hour period. T.R. 110; 116 ("Q. Within the independent contractor agreement on page 5, it indicates the number of hours to be worked by driver are to be determined at the sole discretion of the driver. That's what you did, correct? A. Yes."). Mr. Berry likewise testified that Laclede Cab provided him with a minimal amount of training. T.R. 100.

Importantly, Mr. Berry also admitted that he had discretion as to whether to provide transportation to customers. T.R. 101 (" . . . if you go into an area and it doesn't look right, you don't have to take every order. You know, you don't have to pick up everybody, if it doesn't look or feel right."), and T.R. 113 ("Q. In terms of safety for you, you had the right in your sole discretion that if you accepted a fare and you went some place that you didn't feel safe, you could turn around and not get the fare, correct? A. That's right. Q. And in fact even if you drove up and saw the person coming to your cab

and you felt unsafe for any reason you could reject that fare and leave? A. You could, yes.").

Mr. Berry also testified that he was able to take a vacation at a time of his choosing without penalty from Laclede Cab:

> Q. Okay, so let's say you were going to go on vacation in two weeks and you told them that. What happened to the pro charge for the time that you were away? . . . . You'd have to pay it anyway?
>
> A. No, you wouldn't.
>
> Q. Would not?
>
> A. You would not have to.

T.R. 104.

Mr. Berry likewise stated that Laclede Cab did not preclude him from providing services to non-dispatched customers. T.R. 106 ("Q. Were you able to pick up your own passengers that were not provided by the dispatch service? A. Uh, yeah.").

Mr. Berry also admitted that he used the taxicab for personal reasons, such as to transport friends or family members free of charge. T.R. 106-107 ("A. . . . also sometimes I would use, uh, like friends or family members, sometimes I would take them places too. . . . Q. Now, if you were picking up a friend or a family did you have to alert dispatch that you weren't available? A. Oh no. You didn't have to."), and T.R. 111 ("Q. In fact if you were picking up family members to take them someplace as a favor to them you may be in the area but you had every right in your own discretion to reject that fare? A. Yes. Q. So you could take your family to where they wanted to go. A. Yes.").

Due to the compensation structure between himself and Laclede Cab, Mr. Berry viewed himself as operating his own business. T.R. 115 ("Q. And you sort of looked at this as that was your own little business that you were running within that cab. A. Yes."). Indeed, Mr. Berry testified as to the entrepreneurial nature of his relationship with Laclede Cab as follows:

> Q. . . . . The relationship that you had with Laclede is that you basically could make as much money as you could during a particular day based upon the number of fares that you picked up?
>
> A. Yes.

TR 109.

POINTS RELIED UPON

POINT RELIED ON I: THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN FINDING THAT FARES PAID BY CUSTOMERS TO LACLEDE CAB'S TAXICAB DRIVERS WERE SUBJECT TO THE UNEMPLOYMENT TAX BECAUSE R.S.Mo. § 288.090.2 EXPRESSLY LIMITS THE AMOUNT THAT EMPLOYERS ARE REQUIRED TO CONTRIBUTE TO THE UNEMPLOYMENT COMPENSATION FUND TO WAGES PAID *BY EMPLOYERS* IN THAT THE UNDISPUTED TESTIMONY ESTABLISHES THAT THE REVENUE AT ISSUE IN THIS CASE WAS PAID BY THE TAXICAB CUSTOMERS TO THE TAXICAB DRIVERS, AND WAS NOT WAGES PAID BY LACLEDE CAB

Cases and other authority relied on by Appellant:

R.S.Mo. § 288.090

Plaza 3 Restaurant Corp. v. Labor and Indus. Relations Com'n, 703 S.W.2d 510, 514 (Mo. App. 1985)

POINT RELIED ON II: THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN FINDING THAT THE TAXICAB DRIVERS ARE EMPLOYEES BECAUSE THE FACTS COMPEL A FINDING THAT THEY ARE INDEPENDENT CONTRACTORS IN THAT LACLEDE CAB DOES NOT RETAIN THE RIGHT TO CONTROL THE MANNER AND MEANS BY WHICH THEY PERFORM THEIR JOBS BECAUSE IT DOES NOT EXERCISE PERVASIVE CONTROL EXCEEDING TO A SIGNIFICANT DEGREE THE SCOPE OF CONTROL IMPOSED BY THE METROPOLATIN TAXICAB COMMISSION VEHICLE FOR HIRE CODE.

Cases and other authority relied on by Appellant:

Travelers Equities Sales, Inc. v. Division of Employment Security, 927 S.W.2d 912 (Mo. App. W.D. 1996)

NLRB v. Associated Diamond Cabs, Inc., 702 F.2d 912 (11th Cir. 1983)

Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366 (D.C. Cir. 1983)

ARGUMENT

POINT RELIED ON I: THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN FINDING THAT FARES PAID BY CUSTOMERS TO LACLEDE CAB'S TAXICAB DRIVERS WERE SUBJECT TO THE UNEMPLOYMENT TAX BECAUSE R.S.Mo. § 288.090.2 EXPRESSLY LIMITS THE AMOUNT THAT EMPLOYERS ARE REQUIRED TO CONTRIBUTE TO THE UNEMPLOYMENT COMPENSATION FUND TO WAGES PAID *BY EMPLOYERS* IN THAT THE UNDISPUTED TESTIMONY ESTABLISHES THAT THE REVENUE AT ISSUE IN THIS CASE WAS PAID BY THE TAXICAB CUSTOMERS TO THE TAXICAB DRIVERS, AND WAS NOT WAGES PAID BY LACLEDE CAB

A. Standard of review

Under R.S.Mo. § 288.210, the scope of judicial review of the Commission's decision is limited to whether it:

(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.

However, a reviewing court makes its own conclusions of law from the Commission's findings. *Travelers Equities Sales v. Div. of Emp. Sec.*, 927 S.W.2d 912, 917 (Mo. App. W.D. 1996).

B. Legal argument

It is the cardinal rule of statutory interpretation that where the language is plain and admits of but one meaning, there is no room for construction. *L&R Dist. Co. v. Missouri Dept. of Revenue*, 648 S.W.2d 91, 95 (Mo. 1983). Moreover, tax laws are to be strictly construed against the taxing authority. *Id*.

Section 288.090 R.S.Mo. expressly provides that the amount that employers are required to contribute to the unemployment compensation fund is limited to ***wages*** paid ***by employers***. As a result, unemployment tax withholding is only applicable where an employee receives wages that are paid by the employer. As discussed in detail below, that is not the case here. The evidence established that the public, not Laclede Cab, receives the service provided by taxi drivers and accordingly the public, not Laclede Cab, pays the taxi driver for that service. Payment to the taxi driver comes directly from the public for services rendered directly to the public. No wages are paid by Laclede Cab to drivers. There is no evidence in the record that demonstrates that any money distributed to the drivers by Laclede Cab is in any way correlated to the hours worked or the services the drivers provided.

Moreover, the evidence was undisputed that drivers own all of the fares they receive, and that their fares are not shared with Laclede Cab. The testimony was consistent and unrefuted that Laclede does not receive a portion of the fares and drivers are not even required report to Laclede Cab the amount of fares they generate while operating the cab. A driver can make a $1,000.00 in fares during a shift or can make zero dollars in fares during a shift. Laclede Cab does not know, nor does it ultimately care.

The driver has no obligation to provide Laclede Cab with any information regarding the fares the driver generates. With the exception of administrative fees which are charged to the driver for credit card processing by Laclede Cab, the fares paid to the driver by the public are wholly unrelated to payments that occur by and between Laclede and the drivers. In short, the facts establish that a driver's compensation is entirely independent of Laclede Cab. Drivers are paid by the public for services rendered to the public. No "wages" are paid by Laclede Cab as is borne out by the evidence. Accordingly, unemployment tax is not applicable in the context presented.

In attempting to collect unemployment tax from Laclede Cab, the Commission erroneously focused on the only distribution of money from Laclede to its drivers, the payment of "change" resulting from vouchers and the processing of fares that were paid using credit cards. The foregoing is the only money reflected in a "cash out column" on Laclede Cab's reports. As previously noted, payment of "change" to the driver occurs when the amount of the voucher and credit card payments exceed the daily "pro" that the drivers were required to pay to operate a Laclede Cab taxi. In such a situation, Laclede Cab processes the vouchers and credit card payments, deducts a ten percent (10%) administrative fee, further deducts the daily "pro", and issues payment or "change" to the driver for the remainder. Further, the testimony was that drivers were free to use companies other than Laclede Cab to process credit card payments. Accordingly, if a driver receives credit card payments for fares that exceed the "pro" after the credit card processing administrative fees are deducted, the driver is issued a payment for that amount. This money is simply not a "wage" paid by Laclede Cab to the driver. The

amount paid has absolutely no correlation to the service provided by the driver or the hours worked. Instead, it consists only of processing and payment of fares paid using vouchers or credit cards. The Commission's attempt to treat such payments as "wages" mischaracterizes the facts and context of these payments, and produces illogical results.

The following simple example illustrates the illogical results that occur under the Commission's position. Drivers A, B and C are all "open lease" drivers that drive their cabs for a full 24 hour shift and are subject to a daily "pro" of $82.00. Driver A receives $500.00 in fares from the public during his shift all of which are paid in cash. Drivers B and C similarly receive $500.00 in fares from the public during their shifts, however, those fares are all paid using credit cards. Driver B elects to use a third party for credit card processing of his fares. Driver C, however, uses Laclede Cab for credit card processing of his fares.

Driver A would owe Laclede Cab $82.00 for his "pro." Laclede Cab would never know the amount of money earned by Driver A during the shift since he was paid in cash. Likewise, Driver B would owe Laclede Cab $82.00 for his "pro" and Laclede Cab would never know the amount of money earned by Driver B during the shift since Driver B elected to use a different company for credit card processing. Driver C, however, who elected to use Laclede Cab to process credit card payments, would receive "change" from Laclede Cab. Specifically, Driver C would receive a payment of $368.00 from Laclede Cab, calculated as the $500.00 in fares paid via credit card, less the 10% administrative fee for credit card processing ($50.00), less his "pro" ($82.00).

Despite the fact that the three drivers were all Laclede Cab drivers, all three performed the same services during the same time period and all three were paid the same amount by the same general public, under the Commission's position Drivers A and B received no "wages," yet Driver C is deemed to have received "wages" of $368.00, i.e. the "change" he received from Laclede Cab. Stated differently, Driver C is being deemed to have received "wages" solely by virtue of the fact that his fares were paid by credit cards and he then elected to process those fares using Laclede Cab.

This example demonstrates the flawed logic of the Commission's interpretation, and the incongruous results it creates. The reality of the situation is that neither Driver A, B or C is paid "wages" by Laclede Cab – all three drivers are paid by the public for services rendered to the public. Those fares are owned by the driver. Laclede Cab has no rights to them, does not share in them and makes no effort to even account for how much the driver made in fares. The fact that some fares are paid via credit cards and a driver elects to use Laclede Cab to process those credit card payments does not somehow convert those fares into a "wage" paid by Laclede Cab.

In analyzing the language of the statute, the most factually analogous case is *Plaza 3 Restaurant Corp. v. Labor and Indus. Relations Com'n*, 703 S.W.2d 510 (Mo. App. 1985) in which the issue presented was whether tips given by restaurant customers to waiters and waitresses were wages upon which the employer was required to pay employment taxes.

The *Plaza 3* court began its analysis by examining the plain language of the statute that required employers to make payments into the unemployment compensation fund –

R.S.Mo. § 288.090 – which provided as follows: "[e]ach employer shall pay contributions equal to two and seven-tenths percent of *wages paid by him* with respect to employment during each calendar year." *Id*. at 511 (emphasis added). The *Plaza 3* court focused on the phrase "wages paid by him" to conclude that tips did not fall within the scope of the statute. To wit:

> The statute [R.S.Mo. § 288.090] does not require contributions from employers on any wages except those paid by them. ***If compensation paid indirectly from other sources is to be included in the assessment of contributions and in the calculation of benefits, the subject must be addressed through an amendment of the statute by the legislature.***

Id. at 514. (emphasis added).

Despite the *Plaza 3* court's invitation to the Missouri General Assembly to alter its conclusion by virtue of a statutory amendment, it has failed to do so. Indeed, the present version of R.S.Mo. § 288.090.2 provides as follows:

> As of June thirtieth of each year, the division shall establish an average industry contribution rate for the next succeeding calendar year for each of the industrial classification divisions listed in the industrial classification system established by the federal government. The average industry contribution rate for each standard industrial classification division shall be computed by multiplying total *taxable wages paid* ***by each employer*** in the industrial classification division during the twelve consecutive months ending on June thirtieth by the employer's contribution rate established for

the next calendar year and dividing the aggregate product for all employers in the industrial classification division by the total of *taxable wages paid **by all employers*** in the industrial classification division during the twelve consecutive months ending on June thirtieth. Each employer will be assigned to an industrial classification code division as determined by the division in accordance with the definitions contained in the industrial classification system established by the federal government, and shall pay contributions at the average industry rate established for the preceding calendar year for the industrial classification division to which it is assigned or two and seven-tenths percent of taxable *wages paid **by it***, whichever is the greater, unless there have been at least twelve consecutive calendar months immediately preceding the calculation date throughout which its account could have been charged with benefits. The division shall classify all employers meeting this chargeability requirement for each calendar year in accordance with their actual experience in the payment of contributions on their own behalf and with respect to benefits charged against their accounts, with a view to fixing such contribution rates as will reflect such experience. The division shall determine the contribution rate of each such employer in accordance with sections 288.113 to 288.126. Notwithstanding the provisions of this subsection, any employing unit which becomes an employer pursuant to the provisions of subsection 7 or 8 of section 288.034 shall pay contributions equal to one percent of *wages*

> *paid **by it*** until its account has been chargeable with benefits for the period of time sufficient to enable it to qualify for a computed rate on the same basis as other employers.

R.S.Mo. § 288.090.2 (Emphasis added).

The plain language of R.S.Mo. § 288.090.2 expressly limits the amount that employers are required to contribute to the unemployment compensation fund to wages paid *by employers*, not third parties such as taxicab passengers. The undisputed testimony before the Commission established that the fares paid to the taxicab drivers were plainly not paid by Laclede Cab; rather, the fares were paid directly to the taxicab drivers by the customers. Further, those fares are not shared or split with Laclede Cab. The holding of *Plaza 3* case is applicable to the present situation and the same result is appropriate herein. As the court in *Plaza 3* held, if compensation paid indirectly from other sources -- i.e. taxi fares -- is to be included in the assessment of contributions and in the calculation of benefits, the subject must be addressed through an amendment of the statute by the legislature. No statutory language exists to support the Commission's argument that taxi fares paid by the general public to the driver should be treated as wages for purposes of unemployment taxes.

Laclede Cab notes that the Missouri Legislature subsequently reversed the *Plaza 3* holding by amending the definition of "wages" in R.S.Mo. § 288.036.1, which now provides that "[g]ratuities, including tips received from persons other than the employing unit, shall be, for purposes of this chapter, treated as having been paid by the employing unit." However, this amendment does not have any impact on the present case because

the Division is seeking to recover unemployment taxes from Laclede Cab for the "change" that it provided to the taxicab drivers (i.e. the amount of the credit card and vouchers that exceeded the "pro" that the drivers were required to pay to Laclede Cab) as reflected in the "cash out column" of the company's records. TR 124-125 (testimony of Renee Rodrique, auditor for the Division of Employment Security) ("Um, I was given daily records from the employer, um, and I picked up – there was a cash out column, which showed what the driver walked away with each day as far as payment to the driver. . . .the drivers drove the cab, were required to pay, um, a daily fee to lease the cab, uh, from Gateway . . . they use their system as far as charge payments, um, and that if they didn't make enough in a particular day then they would have to pay the driver the – the pro fee, um, or if they made more than that they took that as their income for the day."). The auditor, Renee Rodrique, further provided the following additional testimony:

Q: Now, all you could really conclude from looking through the documents that you did is that there is simply money going from Laclede to these drivers, correct?

A: Exactly

* * *

Q: . . . From the standpoint of the information contained within Exhibit D-1 pages 3 through 72 [the cash-out columns of the company's records] –

A: Okay.

Q: All that depicts is money that you saw go from the company to the driver, correct?

A: Yes.

Q: You don't know if fact if it represents a wage of any type, correct?

A: A wage? Its a payment, whether or not it's a wage it didn't every [sic] call it a wage on the paperwork, no. It was a- - a cash out is basically what it said.

Q: We've now heard from Mr. Parent, Mr. Berry and Mr. McNutt, who have told us, it's effectively change, correct?

A: No, this – it's still the same.

Q: You understand that it is the way the system works –

A: Oh chan - - I see, I thought you said change not changed. I thought you said changed.

Q: No. It's change.

A: Yes, yes.

Q: And it is not a wage, it is not a commission, it is change for this reconciliation of the pro-forma and the credit card.

A: Right, its a reconciliation, yes.

Q: And you would agree with me, based upon what you've heard and the evidence and what you've seen, is that it is not a wage?

A: It is a payment.

T.R. at 137-139. The Auditor's own testimony reflects that she equated all "cash out" that went to the driver due to credit card processing as "wages" subject to unemployment tax. This conclusion is counter to, and erroneous under, R.S.Mo. § 288.090.2

If the Missouri General Assembly is inclined to change the plain language of R.S.Mo. § 288.090.2 and remove the limitation on employer contributions to the unemployment fund beyond the wages paid *by employers* to employees, it is free to do so. Likewise, if the Missouri General Assembly is inclined to amend the definition of "wages" in R.S.Mo. § 288.036.1 to include fares that taxicab customers pay to taxicab drivers, it is also free to do so. However, it has not done so. Under the plain and unambiguous language of these statutes as presently written, there is an express limitation on employer contributions to the unemployment fund to wages paid *by it*. The undisputed facts before the Commission established that the revenue at issue in this case was paid by the taxicab customers, and this revenue is beyond the scope of R.S.Mo. § 288.090.2. This Court must enforce the statute as written.

POINT RELIED ON II: THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN FINDING THAT THE TAXICAB DRIVERS ARE EMPLOYEES BECAUSE THE FACTS COMPEL A FINDING THAT THEY ARE INDEPENDENT CONTRACTORS IN THAT LACLEDE CAB DOES NOT RETAIN THE RIGHT TO CONTROL THE MANNER AND MEANS BY WHICH THEY PERFORM THEIR JOBS BECAUSE IT DOES NOT EXERCISE PERVASIVE CONTROL EXCEEDING TO A SIGNIFICANT DEGREE THE SCOPE OF CONTROL IMPOSED BY THE METROPOLATIN TAXICAB COMMISSION VEHICLE FOR HIRE CODE.

A. Standard of review

Under R.S.Mo. § 288.210, the scope of judicial review of the Commission's decision is limited to whether it:

(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.

However, a reviewing court makes its own conclusions of law from the Commission's findings. *Travelers Equities Sales v. Div. of Emp. Sec.*, 927 S.W.2d 912, 917 (Mo. App. W.D. 1996).

B. Legal argument

As set forth more fully *supra*, Point I is dispositive. The "change" paid to drivers resulting from credit card processing for fares is not "wages" paid by Laclede Cab and it is therefore not necessary for the Court to reach a determination as to whether Laclede Cab's taxicab drivers were employees or independent contractors. In the alternative, however, the facts before the Commission established that Laclede Cab's taxicab drivers were not employees. The Opinion by the Western District Court of Appeals in this matter provided a detailed analysis of this issue and its conclusion that Laclede Cab's taxi drivers were independent contractors was correct under the law.

The determination of whether the taxicab drivers in this case are employees or independent contractors is determined by the following statute and regulation:

> 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 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.

R.S.Mo. § 288.034.5.

> In order to interpret section 288.034.5, R.S.Mo, effective June 30, 1989, the division shall apply the common law rules applicable in determining the employer-employee relationship under 26 U.S.C., Section 3306(i). In applying the provisions of 26 U.S.C., Section 3306(i) the division shall consider the case law, Internal Revenue Service regulations and Internal Revenue Service letter rulings interpreting and applying that subsection.

8 C.S.R. § 10-4.150.

In Revenue Ruling 87-41 the IRS identified twenty factors to consider in classifying an individual as an employee or independent contractor. Those factors are as follows:

> 1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising, and paying assistants; (6) continuing relationship; (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (10) order or sequence set; (11) oral or written reports; (12) payment by hour, week, month; (13) payment of business and/or traveling expenses; (14) furnishing of tools and materials; (15) significant investment; (16) realization of profit or loss; (17) working for more than one firm at a time; (18) making service available to general public; (19) right to discharge; and (20) right to terminate.

Nat'l Heritage Enters. v. Div. of Emp. Sec., 164 S.W.3d 160, 167 (Mo. App. W.D. 2005).

No single factor is conclusive, but some may be more important than others depending on the industry and context in which the services are performed. *Id*.

As reflected by the Opinion of the Western District Court of Appeals in this matter, applying the 20-factor test supports the conclusion that the taxi drivers were independent contractors. Moreover, two significant facts in this case strongly lead to the conclusion that Laclede Cab's taxicab drivers are independent contractors.

First, there is no evidence that Laclede Cab imposed pervasive control on the taxicab drivers beyond that imposed by the Metropolitan Taxicab Commission Vehicle for Hire Code (the "VHC"). Accordingly, because the taxicab drivers were free to perform their jobs in any manner in which they deemed fit, other than by complying with the VHC, Laclede Cab lacked the right to control the manner and means by which their results were to be accomplished. This is especially true where, as here, the industry has historically and logically included many independent contractors.

Second, because Laclede Cab has structured its rental arrangement with its drivers as a flat fee, it had no financial incentive to control the means and manner by which the taxicab drivers perform their jobs because it received the same amount of revenue from the taxicab drivers regardless of whether the taxicab drivers realized a profit or loss. Under these circumstances, there is a strong inference that the taxicab drivers are independent contractors.

The law is well-established that "reasonable efforts to ensure compliance with government regulations does not evidence control unless pervasive control by the employer exceeds to a significant degree the scope of the government imposed control." *K&D Auto Body, Inc. v. Division of Employment Security*, 171 S.W.3d 100 (Mo. App.

W.D. 2005)(finding no control imposed by employer on tow truck drivers beyond that imposed by the government).

For instance, in *Travelers Equities Sales, Inc. v. Division of Employment Security*, 927 S.W.2d 912 (Mo. App. W.D. 1996) the Court found that there was not any evidence of control over securities brokers that was imposed by their employer in addition to that imposed by NASD, SEC, and state law requirements. Accordingly, the *Travelers Equities Sales* court found that the brokers were independent contractors. In so doing, the *Travelers Equities Sales* court cited to *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 922 (11th Cir. 1983) for the proposition that reasonable efforts to insure compliance with government regulations do not evidence control unless *pervasive control* by the employer exceeds to a significant degree the scope of the government imposed control." *Id*. at 918 (emphasis added).

Notably, the *Associated Diamond Cabs* case involved taxicab drivers that were required to operate in compliance with municipal regulations that applied to taxicab drivers. The municipal regulations required the drivers to maintain daily "trip sheets" that recorded all trips made, their origin and destination, and the fares charged at the time of each trip. *Associated Diamond Cabs, Inc.*, 702 F.2d at 917. The regulations also required the drivers to obtain a license and to maintain the taxicabs so as to ensure that they do not interfere with passenger safety. *Id*. at 917-918. The issue in the *Associated Diamond Cabs* case was whether the taxicab drivers were independent contractors under the National Labor Relations Act, which applies the common law test that is very similar to the test to be applied in this case. *Id*. at 918.

The *Associated Diamond Cabs* court rejected the assertion that compliance with the government regulations was indicative of control by the employer. Indeed, "[g]overnment regulations constitute supervision not by the employer but by the state. . ." *Id*. at 922. Accordingly, because there was not any evidence of pervasive control imposed by the taxicab company that significantly exceeded the scope of the governmental imposed control, the *Associated Diamond Cabs* court found that the taxicab drivers were independent contractors. *Id.*

Similarly, there is simply no evidence in this case that Laclede Cab imposed any control, much less pervasive control, over the taxicab drivers over and above the level of regulation imposed by the Metropolitan Taxicab Commission's Vehicle for Hire Code.

Respondent has argued that *Higgins v. Missouri Div. of Emp. Sec.*, 167 S.W.3d 275 (Mo. App. W.D. 2005) is applicable to the case at bar. To the contrary, several points distinguish *Higgins* from the instant case. Several facts that indicate employee status were present in *Higgins*, are wholly absent from the Appellant's operations. For example, the owner in *Higgins* required drivers to check the cabs for oil and fluids at the beginning and end of each shift; if a driver needed to purchase gasoline for the cabs, the owner split the cost with the driver. *Id.* at 277. Additionally, the owner reimbursed drivers for minor repairs and the owner paid the insurance deductible in the event a driver damaged a cab in an accident. *Id.*

The most significantly distinguishable fact between *Higgins* and the present case, is the fact that the drivers in *Higgins* were required to maintain log sheets for each shift, including the fare amount, submit the sheets and pay a $3.00 fee to help pay for the logs.

Id. at 278. Further, the owner in *Higgins* received a substantial percentage of the driver's fares. *Id.* at 278 (drivers totaled up the gross fares received, subtracts the cost of gas purchased and fifty percent of the remaining balance went to Higgins). In addition to the required daily logs, inside each cab was a list of forty-one rules entitled "TAXI CAB DRIVERS RULES," which explicitly detailed how the drivers were to perform their duties. *Id.* at 285-86. These "Drivers Rules" were promulgated and implemented by the owner in *Higgins*. *Id.* None of the facts that indicated such a level of employer-control in *Higgins* are part of the equation in the case at bar. The arrangement and business model for Laclede Cab is entirely different. The evidence was undisputed that Laclede Cab was paid a flat rate "pro" by the driver for use of the cab, Laclede Cab did not require reporting of fares and Laclede Cab did not receive a portion of any fares obtained. Further, Laclede Cab's drivers were free to perform their jobs in any manner in which they deemed fit provided they complied with the VHC. *Higgins* is distinguishable from the facts before this Court.

In its Decision, the Commission purported to disregard any control imposed by the Vehicle for Hire Code in reaching its conclusion (L.F. 052), but then on several instances it relies on precisely the same governmental imposed requirements in justifying its Decision. To wit:

- Factor 1 – instructions – finding that "with respect to any drivers using their own vehicles, Gateway mandated that they paint and sign the exterior of the vehicle in conformity with the rest of its fleet ." L.F. 053. But see L.F. 175 (§ 501A of the Vehicle for Hire Code)("Evert airport taxicab . . . shall have printed, in colors

contrasting that of the vehicle surface to which affixed, on the outside of one (1) door on each side of such vehicle in letters at least two and one-half (2 1/2) inches high, permanently affixed to the door, the name of the vehicle license holder, the initial fare rate, in letters at least one (1) inch high, the rate graduations in 1/10th of a mile and the additional charge for extra passengers, if any, and the rate, if any, for return mileage from points beyond the geographical boundaries of the City and County.");

- Factor 2 – training – finding that "Gateway did train the drivers regarding use of the vouchers, credit card, and dispatching system." L.F. 053. But see L.F. 165 (§ 211 of the Vehicle for Hire Code requiring licensed taxicab companies to develop and implement a training program);[1]

[1] With regard to factor 9 - doing work on employer's premises - the Commission found that "the taxis were the property of Gateway (whether leased or licensed) and were an extension of Gateway. L.F. 054. However, this is directly contrary to the recent decision in *C.L.E.A.N, LLC v. Div. of Emp. Sec.*, 405 S.W.3d 613, 623-24 (Mo. App. 2013) in which the court noted that "if the particular nature of the business at issue requires the work to be performed off the employer's premises, the factor of whether work is performed on the employer's premises is inapplicable. Accordingly, because the nature of driving a taxicab necessarily requires the work to be performed away from Laclede Cab's premises, this factor is inapplicable.

- Factor 14 – furnishing of tools and materials – Despite its admonition that it was disregarding VHC provisions, the Commission expressly relied on the fact that "[t]he Code required that the vehicles not be too old and that they be well maintained. Logically, Gateway had an interest in trying to control how the drivers treated taxis, regardless of any Code requirements" in finding that this factor favored employee status. L.F. 054.
- Factor 17 – working for more than one firm at a time – Despite its admonition that it was disregarding VHC provisions, the Commission expressly relied on the fact that "[t]he Code did not allow the drivers to work for more than one cab company at a time. Thus, there is no way that the drivers could have been operating independently" in finding that this factor favored employee status. L.F. 055.
- Factor 18 –making services available to general public – Despite its admonition that it was disregarding VHC provisions, the Commission expressly relied on the fact that "[t]he drivers could not offer their services to the public at large. They had to be associated with a company like Gateway that had the proper certification from the MTC allowing operation as a cab company" in finding that this factor favored employee status. L.F. 055. But see L.F. 171 (§ 401A1 of the Vehicle for Hire Code requiring a MTC driver's license to be issued "to an individual for a specific CCN holder" such as Laclede Cab).

For all of these reasons, there is not any competent or substantial evidence that Laclede Cab imposed pervasive control on the taxicab drivers beyond that imposed by

the Metropolitan Taxicab Commission Vehicle for Hire Code. Accordingly, it's finding that the taxicab drivers were employees must be reversed.

Courts from other jurisdictions have held that there is a strong inference that a taxicab company does not exercise control over the means and manner in which the taxicab drivers perform their jobs where, as here, the drivers pay a fixed rental fee for use of the taxicab, regardless of his or her earnings on a particular day and retains all of the fares collected in excess of the rental fee without being required to account for this revenue in any manner to the taxicab company.

For instance, in *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983)[2] the Court determined that taxi drivers who leased their vehicles for periods ranging from 8-hours, 24-hours, a weekend, or an entire week in exchange for a flat lease fee were independent contractors. There was no requirement that drivers keep trip sheets or other accountings of their fares, and the lease fees were fixed and totally unrelated to the profits earned by the drivers.

In reaching its decision, the *Yellow Taxi* court focused primarily on the fact that the taxi lease fares were *unrelated to the profits earned by the drivers*, and, therefore, the company had "no financial incentive to exert control". The *Yellow Taxi* court concisely summarized its reasoning as follows:

[2] The *Yellow Taxi Co.* case also arose under the National Labor Relations Act, and it therefore applied the common law test to determine employee-independent contractor status.

> When a driver pays a fixed rental, regardless of his earnings on a particular day, and when he retains all the fares he collects without having to account to the company in any way, there is a ***strong inference that the cab company involved does not exert control over "the means and manner" of his performance***. This conclusion is justified because under such circumstances, ***the company simply would have no financial incentive to exert control over its drivers***, other than such as is necessary to immunize the proprietor of a cab from liability which arises from its operation by virtue of the lessor's ownership. However the driver conducts his occupation, the company has received its financial reward and the cab driver's self interest in the success of his venture and the municipal regulations are some assurance that the cab service will continue to be attractive to customers.

Id. at 879 (emphasis added).

Numerous other courts and administrative agencies have reached the identical conclusion under similar factual scenarios, including as recently as February 26, 2014, *Arena v. Delux Transportation Services, Inc.*, 12-cv-1718-LDW, 2014 U.S. Dist. LEXIS 24724 (E.D. NY 2014). See also *NLRB v. AAA Cab Services, Inc.*, 341 NLRB No. 57 at * 7 (2004)("In the context of the taxicab industry, the Board has given significant weight to two factors: the lack of any relationship between the company's compensation and the amount of fares collected, and the company's lack of control over the manner and means by which the drivers conducted business after leaving the company's garage.")(drivers

were independent contractors due to flat fee paid to company for use of taxicab, and significant governmental regulation of taxicab drivers); *EEOC v. North Knox School Corp.*, 154 F.3d 744 (7th Cir. 1998)(taxi drivers were independent contractors); *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996)(airport limousine driver was independent contractor); *Ace Cab Co.*, 273 NLRB No. 186 (1985)(drivers were independent contractors where they paid a flat daily fee for use of the taxicabs and retained all fares generated, and rules under which the drivers operated were dictated by governmental regulation); *Air Transit, Inc. v. NL*RB, 679 F.2d 1095 (4th Cir. 1982)(cab drivers who paid flat fee for the ability to participate in cab company's feed line of customers were independent contractors); *City Cab Co. of Orlando, Inc.*, 285 NLRB No. 81 (NLRB 1987)(cab drivers are independent contractors); *Local 777 v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978)(taxi drivers who leased cabs from company which imposed virtually no control over lessee drivers, where the drivers were not required to provide any revenue to the company, and where the company received the same amount of revenue irrespective of the amount received by the drivers, were independent contractors); *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354 (9th Cir. 1975)(taxi drivers independent contractors); *Goodman v. Allen Cab Co.*, 232 S.W.2d 535 (Mo. 1950)(noting that taxicab drivers that paid flat rental fee for daily lease of taxicab who were required to pay the full rental charge regardless of the amount taken in for fares, were not required to respond to dispatched calls, unless they desired to do so, and where the company maintained the cabs against ordinary wear and tear and also furnished oil, but the drivers paid for gasoline they used while renting the taxicab and were supposed to pay for all

damages to the cabs while in their possession were independent contractors under common law test).

The facts of the *Yellow Taxi Co.* case are materially indistinguishable from the facts of this case and the same result (i.e. a finding of independent contractor status) is appropriate herein. The Chief Executive Officer of Laclede Cab - Mr. Dave McNutt – testified that it makes no difference to the company how much or how little a driver makes on a given shift so long as Laclede Cab receives its "pro". To wit:

Q. . . . you indicated that during a shift or when he's out with his cab, he could choose not to pick up any fares?

A. That's correct.

Q. And as long as he pays the pro-forma does he satisfy his obligation to the company?

A. Yes.

Q. And the company would have provided him with a cab. Company has satisfied its obligation to him.

A. Correct.

. . . .

Q. Would it be fair to say that as long as the driver pays his pro and operates in compliance in terms of his conduct with the code that you don't really – or really care as to how they perform their job?

A. Yes, that's true.

TR 63-64; 69-70.

The undisputed fact that Laclede Cab's drivers pay it a flat fee in exchange for their use of the vehicles, along with the undisputed fact that the drivers keep whatever revenue that they are able to generate from customer fares in excess of the flat fee less their expenses, reveal that this is truly the essence of an independent contractor relationship. Once Laclede Cab receives its "pro" from the driver, its financial involvement in the matter is essentially complete. It does not make any financial difference to Laclede Cab if the driver earns $100 or $1,000 in excess of their costs for a given shift; nor does Laclede Cab track how much or how little the driver may earn, as is typical with independent contractors.

Laclede Cab therefore has no corresponding motive to exercise any control regarding how the drivers go about performing the details of their job thereafter. Instead, the means and manner by which the drivers perform their jobs is dictated solely by Taxicab Commission regulations. Simply put, the drivers "eat what they kill," and this compensation structure gives them every incentive to work as hard as possible to maximize their earnings. This is the essence of entrepreneurialism – the harder you work then typically the more that you earn.

In addition, the Commission's Decision attempts to gloss over the significant investment that Laclede Cab's drivers make in their occupation. This fact becomes apparent when the Court considers that an "open shift" driver will pay Laclede Cab in excess of $25,000 as rent for use of its taxicab if they work every week of the year (i.e. $82/day * 6 * 52 = $25,524).

With the ever-increasing cost of gasoline, it is not out of the question that a driver could spend $30/day on gasoline expenses, which equates to an annual expense in excess of $9,000 ($30 * 6 * 52 = $9,360). It is difficult to imagine any employee who invests nearly $35,000 out of their personal funds on an annual basis in their job.

It is also important to note that the taxicab industry is one that traditionally utilizes a large number of independent contractors to perform services. *Travelers Equities Sales, Inc.*, 927 S.W.2d at 918 ("The only significant controls that TESI had over the representatives were dictated by the NASD, the SEC and state law. These rules must be followed by all brokers/dealers and cannot be interpreted in an isolated case as being "control or direction" within § 288.034.5 when *such an interpretation would bring within the employment security law an entire industry which historically and logically includes many independent contractors*.")(emphasis added).

Moreover, the Commission failed to address the impact of IRS Publication 15-A (2012)(Appendix A0066-74), despite the requirement imposed by 8 C.S.R. § 10-4.150 that it consider Internal Revenue Service regulations and letter rulings interpreting and applying R.S.Mo. § 288.034.5.

This example provides as follows:

Taxicab Driver

Example

Tom Spruce rents a cab from Taft Cab Co. for $150 per day. He pays the costs of maintaining and operating the cab. Tom Spruce keeps all fares that he receives from customers. Although he receives the benefit of Taft's two-way radio

communication equipment, dispatcher, and advertising, these items benefit both Taft and Tom Spruce. *Tom Spruce is an independent contractor*.

Appendix at A0074 (emphasis added).

Thus, even the IRS, which is the very entity that the Division's own regulations require it to follow, construes taxicab drivers that operate under identical circumstances as Laclede Cab's drivers to be independent contractors.

Both Respondent and Amicus Curiae Independent Tax Driver Association, LLC have cited *State ex rel. Sir v. Gateway Taxi Mgmt. Co.*, 400 S.W.3d 478 (Mo. App. E.D. 2013) in support of their arguments and transfer of this matter to this Court. However, their reliance on *State ex rel. Sir v. Gateway Taxi Mgmt. Co.* is misplaced. The *Sir* case is distinguishable for two (2) significant reasons.

First, the *Sir* case arose under the Missouri Human Rights Act, not the employment security statutes. In *Howard v. City of Kansas City*, the Supreme Court of Missouri noted that the policy considerations behind the Missouri Human Rights Act are different than determining whether an individual is an employee or independent contractor under the common law twenty factor analysis. 332 S.W.3d 772, 781 (Mo. banc. 2011). Accordingly, the court's ruling in *Sir* involved a different analysis and differing considerations which are not applicable to the circumstances presented here. Indeed, the *Sir* case noted that this Court in *Howard* applied a different analysis because it was brought under the MHRA and did not use or weigh the twenty enumerated factors. *Sir*, 400 S.W.3d at 485. The *Sir* court even noted that the definition of "employee" is not as restricted in MHRA cases as under the common law analysis. *Id.*

Attempting to extrapolate the holding of *Sir*, which was specific to a case decided under the MHRA, to apply to all employee-independent contractor analyses is mistaken. Such an argument ignores this Court's prior holding in *Howard*, expressly recognized by *Sir*, that the MHRA involves different considerations, a differing analysis and a less restricted definition of "employee."

Second, the *Sir* court did not have the opportunity to analyze the impact of the Vehicle for Hire Code on the analysis under the MHRA because the Code was not introduced into evidence, and the *Sir* court was unable to take judicial notice of it. *State ex rel. Sir*, 400 S.W.3d at 488-89. ("Because the Vehicle for Hire Code was not in evidence before the Commission and, as a result, not in the record on appeal, we cannot determine whether or the extent to which this Code controls respondent's taxicab drivers' conduct"). In contrast, the Vehicle for Hire Code was introduced into evidence in this case and there is a dearth of evidence of any pervasive control that Laclede Cab exercised beyond that imposed in connection with the Vehicle for Hire Code. As addressed in detail *supra*, "reasonable efforts to insure compliance with government regulations do not evidence control unless pervasive control by the employer exceeds to a significant degree the scope of the government imposed control." *K&D Auto Body*, 171 S.W.3d at 106.

Finally, Amicus Curiae Independent Tax Driver Association, LLC in their Suggestions in Support of Transfer cited *Shinuald v. Mound City Yellow Cab Company*, 666 S.W.2d 846 (Mo. App. 1984) to argue that taxi drivers have been deemed employees. Attempts to equate *Shinuald* to the present matter are inappropriate. First, *Shinuald* was decided under Worker's Compensation Law and applied the definition of "employee"

contained with Worker's Compensation Statutes. Accordingly, like *Sir*, the analysis and considerations were different than in the present context. Second, *Shinuald* was decided before the dictate of *K&D Auto Body* that reasonable efforts to ensure compliance with government regulations does not evidence control. Aspects of claimed "control" cited in *Shinuald* are requirements that are imposed in connection with the Vehicle for Hire Code which should not be considered evidence of "control." (See, *Shinuald*, 666 S.W.2d at 848 (required physical, training, dress code, company established rates for fares, etc.)). Further, the taxi drivers in *Shinuald* were required to fuel their taxis at company owned pumps and drivers were required to accept only company dispatched fares or fares obtained at company operated cabstands – a level of company control greater than in the present matter. Finally, *Shinuald* was decided using an incorrect standard of review which was overruled by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. 2003)(overruling a litany of cases, including *Shinuald*, which hold that the reviewing court must view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the award). *Shinuald* simply does not provide persuasive support for Respondent's position in this matter.

For all of the foregoing reasons, the Decision issued by the Missouri Labor and Industrial Relations Commission should be reversed.

CONCLUSION

For the foregoing reasons, the Decision issued by the Labor and Industrial Relations Commission should be reversed in its entirety.

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CERTIFICATE OF COMPLIANCE

CERTIFICATE PURSUANT TO RULES 84.06(c) and 84.06(g)

The undersigned counsel for Appellant hereby states:

1) The foregoing brief contains 12,143 words, which is within the applicable limitations in length set forth in Rule 84.06(b);

2) Respondent Laclede Cab certifies this electronic version of this brief that is provided has been scanned for viruses under Trend Micro Client/Server Security agent v 5.1, and has been found to be virus-free; and

3) Respondent Laclede Cab's Brief complies with the page limits of Local Rule 360.

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The undersigned hereby certifies that on this 15th day of December 2014, the foregoing was filed electronically with the Clerk of Court, therefore to be served electronically by operation of the Court's electronic filing system upon the following:

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