No. SC94464

IN THE
SUPREME COURT OF MISSOURI

GATEWAY TAXI MANAGEMENT,
Appellant,

v.

DIVISION OF EMPLOYMENT SECURITY,
Respondent.

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

SUBSTITUTE BRIEF OF RESPONDENT, MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, DIVISION OF EMPLOYMENT SECURITY

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INTRODUCTORY STATEMENT

This case is ultimately about whether or not the taxicab drivers of Laclede's 140 car cab fleet should be provided unemployment insurance protections. These taxicab drivers are legally prohibited from owning their own taxicab businesses, yet, treated as independent contractors by Laclede, which does own and operate a taxicab business. While driving for this taxicab business, the evidence has shown that the drivers rely entirely on providing their services to Laclede as their sole source of income. Hence, if the taxicab company decided to no longer utilize their services, they would no longer have a source of income. This same taxicab business, on which drivers rely for income, has required their taxicab drivers to enter into fee arrangements that one of its former drivers described as "a nice little way to get around the labor laws in the state." (Tr. 20). Laclede, in operating a taxicab business has shown that it is selective in the hiring process of its drivers, but all the while argues that it does not have any incentive to control what, where, or how its taxicab drivers provide services under their name so long as they get a rental fee for their cab. *See State ex rel. Sir v. Gateway Taxi Management Co.*, 400 S.W.3d 478, 493 (Mo. App. E.D. 2013). In addition to the legal impediments preventing the drivers from truly acting independently, Laclede imposes additional rules which limit the drivers' entrepreneurial abilities to establish good will and recruit customers by controlling the manner and means in which they can pick up passengers. After looking at the various means and methods Laclede employs in controlling these taxicab drivers, this Court should reach the same conclusion as the Labor and Industrial Relations Commission did below – that the taxicab drivers are employees of the taxicab business.

STATEMENT OF FACTS

Appellant Gateway Taxi Management Company, doing business as Laclede Cab (hereinafter referred to as "Laclede" or the "taxicab business"), operates as a taxicab business in the St. Louis Metropolitan area. (Tr. 41-42; 307). Laclede Cab operates under a Certificate of Convenience and Necessity (CCN) pursuant to the Metropolitan St. Louis Taxi Cab Commission's Vehicle for Hire Code (VHC). (Tr. 42-43). Gateway Taxi Service, a separate company, owns approximately 140 cabs[1]. (Tr. 47). Drivers enter into an "Independent Contractor Agreement" with Laclede Cab to drive the cabs and pay a daily rental fee for use of the cab called a pro-ration[2]. (Tr. 47; 50). The arrangement requires the drivers to pay $82.00 per day six days a week for use of the cab. (Tr. 48). If a driver owns his own vehicle, there is a weekly fee of $295.00. (Tr. 48). There are also shift cabs that are usually assigned to new drivers for 12 hour shifts at a rate of $70.00 per day rental. (Tr. 48). Drivers are responsible for the cost of gasoline and keeping the vehicle clean. (Tr. 64, 104).

Drivers receive training which consists of an instructional video viewed at Laclede Cab's offices, driving with a supervisor for half a day, and instructional training on the use of its credit card and dispatch systems. (Tr. 31; 48). Drivers obtain fares from the

[1] Gateway Taxi Service is a separate registered corporation. (Tr. 42). Mr. McNutt, Laclede's CEO, started Gateway Taxi Service in 1992 which owns and performs all the maintenance on the cabs for Laclede. (Tr. 41-42; 47).

[2] The term pro-ration is often referred to as "pro."

dispatch system. (Tr. 53). The prior system was a two way radio dispatch where calls went to certain zones around the metropolitan area. (Tr. 53). Today's dispatch system is guided by GPS and targets the closest vehicle to the customer. (Tr. 53). The closest driver is sent a prompt to accept or reject the request for the fare. (Tr. 53). If the fare is accepted, the driver keeps all of the fare with the exceptions noted in the next paragraph. (Tr. 49-50). The drivers' fares are the sole source of income for those operating under the terms of the agreement entered into with the taxicab business. (Tr. 20; 107). If the order is rejected, it automatically routes to the next closest vehicle. (Tr. 53).

Certain fares cannot be refused unless the safety of the driver is in question. (Tr. 83). These fares are charge customers of Laclede Cab who present vouchers to the drivers for payment. (Tr. 85). These customers are corporate entities, state agencies, and charitable organizations that the taxicab business has built up a reputation with over its sixty (60) plus years of operation. (Tr. 49). Laclede Cab is paid directly for the voucher service. (Tr. 85). The driver is paid 90 percent of the fare and Laclede Cab keeps 10 percent. (Tr. 85). Drivers are required to accept credit card transactions. (Tr. 49). Laclede Cab keeps 8 percent of the credit card charge as a fee. (Tr. 86).

It is a goal of Laclede Cab to have customer calls answered promptly. (Tr. 71). It is also a goal for cabs to be available timely for customers. (Tr. 71). If drivers are handling their own calls, they are not available for dispatch. (Tr. 71-72). The taxicab business prevents its drivers from picking up passengers in conflict with the dispatch system. (Tr. 309). The cabs are maintained by Gateway Taxi Service. (Tr. 75). Oil changes take place every 6 weeks. (Tr. 75). Maintenance is performed when something

breaks. (Tr. 76). Drivers are given loaner vehicles during maintenance. (Tr. 76). Regularly scheduled maintenance is for the purpose of maintaining the vehicles for operation as taxi cabs. (Tr. 76).

Laclede Cab provides liability insurance for the drivers. (Tr. 81). Drivers are not listed individually on the policy. (Tr. 81). Drivers do not need to obtain their own liability policies. (Tr. 81).

According to the independent contractor agreement and the terms of the taxicab's contract with its insurance company, the vehicles are operated for business use only. (Tr. 84). Only the driver can operate the vehicle and the dispatch system. (Tr. 84). Drivers are free to quit and Laclede Cab could discharge them at anytime without liability. (Tr. 86).

PROCEDURAL BACKGROUND

A deputy of the Division determined that since January 1, 2009, Linda Stevenson, Sylvester Johnson, Thomas McAvoy, and all others shown on the Field Report of Wages for the years 2009, 2010, and 2011 engaged as taxi drivers, performed services for "wages" in "employment" by Laclede[3]. (Tr. 230). Laclede filed an appeal from this determination. A hearing was held on August 27, 2012. The Appeals Tribunal issued a decision on October 9, 2012 reversing the determination made by the deputy. The Labor

[3] The company is often referred to in the record by its official name of Gateway Taxi Management Company, but the parties agreed during the hearing that Gateway Taxi Management does business as Laclede Cab. (Tr. 8).

and Industrial Relations Commission (Commission) then reversed the determination made by the Appeals Tribunal and found the taxi drivers to be employees because Laclede either retained the right to control or exercised control of how the drivers obtained their "results" outside the requirements of the VHC. (L.F. 56). Laclede then timely filed an appeal to the Western District, Missouri Court of Appeals, which held that the drivers were independent contractors. The Division then applied for transfer to this Court. That Application was sustained and ordered transferred by this Court on November 25, 2014.

STANDARD OF REVIEW

Section 288.210, RSMo, governs judicial review of Commission decisions in employment security matters. This section provides in part as follows:

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

It is the function of the reviewing court to decide whether the Commission reasonably could have made its findings and drawn its conclusions. *Burns v. Labor & Indus. Relations Comm'n*, 845 S.W.2d 553, 554-55 (Mo. banc 1993). "If evidence before the administrative body would warrant either of two opposed findings, the reviewing court is bound by the administrative determination, and it is irrelevant that there is supportive evidence for the contrary finding." *Pulitzer Pub. Co. v. Labor & Indus. Relations Comm'n*, 596 S.W.2d 413, 417 (Mo. banc 1980). The weight to be given

evidence and the resolution of conflicting evidence are for the Commission, and if its decision is supported by competent and substantial evidence, its decision must be affirmed. *Selby v. Trans World Airlines*, 831 S.W.2d 221, 222 (Mo. App. W.D. 1992); *Burns*, 845 S.W.2d at 554-55. The court must determine "whether, considering the whole record, there is sufficient competent and substantial evidence to support the award." *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003). A reviewing court, thus, must affirm those decisions of the Commission that are supported by substantial and competent evidence taken from the whole record unless it disagrees with the Commission's application of law. *Aldridge v. Southern Missouri Gas Co.*, 131 S.W.3d 876, 880 (Mo. App. S.D. 2004) (citing *Lammert v. Vess Beverages, Inc.*, 968 S.W.2d 720, 723 (Mo. App. E.D. 1998)).

Laclede's drivers cannot be eligible for Missouri unemployment benefits if this Court reverses the Commission's decision. To be eligible for unemployment benefits, an individual must be an "eligible insured worker," Section 288.060.2, RSMo. To be an insured worker, an individual must earn sufficient "wages" in employment, Section 288.060.4. If the money or fares received by the drivers from Laclede's customers is not remuneration "payable or paid" by Laclede, the drivers are not covered by the Missouri Employment Security Law. If the fares received by the drivers are remuneration "payable or paid" by Laclede, then the drivers are covered by the Missouri Employment Security Law and Laclede must show to this Court that it has met its burden in proving that they do not retain the right to control those driving pursuant to the agreement entered

into with Laclede. *See* Point II, *infra.* The legislature addressed this result in Section 288.020, RSMo which states as follows:

> 1. As a guide to the interpretation and application of this law, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to health, morals, and welfare of the people of this state resulting in a public calamity. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.
>
> 2. This law shall be liberally construed to accomplish its purpose to promote employment security both by increasing opportunities for jobs through the maintenance of a system of public employment offices and by providing for the payment of compensation to individuals in respect to their unemployment.

Generally, the tax provisions of a statute are strictly construed against the taxing authority. However, the tax provisions of the Employment Security Law "are incidental to its paramount and remedial purpose of relief and a liberal construction of 'employer' and 'employment' is warranted to secure that purpose." *Beal v. Indus. Comm'n*, 535 S.W.2d 450, 458 (Mo. App. W.D. 1975). There are a number of federal and foreign state cases to support the Commission's decision. There are also some federal and foreign state cases to support Laclede's position. The legislature, through § 288.020, has manifested its intent that this Court should liberally construe Missouri's law by adopting

the cases which support the Commission's decision and rejecting the contrary cases from other jurisdictions.

ARGUMENT

I. APPELLANT'S LATE-IN-THE-GAME ARGUMENT THAT IT NEVER PROVIDED ITS DRIVERS REMUNERATION FOR SERVICES RENDERED EXALTS FORM OVER SUBSTANCE. (RESPONDS TO APPELLANT'S POINT I)

A. Laclede waived its argument that "wages" were not paid to its drivers by not raising the legal issue to the Commission

Laclede's failure to raise the legal issue of whether or not wages were paid for services rendered at the Commission level precludes its ability to now bring the issue before this Court. "'As a general rule, we will not set aside an administrative action unless the agency has been given prior opportunity to consider the claimed error. We cannot convict [an administrative tribunal] of erroneously deciding an issue never presented to it.'" *State ex rel. Sir v. Gateway Taxi Management Co.*, 400 S.W.3d 478, 493 (Mo. App. E.D. 2013) (citing *Wells v. Director of Public Safety*, 295 S.W.3d 597, 600 (Mo. App. 2009)).

Here, the Appeals Tribunal found that the remuneration generated from the drivers' services was wages pursuant to Section 288.036, RSMo, albeit ultimately holding that the drivers were independent contractors. (L.F. 41-42). The Division then solely appealed the Tribunal's conclusion that the drivers were independent contractors to the Commission. Since the Tribunal correctly found that the Division had met its burden of proving that wages were paid to the drivers, it did not appeal that determination.

It was in its response to the Division's appeal that Laclede should have raised the issue of whether or not wages were paid. The closest Laclede came in presenting the legal issue of whether or not wages were paid to Laclede's drivers was one sentence in the "Factual Overview" portion of its brief which stated, "[t]he taxicab drivers do not any receive (sic) compensation (i.e. wages) from Laclede for services the drivers render to the customers." (Supplemental Legal File, p. 26). Laclede then presents a separate section of its brief for legal argument which does not make any argument that wages were not paid pursuant to Section 288.036. Additionally, in Laclede's conclusion it prayed for relief in the form of requesting the "Commission to affirm the decision of the Appeals Tribunal in its entirety…" (Supplemental Legal File, p. 37).

In the Western District, Laclede argued that the Commission applied the presumption of employment under Section 288.034.5, RSMo, without really discussing or analyzing whether or not wages were paid to its drivers. Laclede is correct in its assertion that the Commission did not discuss or analyze whether or not the presumption applies and that is because Laclede did not properly raise the issue to the Commission or put them on notice that it was an issue presented to the Commission for their consideration. One sentence in the factual background portion of a brief cannot be sufficient to put an administrative tribunal on notice of a legal question presented to it, especially where the prayer for relief asks the tribunal to completely adopt a decision which contains the conclusion of law Laclede is now claiming to be erroneous. Because the time for Laclede to raise the legal issue presented in Appellant's Point I was before

the Commission and it failed to properly do so this Court should now reject the late-in-the-game arguments contained therein.

B. Fares generated by and through Laclede's taxicab business license and retained by its drivers is remuneration that is payable by Laclede to its drivers.

Laclede argues that the drivers of its 140 car cab fleet are not eligible for unemployment benefits and, therefore, it does not owe any unemployment insurance tax liability to the Division because the drivers are not "paid" by Laclede. This argument misstates Missouri law. The issue is not whether the cab drivers were "paid" by Laclede; the issue is whether the remuneration was "***payable or*** paid" by Laclede. Appellant's Point I is contrary to law and exalts form over substance.

Once the Division establishes that a worker received wages, or remuneration for services rendered, the burden then shifts to the employer to prove that they were not employees of the business. *Bedford Falls Co. v. Div. of Emp. Sec.*, 998 S.W.2d 851, 856 (Mo. App. W.D. 1999). If this Court does not conclude that the issue of whether or not remuneration was paid or payable has been waived in this case, the court then must first analyze whether or not the drivers received remuneration for services rendered to Laclede. The Missouri Employment Security Law regarding remuneration or "wages" differs from the federal law cases. Section 288.036.1 defines "wages" as, "all remuneration, ***payable or*** paid, for personal services…" (Emphasis added).

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *Wolff Shoe Co. v. Director of*

Revenue, 762 S.W.2d 29, 31 (Mo. Banc 1988). "Each 'word, clause, sentence and section' of a statute should be given meaning." *State ex rel. Mo State Bd. v. Southworth*, 704 S.W.2d 219, 225 (Mo. Banc 1986). "[A]ll words utilized by the legislature are presumed to have separate and individual meaning." *State v. Carouthers*, 714 S.W.2d 867, 870 (Mo. App. E.D. 1986). By defining "wages" for unemployment tax purposes as remuneration "**payable or** paid," the legislature must have intended to include more than remuneration that was "paid" by the employer. Appellant's Point I is based upon ignoring the term "payable" and discussing the term "paid." Laclede's argument is not dispositive herein and should be rejected by this Court.

Missouri cases establish that fares retained by cab drivers as part of a contractual agreement to retain such fares are wages. Laclede allows its drivers to retain fares pursuant to its contractual arrangement with its drivers. (Tr. 312). Thus, all fares collected by the cab drivers are wages as that term is defined under Section 288.036.

In *Shinauld v. Mound City Yellow Cab Co.*, 666 S.W.2d 846 (Mo. App. E.D. 1984) (overturned on grounds relating to Standard of Review), the Eastern District examined the exact same relationship that Laclede has with its drivers and the exact same argument employed by Laclede to this Court. In *Shinuald*, Mound City Yellow Cab argued that its drivers never received a paycheck or any money from Yellow Cab. *Id.* at 849. The court held that its agreements with its drivers allowed it to employ "an ingenious alternative in fixing their compensation" and "decline[d] to permit the reality of that status to be obscured by formalities attending the employee's remuneration." *Id.* at 849.

Additionally, the Western District similarly held that where a taxicab driver has the right to retain a percentage of the fare, the entire fare was "wages" under Section 288.036. *Higgins v. Missouri Div. of Emp. Sec.*, 167 S.W.3d 275 (Mo. App. W.D. 2005). "Revenue generated in the businesses as structured by Higgins is first and foremost revenue of her cab companies." *Id.* at 282. Therefore, the "fares retained by the cab drivers each night, although never specifically under the dominion or control of Higgins was '**payable or** paid' to the drivers as those terms are used in section 288.036.1." *Id.* (Emphasis added).

Similar federal cases and revenue rulings hold that taxicab drivers are employees of a company engaged in the taxicab business when drivers pay the company a percentage of the fares they collect. The United States Court of Appeals for the Eighth Circuit found that taxicab drivers in St. Louis, Missouri were employees of the company for Federal Unemployment Tax Act (FUTA) purposes when the drivers pay the company a percentage of the fares they collect. *Air Terminal Cab Inc. v. United States*, 478 F.2d 575 (8th Cir. 1973). There, the court specifically mentioned 26 U.S.C § 3306, which defines "wages" under FUTA. The court cited, with approval, the taxicab case of *United States v. Fleming*, 293 F.2d 953 (5th Cir. 1961). In *Fleming*, the United States Court of Appeals rejected the argument made herein by Laclede. In *Fleming*, the taxicab drivers paid a percentage of the fares to the Company, retaining the balance for themselves. While the district court found the drivers to be employees, it declared the drivers' portion of the receipts not to be wages because it was not paid to them by the company, it was paid by the passengers. The Government challenged this assertion as an erroneous

conclusion of law. On appeal, the 5th Circuit Court of Appeals cited numerous cases "holding that cab drivers are employees under Social Security and Unemployment Compensation statutes." *Id.* at 956. The 5th Circuit Court of Appeals overturned the district court's opinion regarding who paid the drivers, stating as follows:

> We think the argument, persuasive as it seemed to the district court, that the remuneration received by the drivers was not wages and hence no tax was payable with respect thereto, is a fallacious one. …
>
> * * *
>
> 'Wages' means remuneration for employment. 26 U.S.CA. (I.R.C. 1939) § 1426(a). There being an employer-employee relationship, as the district court correctly determined, and the taxicab business being the business of the employer, it follows that the collection of fares made by the employees for the employer are of funds of the employer and received for the employer's account. If the remuneration accrues from a service rendered by the employee in the employment, that remuneration does not fall outside the category of wages merely because the employee's remuneration is based upon a commission and is withheld in the employee's accounting with his employer for collections made. There is no analogy between the remuneration here involved and tips and gratuities.

Id. at 957-958. Additionally, the I.R.S. has ruled that both insurance agents who retain their portion of a commission while transmitting the remainder to its general agent and sales agents for lottery tickets who retain their portion of the sales were paid wages. *See* Revenue Rule 55-522, 1955-2 C.B. 489; *See also* Revenue Rule 92096, 1992-2 C.B. 281.

The federal cases cited in Point I of the Brief filed by the St. Louis Convention and Vistors Commission[4] to the Western District, *New Deal Cab Co. v. Fahs*, 174 F.2d 318 (5th Cir. 1949) and *Party Cab Co. v. U.S.*, 172 F.2d 87 (7th Cir. 1949), are not cases which analyze the term "wages" pursuant to FUTA and this Court need not consider them persuasive.[5]

Here, by Laclede's own admission, "Laclede is engaged in the taxicab business…" (Tr. 307). It has contracted with drivers to provide taxicab services to the general public and "'charge customers' that contact Laclede on a regular and routine basis for pickup and delivery services." (Tr. 310). These services are provided "under the license granted to Laclede" and utilize "Laclede's system of operation, trade name, trademarks, symbols and colors, goodwill, and radio receiving and dispatching equipment." (Tr. 309-311). Laclede took active efforts to prevent its drivers from using personal cell phones to generate independent business. The evidence well established that the drivers really only obtained passengers through Laclede's dispatch system (Tr. 35-36). Thus, all services

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[4] At the time the Division filed its brief to the Western District in this matter, a partner of the law firm representing Laclede, Andrew Leonard, was listed as the Chairman of the Board of Commissioners for the St. Louis Convention and Visitors Commission. *See* http://explorestlouis.com/st-louis-cvc/about-us/board-of-commissioners/

[5] There are other factual distinctions in those cases as well. For example, in *Fahs* there was no explicit prohibition from using the car only for business purposes. 174 F.2d at 320. *See* "Independent Contractor Agreement," Tr. 309.

were provided to Laclede and its customers and all revenue generated in the course of Laclede's taxicab business utilizing its goodwill and trade name belonged, first and foremost, to Laclede. If the taxicab business contracts with its drivers to retain all or a portion of the fare, that revenue is still **payable** by Laclede (the taxicab business) and, therefore, wages pursuant to Section 288.036.1.

Laclede's argument relies entirely on a misinterpretation of *Plaza 3 Restaurant Corp. v. Labor and Indus. Relations Comm'n*, 703 S.W.2d 510 (Mo. App. W.D. 1985). The question presented to the court in *Plaza 3* was whether tips provided to waiters and waitresses should be considered wages or gratuitous payments made by the customer to the waiter or waitress. 703 S.W.2d at 510. As quoted above, § 288.036.1 defines wages in part as: "all remuneration, **payable or** paid, for personal services…" [Emphasis added]. *Plaza 3* distinguished tips from wages as follows:

> Although tips are generally paid to waiters and waitresses by respondents' customers, they are not required as a condition for service, are not a component of respondents' menu prices and are entirely gratuitous.

Id. at 511. Just as the Fifth Circuit ignored such an analogy in *Fleming*, this court should do the same. The fares collected at issue herein are a component of Laclede's taxicab business, are a condition for service, and are not gratuitous in nature. The fares are set by Laclede and advertised on the outside of their cabs as required by the VHC. The fares are taken by the drivers from the customers after they have received rides from a Laclede cab and are commissions that are "**payable**" or paid by Laclede to the driver under the terms of their contract. The driver's wages were not paid by the customer as is a tip. When a

person in the St. Louis Metropolitan area needs a cab, he looks in the telephone book and chooses between Laclede Cab or some other company providing the same or similar services. If he calls Laclede Cab's telephone number, he asks for a Laclede cab and not a particular driver.[6] Thereafter, a vehicle with a Laclede Cab sign arrives at his location. At some point, the customer is informed of the fare set by Laclede and pays with cash, credit card, or voucher. Regardless of the manner of payment, the customer understands he or she is making payment to Laclede Cab as it is the company that possesses the CCN and its name is painted on the car. The customer does not know, or care, how Laclede compensates its drivers. The customer may give a tip to the driver, which is perceived differently than the cab fare. Finally, should the customer have a bad experience, it is to Laclede that they would likely lodge their complaint.

Here, Laclede has created a wage payment system in an attempt to accomplish covertly what it could not accomplish with its Independent Contractor Agreement. It is reasonable for this court to believe that Laclede is a savvy business run by experienced

[6] Laclede's rules prohibit the driver from carrying a cellular phone while driving a Laclede Cab. (Tr. 312-13). Additionally, when Laclede found out that a specific driver was taking phone calls from customers he was instructed to tell the customers to call the dispatch number. (Tr. 99). In fact, the whole point of Laclede's dispatch system is to ignore the preference for a driver, if there is one, and give the job to the driver who can reach the customer in the most efficient means possible in furtherance of its own business interest and regardless of the driver's interests. (Tr. 53).

businesspersons. Additionally, it is also reasonable for this court to believe that the savvy businessperson would be able to determine how much a cab should generate in money per day[7]. Thus, the business model that Laclede has created requires the drivers to "pay" what the cab company would otherwise make on fares after paying its drivers normal wages or commissions for the work that they are doing while operating under Laclede's name, picking up its valued charge or voucher customers, and solely using its dispatch system to pick up customers of the business.

Any notion that the drivers are not providing services to customers of Laclede and that the fares its drivers receive are not wages payable by the business should be rejected. Laclede's entire raison d'être is that of a taxicab business. The business relies on customers to keep its drivers busy and bringing in fares so that they may pay their daily pro back to Laclede. Because the customers are, first and foremost, Laclede's customers, the services the drivers render are for Laclede cab. Logically, then, the revenue generated by its customers through Laclede's own goodwill, trade name, and trademarks is, first and foremost, Laclede's. The formalities attending to how a business contracts with its employees to pay them must not distract from the ultimate conclusion that the fares are wages for services rendered in employment under Section 288.036.1 because

[7] This is also clear from the record as Laclede Cab charges a lower daily pro for holidays given that the business is slower. (Tr. 68).

they are **payable to the drivers by Laclede.**[8] Therefore, the Commission correctly applied the presumption of employment against Laclede and this court should affirm the decision that wages were payable or paid by Laclede.

II. THE DRIVERS ARE EMPLOYEES OF LACLEDE'S TAXICAB BUSINESS BECAUSE THE DRIVERS CANNOT LEGALLY OPERATE THEIR OWN BUSINESSES INDEPENDENT OF LACLEDE AND LACLEDE CONTROLS THE MANNER AND MEANS OF HOW THE DRIVERS PERFORM THEIR SERVICES. (RESPONDS TO APPELLANT'S POINT II)

The taxicab drivers of Laclede's 140 car cab fleet are legally prevented from operating their own taxicab businesses independent of Laclede. While prevented from truly acting independently, Laclede does not afford them with the same protections as that of an employee. Because the Metropolitan Taxicab Commission (MTC) and Laclede have put these drivers into a precarious status of not truly being independent and, yet not treating them as employees, this Court should clarify that relationship by affirming the decision of the Commission that the drivers are employees.

A. This court should overrule *Travelers Equities Sales, Inc. v. Div. of Emp't Sec.*, or find that this decision does not apply in this case.

[8] Laclede also argues that it may be difficult for the business to provide an accounting of fares as wages. Somehow these fares must be accounted for to comply with federal and state tax purposes. No court has raised the accounting issue presented by Laclede as a concern and this court should similarly ignore the claim.

Appellant urges this Court to extend current case law which holds 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." *Travelers Equities Sales, Inc. v. Div. of Emp't Sec.*, 927 S.W.2d 912, 918 (Mo. App. W.D. 1996). This rule of law as applied generally and to these facts has never been reviewed by this Court and should be overturned because it is contrary to good public policy.

There are important public policy considerations at stake in extending *Travelers* in this case. There are currently forty one titles of Missouri law found within the Revised Statutes of Missouri. Included in those multiple titles of law is a single title which is specifically devoted to "Occupations and Professions." Title XXII, RSMo. Within that title are laws which regulate accountants, barbers, cosmetologists, podiatrists, nurses, and plumbers, to name only a few. *Id.* That title does not include lawyers, railroad workers, innkeepers, farmers, bar tenders, day care providers, teachers, military servicemen and women, or first responders who all work in environments subject to governmental regulation. As the titles of our Missouri law and the chapters therein increase, so too does the governmental regulation in almost every conceivable occupation. An extension of the rule found in *Travelers* is a suggestion that our first responders, teachers, and railroad workers could be considered independent contractors if government regulation of their occupations rises to some significant level.

Further, a worker at McDonald's on the food preparation line could be considered an independent contractor under a ruling which extends *Travelers* to the present case. It

would be very difficult, if not impossible, to make the argument that the substantive work of someone preparing food in a fast food chain restaurant does not relate back to a governmental health code regulation of some kind. Granted, there may be exceptions at the fringes which include coming to work on time, wearing a uniform, etc., but under this ruling all the work in preparing food and maintaining a clean work environment could not be used to establish an employment relationship between McDonald's and food preparers.

Throughout this case, the taxicab business has argued that almost everything that these taxicab drivers are required to do can be attributable to the VHC. This control imposed by the VHC is implemented and imposed by the MTC where the taxicab owners themselves are instrumental in the creation of the requirements of the VHC.[9] While the taxicab business argues that governmental regulation cannot be used against them in establishing an employment relationship it ignores the very real fact that the taxicab

[9] The MTC is a quasi governmental entity organized under §§67.1804 to 67.1808, RSMo. The MTC has "primary authority over the provision of licensing, control and regulations of taxicab services" within the city of St. Louis. §67.1804. The MTC is made up of, at least in part, owners of both large and small taxicab companies. *See* §67.1806.2(1)-(2).

owners themselves have established this control over their own industry in the St. Louis Metropolitan area.[10]

A ruling extending *Travelers* as urged by the taxicab business in this case will incentivize leaders of industry to go to the state legislature or local government body and ask that a board or commission run, in large part, by members of their industry be created so that they may impose pervasive governmental regulations which will be so controlling over industry employees that they then avoid becoming an employer and receiving unfavorable treatment in paying state and federal taxes, paying workers' compensation insurance, and becoming liable for discrimination under the Missouri Human Rights Act.

The policy outcome advocated by the taxicab business does not make practical sense from the standpoint of the driver. It is the code that legally prevents them from operating as an independent taxicab business. Under Laclede's argument it is the code that prevents the driver from becoming an employee of Laclede because virtually everything that the taxicab drivers are required to do can be attributed back to the VHC. If true, then the drivers can derive no benefits from truly being independent or an employee because of the code. This outcome is contrary to good public policy.

Because the current rule as applied in this case could result in the loss of the unemployment insurance safety net for many who deserve that protection[11], and

[10] It is noteworthy to point out that Mr. McNutt, the business owner who testified at the hearing is listed as a member of the Metropolitan Taxicab Commission at the time of filing this brief at, http://www.stl-taxi.com/contact.htm.

practically does not make any sense from the perspective of the taxicab drivers' ability to actually have an independent business, this Court should either overrule *Travelers* or, at least, decline to extend it in this case. Applying *Travelers* here would mean that all control the taxicab business imposes to ensure compliance with the VHC could be used against them in establishing an employment relationship. That would impose an overwhelming burden to overcome to try to prove that the drivers are not independent contractors, despite all the restrictions to their ability to act independently. *Travelers* should not be extended and this Court should find that the Commission was correct in finding an employment relationship between the taxicab business and its taxicab drivers.

B. Even if *Travelers* applies, the taxicab drivers are employees of the taxicab business because it imposes significant controls above and beyond the code that restrain their abilities to truly act independently.

If this court chooses to extend *Traveler's* in this case, an employment relationship still exists. Even after considering all the requirements of the VHC, the taxicab business still controls its drivers over and above the requirements of the VHC by and through Laclede's payment scheme; use of its GPS dispatch system and the taxicab business' prohibition of picking up customers in conflict with the dispatching system (Tr. 309); use of its voucher system in providing services to corporate, state agency, and non-profits Tr.

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[11] In fiscal year 2013 alone, workers filed 363,604 initial claims and the Division paid out $849.7 million of unemployment benefits. Missouri Department of Labor and Industrial Relations Annual Report, 2013.

49); requirements of using the cab solely for business use[12] (Tr. 49; 85); requiring the use of Laclede's credit card system[13]; and the contracts entered into between Laclede and its cab drivers. An "independent contractor" is "'one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of the employer, except as to the result of his work.'" *K & D Auto Body, Inc. v. Div. of Emp. Sec.*, 171 S.W.3d 100, 105 (Mo. App. W.D. 2005) (quoting *Vaseleou v. St. Louis Realty & Sec. Co.*, 130 S.W.2d 538, 539 (Mo. 1939)). A business is not required to pay unemployment contributions for an independent contractor, but is required to do so for an employee. *Quality Medical Transcription, Inc. v. Woods*, 91 S.W.3d 181, 184 (Mo. App. W.D. 2002).

If a worker has been paid by a business, "there is a presumption of an employer-employee relationship, and to the extent it challenges that presumption, the burden of proof rests with the employer" to show otherwise. *E.P.M. Inc. v. Buckman*, 300 S.W.3d 510, 513 (Mo. App. W.D. 2009).

The Division applies the "common law right to control test" in determining whether a worker is an employee or an independent contractor for purposes of the

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[12] The taxicab business may try to argue that this is a requirement of the VHC even though it is also a requirement of their insurance company. (Tr. 84).

[13] The Commission did note that while the taxicab business asserted that the drivers could use whatever processing system they wanted, they trained them on their own system and did not mention that they had an option available to them. (L.F. 53).

Employment Security Law. Section 288.034.5, RSMo. The Division follows Internal Revenue Service (IRS) guidance and case law applying that guidance. 8 CSR 10-4.150(1). This guidance includes the 20-factor test established by the IRS. *Nat'l Heritages Enters., Inc. v. Div. of Emp. Sec.*, 164 S.W.3d 160, 166 (Mo. App. W.D. 2005); *See also Haggard v. Div. of Emp. Sec.*, 238 S.W.3d 151, 156 (Mo. banc 2007).

The 20 factors are: (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 the general public; (19) right to discharge; and (20) right to terminate. *Nat'l Heritage Enters.*, 164 S.W.3d at 167. The twenty factors:

> are guides or aides in determining the nature of the employment relationship, and are not the only factors to consider. 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. 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. Not every factor will apply in every case. *E.P.M.*, 300 S.W.3d at 514. A factor that does not apply or that does not weigh clearly in favor of either employment or independent contractor status may be treated as neutral. *Nat'l Heritage Enters.*, 164 S.W.3d at 172.

The decision "does not rest on a numerical count of the factors favoring employee or independent contractor status[.]" *E.P.M.*, 300 S.W.3d at 515. There is no "magic formula" for determining how many or which factors must be in favor of an employment relationship in order to find that the worker is an employee. *Haggard*, 238 S.W.3d at 157. The "bedrock" consideration is "the right to control the manner and means of performance." *Bedford Falls Co.*, 998 S.W.2d at 858; *see also* §288.034.5 ("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"). Whether a worker is an employee or an independent contractor depends on the particular circumstances of each case. *E.P.M.*, 300 S.W.3d at 514; *See also K & D Auto Body*, 171 S.W.3d at 105.

Factor 1–Instruction

If the business has the right to require the worker to follow its instructions, it has control over the work which indicates an employer/employee relationship. *Nat'l Heritage Enters.*, 164 S.W.3d at 167. "With respect to the 'instructions' factor, the right to control is manifested in control over the 'when, where, and how' work is completed." *Kirksville Pub. Co. v. Div. of Emp. Sec.*, 950 S.W.2d 891, 897 (Mo. App. W.D. 1997).

The Commission determined that because Laclede cab trained its drivers above the requirements of the code, the drivers were instructed not to use cell phones, the drivers were forced to use the dispatch system, and Laclede instructed the drivers to give preferential treatment to its voucher and charge customers, this factor favors employee status. (L.F. 53). Here, the drivers were driving Laclede cabs with GPS systems so that the business and dispatch system could know where the drivers were at all times (Tr. 13; 58). This would allow the taxicab business to efficiently route customers calls to the driver who could reach the customer in the most efficient manner. Laclede would have this Court believe that their GPS tracking of its drivers is merely a result of the dispatch system and is solely there to help the drivers earn more money should they choose to take advantage of it. This argument, however, ignores the restraint this imposes on the drivers because the GPS system restricts the drivers' ability to get customers since customers are sent to the closest drivers, who can only then decide whether to accept or reject the fare. (Tr. 53-54). As the only realistic way that drivers are able to receive customers, this restriction can impair how much money a cab driver for Laclede's taxicab business can make, especially considering that the drivers are told that they cannot use their own personal cell phones to receive potential repeat customers. (Tr. 35-36; 99).

While the drivers were ostensibly told that they did not have to use its dispatch system to find customers, Laclede's contract with its drivers prohibit them from possessing a cellular phone while driving for Laclede Cab and requires them to give all orders received from the dispatch system a priority over non-dispatched customers. (Tr. 309-13). Additionally, when Laclede Cab learned that a driver was having customers call

him on his cell phone for fares, he was *instructed* to have the customers call and arrange for a cab through dispatch because those rides were interrupting the dispatch system. (Tr. 99). Throughout this action, Laclede has repeatedly stated that it does not care what the cab drivers do as long as Laclede Cab receives its pro. The fact that it is telling its drivers that they cannot have customers call the drivers on their cell phones and requires its drivers to place a priority on all dispatched calls makes that argument disingenuous. The amicus brief filed by the MTC on appeal below makes an attempt at arguing that it is the VHC which dictates this behavior. MTC admits that the Code only prohibits drivers from operating cellular phones while a passenger is in the cab (including loading and off-loading the passenger) or while the driver is driving the cab. MTC's argument is premised on the idea that Laclede created a prohibition of cell phones rule because, given the various activities of using the dispatch system, driving, loading, and off-loading passengers, there would be no opportunity to use the phone. Such an argument would be interesting if Laclede had not repeatedly asserted that it has no reason to control what the drivers do after they pay the business their pro. If the Court accepts that argument as true, then the drivers should be free to sit on the side of the road, read a book, or talk on a cellular phone if they want. That is not an accurate reflection of the agreement signed by the drivers with the business.

Finally, there is absolutely no VHC requirement which would require the drivers to pick up Laclede's dispatch customers or its "charge customers." Again, Laclede's assertions that the drivers can do whatever they want in terms of picking up customers directly contradicts the provision found in its "Independent Contractor Agreement" that

the "[d]river agrees to give orders received from the dispatching system priority." (Tr. 309). Laclede's motive in controlling how the drivers pick up their passengers is in retaining customers who call to request fares through its dispatch system. It is apparent on the face of the "Independent Contractor Agreement" that Laclede is concerned about its business reputation. The Agreement purports to require the drivers to purchase the taxicab business' "goodwill" and the drivers are required not to take any action which would "undermine or compromise Laclede's relationship" with its "charge customers." (Tr. 310). This is a clear indication that the business cares about its business reputation with Laclede's passengers and will control the drivers to ensure that it is maintained. Furthermore, the VHC does not require Laclede to be in the business of providing transportation to voucher customers. The fact that the taxicab business has voucher customers and makes money off of its taxicab drivers providing rides to these voucher customers illustrates the point that there is more incentive to control these drivers than the taxicab business would lead this Court to believe. Because these sources of control are above and beyond any requirement of the VHC, this factor favors employee status.

Factor 2–Training

The Commission found that because the drivers were trained how to use the voucher, credit card, and dispatching systems that this factor favored employment. Laclede argues that it is the VHC which required it to train its drivers. This, again, ignores the fact that the VHC does not require the use of the taxicab business' dispatch, credit card, and voucher systems. While the VHC does require the drivers accept credit card payments for fares, it disbelieved Laclede's testimony that the drivers were told that

they could use whatever credit card processing system that they wanted. The drivers rarely, if ever received fares outside of Laclede's dispatch system, which in turn necessitated proper training on that system. (Tr. 35-36). Both drivers testified that they had no prior experience in providing services as a taxicab driver and would have required training regardless of the requirements of the VHC. (Tr. 10; 94). The VHC only requires minimal training which does not include training for Laclede's specific operations, which go above and beyond the requirements of the VHC and, therefore, this factor favors employee status.

Factor 3 – Integration

"Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business." *Nat'l Heritage Enters.*, 164 S.W.3d at 168. Integration indicates an employer/employee relationship because "a highly integrated worker is more likely to be subject to the business' control," and because, if the duties that are performed are essential to the business' continuation, it is likely that the business will exert control (or at least retain the right to control) the duties. *Kirksville Pub. Co.*, 950 S.W.2d at 898.

The Commission determined that the drivers' services were highly integrated into Laclede Cab's taxicab business. Here, the services offered are taxi services (Tr. 41-42). Laclede suggests it merely provides leased vehicles and a dispatch service but it has also

shown through the "Independent Contractor Agreement" that it is concerned about its business reputation when the drivers take on a fare through either the voucher or dispatch system. (Tr. 307-311). Because the business depends upon fares in order to be successful and the branding and business reputation generates those fares, this factor favors employee status.

Factor 4 – Services rendered personally

When the services must be performed by a particular individual, "it indicates control over the method of performance, which indicates employment status." *Nat'l Heritage Enters.*, 164 S.W.3d at 168. The Commission found that because the VHC requires the workers to perform the work personally that this factor is neutral. (L.F. 53). Drivers must be able to read and understand maps of the metropolitan area, possess a valid chauffeur's license, pass a criminal background check, and pass a physical examination and drug test. (Tr. 55). A driver would not be free to send a substitute. The Commission was correct in its conclusion that this factor is neutral.[14]

Factor 5 – Hiring, supervising, and paying assistants

[14] This conclusion assumes that this Court does decide to apply the *Travelers* decision to this case and hold that the VHC requirements cannot be used to establish an employment relationship. But if *Traveler's* is not applied then this factor should be found to be in favor of employment status because the drivers must render their services personally and without assistants.

The fact that a worker is allowed to hire, supervise, and pay his own assistants indicates independent contractor status. *Nat'l Heritage Enters.*, 164 S.W.3d at 169. The Commission found that this factor was neutral. Due to the nature of the work and the provisions of the VHC, the drivers did not hire assistants. See *K&D Auto Body, Inc.*, 171 S.W.3d at 108. This factor is neutral.[15]

Factor 6 – Continuing Relationship

A continuing relationship exists if "work is performed at frequently occurring although irregular intervals." *Nat'l Heritage Enters.*, 164 S.W.3d at 169. A continuing relationship indicates employment. *Id*. The Commission found that there was a continuing relationship between the taxicab business and its drivers and that this factor favors employee status. Driver Mario Berry provided services for Laclede Cab for approximately 6 months. (Tr. 93). Barry worked continuously during that period and subsequently decided to quit providing services for Laclede Cab. (Tr. 93). Mr. Berry also stated that if he were to take a vacation he would have to provide the taxicab business with advance notice to avoid payment of his pro. (Tr. 103-104). Additionally, Mr. Parent indicated that during the time that he provided taxi services to Laclede Cab, he provided services to no other taxicab company. (Tr. 21). The record shows that Laclede Cab and the drivers contemplated a continuing relationship. This factor favors employee status.

Factor 7 – Set hours of work

[15] See note 14, *supra*.

If the business sets the hours of work, this indicates control and therefore an employment relationship. *Nat'l Heritage Enters.*, 164 S.W.3d at 169. The Commission determined that the drivers could choose when they worked and that this factor slightly favors independent contractor status.

The Division agrees that many of the drivers had no set hours of work under a strict interpretation of that term, but the drivers paid a pro for 6 days a week and had Laclede's cabs for 12 or 24 hours per day for each of the 6 days, depending upon the pro amount paid to Laclede. (Tr. 11; 103). The taxicab business controlled when the driver's drove the cabs to the extent that its drivers could only choose between the late shift or the early shift. (Tr. 17). Drivers were required to be in the cabs to receive dispatch calls and assignments. (Tr. 53). Driver Gregory Parent, who drove a shift cab, was required to work 12 hours per day for six days a week and testified that he did not feel free to choose his own hours. (Tr. 17; 24). Although the drivers are free to accept or reject a dispatch call, sitting in the cab and not taking assignments cost the driver money. (Tr. 33). This factor favors employee status.

Factor 8 – Full time work required

The requirement that the worker perform for the business full time or near full time indicates employment because the business has "control over the amount of time the worker spends working and impliedly restricts the worker from doing other gainful work." *Nat'l Heritage Enters.*, 164 S.W.3d at 169. The Commission found that the drivers' services were required on a full time basis. Here, the Commission made a credibility determination in finding that Laclede told its drivers that they had to work full-

time and could not be part time. (Tr. 9; L.F. 54). It was absolutely necessary for the drivers to work full time in order to make up the pro-ration fee required to be paid daily. (Tr. 33). Although Laclede Cab argues that the drivers were free to work or even reject assignments, without full time work the drivers made little or no income. (Tr. 33). This factor favors employee status.

Factor 9 – Doing work on employer's premises

Work that is done on the employer's premises indicates control, especially if the work could be done somewhere else but the employer requires that it be done on his premises. *Nat'l Heritage Enters*, 164 S.W.3d. at 170. "The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises." *Id.*

The Commission found that the work was performed on the employer premises because the taxicabs were owned by Laclede (whether licensed or leased) and were an extension of the business. (L.F. 54). Control over place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. *K&D Auto Body*, 171 S.W.3d at 109. Here, the drivers were driving cabs that Laclede owned, cabs that had Laclede's name on the side, cabs that had Laclede's credit card processing system in them, cabs that had Laclede's GPS and dispatching devices in them, and cabs that Laclede maintained and insured. The

Commission was correct in its conclusion that the cabs are an extension of the business. This factor favors employee status.

Factor 10 – Order or sequence set

If the business establishes a particular order or sequence to the tasks, it indicates employment because the worker is not allowed to follow his own "pattern of work." *Nat'l Heritage Enters.*, 164 S.W.3d at 170. The Commission found that, because the business arrangement sets priorities of customers and had specific rules regarding voucher customers and its dispatch system, this factor favors employee status. (L.F. 54). Again, the language of the contract between Laclede and its drivers went above and beyond the requirements of the VHC. It created a conflict system of priorities between Laclede's dispatched customers and any others. (Tr. 309). This limited the customer base that the drivers could pull from. Additionally it stated that the drivers should not unreasonably refuse any request of its "charge customers." (Tr. 310). In fact, the contract was so binding on its drivers in this regard that Laclede created a special exemption for non-dispatch and non-charge customers in that it states, "Laclede shall have no control over the Driver in those respects." (Tr. 311). This factor favors employee status.

Factor 11 – Oral or Written Reports

The requirement that reports be submitted to the business indicates control. *Nat'l Heritage Enters.*, 164 S.W.3d at 170. The Commission determined that the drivers were not required to provide Laclede Cab with any reports. However, the drivers had to submit vouchers and credit card receipts for payment of fares. (Tr. 59-60). Although these

requirements were not extensive, they were essential to the operation of the business. This factor favors employee status.

Factor 12 – Payment by hour, week, or month

Payment by the hour, week, or month generally indicates employment, "provided that this method of payment is not just a convenient way of giving a lump sum agreed upon as the cost of a job." *Nat'l Heritage Enters.*, 164 S.W.3d at 170. Payment that is by the job or a strict commission generally indicates independent contractor status. *Id.* The Commission found that drivers were paid the difference between the pro-ration and other expenses such as gasoline and the revenue generated by the cab. (L.F. 54). The wages are more like a commission and, therefore, this factor favors independent contractor status.

Factor 13 – Payment of business or traveling expenses

The payment of travel or other business expenses generally indicates employment, because an employer who is paying these expenses will try to control them by regulating the workers' activities. *Nat'l Heritage Enters.*, 164 S.W.3d at 170-71. The Commission found that this factor was fairly neutral because Laclede paid for the regular maintenance of the vehicles while the drivers paid for gasoline to fuel the cabs, any licensing fees, any mandatory tests, any expenses for cleaning the cars and any expenses for damages to the cabs or the customer's personal property where the drivers were at fault. (L.F. 54). The Commission made a determination that Laclede's share of the expenses was the major portion of the expenses. *Id.* Here, Mr. McNutt testified that his business owned the cabs and maintained and serviced them. (Tr. 74-76; 104). While the Commission was correct

that this is the major expense as the business would have to pay for all routine oil changes, all tire changes, and pay for any repair that needed to be done to the vehicle it was wrong in determining this factor to be neutral. After considering the fact that the major costs of maintaining the cabs likely outweighs the other costs in fueling the car and getting licenses, this factor slightly indicates employee status.

Factor 14 – Furnishing tools and materials

Provision of tools and materials, particularly when they are expensive, indicates employment. *Nat'l Heritage Enters.*, 164 S.W.3d. at 171. The Commission found that this factor favors employee status since Laclede provided the vehicles, a fleet of 140 taxicabs, to the drivers. (L.F. 54). The business owned approximately 140 cabs at a cost of $8,000.00 each. (Tr. 47; 74). When the employer furnishes valuable equipment, the relationship is almost invariably that of employment, as common sense dictates that a business will retain a right of control when it furnishes expensive equipment, in order to protect the investment and to maintain productive and efficient use. *K&D Auto Body, Inc.*, 171 S.W.3d at 114. Additionally, the cars were equipped with GPS, Laclede's dispatch system, and credit card processing systems. (Tr. 13; 48; 53). This factor favors employee status.

Factor 15 – Significant Investment

The Commission found that the drivers did not have any significant investment in the taxi cab business. (L.F. 55). The drivers were provided with the cabs and the dispatching system. (Tr. 48, 53). Drivers only provided the cost of gasoline, the pro-ration, uniform, and cost of cleaning the cab along with the costs associated in getting

their licenses. (Tr. 51; 66-67; 97, 105; 115-16). All these costs were de minimus. This factor favors employee status.

Factor 16 – Realization of profit or loss

The fact that a worker can experience a profit or loss, in addition to that normally experienced by an employee, indicates independent contractor status. *Nat'l Heritage Enters.*, 164 S.W.3d at 171-72. The Commission found that the drivers could realize a loss. (L.F. 55). Driver Mario Berry earned about $20.00 per hour performing services for Laclede Cab. (Tr. 107). Driver Gregory Parent earned about $6.50 per hour. (Tr. 20). There was no evidence that a driver suffered financial loss. Even though it was theoretically possible for a driver to suffer a financial loss, no driver lost money providing services for Laclede Cab. (Tr. 20; 107). Additionally, the arrangement is setup such that the drivers should only make money. If Laclede's drivers were routinely losing money, there would likely be no drivers that would be interested in providing services under this type of agreement. This factor favors employee status.

Factor 17 – Working for more than one firm at a time

Performing more than "de minimus" work for more than one business at a time generally indicates independent contractor status. *Nat'l Heritage Enters.*, 164 S.W.3d. at 172. The Commission found that the drivers could perform services for only one taxi company at a time, pursuant to the taxi commission code. (L.F. 55). Furthermore, the contract between Laclede and its drivers required the drivers to lease their cars at shifts of either 12 hours or 24 hours a day for six days a week. (Tr. 307-08). The business even told its drivers that they had to work for Laclede on a full-time basis. (Tr. 9). Because

there was no feasible way that the drivers could work for another cab company, notwithstanding the code, this factor favors employee status.

Factor 18-Making services available to the general public

The Commission found that drivers were not allowed to offer their services to the general public. (L.F. 55). As mentioned above, the drivers were legally[16], contractually and practically dependent upon Laclede Cab for taxi services. This factor favors employee status.

Factors 19 and 20 – Right to discharge and right to terminate

The business' right to summarily discharge a worker and a worker's right to leave without notice and without incurring liability indicates employment status. *Nat'l Heritage Enters.*, 164 S.W.3d at 172-73. The Commission found that Laclede Cab could discharge the drivers at any time without liability and that the drivers could quit at any time without incurring any liability. This was a part of the contractual relationship between Laclede and its drivers. These factors favor employee status.

Analysis of Laclede's relationship with its drivers

Laclede contends that the VHC controlled the conduct of the drivers and not Laclede Cab. In this respect, the drivers would be subject to the control of the independent regulatory authority, the taxi commission, rather than Laclede Cab. These requirements included wearing a uniform, acting appropriately in public and to drive prudently. (Tr. 46). Under the *Travlers* decision, as discussed above, reasonable efforts

[16] The VHC required them to affiliate with a CCN holder.

to ensure compliance with governmental regulations do not show control unless the company's control significantly exceeds the scope of government imposed control. *Travelers Equities Sales, Inc.*, 927 S.W.2d at 918.

In this case, the agreement between the parties shows Laclede Cab retained a right of control over how the job was performed which exceeded the requirements imposed by the MTC. Paragraph 5 of the parties' agreement states that: "driver agrees to give orders received from the dispatch system priority, and shall not pick up passengers on his/her own if in conflict with the dispatching system, and without notifying the dispatcher." (Tr. 72; 309). Also, the agreement requires the drivers not to "unreasonably refuse any request concerning a 'charge customer' of Laclede." (Tr. 310). Vehicles are to be used for business purposes only. (Tr. 309).

"It is not necessary that the employer actually direct and control the manner in which services are performed; it is sufficient if he or she has the right to do so." *Higgins*, 167 S.W.3d at 287. Therefore, Laclede Cab reserved the right to require its drivers to notify and obtain permission from dispatch before picking up any passenger, to accept Laclede Cab's charge customers, and to forbid drivers from using cabs for anything other than company business purposes.

There are no set numbers of criteria necessary to reach a conclusion of employee status. Here, there are 17 factors in favor of employment, 1 factor in favor of independent contractor status and 2 neutral or inapplicable factors. The evidence establishes that Laclede Cab retained the right to control the taxi cab drivers' services.

At the hearing in this matter, Laclede reiterated its point that the taxicab drivers signed "independent contractor agreements" with the taxicab business. Recently, in *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014), the United States Court of Appeals for the Ninth Circuit dealt with the issue of whether or not drivers delivering packages for FedEx should be considered employees of FedEx. *See also Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033 (9th Cir. 2014). The facts in *Alexander* established that the drivers purchased their own trucks, were restricted to certain delivery zones, were trained on efficient ways to deliver packages to customer's doorsteps, and had to wear uniforms, among other things. *Alexander*, 765 F.3d at 984-87. While the *Alexander* court held that under California's right-to-control test the drivers were employees of FedEx, what was more curious was the concurring opinion written by Judge Trott and joined by Judge Goodwin. *Id.* at 997-98. Judge Trott's opinion characterized FedEx's business model as creating an employment relationship even though the intent was for it to be in the form of an independent contractor model. *Id.* at 997. Laclede has created a similar model in this case as well. As part of Judge Trott's characterization, he beckoned the wisdom of Abraham Lincoln who was "reportedly asked, 'If you call a dog's tail a leg, how many legs does a dog have?' His answer was, 'Four. Calling a dog's tail a leg does not make it a leg.'" *Id.* at 998. The point Judge Trott is making is that some employers today find it expedient to avoid treating their workers as employees and have developed ingenious schemes that exalt form over substance to avoid the complications and costs associated with an employer-employee relationship. Therefore, it is an essential responsibility of the

judiciary to examine and verify that these relationships are, in fact, proper and not just ingenious alternatives to an employment relationship which work to the detriment of thousands of real hardworking Missourians who merely intend to do their jobs, without any entrepreneurial goals, and then go home.

This case must be viewed in light of the underlying purpose of the employment security law. *Travelers*, 927 S.W.2d at 917. The purpose of the law is to provide benefits to workers who become "unemployed through no fault of their own." Section 288.020.1, RSMo. The purpose of making this employee versus independent contractor decision is to determine whether the cab drivers would be eligible for unemployment benefits if they were to lose their positions through no fault of their own.

The success of Laclede Cab's business depends upon the work of the drivers. Laclede Cab's reputation with the greater St. Louis community requires that the work be performed by dependable, reliable, and trained drivers. The taxicab business' success in retaining its voucher customers is dependent upon providing good customer service from its drivers. It is a reasonable inference from the record that taxicab business has the right to engage in control of its taxicab drivers where the work performed is subject to negative financial impacts.[17]

[17] In fact, drivers have been terminated where at fault accidents led Laclede to believe that the drivers were unsafe. (Tr. 81). Also, if there is no business being generated for Laclede's drivers, there will be no "pro" that Laclede receives.

An independent contractor generally would expect to have multiple projects going at the same time, or projects set up to proceed sequentially without break, so that the loss of one job does not cause a devastating total loss of income. Here, virtually all of the drivers are placing all of their income expectations in their positions with Laclede Cab, subject to Laclede Cab's direction, oversight, and control. Whether or not the drivers theoretically could provide services as independent contractors, the arrangement under which they work with Laclede Cab does not create such a relationship. Here, whether it is by regulation or by company restrictions imposed by Laclede, the drivers are dependent on Laclede for fares since they may not utilize cell phones to be independent entrepreneurs and the drivers have shown that virtually all of their fares are generated by the dispatch system. (Tr. 36; 99). Laclede Cab's drivers are workers that the employment security law is intended to protect, and they should be covered by that law.

In addition to the federal cases cited in Point I, *supra*, which found taxicab drivers to be employees of the business, there is established Missouri case law finding an employment relationship in similar circumstances. In *K & D Auto Body*, the court found that tow truck drivers who received a commission for the fare of a tow were employees because the factors favoring employment status outweighed those favoring independent contractor status in that the vehicles provided to the tow truck drivers created an inference of the right to control because of their value. 171 S.W.3d at 114. The *Higgins* court found that a "hands off" owner of a taxicab business in Rolla retained an unrestricted right to control the manner and means of her taxicab drivers. 167 S.W.3d at 287. The Eastern District, in *Shinuald*, held under this same set of facts that cabdrivers

were employees of Yellow Cab pursuant to Missouri employer-employee law for workers' compensation purposes. 666 S.W.2d at 849. Here, the business has not only retained a right to control the drivers but has restricted their use of cell phones, imposed a priority system for picking up customers, and installed GPS devices in its cabs which restrain the ability to get new customers based on location, to name only a few elements of control imposed by the taxicab business. Laclede attempts to distinguish *Higgins* by arguing that there are factual dissimilarities. Laclede is correct in its assertion that there are factual differences in that case, but there are always going to be factual differences in any case establishing an employment or independent contractor relationship under Missouri's Employment Security Law because it is a fact intensive test where one simple fact could outweigh all of the others. It is the exercise of control of the business that was important to the *Higgins* court and it is because Laclede has exercised control which limits its drivers' ability to truly act independently from Laclede (by restricting the way the taxicab business' drivers can receive customers) which makes them employees as the drivers were in *Higgins.*

The cases Laclede relies on in its brief neither rely on Missouri Employment Security law nor are they cases which establish a similar burden of proof in an area of law that is to be liberally construed in favor of awarding unemployment benefits. *See* §288.020, RSMo. Furthermore, all of the cases relied upon by Laclede can be distinguished based under a proper analysis of the common law right to control test which is fact intensive. *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983) (distinguished by the facts that the drivers can use their cabs for personal business and

that the drivers "are able to create goodwill that inures to them personally."); *NLRB v. AAA Cab Services, Inc.*, 341 NLRB No. 57 (2004) (distinguished by the fact that drivers can sublease their vehicles to other drivers and that "it is not uncommon for drivers to have private clientele, who will contact the drivers via cell phone or pagers…"); *EEOC v. North Knox School Corp*., 154 F.3d 744 (7th Cir. 1998) (distinguished by the fact that case dealt with school bus drivers under a completely different arrangement); *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996) (distinguished by the fact that the putative employee actually owned her own independent business and limousine); *Ace Cab Co.*, 273 NLRB No. 186 (1985) (distinguished by that fact that the drivers were not required to use the dispatch system); *Air Transit, Inc. v. NLRB*, 679 F.2d 1095 (4th Cir. 1982) (distinguished by the fact that Air Transit did not own any cabs and that the drivers could make special arrangements to pick up passengers at locations away from a "feed line" it had established to set priorities for its drivers); *City Cab of Orlando, Inc.*, 285 NLRB No. 81 (1987) (distinguished by the fact that the drivers can choose whether or not they utilize the dispatch system); *Local 777 v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978) (distinguished by the fact that in this case "[e]very fare a cab driver receives is based in substantial part on the goodwill which the drivers build up. The attractiveness of their cab service to passengers constitutes the principal basis for the income of the lessees."); *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354 (9th Cir. 1975) (distinguished by the fact that the drivers are "free to work for other companies and make their own arrangement with clients and to develop their own goodwill…"); *Goodman v. Allen Cab Co.*, 232 S.W.2d 535 (Mo. 1950) (distinguished in that the case does not analyze the law

as it relates to an employer-employee relationship and is based on an evidentiary matter). In virtually all of these cases[18], there is one stark contrast – the taxicab drivers in those cases were able to "make their own arrangements with clients and develop their own goodwill" whereas, here, Laclede actively prohibits that kind of independent business activity. *See Air Transit*, 679 F.2d at 1099.

Laclede has failed to provide this court with an in-depth analysis of the twenty factors or cite any Missouri case law to support its position. Instead, it relies on a number of cases outside of the jurisdiction and context of Missouri Employment Security Law. These cases do not perform a twenty factor analysis like Missouri Employment Security cases. At the same time Laclede argues that the test utilized in these cases is very similar to the test used by Missouri courts, it attempts to distinguish the Missouri Court of Appeals for the Eastern District's decision in *State ex rel. Sir*. That case involves the exact same facts as those presented to this Court and the Court's opinion analyzes the employment issue through the lens of Missouri Employment Security cases. *State ex rel. Sir*, 400 S.W.3d at 487-89. The taxicab business attempts to distinguish this case because

[18] This statement is not true when compared to *Arena v. Delux Transp. Services, Inc.*, 3 F.Supp.3d 1 (E.D. New York 2014). This was a Fair Labor Standards Act wage and hour case which does not involve the same considerations here. The FLSA does not use the 20 factor common law test for control and it does not have a presumption in favor of an award of benefits as Chapter 288 does. For those reasons, this Court should decline to follow *Arena*.

it applies a different test than that required under Missouri's Employment Security Law and ignores the purpose *State ex rel. Sir* serves to this court, which is twofold: (1) this case establishes an employment relationship under the same set of facts and for the same taxicab business while relying on cases interpreting Missouri's Employment Security Law; and (2) it illustrates the problems surrounding the illusory proposition asserted by the taxicab business that the company only cares about receiving its "pro" and nothing else. If the company truly only cared about receiving its "pro" Laclede would not selectively choose who is able to provide that "pro" and drive one of their cabs.[19]

[19] It would be helpful, however, for this court to examine the facts in *State ex rel. Sir*. That case provides this court with additional evidence and consideration for Laclede's argument that it has no incentive to control its drivers and the only financial motivation of the business is the receipt of its pro. In that case, Mr. Sir filed a petition alleging that he was discriminated against when the business indicated that it did not want to hire someone, like Mr. Sir, with limited motor abilities resulting from a stroke. 400 S.W.3d at 483. If the court were to believe Laclede's repeated assertion that as long as Laclede received its pro that it didn't matter what the drivers did, then it would beg the question as to why Laclede would refuse to accept a pro from someone with limited mobility as long as they were able to receive their license and were allowed to drive a taxicab pursuant to the VHC, as was Mr. Sir. *Id.* at 482-83. The fact that Laclede did not hire Mr. Sir is a strong indication that there is more control being asserted over the drivers than Laclede would have this court believe.

Laclede further argues that the "Commission failed to address the impact of IRS Publication 15-A (2012)."[20] (Appellant's Brief, p. 41). Laclede, however, misapplies the regulation at issue. 8 CSR 10-4.150(1) states as follows:

> In order to interpret **section 288.034.5, RSMo**, 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. [Emphasis added].

Laclede asserts that under this regulation the Commission should have found that a four sentence paragraph example provided in IRS Publication 15-A (2012) was dispositive of the issue presented to it and should have ruled that the drivers were independent contractors. This ignores that the fact pattern provided as an "example" in the publication is very limited in its facts. Laclede has filed a statement of facts which is multiple pages long and much more complicated than the paragraph it asserts as persuasive. This court is under no obligation to consider the IRS Publication as persuasive in this matter because this situation is more complex than the example in that the IRS Publication does not consider facts where: the taxicab business pays for the

[20] The St. Louis Convention and Visitors Commission makes a similar argument for Revenue Ruling 71-572, 1971 WL 26813. (St. Louis Convention and Visitors Commission Brief to the Western District, p. 27).

routine and regular maintenance of the vehicles, the taxicab business sends the drivers out to provide rides to preferred or "voucher" customers, the taxicab business imposes restrictions on the manner and means in which its drivers can pickup customers, and the taxicab business demands that its drivers not use their own personal cell phones to keep and retain customers.

As mentioned above, the factors are meant to be a guide. At the end of its analysis of all of those factors, this Court must balance its analysis of this guide with a practical realization or understanding of who is really controlling the work that is done. Here, the taxicab business is controlling the manner and means in which the drivers receive any and all of their business and the taxicab drivers are entirely dependent upon the taxicab business to provide them with customers that call Laclede cab. Where such a relationship exists it is imperative to provide the "independent contractors" with unemployment insurance protections should the taxicab business decide that it no longer wants to use a driver's services because he or she suffered a stroke or because it decides it is no longer financially viable to continue its operation in whole or in part. It is precisely in those areas of control, which are outside of the requirements of the VHC that this Court should find that an employment relationship exists.

CONCLUSION

Because there is an extraordinary amount of control imposed by Laclede over its cab drivers, which is above and beyond what the VHC requires, the decision of the

Commission finding employment status for the taxicab drivers should be affirmed pursuant to the rationale discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served upon Brian McGovern, 400 S. Wood Mill Rd., Ste. 250, Chesterfield, MO 63017 via the Court's e-file system on January 12, 2015.

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CERTIFICATE OF WORD COUNT

I hereby certify the following:

1. The foregoing brief has been prepared in Microsoft Word 2007, 13 point Times New Roman font.

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3. The foregoing brief contains 14,468 words.

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