1983

Darrell Nielsen v. Board of Review of The Industrial Commission of Utah, And Department of Employment Security, And Edward R. Beale : Defendant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

DARRELL NIELSEN :

Plaintiff, :

CASE # 83-A-1331

v. :

SUPREME COURT No. 19369

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, and DEPARTMENT OF EMPLOYMENT SECURITY, and EDWARD K. BEALE, :

Defendants.

BRIEF

Appeal from the decision of The Industrial Commission of Utah, Department of Employment Security and Board of Review.

Darrell Nielsen, Appellant
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by

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IN THE SUPREME COURT OF THE STATE OF UTAH

Plaintiff,

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and

Attorneys for Respondents

[illegible] and relief sought.

DEFINITIONS

Reference: Volume 59 Page 928 Paragraph 4 American Jurisprudence 2d

Definitions of Partnership - Under Uniform Partnership Act.

The Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."

Reference: Volume 33 Page 339 Paragraph 1502 American Jurisprudence 2d

Definition of Partnership - Under Federal Definition.

What is a partnership under the Tax Law.

In general a partnership exists when two or more persons join in carrying on a trade or business, each person contributing either money, property, labor, or skill and sharing in the profit and losses of the business. For tax purposes, the code provides that a "partnership" includes a Syndicate, Group, Pool, Joint Venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on.

Reference: Circular E Employer's Tax Guide page 4 Paragraph 4

4. Who Are Employees?

Generally, employees can be defined either under common law or under special statutes for special purposes.

Common Law Employees. - Anyone who performs services that can be controlled by an employer.

Generally, people in business for themselves are not employees.

For FICA tax purposes, an employee is a person.

IN THE SUPREME COURT OF THE STATE OF UTAH

DARRELL NIELSEN,

Plaintiff,

vs

Case No. 19369

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, and DEPARTMENT OF EMPLOYMENT SECURITY, and EDWARD R. BEALE,

Defendants.

DEFENDANT'S BRIEF

Appeal from a decision of the Department of Employment Security, State of Utah, as affirmed by the Administrative Law Judge and upheld by the Board of Review of the Industrial Commission, State of Utah

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TABLE OF CONTENTS

STATUTES

TABLE OF CONTENTS (Continued)

STATUTES (Continued)

CASES CITED

TABLE OF CONTENTS (Continued)

CASES CITED (Continued)

TABLE OF CONTENTS (Continued)

CASES CITED (Continued)

OTHER AUTHORITIES

IN THE SUPREME COURT
OF THE STATE OF UTAH

DARRELL NIELSEN,

Plaintiff,

vs

Case No. 19369

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH and DEPARTMENT OF EMPLOYMENT SECURITY, and EDWARD R. BEALE,

Defendants

DEFENDANT'S BRIEF

NATURE OF CASE

This is an appeal pursuant to §35-4-10(i), Utah Code Annotated 1953, from a decision of the Board of Review, Industrial Commission of Utah, affirming the decision of the Administrative Law Judge declaring that the defendant, Edward R. Beale, was an employee of Darrell Nielsen, the Plaintiff, pursuant to §35-4-22(j), Utah Code Annotated 1953, rather than an independent contractor.

DISPOSITION BELOW

On November 5, 1982 the claimant, Mr. Beale, was notified by the Department of Employment Security that he was monetarily ineligible to receive unemployment benefits as a result of his association with F.B. Truck Lines. Mr. Beale filed an appeal against this decision on February 15, 1983 stating that he was employed by the Plaintiff, not F.B. Truck Lines, during his base period. In an appeal decision issued on May 3, 1983 the Appeal Referee ruled that Mr. Beale was an employee of the Plaintiff pursuant to §§35-4-22(j)(5), 35-4-22(p) and 35-4-4(f) of the Act and remanded the matter to the Central Office for a monetary determination based on this finding. (A timeliness issue with regard to the late-filed appeal was resolved in the claimant's favor based upon continued contact with the Department Representative in California.) The Board of Review affirmed the decision of the Appeal Referee on July 15, 1983 in Case No. 83-A-1331, 83-BR-330.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the decisions of the Board of Review and the Appeal Referee. Defendant seeks affirmation of said decisions.

STATEMENT OF FACTS

Plaintiff was the owner of a semi-tractor for which he contracted with F.B. Truck Lines to haul various loads, apparently in their trailers, to whatever location they might specify. R0041 and 0048 Plaintiff also hired

driving team consisting of the claimant and another party, who actually drove the truck. R0030 and 0031 The claimant and the other driver began working for the Plaintiff on or about June 29, 1981 and last worked on October 4, 1982. R0027

F.B. Truck Lines paid the Plaintiff at a rate of $.65 per loaded mile and $.32 or $.33 per mile when traveling without a load between hauls. R0040 The claimant received $.16 per mile in 1981 and $.20 per mile in 1982 for his services as driver. R0027 The claimant was paid some amounts as advances and draws directly by F.B. Truck Lines; however the net earnings due the claimant were paid from the Plaintiff's account. R0043 There were no profits made by the Plaintiff on the trucking venture. R0044 The truck was purchased as a tax write-off. R0051

Only the Plaintiff, not F.B. Truck Lines, had the discretion to terminate the claimant's services. R0044 and 0047 The Plaintiff had "say and control" over the truck with regard to service and repairs and what sort of loads would not be hauled in the truck. R0049 The Plaintiff had instructed the claimant on several occasions not to accept exempt loads (relating to surcharges). R0049 The Plaintiff could remove the truck from service if he pleased or put it anywhere he pleased, leaving the claimant with the alternatives of accepting the change or quitting. R0049

The claimant had been a truck driver for approximately twenty-three years. He had never owned his own truck. R0049 He had never been an independent contractor. R0028

ARGUMENT

POINT I

IN REVIEWING CERTAIN DETERMINATIONS OF THE INDUSTRIAL COMMISSION UNDER THE UTAH EMPLOYMENT SECURITY ACT THE COURT WILL AFFIRM THE COMMISSION'S FINDINGS UNDER AN INTERMEDIATE STANDARD OF REVIEW IF SUCH ARE SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE AND PROVIDE A REASONABLE AND RATIONAL APPLICATION OF LAW TO FACT.

The standard of review in employer contribution cases, as in all unemployment insurance cases, is confined to questions of law. As stated in Superior Cable Installers, Inc. v. Industrial Commission of Utah, Utah, No. 19407, Slip Opinion (S.Ct. Utah, April 18, 1984):

> The role of this Court in reviewing the findings of the Board is limited by U.C.A., 1953, §35-4-10(i), which sets forth the standard of review: "In any judicial proceeding under this section, the findings of the commission and the board of review as to the facts if supported by evidence, shall be conclusive and the jurisdiction of the court shall be confined to questions of law."
>
> Therefore, if the findings of the Board of Review are supported by the evidence, the decision must be affirmed.

This Court, ruling on unemployment insurance matters, has consistently held, that where the findings of fact of the Commission and the Board of Review are supported by evidence they will not be disturbed. Martinez v. Board of Review, 25 U. 2d 131, 477 P.2d 587 (1970) and Whitney v. Board of Review of Industrial Commission of Utah, Utah, 585 P.2d 780 (1978). This same standard has been preserved by this Court in other decisions arising from administrative actions. Milne Truck Line, Inc. v. Public Service Commission, Utah, 368 P.2d 590 (1962) and PBI Freight Service v. Public Service Commission of Utah, Utah, 598 P.2d 1352 (1979).

Matters before the Court have, in practice, provided instances where this dichotomous standard of review is not so clearly applicable. Cases which give rise to mixed questions of law and fact have generated an intermediate category of review of administrative decisions upon which the courts exercise a scope of review more extensive than when reviewing agency findings on questions of basic fact, but less extensive than when reviewing to correct error in agency decisions on questions of general law. Salt Lake City Corporation v. Department of Employment Security, Utah, 657 P.2d 1312 (1982). In reviewing the agency's decisions in questions of mixed law and fact and the application of findings of fact to the legal rules governing a case, a court should afford great deference to the technical expertise or more extensive experience of the responsible agency so long as those decisions fall within the limits of reasonableness and rationality. Gray v. Department of Employment Security, Utah, 681 P.2d 807 (1984), City of Orem v. Christensen, Utah, 682 P.2d 292 (1984), Utah Department of Administrative Services v. Public Service Commission, Utah, 658 P.2d 601 (1983) This latter case goes on to describe that category of review more fully as follows:

> Also among these intermediate issues are the Commission's decisions on what can be called questions of "special law." These are the Commission's interpretations of the operative provisions of the statutory law it is empowered to administer, especially those generalized terms that bespeak a legislative intent to delegate their interpretation to the responsible agency. In reviewing agency decisions of this type, we apply what we have called the "time honored rule of law . . . that the construction of statutes by governmental agencies charged with their administration should be given considerable weight . . . ." McPhie v. Industrial Commission,

> Utah, 567 P.2d 153, 155 (1977); West Jordan v. Department of Employment Security, Utah, 656 P.2d 411 (1982). An agency's interpretation of key provisions of the statute it is empowered to administer is often inseparable from its application of the rules of law to the basic facts . . .

Reasonableness must also be determined with reference to the specific terms of the underlying legislation and in light of the public policy sought to be served. Utah Department of Administrative Services, supra. The primary public policy consideration under the Employment Security Act, as stated in §35-4-2 of the Act, is to protect against economic insecurity due to unemployment which is a serious menace to the health, morals and welfare of the people of this state. Thus it is in the public interest to protect against the crushing blow of unemployment on the worker and his family. Further, a liberal construction of the Act in favor of the worker is required to best effectuate its stated purposes. Gocke v. Wiesley, 18 Utah 2d 44, 420 P.2d 44 (1966); Singer Sewing Mach. Co. v. Industrial Commission of Utah, Department of Placement and Unemployment Insurance, 104 U. 175, 134 P.2d 479 (1943); Johnson v. Board of Review of Industrial Commission, Department of Employment Security, 7 Utah 2d 113, 320 P.2d 315 (1958).

When the decision being reviewed represents the agency's weighing of competing values to select a particular goal, its interpretation of a special law, or its application of its findings of fact to a finding or conclusion on the "ultimate facts" in the case, judicial review necessarily involves an independent judgment of the reasonableness of the agency decision. However the statutory setting in which the decision operates must provide the backdrop

... the judicial process. Utah Department of Administrative Services and Milne, supra.

Bearing these parameters in mind, the Court should affirm the decision of the Appeal Referee if that decision is:

1. found to be within the parameters defined by the Act;
2. supported by competent evidence (which need not be uncontradicted evidence pursuant to Salt Lake City Corporation, supra.); and
3. reasonable in its application of the agency's policy to the facts.

Having met these criteria in its review and decision-making processes, the Defendant asserts that the Court will affirm the Agency's findings. The Defendant sets out the tests utilized in reaching its ultimate conclusions in the "Arguments" below which demonstrate the Agency's proper application of fact to law pursuant to the express policy of that body.

POINT II

THE PERFORMANCE OF PERSONAL SERVICE FOR WAGES, PURSUANT TO THE DEFINITIONS PROVIDED IN THE ACT, IS THE ESSENTIAL PRELIMINARY FINDING TO FURTHER CONSIDERATION OF THE EMPLOYEE/INDEPENDENT CONTRACTOR ISSUE.

Plaintiff's brief has raised an issue as to whether the claimant and his co-driver were in partnership, thereby precluding any consideration of them individually as employees. Plaintiff's witness made the following claim at the appeal hearing:

> . . . Ed and Annette are a team, a partnership, contracting with Daryl Nielsen to drive the truck for a specific milage [sic] rate and I question the fact that he is an employee. R.0032

No evidence was presented in support of this assertion. Payments were made to each party individually. R.0044 Expense records gave the full name of each driver rather than any partnership name or designation. R.0110 Correspondence was addressed to the claimant alone from the Plaintiff on October 19, 1982. R.0097 The evidence which was presented in this matter points solely to individual employment; therefore, consideration of question of personal service for wages pursuant to the Act is required.

Performance of personal service for wages is predicated on the statutory language of §§35-4-22(j)(1) and 35-4-22(p) of the Act. §35-4-22(j)(1) holds that:

> "Employment" means any service . . . performed for wages or under any contract of hire written or oral, express or implied.

§35-4-22(p) defines "wages" as:

> . . . all renumeration for personal services including commissions and bonuses and the cash value of all renumeration in any medium other than cash. Gratuities customarily received by an individual in the course of his employment from persons other than his employing unit shall be treated as wages received from his employing unit. The reasonable cash value of renumeration in any medium other than cash and the reasonable amount of gratuities shall be estimated and determined in accordance with the rules prescribed by the commission . . .

Those relationships which are excluded from the definitional test for employment must be bona fide lessor-lessee, vendor-vendee or franchise relationships as established historically by a long line of cases resolved befo

this Court. Fuller Brush v. Industrial Commission of Utah, 99 U. 97, 104 P.2d 201 (1940); Singer Sewing Machine, supra; Salt Lake Tribune Pub. Co. v. Industrial Commission, 99 U. 259, 102 P.2d 307 (1940); Logan-Cache Knitting Mills v. Industrial Commission, 99 U. 1, 102 P.2d 495 (1940); Blamires v. Board of Review of Department of Employment Security of Industrial Commission, Utah, 584 P.2d 889 (1978); Leach v. Board of Review of Industrial Commission, Department of Employment Security, 123 U. 423, 260 P.2d 744 (1953). The individual who gains his income from services performed as an auto mechanic, dentist, plumber, CPA or even as a truck driver, is brought within the test of §35-4-22(j)(1) as rendering personal services for renumeration. The broad application of this test is seen in the language of Fuller Brush, supra, which says in part:

> A takes to the blacksmith a horse to be shod and a plow point to be sharpened. The smith renders personal service and receives renumeration for his time and labor, which constitutes wages under the act.

In our case the claimant drove a truck owned by the Plaintiff, and at the request of the Plaintiff, for pay. The evidence being sufficient for a finding of employment under the definitions of §§35-4-22(j)(1) and 22(p), the first phase of the statutory scheme was completed by the trier of fact. Defendant asserts that this finding is without error. Only after this finding is made, can the trier of fact proceed through the statutory framework to the three-part test provided in §§35-4-22(j)(5)(A),(B) and (C) to determine if any of the exclusions given there would have proper application to these findings and the remaining evidence.

POINT III

EACH OF THE THREE CONDITIONS SET FORTH IN §§35-4-22(j)(5)(A), (B) AND (C) OF THE ACT, COMMONLY KNOWN AS THE "ABC TEST," FOR ESTABLISHING INDEPENDENT CONTRACTOR STATUS MUST BE MET OR THE SERVICES PERFORMED WILL BE HELD TO BE EMPLOYMENT.

§35-4-22(j)(5) provides as follows:

> Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, and are deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commission that:
>
> (A) The individual has been and will continue to be free from control and direction over the performance of those services, both under his contract of hire and in fact;
>
> (B) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all of the places of business of the enterprise for which the service is performed; and
>
> (C) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.

The exclusion provisions are in the conjunctive. Therefore, all three elements of the ABC Test must be met in order for services to be excluded from coverage as employment under the Act. Superior Cable Installers and Leach, supra. Failure to meet the requirements of any one is sufficient to support a finding that the services provided constitute employment. Globe Grain and Milling Co. v. Industrial Commission, 98 U. 36, 91 P.2d 512 (1939). Some pertinent characteristics of the Plaintiff's relationship with the claimant in the case at hand are:

1) The claimant was hired to drive the truck by the Plaintiff.

2) The Plaintiff retained the sole right to discontinue the claimant's services.

3) The claimant received load and destination information from the contract carrier, F.B. Truck Line.

4) Some loads offered by the contract carrier were not profitable due to surcharge problems.

5) The Plaintiff retained the right to determine what loads would or would not be hauled by the claimant.

6) The Plaintiff exercised his discretion in refusing certain loads on several occasions.

7) The Plaintiff approved major repairs on the truck prior to any work being performed and bore the costs of the repairs.

8) The Plaintiff paid the claimant at a flat rate of pay ($.16 per mile when first hired and later $.20 per mile).

9) The claimant had no stake in the profits of the trucking enterprise.

10) The claimant was paid directly by the Plaintiff when advances made by the contract carrier to the claimant did not cover the full amount due pursuant to No. 8 above.

In Rev. Rul. 524, 1971-72 C.B. 346 advice was requested as to whether a truck driver is an employee of the party leasing a tractor-trailer rig with a driver to a contract carrier when the right to direct and control the driver to the extent necessary to protect the investment is retained by the lessor. The following conclusions were drawn:

> In the instant case the leasing company owns the tractor-trailer rigs and leases them with driver; it furnishes major repairs, tires, and license plates for the rigs; it generates all the work or jobs; it bears

> the major expenses and financial risks of the business; and it hires the driver to perform personal services on a continuing basis. The driver is not engaged in an independent enterprise requiring capital outlays or the assumption of business risks, but rather his services are a necessary and integral part of the leasing company's business. The leasing company has the right to direct and control the driver to the extent necessary to protect its investment, and to discharge him if his conduct jeopardizes its contract with the carrier.
>
> Accordingly, it is held that the driver engaged in performing services under the circumstances described above is an employee of the leasing company for the purposes of the Federal Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages.

There are several pertinent excerpts from the testimony in the case at hand which it is now appropriate to review. The first of these demonstrates the nature of the claimant's working relationship with the Plaintiff as long term and precluding the possibility of other work during the same period by its full-time nature:

> Referee: . . . when did you first start working for Nielsen Enterprises?
>
> Claimant: Ah, June 20, officially June 29, 1981.
>
> Referee: Okay, and then the last day of employment we have October 4, 1982, are we correct?
>
> Claimant: That is correct? [sic]
>
> Referee: What type of work were you doing?
>
> Claimant: I was driving.
>
> Referee: And your rate of pay?
>
> Claimant: In 1981 it was 16 cents a mile, in 1982 it was 20 cents a mile.

Referee: All right, and you were a full-time employee?

Claimant: Yes, m'am. R.0027

The claimant has a long history of work of this nature:

Referee: . . . Now have you ever been a truck owner or ever done this on your own?

Claimant: No m'am.

Referee: Okay. Have you always driven for someone else?

Claimant: Yes m'am.

Referee: How long have you been driving?

Claimnt: Oh, approximately 23 years. R.0048

It was the claimant's understanding that he had been "hired" by the Plaintiff and that the Plaintiff alone had the authority to terminate his services:

Referee: . . . If F. and B. [contract carrier] had been displeased with you as a driver, would they have been able to terminate your relationship?

Claimant: They would have notified the owner of the tractor that they wanted me terminated, is what they would have done.

Referee: And then the termination would have been done by whom?

Claimant: By the person who hired me, Mr. Nielsen [Plaintiff]. R.0047

Plaintiff's accountant concurred in this authority:

Referee: . . . Who would have the right to fire either Berle [sic] [claimant] or Simms?

Plaintiff's Accountant: Well Daryl [Plaintiff] would be the only one that would have had any right to do that as far as I know. R.0044

With regard to control over the actual work performed the following is significant:

> Referee: . . . Then ah, who gave the directions of where you were to go and what you were supposed to do in terms of loads?
>
> Claimant: Ah, dispatching and loading orders came from F.B. Trucklines [sic] [contract carrier].
>
> Referee: Okay, did Mr. Nielsen [Plaintiff] have anything to do with that at all?
>
> Claimant: Not as far as dispatching and such. Now he could, at his discretion, tell us certain loads that he would not want us to take . . . R.0048

> Plaintiff's Accountant: Ed [claimant], at any time did Daryl [Plaintiff] request you not to take a load?
>
> Claimant: Yes he did Orin, ah, several times he asked me not to take exempt loads. R.0049

Not only did the Plaintiff have the right to control which jobs the claimant might perform, but this right was exercised on several occasions.

Monies due the claimant for his work were covered in part by advances made by F.B. Truck Lines, but any balance due was paid by the Plaintiff:

> Plaintiff's Accountant: Well he [Plaintiff] put the money in the bank account and paid the bills out of it like the truck payments, the insurance and then occasionally he'd pay Ed [claimant] or Simm some amount that they claimed they had coming. R.0044

> Referee: And how were your checks made out?

Claimant: The checks, when I received them I was usually going through Salt Lake City and they would be made out to me and I would usually cash them right on the spot.

Referee: What was the name of the company on the check?

Claimant: Ah, it is run from, as I stated, from Daryl Nielsen's [Plaintiff's] personal account to Daryl Neilsen truck account, ah, Nielsen Enterprises, ah, let's see, DN land development in Ogden, Utah. And I have been paid in cash at times. R.0027 and 0028

Repairs to be made on the truck were handled as follows:

Claimant: . . . If the truck needed repairs I could not authorize the moneys [sic] to pay for any repairs. That had to come from either Mr. Alexander [Plaintiff's accountant] or Mr. Neilsen [Plaintiff]. F.B., while they were in essence handling the running of the truck, it was at the owners [sic] discretion at any time he wished to he could remove the truck from F.B.'s service, he could put the truck anywhere he wanted to put the truck. My option was I could either go where he put the tractor or I could quit and get off the tractor and go look for work elsewhere. R.0049

Considering the characteristics observed in this employment situation and enumerated on page 11 of this point plus the testimony reviewed above, an almost identical case to that in Rev. Rul. 524, supra, is presented by the case at hand.

Other similar fact situations have given rise to case law on point here. In Harry L. Young and Sons, Inc. v. Ashton, Utah, 538 P.2d 316 (1975), this Court distinguished the employer/employee relationship from that of an independent contractor in holding that the employee is hired, paid a fixed salary

or rate and is subject to a greater degree of control in the performance of his duties than is the independent contractor who is engaged to do some particular project or piece of work, usually for a set sum and is responsible only for satisfactory completion of the task. The Court went on to point out that the furnishing of equipment, particularly expensive equipment, has a significant bearing upon the issue of retention of control by the employer.

This language has brought us precisely to the "control and direction" elaborated in the "A Test" of §35-4-22(j)(5). Comparing the Court's findings to the present factual scenario, it is apparent that the relationship between the Plaintiff and the claimant is one of employment as affirmatively asserted by hiring, firing and pay practices and in terms of investment. This finding is further supported by this Court's decision in Kinne v. Industrial Commission, Utah, 609 P.2d 926 (1980) where the truck driver was also found to be the employee of the truck owner-lessor.

As a further consideration under the "A Test", it has been noted that:

> The most important factor to be considered in determining whether an arrangement between a principal and another person for the performance of work creates an employer-employee relationship between them is whether the principal has the right to control the manner in which the other person performs the work in question. Morish v. United States, 555 F.2d 794 (Ct. Cl. 1977).

In the above case the fact that the plaintiff exercised his right of control in a broad sense by only generally monitoring the activities of his truck drivers did not militate against the existence of the right of control, particularly as the nature of the work involved did not require, or even permit

very much actual supervision by the plaintiff. Again precedent case law has resolved a comparable fact situation in favor of an employer/employee relationship.

The "B Test" sets forth a perplexing alternative situation whereby either of two elements would result in a finding favorable to independent contractor status. To reiterate the statute, the individual is held to be an independent contractor if the service provided is outside the usual course of business or if the service is performed outside all of the places of business of the enterprise for which the service is performed. A truck is a mobile working environment, thereby increasing the complexity of applying this test. In Blamires, supra, the "B Test" was satisfied because Blamires performed his services outside any places of business which his principal had previously maintained or which were utilized for any purpose except Blamires' own.

As distinguished from Blamires, this claimant performed his services within the physical facility, the truck itself, provided by the Plaintiff. Utilization of the facility served both the Plaintiff and the claimant in terms of financial gains. At the end of the claimant's services, the facility remained in the hands of the Plaintiff, as further evidence of employment pursuant here to the "B Test".

An individual who is customarily engaged in an independently established trade, profession, occupation or business meets the criteria for exclusion as an independent contractor under the "C Test" of §35-4-22(j)(5).

The statute is interpreted to mean neither "independently engaged in a established business" nor "customarily engaged in an independent business." Fuller Brush Co., supra. As correctly interpreted in Fuller Brush:

> The adverb "independently" clearly modifies the word "established", and must therefore carry the meaning that the "business" or "trade" was established independently of the employer or the rendering of personal service forming the basis of the claim.

As in Superior Cablevision, supra., this claimant did not work for anyone other than the Plaintiff. The claimant had no ownership or proprietary interest in the Plaintiff's trucking venture that he could have transferred to another for value.

The good will, if any, attaching to this venture inured to the benefit of the Plaintiff rather than the claimant. The claimant was but a replaceable part of the business venture. As held in Leach, supra, and particularly applicable to the present claimant, the claimants:

> . . . had nothing aside from their relationship with the plaintiffs. When the services of a dealer were terminated by the plaintiffs, he became unemployed and had to secure employment elsewhere. He had no business of his own to fall back on--a business established independently of his relationship with the plaintiffs and from which his services for the plaintiffs emanated, a business in which he was customarily engaged aside from his relationship with the plaintiffs.

If the truck were removed from the claimant's use, he would have been left without tools or equipment to perform his trade, other than his basic driving skill which certainly alone cannot be construed to comprise an independently established business. Even ownership of the truck by the worker is not

necessarily indicative of an independent contractor relationship rather than an employer/employee relationship. See Showers v. Lund, Neb. 242 N.W.258 (1932); North Alabama Motor Exp. v. Whiteside, Ala., 169 So. 335 (1936); Texas Employer's Ins. Asso. v. Owen, Tex., 298 S.W.542 (1927) and Annot., 120 A.L.R. 1031, 1052 et. seq. The evidence here does not show the claimant to have had an independently established business to rely on when separated from the Plaintiff.

Having exhausted each test, not merely one of the three as required by precedent, and upon finding in each case sufficient evidence to support a conclusion of employment, the Defendant asserts that the Plaintiff was in fact the employer of the claimant for the proper application of unemployment insurance law.

CONCLUSION

A thorough analysis of the facts presented and statutes applicable to this case has been made at each level of review by the Commission pursuant to historically established principles handed down by this Court. The Appeal Referee and the Board of Review ruled without error in the findings, supported by substantial and competent evidence, that the Plaintiff employed the claimant and that such employment was not subject to exclusion from the coverage of the ABC Test set forth in §35-4-22(j)(5) of the Act. The decision of the Commission, that the Plaintiff is liable for contributions to the unemployment insurance fund on behalf of the claimant, should be affirmed by this Court.

Respectfully submitted this 5th day of September, 1984.

DAVID L. WILKINSON
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K. ALLAN ZABEL
Special Assistant Attorney General

By _____
Linda Wheat Gowaty
Attorney for Defendant

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed two copies of the foregoing Defendant's Brief, postage prepaid, to: Darrell Nielsen, Plaintiff, P. O. Box 1623, Ogden, Utah 84402, this 5th day of September, 1984.

_____