087

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 82,409

Beverly Williams,

Petitioner,

v.

Fort Pierce Tribune/Claims Center

Respondents

_____/

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

INTRODUCTION

In the Court below, this was an appeal from an Order of the Honorable Judith A. Brechner, Judge of Compensation Claims, (JCC), entered on March 18, 1991. Respondents are Fort Pierce Tribune, a/k/a "the News" or "the Tribune", the Employer below, and Claims Center, the Carrier below, in this Workers' Compensation matter. Petitioner is Beverly Williams, the Claimant below. The parties will be referred to by their names, their positions before this Honorable Court, their positions before the District Court of Appeal (DCA) or by their positions below before the JCC.

All references to the Record on Appeal will be through the abbreviation "(R.)". All emphasis is added unless otherwise indicated. All italicized wording contained in quoted materials is as contained in the quoted materials.

STATEMENT OF THE FACTS AND OF THE CASE

Claimant testified live before the Judge of Compensation Claims[1]. (R. 13). She was injured on November 1, 1989, while working as a carrier for the News Tribune, a/k/a the Fort Pierce Tribune. (R. 14). She delivered to homes on a specific route. (R. 14). She testified she took over an established route involving delivery to approximately 100 homes, (R. 16), and that there were more than 20 other home delivery carriers for the Tribune. (R. 16-17). There were two people from the employer who monitored or supervised her. (R. 17-18). She testified that she had her own

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[1] The JCC accepted the Claimant's version of the facts. All of the testimony in question was live before the JCC. Some of the testimony of others in conflict with that of the Claimant is not discussed in the Statement due to space constraints.

district which was exclusive to her, (R. 18-19), and that she was assigned a district and had no choice in the matter. (R. 19). Each carrier had his or her own district. (R. 20). Her testimony included that she had no authority to change her district and she worked from a list that the News provided. She had certain defined time constraints, all set by the News. (R. 20-22). Claimant testified she did not have any discretion about putting in the flyers or circulars in with the papers. She just had to do that. (R. 23).

She testified again that she was required to have home delivery papers delivered by no later than 6:30 a.m. (R. 23-24). Claimant testified she delivered to stores as well as homes. (R. 26). She did no independent advertising as a delivery person. (R. 26). Claimant's testimony also included that she delivered exclusively for the News and believed that she could not deliver for anyone else. (R. 27). Claimant worked 7 days a week for the tribune. (R. 27-28). The Tribune would send the bills to the customers and they would pay the Tribune directly. (R. 28). Claimant did not initiate the bills, (R. 28), and she did not get duplicate copies of the bills or any other indication of the billings. (R. 28). The bills went out directly from the Tribune to the customer. (R. 28). Claimant's testimony also included that she could not change the price and had no say as to the price. She could not add customers to her route. (R. 29-30)

Claimant was given a piece of paper with new "starts and stops" on a daily basis, (R. 30-32), and would have to follow the instructions on that paper. (R. 32). The papers would also contain

complaints and it was typewritten from a computer. (R. 32). Testimony on this account showed:

> "Q. And give us an example of a complaint?
> A. Well, if I deliver home delivery and I threw it in the ditch and it got wet the customer would call up and complain. They would want credit for this paper and then I would be told about it through this, our sheets -- our daily sheets.
> Q. And then you would be penalized for it? Would it cost you money?
> A. It would cost me a paper. (R. 32)

The Claimant also testified that even if someone was not paying and the Tribune told her to keep the delivery going she would have to comply. (R. 33). In addition, if the customer still did not pay the Claimant was the one who would bear the loss for unpaid newspapers. (R. 33). She could not cut anyone off her route. (R. 34-35). Claimant's testimony included:

> "Q. All right. Was the actual work of delivering the paper and getting the paper to the home customers was that ever criticized or critiqued, you know, looked over?
> A. We would have meetings on the dock between the supervisors and carriers.
> Q. How many supervisors were there?
> A. Sometimes on the dock there might be one maybe two.
> * * *
> Q. We were talking about at meetings when you would go get the papers?
> A. When the Tribune wants to -- wanted something to get over to the carriers they would bring a supervisor in and they would have like meetings on the dock.
> Q. When you mean something you mean a verbal communication?
> A. If the carrier is not doing their job they would be talked to.
> Q. Like give me an example.
> A. If they put papers in -- they have the racks and racks aren't doing good and they keep putting the same papers in them pulling the same papers out supervision will say, you know, see what we can do to move it.
> Q. Meaning sell them?
> A. Yes.
> Q. Is that what you mean by move it?
> A. Yes.
> Q. And your job as a delivery person with the News Tribune was this to be an occasional job for you where you

could sporadically once in a while --

A. No it was permanent.

Q. And tell us what happened -- suppose you were ill and couldn't get to the News Tribune at mid night what was the procedure, how would you handle that?

A. Well if I had nobody to take over the route I would have to call the Tribune and then there they would send somebody out from the Tribune.

Q. Could you just pick any Joe off the street to take over your route for you?

A. No.

Q. You're married; right?

A. Yes.

Q. And your husband -- you have a husband obviously?

A. Yes.

Q. He's done newspaper delivery work?

A. Yes. Yes.

Q. Could you just unilaterally send him down there to do the job or would you have to get the approval of the News Tribune?

A. Well, approval." (R. 38-40)

The Tribune paid her every two weeks. (R. 42). Claimant's testimony included:

"Q. All right. If you -- if you messed up, made a mistake or did something really outrageously wrong could the News Tribune terminate you or fire you?

A. Yes.

Q. Did you know employees to be terminated or fired?

A. Yes.

Q. Have you seen any examples?

A. With a carrier. Her and her husband they done big routes and they had a lot of misses and they were just terminated. Took no more." (R. 44)

Claimant also stacked paper machines. Her testimony included:

"Q. Was it pretty much the same as the home delivery that you were told the locations to go, where there's racks?

A. Yes, it was on the computer sheet that we had.

Q. Did you have the authority let's say -- I'll give you a silly example. But if you were a bowler and you noticed that there was no rack at the bowling alley did you have the authority to go to your car take out a rack and set one up there on your own, say gee, I'm going to establish a rack right here at the bowling alley?

A. Well, I would have to call the Tribune and ask them if it was okay to put a rack there.

Q. Okay. I mean you couldn't do it on your own is what I'm getting at?

A. No.

* * *

Q. And would the same thing about payments be true about with stores? Let's say you have a rack in a 7-11. Does the 7-11 Company send the check to the News Tribune? How's the billing done on 7-11 and stores?

A. The billing is done where the carrier makes out their bills. They have a money order from the 7-11 and make it out to the Tribune and then I turn it in.

Q. Okay. They don't make it out to you?

A. No. No." (R. 44-45)

Claimant did choose her own helpers but apparently it had to be all approved, at least in principle, with the Tribune. (R. 50). Claimant's testimony also included that at times she and her husband would cooperate with transportation. Her husband had a separate Miami Herald route. (R. 51-52). Claimant testified that she was the only Fort Pierce Tribune carrier in Okeechobee. (R. 55). Claimant's testimony also included:

"Q. No one came out and told you all right you have to go from the Jones' residence to the Smith residence to the Waters' residence, did they?

A. He gave me a list.

Q. You were free to deliver on that list in any way that was convenient for you as long as you got the end result accomplished; is that right?

A. As long as I got to those stores that they had was on that sheet.

Q. Stores and the individual customers; is that right?

A. Yes.

Q. No one got out there and controlled the details of how you did that on a day to day basis, did they?

A. No.

Q. No one from the Tribune did?

A. They never came out." (R. 56-57)

Claimant testified she had no benefits of any kind provided to her by the Tribune, including vacations. (R. 58). She stated:

"Q. If someone covered your route for you you had to pay that person; isn't that true?

A. Well, with the approval of the Tribune. If it was okay with them. They would check the person out that if they were a carrier -- that they were a carrier. The money would come out of the route to pay them.

Q. Come out of the route, your business?

A. Yes, the route.
Q. Which was your business?
A. Which is my business, yes.
Q. No one went out there and told you if you wanted to take a break, stop and get a cup of coffee, wanted to stop your car and get out and stretch for five or ten minutes no one was out there telling you you couldn't do those things; isn't that true?
A. No, we had just a time limit. We knew what time to deliver up to and that's it.
Q. And in fact what the Tribune was concerned with was the end result that is making sure that the papers got out by 6:30 in the morning?
A. Yes." (R. 59)

On re-direct examination, Claimant identified a February 3, 1990, memorandum from a supervisory person at the putative Employer. (R. 60-61). It was a "standards" sheet which allowed one error per on thousand papers delivered. (R. 61).

William McKay testified live before the Judge of Compensation Claims. (R. 71). He works at the Ft. Pierce Tribune in single copy sales. (R. 72). The witness testified:

"Q. Okay. Would you agree with the proposition that distribution of the newspaper is an integral part of the newspaper business?
A. Yeah, it's a part of business, yes. (R. 88)
* * *
"Q. So it's an integral part?
A. Yeah." (R. 88)

The witness also testified:

"Q. Now, suppose that her performance, Mrs. Williams, performance was very unsatisfactory or she did something absolutely wrong could you terminate her?
A. Each contract had a two week clause in it where you could terminate in two weeks on written notice or for no reason." (R. 89)

On various carrier's statements, deductions are made for a bond and for insurance. (R. 93[2]). On numerous of the printed,

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[2] This comes from the Record volume with 195 pages.

presumably, computer generated statements there are "other debits" indicated amounts of money without explanation. (R. 105).

The Record also contains a memorandum from The Tribune detailing procedures for returns, (R. 6), and a memorandum from the home delivery manager detailing collection procedures. (R. 8-9). This memo, (R. 8-9), requires that upon indication of nonpayment and default "the account should then be written up on the request to stop for nonpayment form with all the account information and the specific details about your collection efforts listed." (R. 9)

The Record contains a memorandum dated February 3, 1990, from the district manager to all carriers dealing with the subject of service errors. (R. 11). This contains the following statement:

> "You are held responsible for each service error, and if you fail to meet the minimum standards for service errors, as set in your agreement with The Tribune, and described above, **your agreement could be terminated.**" (R. 11)

The memorandum also contains the following:

> "Every effort must be taken to satisfy the customer. If this means that the paper has to be double bagged or sealed at the end in inclement weather, then that must be done. **If a customer requests a paper to be tubed or delivered in a certain spot (over fence, in carport, close to door, etc.), this must be done**. If you are not able to accomplish delivery to all of your subscribers no later than 6:30 a.m., under normal conditions, we need to evaluate your route to determine the problem and recommend the solution." (R. 11)

The Judge of Compensation Claims entered her Order, (R. 131-138), on March 25, 1991. (R. 138). Among findings contained in that Order are the following:

> "D. The only issue to be determined by the undersigned was the compensability of the claim. The claimant contended that she was an employee of the Fort Pierce Tribune; the employer/servicing agent contended that she was an independent contractor.
>
> In making my findings of fact and conclusions of law in

this claim, I have carefully considered and weighed all of the evidence presented to me, I have observed the candor and demeanor of all of the witnesses and I have resolved all the conflicts in the testimony and evidence;

* * *

The claimant, BEVERLY WILLIAMS, testified at the hearing; I have carefully scrutinized her testimony and compared it with the testimony of all other witnesses who have testified in this cause. I find the claimant to be a credible witness and I find that her testimony is entitled to be believed. Having heard and considered all of the evidence relating to the primary issue, namely whether the claimant was an employee of the Fort Pierce Tribune or an independent contractor thereof, I specifically find that the claimant's testimony is credible. This is not meant to imply that other witnesses who have testified on this issue are less than truthful; it is clear to the undersigned that the Fort Pierce Tribune, like many newspapers in order to limit potential liability, would prefer that their delivery people be independent contractors and attempt to organize their distribution systems to accomplish that objective. However, based upon the facts presented in this hearing and the legal conclusions which can be drawn from those facts, that objective was not accomplished by the Fort Pierce Tribune and for the reasons explicated below I find that the claimant, BEVERLY WILLIAMS, was in fact on the date of accident, namely 11/01/89, an employee of the Fort Pierce Tribune. This case is analogous to the decision of the Industrial Relations Commission in Levine v. The Miami Herald, 8 F.C.R. 327 (IRC Order 2-2525, 06/25/74). In that case, the Industrial Relations Commission pointed out that the Workers' Compensation Act is `social legislation designed to protect working men and women of this State in respect of injuries produced by accident arising out of and in the course of their employment. Every doubt is to be resolved in favor of coverage.' The Workers' Compensation Statute provided then, as it does now, that the term `employee' shall not include `independent contractors.' See Section 440.02(11)(d)I. The various Courts of this State in deciding whether an individual is an employee or independent contractor have adopted a number of tests, including that suggested by Section 220 of the Restatement of the Law of Agency (Second Edition). The question of whether or not an individual is an independent contractor ultimately turns on the power to control. Although the testimony in evidence in this cause was conflicting on certain factual points, the undersigned is satisfied that the Fort Pierce Tribune exerted sufficient control over the claimant's activities as a newspaper delivery person to render the claimant an employee as opposed to an independent contractor. While I have considered all of the criteria suggested by the Restatement of the Law of Agency, I find the following indicia to be most persuasive in arriving at the conclusion that the claimant was an employee of the Fort Pierce Tribune:

a. EXTENT OF CONTROL WHICH, BY THE AGREEMENT, THE MASTER

MAY EXERCISE OVER THE DETAILS OF THE WORK. The claimant delivered newspapers for the Fort Pierce Tribune from 06/01/89 until her accident on 11/01/89. At the time the claimant was hired, she was required to fill out an application for employment. The claimant took orders from a distribution supervisor and had an established route with certain confined territorial or geographical limits. The Fort Pierce Tribune provided the claimant with a daily customer list; this computer printout instructed the claimant to deliver papers to new customers, stop delivery to customers who no longer desired the paper and suspend delivery to those who did not pay. In addition, the daily printout contained any customer complaints that had been received by the Fort Pierce Tribune regarding delivery. Each day the claimant would pick up the papers to be delivered and the printout sheet of customers at the Fort Pierce Tribune; the claimant was required to pick up the papers at approximately 12:00 a.m. and to have them delivered by 6:30 a.m. According to the testimony of the claimant, each detail relating to delivery of the paper was dictated by the Fort Pierce Tribune and the claimant did not have any authority or independent power to deviate from the procedures established by the Fort Pierce Tribune. **The totality of facts in this case indicates that the claimant had little, if any, latitude to deviate from the manner and method of delivery prescribed by the Fort Pierce Tribune and that each and every important aspect relating to delivery was controlled by the Fort Pierce Tribune.**

b. WHETHER OR NOT THE ONE EMPLOYED IS ENGAGED IN A DISTINCT OCCUPATION OR BUSINESS. The claimant testified that you do not need a professional license or credentials to deliver newspapers. No occupational license is required. The claimant does not do any advertising nor does she deliver newspapers for any other company. The claimant testified that she worked exclusively for the Fort Pierce Tribune. There was conflicting evidence on this point, which may be explained by the fact that the claimant's husband delivers papers for the Miami Herald. There was no competent substantial evidence adduced at the trial that the claimant on 11/01/89 worked delivering newspapers for anyone other than the Fort Pierce Tribune. The claimant did not bill customers for the papers which were delivered nor did she collect money from the customers for papers which were delivered. Billing and collection were handled directly by the Fort Pierce Tribune. The claimant did not have any involvement in setting the price for the papers which she delivered nor did she have any authority to raise the price, give discounts, add or drop customers. **If a subscriber did not pay, it was not the claimant's decision to terminate delivery, rather this was done by the Fort Pierce Tribune and the claimant was notified of the fact by an entry made on the daily customer list prepared by the Fort Pierce Tribune.** The claimant had no authority to create routes outside her territorial limit nor could she vary the time of delivery of the paper.

c. THE SKILL REQUIRED IN THE PARTICULAR OCCUPATION.

Delivering newspapers requires only basic skills, such as being able to drive a motor vehicle, reading a list of customers' names and being physically capable of tossing the paper into a subscriber's yard. Little, if any, training is given or needed.

d. WHETHER THE EMPLOYER OR THE WORKMAN SUPPLIES THE INSTRUMENTALITIES, TOOLS AND PLACE OF WORK FOR THE PERSON DOING THE WORK. With the exception of providing a vehicle for transportation and delivery of the newspapers, the claimant did not provide any tools or materials. The newspapers were picked up daily at the Fort Pierce Tribune. When inserts were required to be delivered, these were also provided by the Fort Pierce Tribune.

e. THE LENGTH OF TIME FOR WHICH THE PERSON IS EMPLOYED. As indicated above, the claimant worked as a delivery person for the Fort Pierce Tribune from 06/01/89 until her accident, which occurred on 11/01/89. This was not casual work; the claimant delivered papers seven days a week, every week. If the claimant knew she was going to be unable to deliver the Fort Pierce Tribune, she had to make arrangements for a substitute and she needed to obtain the prior approval of the Fort Pierce Tribune for such a substitution.

f. THE METHOD OF PAYMENT, WHETHER BY TIME OR BY THE JOB. Although the method of compensation is somewhat confusing, the claimant in essence was paid 5 cents for each paper she delivered. Although the records make it appear that the delivery person purchases the papers from the Fort Pierce Tribune, the uncontroverted evidence was that money never changed hands and the claimant received 5 cents per paper delivered after the Fort Pierce Tribune collected from the customer. The claimant also testified that the Fort Pierce Tribune occasionally ran promotional activities to increase the readership and that she would be paid bonuses based upon her productivity.

g. WHETHER OR NOT THE WORK IS A PART OF THE REGULAR BUSINESS OF THE EMPLOYER. Bill McKay, the claimant's supervisor at the Fort Pierce Tribune, testified that **distribution is an integral part of production and publication of a newspaper.**

4. While it may have been the intent of the Fort Pierce Tribune to establish an independent contractor relationship with the claimant, BEVERLY WILLIAMS, the facts in this case, particularly those relating to the element of control over the activities of the claimant, lead the undersigned to the inescapable conclusion that she was an employee. Accordingly, based upon the testimony and evidence, as well as the law cited by counsel, particularly the Levine case cited supra, **I find that the claimant was an employee of the Fort Pierce Tribune and reject any defense that the claimant was an independent contractor or involved in non-covered employment. Accordingly, I find that the claimant's accident of 11/01/89 is compensable.**" (R. 131-137)

The DCA reversed the Order of the JCC, Fort Pierce Tribune v.

Williams, 622 So.2d 1368 (Fla.1st DCA 1993), and certified the following two questions to this Court:

> "WHETHER, IN LIGHT OF THE EVOLVING BUSINESS RELATIONSHIP BETWEEN NEWSPAPER PUBLISHERS AND PERSONS DELIVERING NEWSPAPERS, THE HOLDING IN MIAMI HERALD PUBLISHING CO. V. KENDALL, 88 SO.2D 276 (FLA.1956), REMAINS VIABLE?
>
> If the above question is answered in the affirmative, we certify the following as an additional question of great public importance:
>
> IF THE DECISION IN MIAMI HERALD REMAINS VIABLE, IS ITS APPLICATION LIMITED TO TORT ACTIONS FOR DAMAGES, OR DOES IT EXTEND AS WELL TO WORKERS' COMPENSATION CASES?" 622 So.2d at 1368

SUMMARY OF THE ARGUMENT

The Kendall doctrine is outmoded and newscarriers should be treated exactly as all other workers in that their status as employees or independent contractors should be determined on the facts of the individual case.

However, even if Kendall is still viable in tort, the purposes and policies behind Florida's workers' compensation system are such that, even in the face of Kendall, newscarriers, and this newscarrier in particular, should be considered employees.

ARGUMENT

POINT I

THE DOCTRINE OF MIAMI HERALD PUBLISHING CO. V. KENDALL, 88 SO.2D 276 (FLA.1956), IS NO LONGER VIABLE

At issue here is whether newscarriers are unique in the general scheme of determinations of status as between independent contractor[3] or employee for vicarious liability purposes in tort

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[3] In De Luxe Laundry & Dry Cleaners v. Frady, 40 So.2d 779 (Fla. 1949), this Court defined "independent contractor", which has never been defined in the Florida's Workers' Compensation Act as:

litigation. If they are independent contractors, then a newspaper for whom they deliver should not be liable for their torts. In any other form of endeavor in Florida, the question of independent contractor/employee is one which turns on the facts of the case. In Magarian v. Southern Fruit Distributors, 1 So.2d 858, 146 Fla. 773 (1941), this Court stated:

> "So the only question we have to determine is whether or not claimant was an employee or an independent contractor.
>
> * * *
>
> '220. Definition.
> '(1) A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control.
> '(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others are considered:
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> '(b) Whether or not the one employed is engaged in a distinct occupation or business;
> '(c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> '(d) the skill required in the particular occupation;
> '(e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;
> '(f) the length of time for which the person is employed;
> '(g) the method of payment, whether by the time or by the job;
> '(h) whether or not the work is a part of the regular business of the employer; and
> '(i) whether or not the parties believe they are creating the relationship of master and servant.
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> * * *
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> In 27 American Jurisprudence page 485, Sec. 5, we find:
> '5. Generally.-- Although it is apparent, from an examination of cases involving the independent contractor relationship,

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". . . we shall bear in mind our opinion in Gentile Bros. Co. v. Florida Industrial Commission, 151 Fla. 857, 10 So.2d 568, where we defined an independent contractor as one following an individual employment and representing his employer as to the results of the work but not as to the means by which the results are accomplished. See also Baya's Bar & Grill et al. v. Alcorn et al., Fla., 40 So.2d 468." 40 So.2d at 779

that there is no absolute rule for determining whether one is an independent contractor or an employee, and that each case must be determined on its own facts, nevertheless there are many well recognized and fairly typical indicia of the status of an independent contractor, even though the presence of one or more of such indicia in a case is not necessarily conclusive[4]. It has been held that the test of what constitutes independent service lies in the control exercised, the decisive question being as to who has the right to direct what shall be done, and when and how it shall be done. It has also been held that commonly recognized tests of the independent contractor relationship, although not necessarily concurrent or each in itself controlling, are the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature of his business or his distinct calling, his employment of assistants with the right to supervise their activities, his obligation to furnish necessary tools, supplies and materials, his right to control the progress of the work except as to final results, the time for which the workman is employed, the method of payment, whether by time or by job, and whether the work is part of the regular business of the employer.' It appears generally conceded that no hard and fast rule may be stated to control the determination of the question as to whether one occupies the status of an employee or that of an independent contractor and that each case must stand on its own facts and, therefore, no useful purpose may be served by citing particular cases involving different factual conditions." 1 So.2d at 859-861

See also Rainsford v. McArthur Dairies, 108 So.2d 914 (Fla.3d DCA 1959), certiorari quashed, 114 So.2d 617 (1959).

In Florida Publications Company v. Lourcey, 193 So. 847, 141 Fla. 767 (1940), this Court dealt with the newscarrier issue in a tort setting. There Seig, the carrier, was required to purchase of FPC's papers and deliver them to its customers. Lourcey was injured, allegedly due to Sieg's negligence and sued Florida Publications. Sieg's contract with FPC was discussed:

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[4] In Blackman & Huckaby Enterprises v. Jones, 104 So.2d 667 (Fla.1st DCA 1958), it was stated that "The question of whether one is an independent contractor or an employee is generally one of fact, the determination of which is not to be based on any one factor but must be determined from the evidence as a whole. Lindsey v. Willis, Fla.App., 101 So.2d 422; Magarian v. Southern Fruit Distributors, 146 Fla. 773, 1 So.2d 858." 104 So.2d at 669

"The making of the contract, its terms, and the fact of the injury are not disputed. The point of cleavage is in the interpretation of the contract. The contract in terms provides that Seig 'shall at all times occupy the position of an independent contractor and control all ways, means, method of conveyance, and distribution relating to the proper performance and completion of the agreement. The corporation looks only to the party of the third part and said carrier to obtain the desired results as herein set out'. These provisions were ample to make Seig an independent contractor if they were not to all intents and purposes vitiated by other provisions of the contract or the practice of the parties under it. Counsel for defendant in error contends that both the terms of the contract and the method of its execution deprived Seig of his independent contractor relation and that since that relation is in dispute, it became one for the jury to determine. The parts of the contract relied on to deprive it of its independent carrier relation are the provisions with reference to its termination, promotion the circulation of the corporation's newspapers, the free distribution of sample copies and the retention of subscription lists from the carrier including the practice of the carrier in the performance of these provisions.

If any of these provisions were such as to hamper or deprive Seig of his free agency in the means and method of performing his part of the contract, they would deprive it of its independent contractor relation but on careful inspection, we do not think they do so. The provision with reference to termination can be exercised only in the event Seig fails to perform the conditions imposed on him. In the matter of promoting the circulation, he is required to do nothing inconsistent with his duties in performing the main contract and this is the case with reference to the other alleged inconsistent duties of which he complains.

We find nothing in any of these requirements or the practice under them to deprive the contract of its independent character. It was in every respect lawful and normally without danger to others and Seig was subject to the will of the corporation only as to results of his work and he was permitted to perform it according to his own methods. He could employ whom he pleased, fire them at his pleasure, and could not be questioned as to his method of performance or have his contract canceled so long as he performed[5]. Having reached this conclusion, it follows that the judgment must be reversed." 193 So. at 847-848

Later, in Miami Herald Publishing Company v. Kendall, 88 So.2d 276 (Fla.1956), this Court again dealt with a newscarrier/vicarious

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[5] Williams needed the News' approval of her choices. (R. 40)

liability situation. In that case the Plaintiff had been struck by a motorcycle driven by a newspaper carrier delivering the Miami Herald. He sued that newspaper. In that case there was a contract between the newspaper and its delivery boys which provided and, apparently, the facts revealed, that the newspaper had no control over the method of distributing or otherwise handling the delivery of the newspapers within the territory of the newsboy. Of extreme importance seemed to be not only the contract but the practice under the contract, unlike here, was apparently consistent for the contract to be effective to negate an employer/employee relationship. The Court stated:

> "We have detailed the provisions of the contract with reference to the obligations of the publisher. We now condense the contents of the contract defining the obligations of the news carrier. He was to furnish the names of new subscribers, to pay to the appellant within a certain time money collected, to present within 48 hours claims for shortages in papers, to call attention to the appellant within six days to errors in statements, to handle The Miami Herald exclusively, to keep in confidence the names of subscribers, to select a substitute in the event he was unable to make his deliveries and be "responsible" for the substitute, to bear all costs of enforcing the contract, to give bond for his faithful performance of the agreement, to acquaint any successor with the route and list of subscribers, to secure delivery of papers in good condition, and to undertake to increase the number of subscribers.
>
> Either party could terminate the contract without cause on fifteen days' notice and the appellant could terminate it for cause without notice.
>
> Our study of the contents of the contract, and particularly the part we have italicized, leads us to the belief that the instrument was intended by both parties to make Molesworth an independent contractor and we frankly say that we have this view not only because of the express conditions we have abridged but also because of the specific mention of an element we consider important, if not essential, that is, the method Molesworth was to employ in carrying the papers to the subscribers once he had received them from appellant. Not only in the contract but in the practical operation under it, the circumstances of which we will presently describe, it was left

entirely to Molesworth to select the conveyance which he would use to transport the papers from the point of origin to the subscribers' front porches.

We turn now to see, from the testimony favorable to the appellee's contention, the nature of the services actually performed and the supervision the appellant exercised over the manner in which its newspapers reached the subscribers through Molesworth or, as appellee puts it, the supervision of the means by which Molesworth performed his work. The newsboy began his work at 4:30 in the morning by getting the papers and folding them. He then started on his route and at 6:30 he finished. If Molesworth overslept, the appellant's manager would go to his home and rout him out of bed. The newsboy was required to deliver the papers in an "unwrinkled condition" and to accomplish this could fold the papers "in threes or fours." Although nobody described to him the exact way to fold the papers, he was evidently told that he could not fold them in 'biscuits.' The agent of the appellant apparently "rode herd" on the newsboys to see that deliveries were made to the subscribers and "that everything was going all right."

It was the practice for complaints about the service to be made either to the appellant or the newsboy. If a subscriber did not receive his paper or had got one that was wet, the representative would see that the subscriber received a good paper and Molesworth would be fined ten cents. For each such improper delivery the carrier would get a yellow slip and if ten yellow slips, representing as many complaints, should be issued, the contract could be terminated. In case of a serious complaint the newspaper's representative would take the newsboy to the customer's home for a conference.

The appellant fixed the retail price of the paper. If payments for subscriptions were received in advance, the payment could be made either to the appellant or to Molesworth, but Molesworth was obligated to pay the appellant for the papers he received whether he collected from the subscribers or not. The newsboy was furnished with customers' cards and a ring on which to keep them. Weekly meetings were held by the appellant's representative and the newsboys for the general purpose of improving the business of appellant as well as the carriers.

We do not find that the extra-contractual activities of the contracting parties neutralized the provisions of the agreement which to us were obviously intended to make Molesworth an independent contractor.

Although we agree with the appellee that the facts peculiar to each case govern the decision, we turn now to Florida Publishing Co. v. Lourcey, supra, to see what supervision was exerted by the publisher over the newspaper distributor who, we decided, was an independent contractor under the contract and

evidence in that case.

The similarity in degree of supervision is striking. For instance, we learn from the original record in the cited case that papers were required to be delivered within certain hours; complaints were made direct to the publisher; the publisher received advance payments for subscriptions; the news carriers were required to attend promotional meetings; the publisher supplied subscribers with issues of the paper in case of misdelivery or non-delivery, but the carrier was not fined; the carrier was under bond; and delivery tickets were supplied to the carrier by the publisher. The carrier furnished his own automobile but there was evidence, which we consider significant, that a representative of the publisher examined the vehicle periodically to see that it was in good condition.

We have studied the "matters of fact" listed in the Restatement of the Law of Agency, supra, that are to be considered in "determining whether one acting for another is a servant or an independent contractor." In this consideration we have not found that every element is so clearly present as to establish beyond argument that the arrangement between the appellant and Molesworth was one of independent contractorship, but when all elements are taken together, we think the conclusion is sound. We have already written our view about "the extent of control" exercised by the publisher over the details of the work, Sec. 220(2)(a). We have the definite opinion that newspaper boys as they perform their work generally in this country have a place in the pattern of American life that constitutes a "distinct occupation[6]," Sec. 220(2) (b), and that the provisions of the contract in this case are harmonious with this idea. True, there was some supervision by the publisher's representative

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[6] In Walker v. Palm Beach Newspapers, 561 So. 2d 1198 (Fla.4th DCA 1990), in certifying a question very similar to the first at bar, the concurring opinion stated:

"The Florida Supreme Court waxed somewhat nostalgic [in Kendall] (in my opinion) when it wrote:

> We have the definite opinion that newspaper boys as they perform their work generally in this country have a place in the pattern of American life that constitutes a "distinct occupation," Sec. 220(2)(b) [Restatement of the Law of Agency], and that the provisions of the contract in this case are harmonious with this idea.

88 So.2d at 279. I submit the court's conclusion that newspaper delivery boys are presumptively independent contractors was colored by a turn of the twentieth-century stereotype of a young capitalist making a fortune, after starting out selling newspapers a la Horatio Alger. Such a scenario was dated when written, and it has not aged well since." 561 So.2d at 1199

but while the newsboy was actually making his deliveries, he was acting alone and was a specialist, at least to the extent of following his route, remembering the addresses of subscribers who were in good standing, and collecting and properly accounting for funds coming into his hands, Sec. 220(c) and (d)[7]. The newscarrier furnished his own instrumentality, a motorcycle, Sec. 220(2) (e). The length of the engagement, or rather the condition for termination of the engagement, was specified in the contract, Sec. 220(2) (f). The method of payment, that is by the subscriber to the newsboy, was the compensation received under the contract, and the newsboy became indebted for papers delivered to him by the publisher whether or not he collected from the subscriber, Sec. 220(2) (g). We do not doubt that distribution of newspapers is a part of the regular business of the publisher but there is no reason that this cannot be done by independent contract, Sec. 220(2) (h). From the contract it is clear to us that the parties believed they were making Molesworth an independent contractor, Sec. 220(2) (i).

We are satisfied that the salient facts were not in dispute and that the basic question was one of law. Having concluded that Molesworth was an independent contractor, it follows that the judgment should be Reversed." 88 So.2d at 277-278

Thus this Court essentially created a conclusive presumption regarding newscarriers[8]. As Judge Barfield pointed out in his

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[7] These facts are not present here. Claimant received daily computer listings of her route and did not collect funds or even bill for them.

[8] Any conclusive presumption which reduces or, as in this case, eliminates any chance of collecting benefits or exercising a remedy is violative of Article I §21 of the Constitution of the State of Florida. It denies access. Furthermore it denies due process since there are simply no grounds of "expediency or policy" requiring either of these presumptions. The basic consideration of due process is fundamental fairness. McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1985); Vaughn v. State, 456 S.W.2d 879 (Tenn. 1970); Pinkerton v. Farr, 220 S.E.2d 682 (W.Va. 1975). In Wiley v. Woods, 141 A.2d 844 (Pa. 1958), the Court stated as a definition of "due process":

"A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial"

That seems particularly appropriate here. The subject conclusive presumption violates substantive due process. See also Heiner v. Donnan, 285 U.S. 312, 52 S. Ct. 358 (1932); United States v. Provident Trust Co., 291 U.S. 272, 54 S. Ct. 389 (1934); McFarland v. American Sugar Refining Company, 241 U.S. 79, 36 S.Ct. 498, 60

concurring opinion in City of Port Saint Lucie v. Chambers, 606 So.2d 450 (Fla.1st DCA 1992):

> "When viewed realistically **the only things that the newspaper carriers do of their own volition under these facts are provide their means of transportation and find replacements to deliver their papers on the days that they are unable to do so**. The notion that the carrier is somehow independent by determining methods of delivery, means of conveyance and type of transportation is like calling a carpenter an independent contractor because he brings his own hammer to work and drives the nails with his left hand rather than his right." 606 So.2d at 451

In Santiago v. Phoenix Newspapers, Inc., 794 P.2d 138 (Ariz. 1990), the Court reversed a lower appellate court's affirmance of a summary judgment in favor of a newspaper in a tort case where that plaintiff sought damages for the negligence of a newscarrier. The Court stated:

> "On April 20, 1986, a car driven by Frank Frausto (Frausto) collided with a motorcycle driven by Santiago. At the time Frausto was delivering the Sunday edition of the Arizona Republic on his route for PNI. Santiago filed a negligence action against Frausto and PNI, alleging that Frausto was PNI's agent. Both parties moved for summary judgment. The court, finding no genuine issues of material fact, concluded that Frausto was an independent contractor. The court of appeals agreed, stating that "[p]arties have a perfect right, in their dealings with each other, to establish the independent contractor status in order to avoid the relationship of employer-employee, and it is clear from the undisputed facts that there was no employer-employee relationship created between PNI and Frausto." Santiago v. Phoenix Newspapers, Inc., 162 Ariz. 86, 90, 781 P.2d 63, 67 (1988).

L. Ed. 899 (1916); Yellow Springs Exempted Village School District Board of Education Et Al. v. Ohio High School Athletic Association et al., 443 F. Supp. 753 (SD Ohio 1978) ("**A permanent presumption is unconstitutional in an area in which the presumption might be rebutted if individualized determinations were made**. Cleveland Bd. of Edu. v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)" 443 F.Supp. at 758) reversed on other grounds Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association, et al., 647 F.2d 651 (CA6 1981); Owens v. Roberts, 377 F.Supp. 45 (MD Fla.1974).

* * *

Frausto began delivering papers for PNI in August 1984 under a "Delivery Agent Agreement," prepared by PNI. The agreement provided that Frausto was an "independent contractor," retained to provide prompt delivery of its newspapers by the times specified in the contract. Although Frausto had the right to operate the business as he chose, he could engage others to deliver papers on his route for no more than 25% of the delivery days. He was free to pursue any other business activities, including delivering other publications, so long as those activities did not interfere with his performance of the PNI contract. Frausto was also required to provide PNI with satisfactory proof of liability insurance, a valid driver's license, and a favorable report from the Arizona Motor Vehicle Division.

The contract was for a period of six months, renewable at PNI's option. Either party could terminate the agreement prior to six months without cause with 28 days notice and for cause with no notice. Under the contract, cause for termination by PNI existed if complaints from home delivery subscribers exceeded an undefined "acceptable" level, or if Frausto failed to maintain "acceptable" subscriber relations or provide "satisfactory service," defined as banding and bagging newspapers to insure they were received in a dry and readable condition. PNI was also free to breach the agreement if it ceased publishing the paper, defined in the contract as "excusable non-compliance." There is no correlative definition of cause for termination by Frausto. Customers paid PNI directly and any complaints about delivery were funnelled through PNI to Frausto. Additionally, the contract required Frausto to allow a PNI employee to accompany him on his route "for the purposes of verifying distribution, subscriber service, or regular newspaper business."

Early each morning, Frausto drove to a PNI-specified distribution point to load the papers into his car. He then delivered the papers before a PNI- specified time to addresses on a delivery list provided and owned by PNI. He could deliver the papers to listed addresses only. When customers were added to and taken from this list by PNI, Frausto was required to incorporate these changes into his route. According to Frausto, the number of papers delivered fluctuated by as much as thirty papers. For these services, PNI paid Frausto a set amount each week. That amount did not vary when addresses within or beyond the contracted delivery area were added to or taken away by PNI from the delivery list. PNI provided Frausto with health and disability insurance, but did not withhold any taxes." 794 P.2d at 139-140

The Court stated:

"Section 220 of the *Restatement (Second) of Agency*, adopted by

Arizona, *see Driscoll v. Harmon*, 124 Ariz. 15, 17, 601 P.2d 1051, 1053 (1979); *Lundy v. Prescott Valley, Inc.*, 110 Ariz. 362, 363, 519 P.2d 61, 62 (1974); *Throop v. F.E. Young & Co.*, 94 Ariz. 146, 150-51, 382 P.2d 560, 563 (1963), defines a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." The Restatement lists several additional factors, none of which is dispositive, in determining whether one acting for another is a servant or an independent contractor. We now review those factors, along with the cases considering them, for evidence of an employer-employee relationship which could preclude the entry of summary judgment.

As a prefatory note, we reject PNI's argument that the language of the employment contract is determinative. Contract language does not determine the relationship of the parties, rather the "objective nature of the relationship, [is] determined upon an analysis of the totality of the facts and circumstances of each case." *Anton v. Industrial Commission*, 141 Ariz. 566, 568, 688 P.2d 192, 194 (App.1984); *Home Ins. Co. v. Industrial Commission*, 123 Ariz. 348, 350, 599 P.2d 801, 803 (1979). Chief Judge Cardozo states that

> We think there is evidence to sustain the finding of the board that claimant was a servant employed to sell the milk and cream of his employer in return for a commission. The contract is adroitly framed to suggest a different relation, but the difference is a semblance only, or so the triers of fact might find.

Glielmi v. Netherland Dairy Co., 254 N.Y. 60, 62, 171 N.E. 906, 906-07 (1930).

The fundamental criterion is the extent of control the principal exercises or may exercise over the agent. *Central Management v. Industrial Commission*, 162 Ariz. 187, 190, 781 P.2d 1374, 1377 (App.1989); *Hamilton v. Family Record Plan, Inc.*, 71 Ill.App.2d 39, 47, 217 N.E.2d 113, 117 (1966); *see also Greening v. Gazette Printing Co.*, 108 Mont. 158, 165, 88 P.2d 862, 864 (1939) (contract terms between carrier and printer not binding on third party; "[i]f one is injured by the servant of another, it is immaterial to him what the terms of the agreement between employer and employee might be. The liability must come from the fact that the employer exercises control over the actions of the person in his employment."); *Femling v. Star Publishing Co.*, 195 Wash. 395, 405, 81 P.2d 293, 298, *set aside on other grounds*, 195 Wash. 395, 84 P.2d 1008 (1938) (question of employer-employee relationship was for jury, notwithstanding contractual provision that carrier was not an employee in any sense).

In determining whether an employer-employee relationship exists, the fact finder must evaluate a number of criteria. They include:

1. The extent of control exercised by the master over details of the work and the degree of supervision;
2. The distinct nature of the worker's business;
3. Specialization or skilled occupation;
4. Materials and place of work;
5. Duration of employment;
6. Method of payment;
7. Relationship of work done to the regular business of the employer;
8. Belief of the parties." 794 P.2d at 141-142

The Court then reviewed the various facts as compared to the factors:

"Such control may be manifested in a variety of ways. A worker who must comply with another's instructions about when, where, and how to work is an employee. See Restatement §220 comment h. In *Throop*, 94 Ariz. 146, 382 P.2d 560, the plaintiff's husband was killed in a collision with a car driven by Hennen, a salesman for the defendant company. Plaintiff sought recovery against the company on a theory of vicarious liability. At the close of evidence, the trial court granted a directed verdict in favor of the company. On appeal, we examined the record for evidence of the company's control. Hennen was required to call on accounts in person and to present all inventory items, to submit written reports on these visits and to make collections. Although Hennen had these responsibilities for a seven-year period, he could sell anywhere in the country, visit prospects whenever he chose, use his own vehicle exclusively, and select all prospects himself, visiting the office only a few times a year. Based on these facts, we agreed the trial court properly directed the verdict in the company's favor because no reasonable juror could find it had exercised sufficient control over Hennen to make him an employee.

Missing in Throop was the right to control the details of how Hennen made his sales. here this right of control exists, the inference of the employer-employee relationship is strengthened. For example, an appellate court overturned the trial court's finding of no employer-employee relationship in Gallaher v. Ricketts, 187 So. 351, 355 (La.Ct.App.1939). The newspaper carrier in Gallaher provided his own transportation and was paid a commission for every dollar worth of papers delivered on his assigned route. The company conducted training programs, including tips on how to distribute the paper and stimulate sales, reimbursed him for some transportation expenses, and retained the right to terminate him at any time. The court concluded that these indices of control demonstrated that the carrier "was merely a cog in the wheel of the defend-

ant's enterprise," and held that Ricketts was an employee. Id. at 355. *See also Harris v. Cochran,* 288 S.W.2d 814 (Tex.Civ. App.1956) (Court sustained verdict against a publisher for injuries caused by its carrier to a pedestrian. Like Frausto, the carrier was required to throw papers to all patrons on the route, to add customers when necessary, and to use his own transportation in delivery. All payments received by the carrier were turned over to the paper and the carrier did not buy any of the papers for delivery. In addition to the fact that the carrier was paid by the hour, he ran personal errands for the manager, and received waxed paper for the papers on rainy days from the company.).

A strong indication of control is an employer's power to give specific instructions with the expectation that they will be followed. *See Cooper v. Asheville Citizen-Times Publishing Co.,* 258 N.C. 578, 589, 129 S.E.2d 107, 115 (1963) ("It would seem the Publishing Company had the legal right to require that Sumner meet any reasonable request of a subscriber with reference to the manner in which he delivered the newspaper."); *see also Press Publishing Co. v. Industrial Accident Commission,* 190 Cal. 114, 121, 210 P. 820, 823 (1922) ("One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed."); *Femling,* 195 Wash. at 409, 81 P.2d at 298 (jury could find carrier was an employee where carrier agreed to abide by rules and conditions contained in contract as well as "any other rules and conditions which may be in effect now or hereafter."). In deciding whether a worker is an employee we look to the totality of the circumstances and the indicia of control. *Central Management,* 162 Ariz. at 190, 781 P.2d at 1377. In this case, PNI designated the time for pick-up and delivery, the area covered, the manner in which the papers were delivered, i.e., bagged and banded, and the persons to whom delivery was made. Although PNI did little actual supervising, it had the authority under the contract to send a supervisor with Frausto on his route. Frausto claimed he did the job as he was told, without renegotiating the contract terms, adding customers and following specific customer requests relayed by PNI." 794 P.2d at 142-143

Perhaps it is time to consider the independent contractor question when newscarriers are involved in the same light and with the same level of objectivity as are other workers[9]. The Kendall

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[9] Judge Sharp in Walker also stated:
"Girls and women, families, and retired persons-- these now also deliver papers in order to support themselves and their families. A much more diverse group of people delivers papers

doctrine should go the way of contributory negligence.

POINT II

IF KENDALL IS VIABLE, THE FACT THAT THIS IS A WORKERS' COMPENSATION CASE SHOULD DETERMINE A DIFFERENT OUTCOME

It has been held the same criteria are used to determine the independent contractor/employee question in workers' compensation cases as are used in tort cases. Florida Industrial Commission v. Schoenberg, 117 So.2d 538 (Fla.3d DCA 1960)[10]; see also Chambers,

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today and for much more mundane reasons.

* * *

In both this case and Miami Herald, the control was so considerable that if such a standard were applied to all other business entities today, there would be very few true employees, and a vast number of independent contractors, in Florida's current work force.

* * *

For example, in this case, Turner was employed exclusively and full-time by the newspaper while delivering papers (one and one-half to two hours per day). He lacked any special skill or knowledge. He was employed indefinitely but could be terminated at any time. The newspaper directed Turner as to how, when, and where, to deliver papers. The newspaper set the retail price. It paid Turner mileage and furnished him with free promotional materials. Customers complained directly to the newspaper. Turner was paid weekly.

* * *

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* * *

Turner received a special computer printout from the newspaper of persons to whom to deliver." 561 So. 2d 1199

[10] "It will be noted that in defining employees, the statute expressly excludes independent contractors. But the statute does not define independent contractors. We are left, therefore with the necessity of using the common law definition and meaning of independent contractors, in determining the status of real estate

supra. That does not mean, however, that they should be weighted in the same way or that the same result should occur under the same facts in a workers' compensation case as in a tort case[11]. Perhaps, considering the purposes of workers' compensation as compared with the policies governing the imposition of vicarious liability in

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salesmen under this act. See Gentile Bros. Co. v. Florida Industrial Commission, 151 Fla. 857, 10 So.2d 568; Florida Industrial Commission v. Peninsular Life Ins. Co., 152 Fla. 55, 10 So.2d 793." 117 So.2d at 540

[11] In Wallowa Valley Stages, Inc. v. The Oregonian Publishing Company, 386 P.2d 430 (Or.1963), the Court stated:

"In cases decided under statutory schemes, newspaper circulation personnel are sometimes treated as employee, at least for such purposes as social security, workmen's compensation, and collective bargaining. In cases brought under such legislation, the purposes behind the particular statute are given primary consideration in determining whether one engaged in work for another should be treated as an employe or an independent contractor. See, e. g., Bowser v. State Indus. Accident Comm., 182 Or. 42, 185 P.2d 891 (1947); Journal Pub. Co. v. State U. C. Comm., 175 Or. 627, 155 P.2d 570 (1945); National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 125, 126, 64 S.Ct. 851, 88 L.Ed. 1170 (1944); Wolfe, Determination of Employer-Employee Relationships in Social Legislation, 41 Colum.L.Rev. 1015 (1941).

In such cases, the tests of 'control' or 'right to control' are deemed to be of only slight, if any, relevance. But see Nordling v. Johnston, 205 Or. 315, 283 P.2d 994, 287 P.2d 420, 48 A.L.R.2d 1369 (1955), noted 37 Or.L.Rev. 88 (1957), where the 'right to interfere' was enough to make the question one for the jury. Where legislation is concerned, persons engaged in a given activity generally are deemed to be employee whenever it is found to be consistent with legislative objectives that they be so regarded. Likewise, they may be treated as independent contractors whenever legislative or other policy considerations make that choice the more reasonable in a given case.

In tort cases, however, the right of the employer to control the workman is the basis most commonly advanced for imposing liability upon the employer. A total lack of control, especially when accompanied by other manifestations of independence, tends to militate against liability. Where the employer has no right to control his actions, the actor is usually deemed to be an independent contractor." 386 P.2d at 431-432

tort cases, one should have to go farther in a workers' compensation case toward the independent contractor end of the spectrum which runs, on the one end, from "independent contractor" to "employee" on the other, to get a valid "independent contractor" ruling. That seems to be the holding in the large majority of cases which have considered the employment status of newscarriers.

This Court has never ruled on the newscarrier/independent contractor/employee question in the workers' compensation setting. This Court had the opportunity to do so in Levine v. The Miami Herald, 7 FCR 278 (1973), cert denied, 280 So.2d 682 (Fla.1973).

In Levine, the Industrial Relations Commission (IRC) was faced with a factual situation similar to that found in Kendall, supra. At the time that that Claimant, Charles Levine, became a newscarrier, he executed a form document with the Herald entitled "Independent Newsdealer's Contract". 7 FCR at 279. He was injured in the course and scope of his activities as a newscarrier. The newspaper had provided the Claimant with the route and the order of newspaper delivery. His conduct was prescribed by the newspaper. The manner in which the newspapers were folded, the way the newspaper was bagged and the details attempting to limit customer complaints were all prescribed by the newspaper. The same is true in the case at bar. Newspapers in that case had to be delivered by 6 a.m. except on Sundays when they had to be delivered by 7 a.m. If the newspaper was delivered wet or soiled and the subscriber complained, the carrier was charged for the replacement paper. The same is true here. The price of the paper was established by the newspaper and could not be changed by the carrier. This is

essentially what Claimant testified. As here, that carrier did not have the power, irrespective of the circumstances, to discontinue service to any customer without the express approval of the newspaper. At the hearing, the issue was Levine's employment status with the Herald. The IRC stated:

> "In such cases as the instant one ...where the issue is the status of the claimant as either an employee or an independent contractor, the `facts' and the selection of the `important' facts seems to be preeminent. This selective perception seems also to be the only single matter upon which the Commission and all the Courts having ruled upon the subject can agree.' *Oriole Builders, Inc., d/b/a Oriole of Margate v. Geck*, 7 FCR 207 (1971). As Mr. Justice Buford said for the Supreme Court in *Magarian v. Southern Fruit Distr.*, 1 So.2d 858 (Fla.1941):
>
> > It appears generally conceded that no hard and fast rule may be stated to control the determination of the question as to whether one occupies the status of an employee or that of an independent contractor and that each case must stand on its facts and, therefore, no useful purpose may be served by citing particular cases involving different factual conditions.
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> See also, *Rainsford v. McArthur Dairies*, 108 So.2d 914 (Fla. App. 1959), at 916: `Each case must turn on its own facts, ...'
>
> In the instant cause, the Order on appeal recites that `the facts are entirely insufficient to establish control of *The Miami Herald* over the newspaper carrier to the extent required of an employee.' The Judge then proceeds to indicate that the facts as he found them weigh heavily in favor of the claimant's status as an independent contractor. And, although the Judge makes notes of a contract (`independent news dealer's contract') between the claimant and *The Miami Herald*, there is no reason to believe that the Judge was unaware of the extant law that such a contract is not itself determinative. *Justice v. Belford Trucking Co., Inc.*, 272 So.2d 131 (Fla. 1972). As the Supreme Court has stated in *Cantor v. Cochran*, 184 So.2d 173 (Fla. 1966):
>
> > ...such status [as an independent contractor] depends not on the statements of the parties [as in a contract document] but upon all the circumstances of their dealings with each other.
>
> It is of commanding importance that the Judge's reference to the facts of the cause follow upon two critical paragraphs (paragraphs four and give, Order) devoted to the legal basis

for the Judge's decision. That is, the Judge's perception of the `important' facts which he took care to recite, was a function of his understanding of the outstanding law on the subject. It becomes necessary, therefore, to inquire into the Judge's statement of the controlling law, as that statement appears in and foundations the Order on appeal.

The critical paragraphs of the Order on appeal are as hereinafter quoted:

> **There are a series of Florida decisions dealing with the question of whether a newsboy (carrier) is an employee of the newspaper or is an independent contractor, all of which hold the latter: *Florida Publishing Co. v. Lourcey*, 193 So. 847 (Fla. 1940); *Miami Herald Publishing Co. v. Kendall*, 88 So. 2d 276 (Fla.1956);** *Enberg v. Miami Daily News*, 3 FCR 224 (1957), cert denied without opinion, 102 So.2d 731 (Fla.App. 1958); *Peairs v. Florida Pub. Company*, 132 So.2d 561 (Fla.App.1st 1961); and the most recent case, a Commission decision, *Monroe v. Florida Publishing Company*, 6 FCR 371 (1970), cert. den. without opinion at 241 So.2d 397 (Fla. 1970). Reference might also be made to *Short v. Allen*, 254 So.2d 34 (Fla. App. 1971).
>
> **The newspaper carrier has traditionally been recognized as an independent contractor having his own distinct occupation and a place in American life according to our Supreme Court in the *Kendall* case**, *supra*....

Accordingly, we must examine this decisional law upon which the Judge relied and as a function of which he proceeded to observe and evaluate the `facts' of the instant cause.

First, a foundational case cited by the Judge of Industrial Claims, *Fla.Pub.Co. v. Lourcey, supra,* (1940), is also cited in and relied upon by the Court in the *Miami Herald Publishing Co. v. Kendall* case, *supra,* 1956. Although the *Lourcey* case concerns a `newspaper distributor,' it was *not* a workmen's compensation case, and it turned determinatively upon a contract which described the person whose status was contested as an `independent contractor'. There the Court said, with respect to the contract: `These provisions were ample to make Seig [the claimant's `employer'] an independent contractor if they were not to all intents and purposes initiated by other provisions of the contract of the practice of the parties under it.' The Florida Supreme Court, though, has recently reminded us that the contract is not determinative, but is only one of several factors to be considered. *Justice v. Belford Trucking Co., Inc., supra,* herein; *Cantor v. Cochran,* 184 So.2d 173 (Fla. 1966).

The second case cited by the Judge, and which case incorporates the *Florida Publishing Co. v. Lourcey* decision, is *Miami Herald*

Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956). Like *Lourcey* before it, *Kendall* too was *not* a workmen's compensation case. It is in this respect highly important to note, then, that the two Commission decisions cited by the Judge - *Enberg v. Miami Daily News*, 3 FCR 224 (1957), and *Monroe v. Florida Publishing Company*, supra.- turned exclusively upon the law which the Commission defined in *Lourcey, supra*, and *Kendall*. Indeed, the Commission's decision in *Enberg* and *Monroe* were mere mechanical incorporations of the Supreme Court's 1940 and 1956 pronouncements respecting agency or tort law, and were without stated rationale for such transposition. Accordingly, the Commission must overrule the *Enberg* and *Monroe* decisions inasmuch as they were predicated upon inapposite law.

The next decision relied upon by the Judge of Industrial Claims herein was *Peairs v. Fla.Pub.Co.*, 132 So.2d 561 (Fla. App. 1961). *Peairs* was an action against a newspaper publisher by husband and wife for injuries received when the wife tripped on a wire loop left in the parking lot by certain newsboys. The District Court of Appeal, there concerned with the publishing company's liability to third parties in tort, stated, at page 564, that any question as to the carrier's status as independent contractors had already been answered by the Florida Supreme Court in *Florida Publishing Co. v. Lourcey* and *Miami Herald Publishing Co. v. Kendall*.

The aforementioned cases - *Lourcey, Kendall,* and *Peairs* - are inapposite of our concern. None was a workmen's compensation case; all were concerned with principles of law external to the statutorily created law of workmen's compensation; none was concerned with the benign purposes of Chapter 440 which, the court has told us, are to be given their head in protection of the workingmen and women of the State of Florida. *Protectu Awning Shutter Co. v. Cline*, 16 So.2d 342 (Fla. 1944); *Port Everglades Terminal v. Canty*, 120 So.2d 596, at 602 (Fla. 1960); *Trail Builders Supply Company v. Regan*, 235 So.2d 482 (Fla. 1970).

The Workmen's Compensation Act of Florida is social legislation designed to protect workingmen and women of this State in respect of injuries produced by accidents arising out of and in the course of their employment. Every doubt is to be resolved in favor of coverage. *Florida Game & Fresh Water Fish Commission v. Driggers*, 65 So.2d 723 (Fla. 1953); *Naranja Rock Co. v. Dawal Farms*, 74 So.2d 282 (Fla. 1954); *Townsley v. Miami Roofing & Sheet Metal Co.*, 79 So.2d 785 (Fla. 1955); *Alexander v. Peoples Ice Co.*, 85 So.2d 846 (Fla. 1955); *City of Hialeah v. Warner*, 128 So.2d 611 (Fla. 1961); *Boden v. City of Hialeah*, 132 So.2d 160 (Fla. 1961); *Thomas Smith Farms, Inc. v. Alday*, 182 So.2d 405 (Fla. 1966). And, concomitantly, every exclusion is to be given limited scope by restrictive interpretation. *Miranda v. Southern Farm Bureau Casualty Insurance Co.*, 229 So.2d 232, 234, 235 (Fla. 1969); *Hackley v. King Edward Tobacco*

Co., 7 FCR 8 (1972); McCrary, Commissioner, dissenting; certiorari denied at 261 So.2d 841 (Fla. 1972); *Ridge Fertilizer Co. v. Edenfield*, 7 FCR 228 (1972); *715 Farms, Ltd. v. Wilson*, 7 FCR 256 (1973); *Park Avenue Greenhouses v. Bates*, 7 FCR 258 (1973), cert. denied without opinion at 277 So.2d 533 (Fla. 1973).

It is clear, therefore, that the Judge of Industrial Claims erred as a matter of law in his unequivocal declaration that the law of the state excluded from workmen's compensation coverage as 'employees,' newsboys as a class. The statute makes no such class exclusion. No case has so ruled, and the Supreme Court and District Court of Appeal decisions on the subject of newsboys' relationship to publishing companies are *not* workmen's compensation decisions. Moreover, the two outstanding Commission decisions on the subject are equally erroneous by dint of their total reliance upon the aforementioned torts decisions which this Commission mistakenly transmuted, somehow, into decisions controlling of workmen's compensation litigation.

Third party litigation arising out of an accident which itself gave birth to workmen's compensation litigation is a matter *not* controlled by Chapter 440. That is, the Supreme Court has had occasion to pronounce upon the law of workmen's compensation which holds that workmen's compensation is an exclusive remedy, by declaring that an injured workingman may also proceed in third party litigation without forfeiting his workmen's compensation benefits. *Hartquist v. Tamiami Trail Tours*, 139 Fla. 328, 190 So. 533 (Fla. 1939); *Vanlandingham v. Florida Power & Light Co.*, 18 So.2d 678 (Fla. 1944); *Hill v. Gregg, Gibson & Gregg, Inc.*, 260 So.2d 193 (Fla. 1972). By the same token, then, **it must be clear that the Supreme Court's discussion of tort law is not ineluctantly binding in the field of workmen's compensation-a statutorily created field of remedial purpose, and the rules and scope of which are intentionally divergent from tort law.** Even as the Supreme Court enlarged the rights of a workmen's compensation litigant by allowing him third party challenge, so too may the Court restrict the effect of this workmen's compensation decision in a fashion not subversive of the decisions in *Lourcey*, *Kendall* and *Peairs*. The permeation of the legal membrane or the resistance of the membrane to permeation-from workmen's compensation into agency law into tort law or vice versa-is a matter controlled by the Supreme Court.

* * *

This Commission's concern herein is that the Judge not assume, as the legislature (in § 627.659, F.S.) did not, that all newsboys as a class are independent contractors. Resistance to attempts to exclude entire classes not specifically excluded by the statute is not unknown. For example, in *Thomas Smith Farms, Inc. v. Alday*, the learned jurist, Mr. Justice Drew, wrote the following:

> We would not be consistent with our oft repeated holding that this latter act (the Workmen's Compensation Act) should always be construed liberally in favor of the workman if, in this instance, we should-as petitioner urges-adopt a construction that would eliminate from the protection of this law a large group of workmen.

Even the agricultural exemption, so called, which is a specific statutory exclusion-unlike the exclusion urged by appellees-was not intended to exclude farmers as a class. As stated in *Alday, supra,* at page 411:

> We point out in conclusion that it never was the intent of the agricultural labor exclusion under the Florida Workmen's Compensation Law to exempt farms as a class or agriculture as an industry, but merely to exempt the kind of work or labor particularly associated with ordinary farming operations performed on a farm....

Newspaper carriers have not been excluded as a class, from coverage in several of our sister states. See *Burchner v. Bergen Evening Record,* 195 A. 2d 22 ([N.J.App]1963); *Nevada Industrial Commission v. Bibb,* 374 P.2d 531 (Nev. 1962); *Havens v. Natchez Times Publishing Co.,* 117 So.2d 706 (Miss. 1960); *Bigger v. Consolidated Underwriters,* 315 S.W.2d 681 (Tex.Civ. App.1958)[12]. The above are cited despite any statutory differences between those states' Workmen's Compensation Acts and our own, merely to demonstrate that other states have taken the position that news carriers, as a class, are not to be perfunctionily denied the benefits of workmen's compensation.

It would appear to be manifestly unjust to hold that newsboys, as a class, are excluded from coverage when the Supreme Court has stated in *Alday, supra,* that even the statutorily described exclusions of § 440.02, F.S., were not intended to exclude entire classes. Stated succinctly, independent contractors, so designated by the facts of each case, are to be excluded, not news carriers as a class. Accordingly, it was error for the Judge of Industrial Claims to assume that newsboys are an excluded class-the decisional law of workmen's compensation is not to that effect. It is to the effect that independent contractors are excluded." 7 FCR at 280-283

The IRC noted that it was the intent of the law that coverage be as wide as possible in workers' compensation cases and stated:

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[12] Compare with the tort case of Mid-Continent Freight Lines, Inc. v. Carter Publications, Inc., 336 S.W.2d 885 (Tex.App 1960), where a summary judgement on independent contractor grounds war affirmed. See also Newspapers, Inc. v. Love, 405 S.W.2d 300 (Tex.1966).

"This Commission was recently reminded - by way of reversal - of the legal preference of the Supreme Court of this State to denominate a claimant to be an employee and not an independent contractor in a case wherein the abovestated problem is a close legal question. See *Justice v. Belford Trucking Company, Inc.*, 272 So.2d 131 (Fla. 1972), and cases cited therein." 7 FCR at 284, n.5

In a note prior to the text of the opinion it was stated:

"The Supreme Court denied certiorari without opinion in *The Miami Herald v. Levine,* 280 So.2d 682 (Fla. 1973) and the I.R.C. Order, below has been popularly nicknamed both, `the newsboy case' and `the *Miami Herald* case,' due to its significance in the evolution of Florida's workmen's compensation case law. Levine was eventually adjudged as an employee in subsequent IRC Order 2-2525(S) (June 25, 1974)." 7 FCR at 279

Levine, supra, reappeared before the IRC after the Judge of Industrial Claims again denied benefits. Levine v. The Miami Herald, 8 FCR 327 (1974). In that opinion it was stated:

"In an Order dated April 12, 1972, the Judge of Industrial Claims dismissed the claim, finding that an independent contractor relationship existed between claimant Levine and The Miami Herald.

In an Order dated February 20, 1973, the Industrial relations Commission reversed and remanded the Judge's Order of April 12, 1972, holding that it was error for the Judge of Industrial Claims to assume that newsboys, as a class, are excluded from workmen's compensation coverage. The Industrial Relations Commission stated:

> ...independent contractors so designated by the facts of each case, are to be excluded, not news carriers as a class.

Certiorari was denied by the Supreme Court of Florida. *The Miami Herald v. Levine,* 280 So.2d 682 (Fla. 1973). Upon remand, the Judge of Industrial Claims, without further hearings, entered an Order dated November 6, 1973, finding the claimant to be an independent contractor, and dismissing the claim.

This cause recurs before the industrial Relations Commission upon the claimant's application for review of the Judge of Industrial Claims' Order of November 6, 1973.

The claimant presents the following points for consideration:

1. Whether the Order of the Claims Judge of November 6,

1973 contravenes the Order of the Industrial Relations Commission.

2. Whether the evidence established an employer/employee relationship between the claimant and the employer as a matter of law.

To paraphrase Justice Drew's words in *Rainbow Poultry Co. v. Ritter Rental System, Inc.*, 140 So.2d 101 (Fla. 1962). "[t]his is a classic example of the...[Judge of Industrial Claims] misconstruing the legal effect of the evidence."

The Workmen's Compensation Act of Florida is social legislation designed to protect working men and women of this state in respect of injuries produced by accidents arising out of and in the course of their employment. Every doubt is to be resolved in favor of coverage. *Thomas Smith Farms, Inc. v. Alday,* 182 So.2d 405 (Fla. 1966); *Boden v. City of Hialeah,* 132 So.2d 160 (Fla. 1961); *City of Hialeah v. Warner,* 128 So.2d 611 (Fla. 1961); *Alexander v. Peoples Ice Co.*, 85 So.2d 846 (Fla. 1955); *Townsley v. Miami Roofing & Sheet Metal Co.*, 79 So.2d 785 (Fla. 1955); *Naranja Rock Co. v. Dawal Farms,* 74 So.2d 282 (Fla. 1954); *Florida Game and Fresh Water Fish Commission v. Driggers,* 65 So.2d 723 (Fla. 1953). And, concomitantly, every exclusion is to be given limited scope by restrictive interpretation. *Hackley v. King Edward Tobacco Co.*, 7 FCR 8 (1972), McCrary, Commissioner, dissenting; *cert. denied,* 261 So.2d 841 (Fla. 1972); *Miranda v. Southern Farm Bureau Casualty Insurance Co.*, 229 So. 2d 232, 234, 235 (Fla. 1969; *Park Avenue Greenhouse v. Bates,* 7 FCR 258 (1973); *Wilder d/b/a 715 Farms, Ltd. v. Wilson,* 7 FCR 256 (1973); *Ridge Fertilizer Co. v. Edenfield,* 7 FCR 228 (1972).

Florida Statute 440.02(2) (c) (1), provides that the terms "employee" shall not include "independent contractors". The Supreme Court, speaking in *Magarian v. Southern Fruit distributors,* 1 So.2d 858 (Fla. 1941), noted that although there is no absolute rule for determining whether one is an independent contractor or an employee, and that each case must e determined on its facts, nevertheless there are many well recognized and fairly typical indicia of the status of an employee vis-a-vis that of an independent contractor. The Court there noted the importance of "control", i.e., who has the right to direct what shall be done, and when and how it shall be done.

In the cause sub judice, the Judge detailed a substantial number of facts upon which he drew his legal conclusion, i.e., that the claimant was an independent contractor. We do not question the Judge's findings of fact, but do find his ultimate conclusion as to the legal effect of these findings to be in error.

At trial, only two witnesses testified: the claimant, and his

former supervisor, Mr. Riley. The claimant, 68-year-old Charles Levine, had eight newspaper routes for *The Miami Herald*. At the time claimant became a carrier he executed a form document with *The Miami Herald* entitled "Independent Newsdealer's Contract". It is uncontroverted that claimant was engaged in his capacity as a carrier on September 7, 1969, the date of the accident.

Each newspaper route of claimant's concerned specific customers of the *Herald* to whom claimant was to deliver the newspaper. The routes, each with specific territorial limits, were provided to claimant, by the *Herald*, with the order of delivery subject to alteration by the *Herald* for the satisfaction of its customers. According to Levine, "They (the *Herald*) gave us a route, and we had to go according to the route to deliver it." Levine's conduct-as all news carriers' conduct-with the *Herald*'s customers was prescribed by the *Herald*. For example, Levine was instructed to fold the newspapers in a certain manner, to "bag" or fold and fasten the papers in a specific fashion, and was directed never to "talk back' to the customers. Additionally, supplies, such as rubber bands and plastic bags, were purchased from the *Herald*.

The time utilized to perform tasks was also defined by the employer. Newspaper deliveries had to be completed by 6:00 a.m., Monday through Saturday, and by 7:00 a.m., on Sundays.

Control-stated in terms of penalties-was certainly not unknown to the news carrier. For example, fines were imposed by the *Herald* if the paper was late delivered. If the paper was wet or soiled, and the subscriber complained, the carrier was charged double for the paper. Complaint-free periods of service were rewarded by bonuses, and contest were run by the *Herald* to encourage solicitation of new customers by the carrier. The carrier received $1.00 for each new subscriber.

The price of the paper was unalterably established by the *Herald*. This carrier could neither raise, nor lower, the price, nor could he gratuitously offer a week's supply of papers to a customer. This carrier did not have the power, *irrespective of the circumstances*, to discontinue service to any customer *without express approval* to do so. Accordingly, the employer continues to charge the carrier for papers delivered to non-paying customers, while the carrier is not entitled to truncate service without prior approval.

Customers who paid quarterly or less often were serviced by the *Herald*, as collection agent, and the funds were credited to the carrier's account-less a 2% handling charge. The carrier was *not allowed* to avoid this charge by personal collection. Customers paying more often than quarterly were collected from directly by the carrier, and all receipts were required to be turned over to the *Herald* within 48 hours.

No social security or withholding was deducted by the employer. The *Herald* was not listed as an employer on the claimants income tax returns.

The claimant provided his own transportation and was aided in the delivery process by his wife, and occasionally an assistant. The district manager was with claimant no more than 20 minutes or so a day, and the claimant never went to the *Herald* building nor attended meetings.

These facts, as found by the Judge of Industrial claims, form the foundation from which a legal conclusion must be drawn. We observe that in cases evincing far less direction and control of claimants, an "employee" status has been adjudged to have obtained. E.g.., *Justice v. Belford's Trucking Co., Inc.*, 272 So.2d 131 (Fla. 1972); *Cantor v. Robert Cochran*, 184 So.2d 173 (Fla.1966); *Toney Builders, Inc., v. Huddleston*, 149 So.2d 38 (Fla.1963); *Magarian v. Southern Fruit Distributors*, 1 So.2d 858 (Fla.1941).

In the cause *sub judice*, **the overwhelming legal impact of the facts is that he *Herald* exercised a substantial and legally important degree of control over the claimant. The legal conclusion that must be drawn from these facts is that a person standing in the factual setting as that of this claimant is an employee and falls within the bounds of §440.02(2) (a), F.S."** 8 FCR at 327-329

It is for the Legislature, not the Courts, to exclude any specific or singular occupation from coverage or "employee" status.

As shown by Levine v. The Miami Herald, supra, and other previously cited authorities, the purpose for which the determination is being made has a major impact on the interpretation of the facts and whether one is dealing with a worker's compensation system as in Levine, supra, or a vicarious liability situation as in Kendall, supra, is of major significance. Professor Larson, in §43.42 of his Treatise, states:

"The source of most of the difficulty in adopting bodily the common-law definition of servant for compensation purposes can now be easily explained, in terms of the above analysis: ***The basic purpose for which the definition is used in compensation law is entirely different from the common-law purpose.***

The `servant' concept at common law performed one main func-

tion: to delimit the scope of a master's vicarious tort liability. This tort liability arose out of detailed activities carried on by the servant, resulting in some kind of harm to a third person. The extent to which the employer had a right to control these detailed activities was thus highly relevant to the question whether the employer ought to be legally liable for them. If I ship a load of goods on a truck, having the right to control the speed and manner of the driving, and if the speed or manner of driving figures in the accident, there is an obvious connection between the right to control that detail and the final liability; while if I turn my goods over to Parcel Delivery Service, I have nothing whatever to say about the details of their performance and therefore should have no liability if an accident comes about because of negligence as to one of these details. True, I am liable for the employee-trucker even if he exceeds the speed which I commanded him to observe - but note that I had the right to control the speed, and if I was unable to exercise it effectively that is no concern of one who is injured by an activity under my control.

By contrast, compensation law is concerned not with injuries *by* the employee in his detailed activities, but with injuries *to* him as a result not only of his own activities (controlled by the employer as to details) but of those of co-employees, independent contractors and other third persons (some controlled by the employer, and others not). To this issue, the right of control of details of his work has no such direct relation as it has to the issue of vicarious tort liability. So, to continue the example of a truck driver, if I regularly, year in and year out, engage an individual trucker to transport logs from my woods to my lumber mill, which is an integral part of my lumbering operation, paying him by the load, and reserving no right of control over the details of his work, it is quite possible that this man is as appropriate a subject for compensation protection as any worker that could be found. He is taking a regular and continuous part in the manufacture of my product; his work is hazardous; his rate of pay is such that he and his family cannot be expected to bear the cost of industrial accident; and his place in the industrial process is not such that he could distribute the risk of injury through channels of his own. In every respect he is the kind of worker for whose benefit the compensation act was thought necessary. Should he be deprived of compensation because of the vicarious-liability requirement of control of the details of the work?"

One example of this dichotomy and of a nonconvergence between the workers' compensation and tort definitions was shown by the Court of Appeals of Georgia in Jones v. Aldrich Company, Inc., 373 S.E.2d 649 (1988). That case involved a common law action for

damages based upon a vicarious liability concept. That tortfeasor took her own automobile on an assignment for her employer and was paid mileage expenses for making the trip. She was on her way home when her automobile collided with a pickup truck which then burst into flames. Both drivers were injured and the pickup truck driver died a short time later. The tortfeasor received worker's compensation benefits as a result of her injury. In the civil action the Plaintiff/personal representative moved for Summary Judgment on the respondeat superior theory. The Court stated:

> "As a general rule, a servant in going to and from his work in an automobile acts only for his own purposes and not for those of his employer, and consequently the employer is not to be held liable for an injury occasioned while the servant is en route to or from his work. 5 Blashfield's Cyclopedia of Automobile Law and Practice, 196, § 3041." *Stenger v. Mitchell,* 70 Ga. App. 563, 566 (28 S.E.2d 885). See also *Bailey v. Murray,* 88 Ga. App. 491, 496 (77 S.E.2d 103). An exception to the general rule is to be made, however, where the employee undertakes a special mission at the direction of the employer. See generally *Chappell v. Junior Achievement,* 157 Ga. App. 41 (276 S.E.2d 98). As it is said, "Where the employee, before of after customary working hours, is on his way home after performing, or on the way from his home to perform, some special service or errand or the discharge of some duty incidental to the nature of his employment in the interest of, or under direction of, his employer, and an injury arises en route from the home to the place where the work is performed, or from the place of performance of the work to the home, such injury is considered as arising out of and in the course of the employment." 6 Blashfield Auto Law & Practice, 170, & 253.34. See also *Gebert v. Clifton,* 553 S.W.2d 230, 232 (Tex. App. 1977).
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> In the case sub judice, the alleged act of negligence occurred while Reifman was going home. But, Reifman had not left Aldrich's usual work place. On the contrary, Reifman left a job site to go home after performing a special errand on behalf of Aldrich. Accordingly, it cannot be said that Reifman was not in the prosecution of Aldrich's business as a matter of law. Whether Reifman was acting within the scope of her employment when she collided with O'Kelley is a question which must be resolved by the trier of fact. *International Business machines v. Bozardt,* 156 Ga. App. 794, 797, supra. The trial court erred in ruling otherwise.

2. Plaintiff contends he is entitled to summary judgment upon the respondeat superior aspect of this case and that the superior court erred in denying his summary judgment motion. In this regard, he argues that Aldrich is estopped from denying it is vicariously liable since Reifman was paid workers' compensation benefits. Completing the argument, plaintiff points out that Reifman would not have been paid workers' compensation benefits unless she was injured by an accident arising out of an in the scope of her employment. See OCGA § 34-9-1 (4).

To be injured within the course or scope of one's employment in the context of the worker's compensation system is not the same thing as to be in the course of scope of one's employment and cause injury to a third person who is foreign to the employee-employer relationship . . . . Worker's compensation is a creature of statute and one designed specially to protect workers injured in the course of their work. The statute is liberally construed to provide coverage to the worker. Within the context of the statute, the employer has a *special duty* vis-a-vis the employees who work for him. Under worker's compensation, an employee is covered for injuries which arise '* * * out of and in the course of employment . . . .' This states a problem of proof different from that which is encountered in the negligence area. . . . Within the general negligence sphere, the rules regarding 'scope of employment' are somewhat different. This is so for a number of reasons. A liberal statute designed to benefit workers is not involved. There is no special relationship giving rise to a special duty as in worker's compensation. There is no sound reason for finding liability without fault for social or economic reasons." *Beard v. Brown,* 616 P.2d 726, 736, 737 (Wyo. 1980).

Since the laws of workers' compensation and negligence are so different, an employee can be said to be within the scope of employment for workers' compensation purposes and not within the scope of employment for negligence purposes. It follows that Aldrich is not estopped from denying vicarious liability simply because Reifman was paid workers' compensation benefits." 373 S.E.2d at 650-651

For other examples where the purpose of the legislation determined the outcome, see United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463 (1947), where the Court dealt with the same employee/independent contractor dichotomy with regard to the Social Security Act and determined that while truck drivers might be independent contractors at common law, they were employees for purposes of the Act. See also National Labor Relations Board v.

Hearst Publications, Inc., 322 U.S. 111, 64 S.Ct. 851 (1944), the issue was whether newsboys were "employees" under that undefined term in the National Labor Relations Act. The Court stated:

> "The newsboys' compensation consists in the difference between the prices at which they sell the papers and the prices they pay for them. The former are fixed by the publishers and the latter are fixed either by the publishers or, in the case of the News, by the district manager. In practice the newsboys receive their papers on credit. They pay for those sold either sometime during or after the close of their selling day, returning for credit all unsold papers. Lost or otherwise unreturned papers, however, must be paid for as though sold. Not only is the "profit" per paper thus effectively fixed by the publisher, but substantial control of the newsboys' total "take home" can be effected through the ability to designate their sales areas and the power to determine the number of papers allocated to each. While as a practical matter this power is not exercised fully, the newsboys' "right" to decide how many papers they will take is also not absolute. In practice, the Board found, they cannot determine the size of their established order without the cooperation of the district manager. And often the number of papers they must take is determined unilaterally by the district managers.
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> In addition to effectively fixing the compensation, respondents in a variety of ways prescribe, if not the minutiae of daily activities, at least the broad terms and conditions of work. This is accomplished largely through the supervisory efforts of the district managers, who serve as the nexus between the publishers and the newsboys. The district managers assign "spots" or corners to which the newsboys are expected to confine their selling activities.
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> The principal question is whether the newsboys are "employees." Because Congress did not explicitly define the term, respondents say its meaning must be determined by reference to common-law standards. In their view "common-law standards" are those the courts have applied in distinguishing between "employees" and "independent contractors" when working out various problems unrelated to the Wagner Act's purposes and provisions.
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> The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as "the test" for deciding whether one who hires another is responsible in tort for his wrongdoing. But this formula has

been by no means exclusively controlling in the solution of other problems. And its simplicity has been illusory because it is more largely simplicity of formulation than of application. Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.

It is hardly necessary to stress particular instances of these variations or to emphasize that they have arisen principally, first, in the struggle of the courts to work out common-law liabilities where the legislature has given no guides for judgment, more recently also under statutes which have posed the same problem for solution in the light of the enactment's particular terms and purposes. It is enough to point out that, with reference to an identical problem, results may be contrary over a very considerable region of doubt in applying the distinction, depending upon the state or jurisdiction where the determination is made; and that within a single jurisdiction a person who, for instance, is held to be an "independent contractor" for the purpose of imposing vicarious liability in tort may be an "employee" for the purposes of particular legislation, such as unemployment compensation. See, e. g., Globe Grain & Milling Co. v. Industrial Comm'n, 98 Utah 36, 91 P.2d 512. In short, the assumed simplicity and uniformity, resulting from application of "common-law standards," does not exist." 64 S.Ct. at 854-856

The Court then stressed that the dichotomy between "employee" and "independent contractor" differs from state to state. The Court stated that the definition of "employee" had to be broader than that of the vicarious liability definitions in order to effectuate the purposes of the act in question. The same must be true in workers' compensation cases.

The Court in dealing with the labor arena made a general statement dealing with legislative intent which is particularly important to the case at bar. The Court stated:

"Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers

in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation." 64 S.Ct. at 858

In Laeng v. Workmen's Compensation Appeals Board, City of Covina, 494 P.2d 1 (Cal. 1972)[13], the Court stated:

"Although we recognize that at the time of his injury the claimant was not yet "employed" by the city in any contractual sense, we are not confined, in determining whether Laeng may be considered an "employee" for purposes of workmen's compensation law, to finding whether or not the city and Laeng had entered into a traditional contract of hire. On the contrary, Labor Code section 3351 provides broadly that for the purpose of the Workmen's Compensation Act "'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . ." Section 3357 of the Labor Code declares that *"Any person rendering service for another,* other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." (See also Lab. Code, §5705, subd. (a)).

Given these broad statutory contours, we believe that an "employment" relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act (cf. Board v. Hearst Publications, Inc. (1944) 322 U.S. 111, 124-129 [88 L.Ed. 1170, 1181-1183, 64 S.Ct. 851]; B. P. Schulberg Prod. v. Cal. Emp. Com. (1944) 66 Cal.App.2d 831, 834-835 [153 P.2d 404]. See generally, 1a Larson, Workmen's Compensation Law (1967) §§43.41, 43.42, pp. 628-633; 2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1970) §3.01[2], pp. 3-3 to 3-5). In so doing we must bear in mind section 3202's mandate that "workmen's compensation statutes are to be construed liberally in favor of awarding compensation." (Greydanus v. Industrial Acc. Com. (1965) 63 Cal.2d 490, 493 [47 Cal.Rptr. 384, 407 P.2d 296]; Reynolds Elec. etc. Co. v. Workmen's Comp. App. Bd. (1966) 65 Cal.2d 429, 433 [55 Cal. Rptr. 248, 421 P.2d 96.)" 494 P.2d at 4-5

In a footnote the Court stated:

"By this statement, of course, we do not imply that common law notions of the employment relationship should never be consid-

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[13] Compare to Rathbun v. Payne, 68 P.2d 291 (Cal.1937), ,in the tort setting for a newscarrier.

ered in determining the issue of "employment" under workmen's compensation, but only that such common law principles are not determinative of the issue. As both Larson and Hanna have pointed out, the differences between the common law and workmen's compensation usage of the term "employment" stem from the fundamentally different purposes served by the employment concept in each context. Thus, whereas at common law the "master-servant" concept was utilized primarily to delimit the scope of the master's vicarious tort liability and was thus concerned with injuries caused by the employee, the basic inquiry in compensation law involves which injuries to the employee should be insured against by the employer. (1a Larson, Workmen's Compensation Law (1967) §43.42, pp. 632-633; 2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1970) §3.01[2], p. 3-4.) Although there is considerable overlap between the two fields, in each context the determination of the presence or absence of a sufficient "employment" relationship must ultimately depend on the purpose for which the inquiry is made." 494 P.2d at 5, n.7

See also Bleeda v. Hickman-Williams & Company, 205 N.W.2d 85 (Mich. 1972)[14]; Laurel Daily Leader v. James, 80 So.2d 770 (Miss.

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[14] Compare Sliter v. Cobb, 200 N.W.2d 67 (Mich.1972), where under facts similar to those at bar, the Court held that there were sufficient issues of fact to preclude a summary judgement. The facts there included:

"1) Defendant News owned the route and leased it to Cobb. The News reserved the right to cancel the agreement without notice for 'good faith reason or reasons.' When Cobb informed the News he intended to quit, it required him to allow a replacement from defendant News' office to ride with him during the last two weeks he worked for defendant News, so that the replacement could learn the route. In *Gall*, Rebtoy, the deliveryman, owned his route and sold it to another party (191 Mich. 405, 408, 158 N.W. 36).

2) Cobb was forbidden by his contract with defendant News from delivering any other publication on the route without written authorization of the News. No such restriction appeared in the agreement in the *Gall* [Gall v. Detroit Journal Co., 191 Mich. 405, 158 N.W. 36 (1916)] Case.

3) When Cobb experienced difficulty (which occurred several times) agents of defendant News rode with him in an effort to iron out the problems.

4) The News directed the manner in which the newspapers were to be rolled, banded and deposited. This clearly involves control over the method of delivery (which is an indication of an employer-employee relationship).

5) Cobb was required to follow the News' billing procedure, credit policies, and a prescribed method of bookkeeping.

6) Cobb was permitted to cancel a customer for nonpayment; he

1955)[15]; Huntington Pub. Company v. Caryl, 377 S.E.2d 479 (W.Va.

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was prohibited by the News from terminating a customer for any other reason without first consulting and receiving permission from defendant newspaper.

7) Further, the route lease provided that Cobb was to receive from the News a mileage allowance of seven cents per mile for servicing the route." 200 N.W.2d at 69

It seems that Cobb had more autonomy than did Williams.

[15] "A great many cases have been cited from other jurisdictions; some of these hold that the carrier boys are independent contractors and some hold that they are employees within the contemplation of the Workmen's Compensation Act. We cite none of them herein for the reason that most of them can be distinguished on the facts from the case here presented. We prefer to base our decision on our own conception of what the Legislature intended by the adoption of the compensation law in this state, as evidenced by the act itself and by what we have already held in interpreting the act and by what has been said by the text writers to the effect that the purpose of such legislation is to take the burden of accident off the shoulders of the unfortunate victim and place it upon the shoulders of industry without regard to the common-law liability of a master to his servant for injuries resulting from the master's negligence. As said by Dean Larson

y in Section 1.20 in his excellent book on Workmen's Compensation:

'Like social insurance, but unlike tort, the right to benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame.'

* * *

"There are several tests to be applied, the weight of each, and whether much or little, rising and falling in the scale as it may or may not be counterbalanced by one or more of the remaining tests, present in the particular case at hand. For this reason these tests cannot be stated in any precise order of importance, but they are as follows: Whether the principal master has the power to terminate the contract at will; whether he has the power to fix the price in payment for the work, or vitally controls the manner and time of payment; whether he furnishes the means and appliances for the work; whether he has control of the premises; whether he furnishes the materials upon which the work is done and receives the output thereof, the contractor dealing with no other person in respect to the output; whether he has the right to prescribe and furnish the details of the kind and character of work to be done; whether he has the right to supervise and inspect the work during the course of the employment; whether he has the right to direct the details of the manner in which the work is to be done; whether he has the right to employ and discharge the subemployees and to fix their compensation; and whether he is

1988)[16]; Evansville Printing v. Sugg, 817 S.W.2d 455 (Ky. 1991).

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obliged to pay the wages of said employees. These are the tests, as we thing, and any other, if differently stated, may be brought within one of those above briefly set out. 14 R.C.L., pp. 67-76; 31 C.J., pp. 473-475; 39 C.J., pp. 1316-1323."

* * *

Applying the above tests to the case at hand we find that under nearly all of them the appellee was an employee of appellant. Appellant had the power to terminate the contract at will; it had the power to fix the price,- ten cents to the news carrier and twenty cents to the customer; it had control of the premises, that is to say, the entire route in and over which appellee was permitted to work; it furnished the materials, i.e., the newspapers on and with which the work was done; appellee dealt with no one else with respect to the output; appellant had the right to prescribe and furnish the details of the work, including the hours thereof; it had the right to supervise and inspect the work during the course of the employment; it had the right to direct the details of the manner in which the work was to be done.

* * *

Stress is also laid on the fact that appellant did not pay social security benefits on appellee's earnings. By 42 U.S.C.A. § 410(a)(16) appellee was specifically exempt from social security assessments. If he had been subject to such assessment, the failure of appellant to collect and remit thereon would not afford any reason for its escape from liability in this case." 80 So.2d at 772-773

[16] "The "suggested" time for deliveries is 6:30 a.m., Monday through Saturday, and 7:30 a.m. on Sunday. It is to the carriers' advantage that they deliver by the "suggested" time because the appellee may view a late delivery as a non-delivery, make the delivery itself, and charge the carrier the retail amount.

The appellee is involved in the carrier-customer relationship in several ways. The appellee provides free delivery tubes for motor route customers and provides receipt books to all carriers. The appellee also accepts new orders and pre-paid subscriptions for carrier delivery. New orders are assigned to carriers. Pre-paid subscriptions are retained by the appellee and credited to the carriers' accounts on a bi-weekly basis. The pre-paid subscriptions are billed at the "suggested" retail price.

* * *

The appellee furnishes the carriers with receipt cards for collection purposes and with bound books in which to maintain their route and collection records. Furthermore, the appellee provides subscribers with receptacles called "tubes" in which newspapers are received as well as stakes upon which the tubes are mounted. These items are furnished free of charge on the customer's request and are installed by the carriers, who are not directly compensated for this service.

POINT III

EVEN IF KENDALL APPLIES TO WORKERS' COMPENSATION CASES, THE CLAIMANT HERE IS STILL AN EMPLOYEE

The findings of the JCC, (R. 131-137), were essentially unchallenged below. She found:

> "The claimant * * * testified at the hearing * * * I specifically find that the claimant's testimony is credible.
>
> * * *
>
> While I have considered all of the criteria suggested by the Restatement of the Law of Agency, I find the following indicia to be most persuasive in arriving at the conclusion that the claimant was an employee of the Fort Pierce Tribune:
>
> a. EXTENT OF CONTROL WHICH, BY THE AGREEMENT, THE MASTER MAY EXERCISE OVER THE DETAILS OF THE WORK. * * * At the time

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The carrier manual indicates that if carriers are "short" on newspapers, the papers will be dispatched by the district sales manager who keeps in touch with the appellee through a two-way car radio. Calls notifying the appellee of shortages, however, must be received by 6:30 a.m., which supports the argument that deliveries are to be made by a set time.

If a carrier fails to deliver altogether (or delivers late enough that it is reported as a non-delivery), appellee assumes responsibility and the district sales manager delivers the route. *The carrier is then billed for the suggested retail rate*, the delivery charge being the difference between the rate the carrier is usually billed and the suggested retail rate.

* * *

The entire relationship between the appellee and its carriers centers in subscriber satisfaction. In a normal wholesaler/purchaser relationship, the wholesaler concentrates its sales efforts on its retailers or purchasers. However, in the daily operation of a newspaper, the newspaper publishing company concerns itself primarily with the subscribers who, under the appellee's theory of the case, are the carriers' customers. We find that the appellee's actions for the home delivery subscribers are inconsistent with the occurrence of a true wholesale sale between the appellee and the carrier.

* * *

Under the circumstances described above, we cannot accept appellee's argument that carriers are purchasing newspapers from the appellee and selling them to subscribers. Even an "independent contractor" can act as an agent of a manufacturer/publisher, and can solicit orders, make deliveries, and do all things necessary to maintain an effective sales network for the retail product." 377 S.E.2d at 480-484

the claimant was hired, she was required to fill out an application for employment. The claimant took orders from a distribution supervisor and had an established route with certain confined territorial or geographical limits. The Fort Pierce Tribune provided the claimant with a daily customer list; this computer printout instructed the claimant to deliver papers to new customers, stop delivery to customers who no longer desired the paper and suspend delivery to those who did not pay. In addition, the daily printout contained any customer complaints that had been received by the Fort Pierce Tribune regarding delivery. Each day the claimant would pick up the papers to be delivered and the printout sheet of customers at the Fort Pierce Tribune; the claimant was required to pick up the papers at approximately 12:00 a.m. and to have them delivered by 6:30 a.m. * * * **each detail relating to delivery of the paper was dictated by the Fort Pierce Tribune** and the claimant did not have any authority or independent power to deviate from the procedures established by the Fort Pierce Tribune. * * * **each and every important aspect relating to delivery was controlled by the Fort Pierce Tribune.**

b. WHETHER OR NOT THE ONE EMPLOYED IS ENGAGED IN A DISTINCT OCCUPATION OR BUSINESS. * * * No occupational license is required. The claimant does not do any advertising nor does she deliver newspapers for any other company. The claimant testified that she worked exclusively for the Fort Pierce Tribune. * * * The claimant did not bill customers for the papers which were delivered nor did she collect money from the customers for papers which were delivered. Billing and collection were handled directly by the Fort Pierce Tribune. The claimant did not have any involvement in setting the price for the papers which she delivered nor did she have any authority to raise the price, give discounts, add or drop customers. **If a subscriber did not pay, it was not the claimant's decision to terminate delivery, rather this was done by the Fort Pierce Tribune and the claimant was notified of the fact by an entry made on the daily customer list prepared by the Fort Pierce Tribune.** * * *

c. THE SKILL REQUIRED IN THE PARTICULAR OCCUPATION. Delivering newspapers requires only basic skills, such as being able to drive a motor vehicle, reading a list of customers' names and being physically capable of tossing the paper into a subscriber's yard. Little, if any, training is given or needed.

d. WHETHER THE EMPLOYER OR THE WORKMAN SUPPLIES THE INSTRUMENTALITIES, TOOLS AND PLACE OF WORK FOR THE PERSON DOING THE WORK. With the exception of providing a vehicle for transportation and delivery of the newspapers, the claimant did not provide any tools or materials. The newspapers were picked up daily at the Fort Pierce Tribune. When inserts were required to be delivered, these were also provided by the * * * Tribune.

e. THE LENGTH OF TIME FOR WHICH THE PERSON IS EMPLOYED. * * * This was not casual work; the claimant delivered papers seven days a week, every week. If the claimant knew she was going to be unable to deliver the [News] she had to make

arrangements for a substitute **and she needed to obtain the prior approval of the [News} for such a substitution.**

f. THE METHOD OF PAYMENT, WHETHER BY TIME OR BY THE JOB. Although the method of compensation is somewhat confusing, the claimant in essence was paid 5 cents for each paper she delivered. Although the records make it appear that the delivery person purchases the papers from the Fort Pierce Tribune, **the uncontroverted evidence was that money never changed hands and the claimant received 5 cents per paper delivered after the Fort Pierce Tribune collected from the customer.** The claimant also testified that the [Tribune] occasionally ran promotional activities to increase the readership and that she would be paid bonuses based upon her productivity.

g. WHETHER OR NOT THE WORK IS A PART OF THE REGULAR BUSINESS OF THE EMPLOYER. Bill McKay, the claimant's supervisor at the Fort Pierce Tribune, testified that **distribution is an integral part of production and publication of a newspaper.**

4. While it may have been the intent of the Fort Pierce Tribune to establish an independent contractor relationship with the claimant, BEVERLY WILLIAMS, the facts in this case, particularly those relating to the element of control over the activities of the claimant, lead the undersigned to the inescapable conclusion that she was an employee[17].

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[17] In Herman v. Roche, 533 So.2d 824 (Fla.1st DCA 1988), the Court stated:

"The deputy agreed with appellees and denied the claim for benefits. The deputy did find appellant Herman suffered an injury on the job. However, he concluded appellant was an independent contractor for whom appellees were not required to provide worker's compensation benefits.

* * *

The deputy also considered the factors set out in Cantor v. Cochran, 184 So.2d 173 (Fla.1966) to determine if there is an independent contractor or employee-employer relationship. Roche was found not to have exercised control or supervision over the details of the work. The deputy concluded Roche did not have the power to fire appellant without liability. The fact Roche replaced appellant with someone else to complete the job did not constitute a "firing." The deputy also inferred that as appellant filed a mechanic's lien, appellant considered himself an independent contractor. Carpentry was found to be a distinct occupation requiring some degree of skill. Considering these factors, the deputy concluded the evidence established appellant was an independent contractor, and not an employee.

* * *

We find the length of employment (for completion of one roof) and the method of payment (upon completion) to be of little importance in arriving at the conclusion that appellant was an employee of Roche. Saudi Arabian Airlines v. Dunn, 438 So.2d 116 (Fla. 1st DCA 1983). Roche's expressed intent to hire appellant as an independent contractor and appellant's efforts

In Lourcey, supra, 193 So. at 847, the Court made the point:

> "If any of these provisions [in the contract] were such as to hamper or deprive Seig of his free agency in the means and method of performing his part of the contract, they would deprive it of its independent contractor relation"

Here the facts, as found by the JCC and as testified by the Claimant show that almost total control was retained by the paper[18]. Claimant testified she did not have any discretion about putting in the flyers or circulars in with the papers. She just had to do that. (R. 23). She testified that she was required to have home delivery papers delivered by no later than 6:30 a.m. (R. 23-24). She could and did not deliver any other papers. (R. 27). Claimant worked 7 days a week for the tribune. (R. 27-28). The Tribune would send the bills to the customers and they would pay the Tribune directly. (R. 28). Claimant did not initiate the bills,

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> to enforce a mechanic's lien (which does not require the lienor to be an independent contractor) do not control the issue of whether an employee-employer relationship existed for purposes of worker's compensation coverage.
>
> * * *
>
> To find appellant an independent contractor is tantamount to judicial approval of illegal actions on the part of Granados and Roche in trying to avoid worker's compensation payments. The Workers' Compensation Act was intended to prevent employers from dividing up work into individual tasks and calling the individual engaged to perform those tasks an independent contractor. By such devices, employers may not escape their responsibilities to their employees." 533 So.2d at 825-826

[18] "The claimant did not have any involvement in setting the price for the papers which she delivered nor did she have any authority to raise the price, give discounts, add or drop customers. If a subscriber did not pay, it was not the claimant's decision to terminate delivery, rather this was done by the Fort Pierce Tribune and the claimant was notified of the fact by an entry made on the daily customer list prepared by the Fort Pierce Tribune. The claimant had no authority to create routes outside her territorial limit nor could she vary the time of delivery of the paper." (R. 135)

(R. 28), and she did not get duplicate copies of the bills or any other indication of the billings. (R. 28). The bills went out directly from the Tribune to the customer. (R. 28). Claimant neither set the price of the paper nor could she vary it. She could not change her customer list, even for cause. (R. 29-30)

Claimant was given a piece of paper with new "starts and stops" on a daily basis. (R. 30-32). Claimant would have to follow the instructions on that paper. (R. 32). The papers would also contain complaints and it was typewritten from a computer. (R. 32). Testimony on this account showed:

> "Q. And give us an example of a complaint?
> A. Well, if I deliver home delivery and I threw it in the ditch and it got wet the customer would call up and complain. They would want credit for this paper and then I would be told about it through this, our sheets -- our daily sheets.
> Q. And then you would be penalized for it? Would it cost you money?
> A. It would cost me a paper. (R. 32)

The Claimant also testified that even if someone was not paying and the Tribune told her to keep the delivery going she would have to comply. (R. 33). In addition, if the customer still did not pay the Claimant was the one who would bear the loss for unpaid newspapers. (R. 33). Claimant also needed the paper's approval to have substitutes for her deliveries. (R. 40). The Claimant testified live before the JCC and the Judge believed her. In virtually every important aspect, the paper had control[19].

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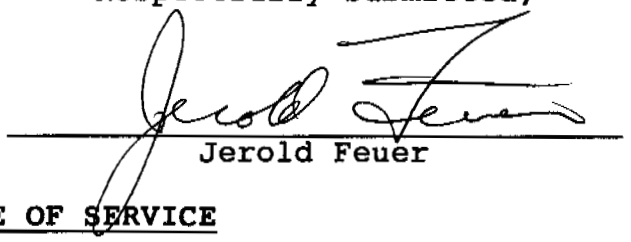
[19] The memo from the News on methods of delivery should be reconsidered:

> "Every effort must be taken to satisfy the customer. If this means that the paper has to be double bagged or sealed at the end in inclement weather, then that must be done. If a customer requests a paper to be tubed or delivered in a certain spot (over fence, in carport, close to door, etc.), this must be

CONCLUSION

The opinion of the DCA should be reversed and the Order of the JCC reinstated.

Respectfully submitted,



Jerold Feuer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing document was served by mail this November 30, 1993, on:

Paul Westcott, Esquire
Rissman, Weisberg, Barrett & Hurt, P.A.
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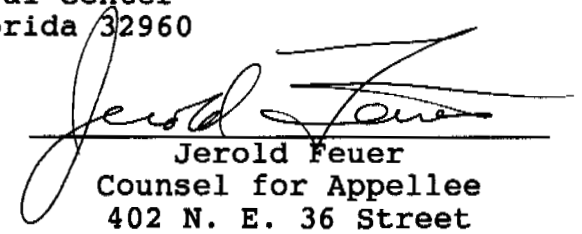

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done. If you are not able to accomplish delivery to all of your subscribers no later than 6:30 a.m., under normal conditions, we need to evaluate your route to determine the problem and recommend the solution." (R. 11)