IN THE SUPREME COURT OF THE STATE OF FLORIDA

STEPHEN KEITH,

Petitioner,

v.

NEWS & SUN SENTINEL COMPANY
and CRAWFORD & COMPANY,

Respondents.

CASE NO.: 83,208
(DCA No. 92-03037)

INITIAL BRIEF ON THE MERITS ON BEHALF OF
PETITIONER, STEPHEN KEITH

ON THE QUESTION CERTIFIED AS OF GREAT PUBLIC IMPORTANCE FROM THE
FIRST DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Petitioner/Appellant, Stephen Keith, shall be designated as "Petitioner" or "Claimant." The Respondents, News & Sun Sentinel Company, and Crawford & Company, shall be designated as "Respondents" or "Employer." Reference to the Record on Appeal shall be "R" followed by the appropriate page number, all in parentheses ( ).

STATEMENT OF CERTIFIED QUESTION

I. Whether, in light of the evolving business relationship between the newspaper publisher and persons delivering the newspaper, the holding in Miami Herald Publishing Company v. Kendall, 88 So.2d 276 (FLA 1956) is still viable?

A[1]. Whether, the Judge of Compensation Claims erred in deciding that the delivery agent, Babapour, was not an employee of the newspaper publisher, the News/Sun Sentinel, and therefore his contemplated employee, the Claimant, a newspaper street vendor, was not an employee of the News/Sun Sentinel?

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[1]) In order to determine compensability it is necessary to explore the employment relationship between the Petitioner/Claimant and the Respondent/News Sun Sentinel vis-a-vis the delivery agent, Babapour.

STATEMENT OF THE CASE

On May 1, 1992, a Merits Hearing was held before the Judge of Compensation Claims, Honorable Joseph F. Hand. On August 11, 1992, an Order denying compensability based upon lack of Employer-Employee relationship was entered.

That decision was appealed to the First District Court of Appeal, State of Florida, and that court in its opinion of February 1, 1994, affirmed the Judge of Compensation Claim's denial of compensability, however, certified to the Supreme Court of Florida as a question of great public importance the following:

> 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?

On February 11, 1994, the Petitioner served its Notice to Invoke Discretionary Jurisdiction of the Supreme Court pursuant to Florida Rules of Appellate Procedure Rule 9.030(a)(2)(A)(v).

This Court served an order dated February 17, 1994 postponing its decision on jurisdiction, however, requesting that Petitioner file a Brief on the Merits.

STATEMENT OF FACTS

On September 28, 1990, the Claimant, Stephen Keith, a forty-one (41) year old male, while selling the News/Sun Sentinel newspapers as a street vendor, was struck by a motor vehicle while crossing Oakland Park Boulevard at the intersection of North Andrews Avenue in Fort Lauderdale, Broward County, Florida. (R579)

Dr. Peter F. Merkle, an orthopedic surgeon, treated the Claimant at the emergency room where he diagnosed multiple open fractures of the right tibia and fibula and left shoulder. (R376)

The Claimant remained hospitalized from September 28, 1990 through October 22, 1990, whereupon he was discharged to Sunrise Rehabilitation Hospital.(R379) Since the initial operation on September 28, 1990, the Claimant has undergone surgery on October 4, 1990 to close the wound to his right leg; February 4, 1991 for irrigation and debridement of his leg; April 25, 1991 Dr. Merkle cut out the infected bone and placed the Claimant in an Ilizarov external fixation device which is designed to lengthen the leg. (R380) Finally, on March 17, 1992, the Claimant's Ilizarov device was removed and he was placed into a cast. Dr. Merkle has opined that the Claimant's leg may need to be amputated. (R387) Throughout the Claimant's treatment by Dr. Merkle, he has been unable to work. (R459)

The Claimant testified that he learned that if he wanted to sell the Sun Sentinel newspaper there were two places in Fort Lauderdale where you went to be picked up. (R197) The Claimant

testified that he went to the Hess Station at 7th Avenue and Broward Boulevard where he first met Mr. Babapour, a delivery agent for the News/Sun Sentinel. (R197) Mr. Babapour testified that it was well known in the neighborhood that if you wanted to sell newspapers you would come to the Hess Station "because it was on the way from the downtown that we picked up the newspapers and people knew that we would be going through Broward Boulevard." (R51)

After their initial meeting, the Claimant testified that he indicated to Mr. Babapour that he wanted to sell newspapers and Mr. Babapour advised him that he could use him but "I would have to work everyday." (R197) The Claimant did not have his own transportation and therefore he would meet Mr. Babapour at 5:00 a.m., at the Hess Station, so that he could get a ride to work. (R198) Mr. Babapour picked up the Claimant at the Hess Gas Station on Broward Boulevard and 7th Avenue to transport him to the various street vending locations. (R50)

The Claimant had an agreement with Mr. Babapour to sell newspapers to customers, in cars, at a specific intersection, and that he could not move from one corner to another corner. Mr. Babapour would not allow a street vendor to distribute papers by bicycle or some other means of transportation, other than walking up to the customer. (R86-87) The Claimant was also prohibited from selling any other papers besides the News/Sun Sentinel at that street location. (R233) Mr. Babapour prohibited the sale of any other newspapers at his street corners because ". . . to me it is

a conflict of interest." (R48)

The Claimant was advised that he was to adhere to rules, as a street vendor, laid down by Mr. Babapour. That Mr. Babapour would drive around his various locations to check on the safety of the street vendors. (R97) The Claimant had to wear a Sun Sentinel hat, a Sun Sentinel T-shirt, a Sun Sentinel apron, he was not permitted to drink alcoholic beverages on the job, there was to be no fighting, and that he was supposed to clean up his work area. (R211) On one occasion, the Claimant was removed from work by Mr. Babapour's "right hand man" because he had been drinking on the job. (R212-213)

The Claimant further testified that he was advised that there would be people from the Sun Sentinel who would drive around to check up on his performance. The Claimant, in fact, observed Tony Alonzo (the Sun Sentinel's Single Copy Division manager) driving around observing the performance of himself and other street vendors. (R211-212) This was confirmed by Mr. Babapour, as well. (R55-56) During Mr. Alonzo's daily inspections of the street vending sites he would be looking to make sure that the street vendors were not drinking, that they had their shirts on, that there was no trash left at the intersections, and to make sure that the street vendors were out of the street when the traffic light turned green for traffic. (R139)

Mr. Babapour had been contacted by Mr. Alonzo, in the past, to correct situations such as the street vendors were not keeping their locations clean, causing a traffic hazard, or they were

drinking, or they were not wearing a T-shirt. Mr. Babapour also responded that if a street vendor was rude or discourteous to a customer who had driven up, that the Sun Sentinel would be contacted and if it was Mr. Babapour's area, he would receive a call to see what the problem was. (R84)

Mr. Alonzo had previously told Babapour, for safety reasons, not to distribute any papers to that vendor. (R161) According to Mr. Alonzo, the delivery agent can make a decision that the street vendor should be terminated or should not be permitted to sell newspapers. (R163) Once he received the complaint from Mr. Alonzo, Babapour would go to the location and try to rectify the problem. (R140) If the street vendor was drinking, Mr. Babapour would pick up the street vendor's papers and not allow him to sell any further newspapers. (R59)

In order to contact Mr. Babapour, he has a beeper for which the Sun Sentinel has his number ". . . that is basically the only lines of communication if he (Mr. Alonzo) wants to get into touch with me. I am on the road. He has no choice but to beep me." (R83) Prior to the Claimant's date of accident, Mr. Alonzo had on occasion beeped Mr. Babapour to advise him that a street vendor was drunk or causing a traffic hazard or creating a sloppy condition at a street corner. As recently as one day before the Merits Hearing, Mr. Alonzo had called Mr. Babapour's beeper number to advise him that Winn Dixie had called the News/Sun Sentinel and advised that there were newspapers and trash bags all over the premises. (R84)

Mr. Alonzo was asked in the event that Mr. Babapour did not correct a situation, such as failing to have removed a vendor from that location or take away the newspapers "what, if anything, would you have done?" His response was "Well, I would have gotten in touch with him again and asked him why the problem wasn't corrected." (R142) In the event that the delivery agent is not performing the contract pursuant to its terms, the News/Sun Sentinel can rescind the Delivery Agent Agreement. (R182)

Mr. Babapour personally timed each and every street location to determine how long it would take for the traffic light to turn from red to green and visa-versa. Once he had this information, he passed it on to new street vendors (including the Claimant). (R72-73) Mr. Babapour tells the street vendors to time the light before they attempt to sell the newspaper so that they can make sure that they are out of the traffic before the light changes to green. (R74)

The Claimant also learned of this timing technique in safety counsel classes which were offered through the National Safety Counsel, Broward Chapter and paid for by the Sun Sentinel company. Mr. Babapour attended these safety meetings where Mr. Alonzo would also be present. The News/Sun Sentinel received copies of the attendance roster. (R142) On the occasion that the Claimant attended, Mr. Babapour drove him to the meeting. (R70)

Mr. Babapour also tells the street vendors to wait until the rain stops before selling newspapers because of the safety hazard to the vendors and also the lack of customer interest in buying a

newspaper when it is raining. (R82)

The Claimant's work day began at the street corner no later than 6:30 a.m. and he worked until 3:30 p.m. to 4:00 p.m. If he left prior to normal quitting time, he was subject to the risk of being fired. (R232) The Claimant knew of instances where Mr. Babapour had fired people because they had left their corners earlier "than what they were supposed to have left their corners and when they had papers that they hadn't sold." (R232) The Claimant worked approximately four days per week. (R215-216) According to Mr. Babapour, the Claimant had worked on and off selling the News/Sun Sentinel for a couple of years prior to his accident. (R49)

If the Claimant repeatedly failed to show up for work he testified that Mr. Babapour had the power to terminate him and tell him not to come back. (R218) When he did miss work, he had a doctor's note from the Clinic and that is why he was never fired. (R218)

The Claimant testified that he believed that Mr. Babapour was a foreman for the Sun Sentinel, and that he (the Claimant) was an employee of the Sun Sentinel. (The Claimant never received any documentation from the Sun Sentinel advising that he was not an employee of their company. (R145)) He based this belief on garments that he had to wear; the cap, the T-shirt and the money bags. That if they did not wear the paraphernalia Mr. Babapour always carried extra garments in case somebody did not bring their clothing.

The T-shirt "' read News/Sun Sentinel' and on the back some of them says [sic] ' Buckle Up It's the Law' ." (R61-62)

The shirts were required because of safety reasons. (R64) They are all reflective and most of them glow in the dark. A few times ". . . Mr. Alonzo even came to me (Babapour) with a different color and said which one do you think would be more suitable for the safety factor and I would give him my opinion." (R69)

The News/Sun Sentinel instructs street vendors to wear the shirt so that the vendors can been seen in traffic. (R149) Although there were some hats and shirts without the News/Sun Sentinel logo on them, the vast majority of the shirts had the News/Sun Sentinel logo. (R150-151)

The News/Sun Sentinel charges the delivery agents fifty percent of the actual cost of the hats, shirts, money bags and aprons. The News/Sun Sentinel absorbs the other fifty percent. (R143-144)

The Claimant testified that out of the twenty-five cents that the paper sold for he received twenty cents, plus any tips that he might receive. The remaining five cents went to Mr. Babapour. (R221) The Claimant was not charged for the papers he did not sell.

In order to become a prospective delivery agent, the Sun Sentinel maintains a circulation department telephone number. The Sun Sentinel's secretary would then pass onto Mr. Alonzo the name of the person who desired street vendor delivery sales. (R134) Behrouz Babapour testified that he had been a delivery agent for

the News/Sun Sentinel for approximately ten to eleven years at the time of the Merits Hearing. (R29)

Mr. Babapour testified that he entered into a yearly "Delivery Agent Agreement Single Copy" with the News/Sun Sentinel Company. (R354) At the outset, there were only five to six locations used by the News/Sun Sentinel to distribute newspapers through street vendors. (R29) At the beginning, the locations were supplied by the News/Sun Sentinel. When he first started selling newspapers through the street vendors, Mr. Babapour was selling about two-hundred and fifty (250) copies per day. (R34) On the date of the Claimant's accident, there were fifty corners at which Mr. Babapour had delivered newspapers to and for which fifty street vendors were working with him. (R43)

Mr. Babapour would go to the Fort Lauderdale location where the papers were printed, pick up the main section of the newspaper, and then drive to a warehouse, maintained by the News/Sun Sentinel to pick up the inserts. (R35) Once he received all of the papers, Mr. Babapour would head on I-95 proceed to his first drop off point, and then continue on to each of his street corners where the papers were sold. (R37) He was required by the terms of the Agreement to deliver a complete, fully inserted copy of the newspaper no later than 6:30 a.m., to the actual street location. (R40) It would be a breach of the delivery agreement if he did not deliver the papers in a timely fashion. (R186)

Mr. Babapour agreed, by virtue of the Delivery Agent Agreement, to provide to the News/Sun Sentinel a list of each and

every location where he sold the News/Sun Sentinel papers. In fact, each week he used a Sun Sentinel provided form indicating the total number of papers he sold, where he sold them, and the amount he sold at each location. (R39, R358-370)

In the event that Mr. Babapour fails to sell all of the newspapers, he returns them to Mr. Alonzo, who in turn checks to see that its fully returned, and credits Mr. Babapour for all unsold papers. (R79) All unsold papers go to a recycling plant. (R133)

Mr. Babapour explained the pay arrangement with the Sun Sentinel. On the bill that he received from the News/Sun Sentinel he was charged twelve cents per paper. On the same bill he was credited ten cents back for delivering the paper, therefore, he paid the News/Sun Sentinel two cents per paper. He collected five cents from the street vendors for each paper sold. Two cents would go to the company and he would keep three cents. (R76)

In September, 1990, Babapour was delivering eight thousand (8,000) newspapers per day. At three cents a paper he was earning $240.00 gross per day. On Sundays, he received twenty five cents for his delivery collection fee per paper, selling approximately five thousand newspapers. Thus, he would earn $1,250.00 for Sunday, alone. (R77) At that rate, he earned $127,400.00 per year. (no Saturday delivery)

At the time of the Claimant's accident, Mr. Babapour had every street vendor, prior to allowing them to sell the newspaper, sign an insurance enrollment card. (R115, 350) (See, R350-351 for

copies of the insurance rejection card and insurance enrollment card) Mr. Babapour received these cards at the News/Sun Sentinel warehouse from the Sun Sentinel. (R47) Once the enrollment cards were signed, Mr. Babapour testified that he turned it in to the insurance company by ". . . give [ing] it to my manager at the time, because we don't go to the main office all of the time. We are out in the field." (R80) Mr. Babapour testified that his manager (at the time the Claimant signed his enrollment card) was Larry Roy. Mr. Roy worked for the Sun Sentinel. (R50)

Mr. Babapour is automatically charged for the "accident insurance" on his paper bill ($1.30 per vendor) and the News/Sun Sentinel in turn reimburses the insurance carrier for the coverage. (R76,47) Babapour would tell the street vendors that he is paying for it and that if they get into an accident "they're covered." (R118-119) The insurance paid for by the delivery agents provided coverage in the event that "if a person is lifting a bundle of newspapers and he pulls (hit)[sic] his back or he twists his ankle or for any unforeseen reason when they are putting the newspapers together or while they are distributing them, it is an accident insurance policy. . . " (R147)

Mr. Babapour never told the Claimant that he did not have Workers' Compensation coverage in existence. The only insurance Babapour had was vehicle insurance for his truck. (R120) The News/Sun Sentinel through Mr. Alonzo never instructed Mr. Babapour, either orally or in writing, that he, in turn, should instruct the street vendors as to the purposes behind the accidental insurance.

Nor, did he ever tell Mr. Babapour to instruct the street vendors that even though they were wearing the shirt, the hat, the money bag and the belt that bore the News/Sun Sentinel's name that they were not Sun Sentinel employees. (R145) Mr. Babapour never discussed, nor was he advised in writing by the Sun Sentinel, per the delivery agreement, whether or not the Sun Sentinel was providing Workers' Compensation coverage. (R122)

Mr. Babapour had previously referred to Mr. Alonzo as his supervisor.

> I am sure that I have said it. He is my supervisor. He is the supervisor that oversees operations . . . and if I run out of the running list, I asked him to give me a pad. You know, things that we need. And he also he drives around, as I said, and if somebody doesn't have a shirt, he would call me, or if somebody is drinking, as you said, or the papers are blowing all over the street and making it hazardous of (sic) [to] the drivers he would call me to take care of the situation. (R61)

Mr. Alonzo testified in response to the following question:

> "Q. At page 21 of your deposition, I asked you: Is there any supervision or is there any way that you can know if Mr. Babapour is doing a good enough job such that it is worth having Mr. Babapour as a contractor?"
>
> "A. At line 10: Oh, sure. What I would do is I would spend time daily driving through intersections making sure each vendor has a shirt, had an apron on for safety reasons, making sure that he is out of the street when the light turns green. Basically I just oversee the safety aspect of it." (R175, lines 10-22)

Mr. Alonzo, examined the street vendor's sales reports provided by the delivery agent to predict how many papers would be necessary for each day. (R129-130) Mr. Alonzo then communicated this information to Mr. Babapour so that he would have an idea of how many papers he needed to deliver on an daily basis. On those

days where the delivery agent exceeds three percent unsold papers, Mr. Alonzo discusses the overage in an attempt to reduce the gap between expected sales and actual sales. (R135) Mr. Babapour, in turn, discusses the quantity of sales with street vendors if they are not selling enough papers. ". . . I have been telling people that, listen so-and-so was working that location and he sold so many more papers. Is there a problem? What is your problem? You know, I would like to know why." (R94-95)

The decision on the amount of papers to be distributed is mutual, based on the information that the delivery agents have, along with the information that the Sun Sentinel receives concerning late breaking news. (R134-135)

The ultimate decision on which street corner the vendors would sell papers at is determined by the News/Sun Sentinel. Mr. Alonzo had the power to veto Mr. Babapour's decision to choose another street vending site within his territory. (R137-138) The Sun Sentinel would veto selections of intersections based on safety factors. (R178) Mr. Alonzo has recommended against the proposed intersection "if there is not a median strip, if the light is short, if that particular intersection is under construction, if the traffic light isn't working correctly for that given day." (R173)

Additionally, the News/Sun Sentinel could also veto Babapour's decision to expand street corner sales, merely because they did not want to expand the program.

Since October 18, 1991, through the Merits Hearing date, the

Sun Sentinel had increased street vending sites from fifty-five to seventy.

In total, there are one hundred thirty (130) to one hundred and fifty (150) street vendors selling the News/Sun Sentinel in Broward and Palm Beach County. (R165)

Mr. Jim Bustraan, the News/Sun Sentinel Vice-President and Circulation Director testified that currently the street sales of the paper were twenty-two thousand (22,000) daily, and right around twenty eight (28,000) to thirty thousand (30,000) papers on Sunday. (R181)

Mr. Bustraan was asked "has the Sun Sentinel ever discussed with you or have you ever been made a part of any discussions as to why no employees are engaged in the sale of newspapers?" His response, "[t]radition in our newspapers, almost every carrier in America today is an independent contractor." (R191, line 22 through R192, line 10)

SUMMARY OF ARGUMENT

The facts underpinning the rationale for the holding in Miami Herald Publishing Company v. Kendall, 88 So.2d 276 (Fla. 1956) are distinguishable from the case at bar so as to preclude its application. Miami Herald was not a case involving worker's compensation benefits. It was a tort action where different social policies apply. Unlike Miami Herald, neither the delivery agent or Petitioner/street vendor, bore any risk of loss for unsold papers.

Moreover, the historical classification of the newspaper industry as being exempt from the mandates of worker's compensation law with respect to its newsboys (having been characterized as independent contractors) is an outdated concept based upon a romanticized view of newspaper boys as occupying a "distinct occupation." Miami Herald, at 278.

The Respondent/News & Sun Sentinel's control exerted over the delivery agent and the Petitioner, utilizing the factors contained in the Restatement (Second) of Agency and adopted in Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), were so pervasive that an employer/employee relationship existed.

Thus, the Judge of Compensation Claims order denying compensability on the basis of lack of an employer/employee relationship between the Claimant/Petitioner, and the Respondents/News & Sun Sentinel Company should be reversed.

ARGUMENT

POINT ONE

ALTHOUGH THE FACTS OF THE CASE AT BAR ARE DISTINGUISHABLE FROM THE UNDERPINNINGS OF MIAMI HERALD PUBLISHING COMPANY V. KENDALL, 88 So.2d 276 (Fla. 1956), THE HOLDING IS BASED UPON A HISTORICAL PERSPECTIVE OF EARLY TWENTIETH CENTURY CAPITALISM THAT NO LONGER EXISTS IN TODAY'S WORLD.

The instant case presents the age old question (at least in this state since 1935) as to why workers' compensation exists, and who it benefits. The answer is ". . . workman's compensation is a product of industrialism and proceeds on the theory that economic loss to the individual by injury in line of duty should be borne in part by the industry by which he is employed in order that his dependent may not want. Duff Hotel Company v. Ficara, 7 So.2d 790, 791 (Fla. 1942).

The newspaper industry, and this Respondent, in particular, steadfastly maintain that "tradition in our newspapers, almost every carrier in America today is an independent contractor." (R192)

The newspaper industry has been protected and sheltered from the statutory obligation that all employers (who have more than four (4) employees) are required to purchase for their workers, worker's compensation insurance coverage. The newspaper industry, at least in the State of Florida, hangs its hat on this Court's decision in Miami Herald Publishing Company v. Kendall, 88 So.2d 276 (FLA. 1956) wherein this Court predicated its holding upon the philosophy "...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' ...." At 279.

In order to discern whether the instant case requires a departure from the holding in Miami Herald Publishing Company v. Kendall investigation of the facts underpinning that decision are essential.

In Miami Herald, a tort action, an individual was struck by a motorcycle operated by a newspaper carrier, delivering the morning issue of the Miami Herald. The Miami Herald's position, of course, was that it was an independent contractor, and therefore, could not be liable for the negligent acts of the newsboy.

> Prior to the accident, for nearly twenty (20) years newsboys who had delivered the Miami Herald were governed by a contract identical with, or similar to the one involved in that case. The news dealer was considered a separate, independent contractor and not subject to the exercise of any control by the publisher over his method of distributing or otherwise handling the delivery of said newspapers within his territory other than is expressly set forth in this contract. . . (original emphasis)

The contract also carried the provisions that the publisher would furnish the news dealer, at a stipulated price, as many copies of daily and Sunday editions as he ordered, would supply him with the names and addresses of all persons wishing the newspaper to be delivered to them in the territory assigned to the news dealer, and would credit the carrier for shortages of papers, and would credit the news dealer 'for subscriptions paid in advance....'

The obligations of the news carrier vis-a-vis news publisher were as follows: He was to furnish the names of new subscribers, to pay to the publisher within a certain time money collected, to

present within forty-eight (48) hours claims for shortages in papers, to call attention to the publisher within six (6) 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 that 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 (15) day's notice and the publish could terminate it for cause without notice.

The most essential element the Court considered in determining the status of the parties was the method the newspaper carrier was to employ in carrying the newspapers to the subscribers once he had received them from the newspaper publisher. This ". . . was left entirely to Molesworth to select the conveyance which he would use to transport the paper from the point of origin to the subscriber's front porches." (Emphasis supplied)

In the instant case, the Claimant was restricted from delivering papers in any manner other than walking to the automobiles and handing the papers to the occupants. He was not responsible to find a substitute in the event that he was unable to make his deliveries; he did not give a bond for the faithful performance of the job; he was not responsible for acquainting any

successor with the route and list of subscribers; nor to increase the number of subscribers; and the employment contract could be terminated at will without notice.

More importantly, the Miami Herald decision is further distinguishable from the case at bar as follows: The Claimant, here, was not fined, nor was any money held back, if he delivered a damaged paper or wet paper, nor was he obligated to pay for the papers if he did not sell them. There, the newsboy "became indebted for papers delivered to him by the publisher whether or not he collected from the subscriber." Neither Babapour, nor the Claimant became indebted for papers that were not sold. (R221) It is this risk of loss that should distinguish Miami Herald vis-a-vis the instant case.

In Walker v. Palm Beach Newspapers, Inc. 561 So.2d 1198 (Fla. 5th DCA 1990) Judge Sharp, in a specially concurring opinion wrote as follows:

> The Florida Supreme Court waxed somewhat nostalgic (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' (citation omitted), and that the provisions of the contract in this case are harmonious with this idea.
>
> 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 á la Horatio Alger. Such a scenario was dated when written, and it has not aged well since.
>
> Control of the delivery person by the business entity is the key factor in distinguishing an employee from an independent contractor. 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. (Emphasis supplied) . . . I suggest that it is now time to reexamine Miami Herald. Were we not bound by stare decisis we should do so.

As a result of Judge Sharp's cogent analysis, the following question was certified to the Supreme Court of Florida as one of great public importance.

> WHETHER, IN LIGHT OF THE EVOLVING BUSINESS RELATIONSHIP BETWEEN NEWSPAPER PUBLISHERS AND THE PERSONS DELIVERING THE NEWSPAPER, THE HOLDING IN MIAMI HERALD PUBLISHING CO. V. KENDALL, 88 So.2d 276 (Fla. 1956) IS STILL VIABLE?

The Supreme Court of Florida granted the Motion to Certify the Question as one of great public importance, however, the parties entered into a Stipulation for Settlement of the claim and a Stipulation for Dismissal was entered and reported at Walker v. Palm Beach Newspapers, Inc., 576 So.2d 294 (Fla. 1990). Subsequently, in City of Port St. Lucie v. Chambers, 606 So.2d 450 (Fla. 1st DCA 1992), rev. denied, 618 So.2d 208 (Fla. 1993), it appears from the limited facts, that the Claimant there dealt directly with the newspaper publisher (without an intermediary delivery agent) and delivered the newspaper by motor vehicle. A detailed analysis of the factors reviewed to determine independent contractor versus employee status are not recited in that opinion.

However, the concurring opinion by Judge Barfield literally hits the nail on the head.

> When viewed realistically the only things that the newspapers carriers do of their own volition under these facts are provide their means of transportation, 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. . . . I do find fault with the historical exclusion of newspaper carriers as a class from coverage as employees. Since the Supreme Court has chosen to define these identical characteristics as those of an independent contractor, we have no choice but to adhere to that precedent. Perhaps it warrants reconsideration by those that created the class.

In Fort Pierce Tribune Company v. Williams 622 So.2d 1368 (Fla. 1st DCA 1993) rev.pndg.sub nom. Williams v. Fort Pierce Tribune Company, No. 82,409 (Fla.; pet. filed September 23, 1993) a different panel of the First District Court of Appeal certified to the Supreme Court of Florida, as a question of great public importance, the same question that is certified in the instant case, as well as an additional question - 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?

In the instant action, as in Fort Pierce Tribune, both panels of the First District Court of Appeal believe that based upon the Miami Herald Publishing Company precedent they were bound (apparently begrudgingly) to uphold the instant order under review.

In Larson's Workmen's Compensation Law Sec. 49.22(1986) Professor Larson notes the recent trend of jurisdictions holds that newspaper carriers are employees.

> Even absent specific statute, the more recent cases dealing with newspaper carriers tend to find employment. The overall development of Worker's Compensation Law shows that the [employment] concept has been broadened and altered (and in rare instances even narrowed) to fit

> the particular needs and purposes of Compensation law. It is significant that in areas were the courts fail or are unable to do this, the legislature fills the gaps, so that the net result of legislation and judicial decision ultimately approaches coverage of the persons who need the benefits of the Act. The largest single category so brought within coverage is that of the employees of uninsured subcontractors, but other specific employment, such as newsboys, . . . have also been included legislatively. (emphasis supplied)

In Evansville v. Sugg, 817 S.W.2d 455 (Ky. App. 1991), the court there succinctly stated the basis for holding that a newspaper carrier should be considered an employee rather than an independent contractor.

> The purpose of Workmen's Compensation Legislation. . . is that the costs of all industrial accident should be borne by the consumer as a part of the product. It follows that any workers whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own cost of industrial accident can be channeled, is within the area of intended protection. . . . the test . . . must, therefore, be essentially an economic and functional one, and the determinative criteria not the inconclusive details of the arrangement between the parties, but rather the extent of the economic dependance of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business. Buchner v. Bergen Evening Record, 195 A. 2d 22, 28 (N.J. App. Div. 1963), citing Larson's.

It is the newspaper industry's, as well as the Sun Sentinel's, view that they should not be burdened with worker's compensation coverage for people that it does not directly employ and pay. However, by creating a straw man intermediary (the delivery agent) they have successfully avoided (hopefully up to now) the imposition of the responsibility to provide worker's compensation benefits that all employers in the State of Florida who have more than four (4) employees provide. The News/Sun Sentinel would have you

believe that it is in the business of printing and publishing newspapers, not delivering them. Apparently, the Respondent is not concerned with whether its papers are sold. It is axiomatic that in order for the Respondent to get its message across, whether it be the dissemination of news, or its voluminous advertising, the papers must be sold. It's on the backs of street vendors, and in this instant case, the legs, that it so heavily depends upon for its papers to be distributed.

There is no logical reason why newspaper street vendors should be considered a distinct class of individuals for which worker's compensation law does not apply.

Moreover, precedent is not always on the side of the newspaper industry. In Levine v. the Miami Herald, 8 FCR 327, IRC order 2-2525 (6/25/74), nearly twenty (20) years post Miami Herald Publishing Company v. Kendall, 88 So.2d 276 (Fla. 1956), the Industrial Relations Commission reviewed an order of the Judge of Industrial Claims that had dismissed the claim, finding that an independent contractor relationship existed between the claimant Levine and the Miami Herald.

In a previous order of the Industrial Relations Commission, in the same matter, it held that "it was error for the Judge of Industrial Claims to assume that newsboys, as a class, are excluded from workman'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." (emphasis supplied)

Certiorari review of the IRC's earlier ruling was denied by the Supreme Court of Florida. Miami Herald v. Levine, 280 So.2d 682 (Fla. 1973)

The IRC stated the principal of worker's compensation law that "every exclusion [denying coverage] is to be given limited scope by restrictive interpretation."

In Levine, the Industrial Relations Commission ruled that the overwhelming legal impact of the facts was that the 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 the Claimant is an employee and falls within the bounds of Section 440.02(2)(a), Florida Statutes."

The same logical conclusion applies to the case at bar.

ARGUMENT

POINT ONE (A)

CONTRARY TO THE LABELING STATUS OF THE NEWSPAPER PUBLISHER AND DELIVERY AGENT, CONTAINED IN THE DELIVERY AGREEMENT, THE TRUE RELATIONSHIP BETWEEN THE NEWS/SUN SENTINEL AND THE DELIVERY AGENT, BABAPOUR WAS ONE OF EMPLOYER/EMPLOYEE BASED ON THE CONTROL EXERTED OVER THE MANNER, TIME AND PLACE OF THE WORK TO BE PERFORMED; DELIVERY OF ITS NEWSPAPER.

Thus, our attention should turn to what constitutes an employee as opposed to an independent contractor. More than fifty (50) years ago, the Supreme Court in Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941), determined that although 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 facts, never-the-less 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.

The Claimant's position is that the delivery agent, Babapour, was an employee of the newspaper publisher and because Babapour's employment contemplated the help of others, Babapour's employees would also be employees of the News/Sun Sentinel within the definition contained in Florida Statutes Section 440.02(11).

There need not be an expressed contractual relationship between the Claimant and the Respondent to establish a master and servant status. "The relationship may arise by implication by the

employment of a sub-servant [Claimant] by a servant [Babapour] to perform duties for the master, where the master has intrusted the servant with a task which can not be performed by him . . . where the business is of such a nature as to require the assistance of others . . . or where the authority to employ, and use a sub-servant may be implied from the nature of the business or the course of trade." Coto v. Anipecu, 371 So.2d 193 (Fla. 3rd DCA 1979); Jacobi v. Claude Noland, Inc., 122 So.2d 783, 787 (Fla. 1st DCA 1960).

The Judge of Compensation Claims failed to reach this conclusion, where he placed undue reliance upon form (i.e., the Delivery Agent Agreement) over the actual conduct of the parties.

The News/Sun Sentinel had a written contract with the delivery agent, Behrouz Babapour. (R353) This written agreement states that the parties were contractor-independent contractor. The mere fact that the agreement delineates the relationship of the parties as contractor-independent contractor is not dispositive of that issue. The agreement's use of a certain descriptive label for one of the contracting parties is not determinative of the actual relationship between the parties. Nazworth v. Swire Florida, Inc., 486 So.2d 637 (Fla. 1st DCA 1986)

In Singer v. Star, 510 So.2d. 637 (Fla. 4th DCA 1987), the Sun Sentinel had a written contract with a delivery agent to sell subscriptions to the newspaper in certain geographical areas. The actual solicitation was done by minors, and Milne, the delivery agent, hired Star to supervise the minors. Star over a period of

time sexually molested some of the minors. The guardian of the minors sued the newspapers, the delivery agent, and Star on the theory of vicarious liability. The newspaper's response was that they should not be liable in tort because the contract stated that Milne, the delivery agent, was an independent contractor and therefore, his employee, Star, could not create vicarious liability.

Citing Ortega v. General Motor Corp., 392 So.2d 40 (Fla. 4th DCA 1980), the Court held "[A] statement in an agreement between parties that one is an independent contractor, as does the contract between the News and Milne, is not dispositive of that issue. . ." A jury may infer the existence of an agency even when both the principle and agent deny it. Id., at 640. Whether one should be regarded as an employee or independent contractor must be decided on a case by case basis. LaGrande v. B&L Services, Inc., 432 So.2d 1364 (Fla. 1st DCA 1983)

In the case at bar, the contract between the News/Sun Sentinel and the "delivery agent" Babapour, contained elements that are enumerated in Section 220(2) of the Restatement (Second) of Agency that would mandate an employer/employee relationship was created.

In Cantor v. Cochran, 184 So.2d. 173 (Fla. 1966) the Florida Supreme Court adopted the following enumerated factors, (contained in the Restatement (Second) of Agency Section 220(2)), to be considered in determining the question of whether one is an employee or independent contractor.

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;

i. Whether or not the parties believe they are creating the relationship of mater and servant; and

j. Whether the principal is or is not in business.

Each factor enumerated in Cantor requires independent (R353-357) analysis, however, the primary factor is the exercise or the right to exercise direction and control over the employee or the right to direct what shall be done, where it shall be done, and how it shall be done. Herman v. Roche, 533 So.2d 824 (Fla. 1st DCA 1988) The test of whether or not a person is an employee is not always whether or not the alleged employer actually controls the alleged employee, but whether he has the right of control. (Emphasis added) Nazworth, supra; Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984)

A. CONTROL

Control factors included within the delivery agent agreement (R353-357) that ought to have established employer/employee control are as follows:

1. The delivery agent must deliver the papers to designated locations and is subject to the New/Sun Sentinel's power to change the locations. (page 1, paragraph 4)

2. The delivery agent must keep a detailed list, "stop-start" list, of the hours that the delivery agent works. (page 1, paragraph 1(a))

3. The delivery agent must keep a detailed delivery list. "The delivery agent will (emphasis added), upon request, provide the New/Sun Sentinel with an accurate delivery list including the number of copies delivered and sold, by day and by edition for each single copy location on the delivery list." (page 1, paragraph 1(a))

4. The delivery list is the exclusive property of the New/Sun Sentinel. (page 1, paragraph 1(a))

5. The delivery agent is required to deliver a complete, fully inserted (including special sections) newspaper to a convenient proper place in a dry condition. (page 1, paragraph 1(b))

6. The delivery agent must deliver the newspaper no later than 6:30 a.m., on weekdays and 12:00 p.m., for afternoon editions, and 7:00 a.m., for the Sunday paper. (page 1, paragraph 1(b))

7. The delivery agent agrees not to stamp upon, insert or attach to the copies of the papers any ads not approved by the News/Sun Sentinel. (page 1, paragraph 1(c))

8. The delivery agent cannot charge an additional fee or cost for the newspaper. (page 1, paragraph 1(d))

9. The delivery agent will be given a credit for any unsold papers returned. (page 1, paragraph 1(e))

10. The delivery agent at the direction of the News/Sun Sentinel is required to deliver the paper to unique locations, which may require special handling (ie. bagging, door to door). (page 1, paragraph 1(f))

11. The delivery agent is required to provide weekly statements of monies collected, and is required to deposit all monies owed to the News/Sun Sentinel (in the New/Sun Sentinel bank account) by Friday. (page 2, paragraph 3(b))

12. The delivery agent agreement states that the newspapers are the property of the News/Sun Sentinel until delivery to the single copy location. (page 2, paragraph 3(c))

13. The delivery agent agrees to display any promotional material about the News/Sun Sentinel, and also is required to remove the promotion, at the direction of the News/Sun Sentinel once they become outdated. (page 2, paragraph 4(b))

14. The Delivery Agent shall personally supervise and participate in the actual delivery of the newspaper. (page 3, paragraph 8)

Notwithstanding the above "control" factors, the delivery agreement states that the News/Sun Sentinel is only interested in the results; ". . . [T]he News/Sun Sentinel is interested only in the results to be obtained by the delivery agent as described in this agreement and the manner in and means to be employed by the delivery agent are matters entirely within the authority and discretion of the delivery agent."

In the day to day operations of the newspaper the delivery agent was required to provide a list of each and every location that he sold the News/Sun Sentinel papers. Each week he was provided a Sun Sentinel form upon which he indicated the total number of papers sold, where they were sold, and the amount sold at each street corner (R39)

In order for the News/Sun Sentinel to exert its control over the delivery agent, Mr. Babapour wore a beeper for which the Sun Sentinel's single copy distribution manager, Mr. Tony Alonzo, had the number. Mr. Alonzo would beep Mr. Babapour and upon return phone call he would instruct Mr. Babapour to correct situations concerning the cleanliness of street corner locations, street vendors having been observed drinking alcoholic beverages, or not wearing a T-Shirt. Once Mr. Babapour received the complaint, he

would go to the street corner location and rectify the problem. (R59)

As recently as one day before the Merits hearing, Mr. Alonzo had called Mr. Babapour's beeper number to advise him that Winn Dixie had called the News/Sun Sentinel and advised that there were newspapers and trash bags all over the premises. Additionally, if a street vendor was rude or discourteous to a customer who had driven up, the Sun Sentinel would be contacted by phone, and if it was Mr. Babapour's area he would receive a phone call from Mr. Alonzo to see what the problem was. (R84)

Mr. Alonzo testified that it was his job to drive on a daily basis through the various locations to check-up on the street vending sites. (R137) Mr. Alonzo testified that upon his daily inspections of the street vending sites he would make sure that the street vendors were not drinking, that they had the News/Sun Seninel shirts on, that there was no trash left at the intersections, and to make sure that the street vendors were out of the street when the traffic light turned green for traffic. (R139)

Mr. Alonzo had previously suggested to Mr. Babapour that if the street vendors were not obeying safety regulations, or were drinking, not to distribute any papers to that vendor. (R161)

In addition to the controls exerted over the delivery agent and the manner in which he supervised the street vendors, the News/Sun Sentinel imposed restrictions upon the time, manner, and the work place where the delivery agent could sell newspapers. The agent's schedule was even set by the Respondent. (See page 29,

factor 6) The decision on which street corners the vendors would sell is determined by the News/Sun Sentinel. (R137) The News/Sun Sentinel's employee, Mr. Alonzo, had the power to veto the delivery agent's decision to choose another street vending site within the delivery agent's territory not only on the basis of safety factors, but also if the publisher did not want to expand the program. (R138, R178)

Mr. Alonzo was asked how the publisher could ensure that Mr. Babapour was doing "a good enough job such that it is worth having Mr. Babapour as a contractor." The News/Sun Sentinel's response was as follows: "Oh, sure. What I would do is I would spend time daily driving through intersections making sure each vendor has a shirt, had an apron on for safety reasons, making sure that he is out of the street when the light turns green. Basically, I just oversee the safety aspect of it." (R175, lines 10-22)

B. DISTINCT OCCUPATION OR BUSINESS

The delivery of the News/Sun Sentinel paper by the delivery agent is not a distinct occupation from the News/Sun Sentinel's business of publishing and disseminating the news/advertising. See Deterts v. Times Publishing Company, 552 P.2d 1033 (Colo. Ct. App. 1976).

C. WORK OF A SPECIALIST

D. SKILL REQUIRED IN THE PARTICULAR OCCUPATION

Similarly, the third and fourth factors are not present in the case at bar. There is no testimony that would indicate that the delivery agent would need any special knowledge or training that

would be necessary to pick up and deliver newspapers to locations designated by the News/Sun Sentinel. Unlike plumbing, masonry or carpentry, there is no specific skill required in lifting bundles of newspapers onto the back of a pickup truck, driving to various street corners and unloading the papers throughout Broward and Palm Beach County. As for supervision, the Respondent's employee Alonzo concedes that he considered himself to be the delivery agents' supervisor (R137) Thus, these factors too have been met by the Claimant in proving up the employer/employee status of Babapour and the Respondent.

E. TOOLS/PLACE OF WORK

The fifth factor is concerned with whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work. There are no instrumentalities or supplies other than twine for the newspapers. No specialized tools are necessary to deliver the newspaper. The News/Sun Sentinel does supply the delivery agents with the Sun Sentinel T-Shirts, hats and money aprons at fifty percent (50%) of its cost. It also provides the delivery agent with the insurance enrollment cards (R44) and the running list pads (R61). However, the actual place of work, for the person doing the work, is determined by the News/Sun Sentinel as they choose which street corners the delivery agents can sell the newspapers at. (R138, 183) The control over the situs of the workplace by the News/Sun Sentinel mandates an employer/employee relationship between the delivery agent and the Respondent.

F. DURATION OF EMPLOYMENT

G. METHOD OF PAYMENT

Factors six and seven, the duration of the employment and method of compensation are considered the least important factors in the employer-employee/independent contractor analysis. Herman v. Roche, 533 So.2d 824 (Fla. 1st DCA 1988), and Saudi Arabian Airlines v. Dunn, 438 So.2d 115 (Fla. 1st DCA 1983). The payment of wages is the least important factor. Hoar Construction v. Varney, 586 So.2d 463 (Fla. 1st DCA 1991) (original emphasis). Even though the delivery agent agreement with the Sun Sentinel is a one year contract, Mr. Babapour has been working as a delivery agent for the Sun Sentinel for approximately ten to eleven years at the time of the Merits hearing. (R29) These factors are concededly neutral in proving up any relationship.

H. IS THE WORK PART OF THE EMPLOYER'S REGULAR BUSINESS

The eighth factor, whether or not the work (delivery of the newspaper) is part of the regular business of the employer is axiomatic. Thus, this would be a factor proving up employer/employee status. Notwithstanding the Respondent's purported independent contract or agreement in the guise of a "Delivery Agreement." The News/Sun Sentinel is in the business of selling newspapers and therefore, the work that the delivery agent did for the News/Sun Sentinel is part and parcel of its regular business. Without delivery there can be no sale.

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. Roche, supra at 826.

It appears that the use of so called "independent contractor agreements" between newspapers and the workers who deliver the paper is pervasive throughout the United States.

In Colorado, the Court of Appeals in Olsen v. Industrial Claims Appeals Office of the State of Colorado, 819 P.2d 544 (Colo. Ct. App. 1991), held that the claimant was not an independent contractor even though there was a contract between the publisher and the newspaper delivery man purporting to establish same.

In Cooper v. Asheville Citizen Times Publishing Co. 129 SE. 2d 107 (N.C. App. 1963), the Court held (in a tort claim) that the evidence was sufficient to support a finding that the newspaper carrier was not an independent contractor of the newspaper publisher, despite a written agreement to the contrary. The court held that the contractual declaration that the newspaper carrier was to distribute papers free from control of the publisher was not determinative. The court stated that a master could not exonerate himself from his legally imposed liability to a third person for injury resulting from the misconduct of a servant by the simple expedience of contracting with the servant that he was to be free from the master's control.

I. RELATIONSHIP THE PARTIES BELIEVE THEY CREATED

The ninth factor is a subjective test. Whether the parties believed they had created an employer-employee relationship. The

delivery agent testified that he believed that the News/Sun Sentinel's employee, Tony Alonzo, was his supervisor. "I am sure that I have said it. He is my supervisor. He is the supervisor that oversees the operation." (emphasis added) (R61) Likewise, Mr. Alonzo testified that he was the delivery agents' supervisor. (R137) The parties own testimony and conduct negates the labels placed upon them in the delivery agent agreement. Thus, this factor should be in favor of finding an employer/employee status.

J. PRINCIPAL IS OR IS NOT IN BUSINESS

The tenth factor whether the principal is or is not in business is clearly evident. The newspaper publisher is in the business of selling papers. "Circulation is a necessity for success. The delivery boys are just as much an integral part of the newspaper industry as are the typesetters and pressmen or the editorial staff." Laurel Daily Leader, Inc. v. James, 80 So.2d 770 (Miss. 1955) This factor is clearly supportive of an employer/employee relationship, as well.

In Wollowa Valley Stages, Inc. v. Oregonian Publishing Company, 386 P. 2d 430 (Or. 1963) the Oregon Supreme Court affirmed a tort recovery against the newspaper publisher finding sufficient evidence for the jury to have determined that the dealer (the equivalent of the delivery agent in the case at bar) was an employee.

The court, in reaching its conclusion was faced with the following facts: Under written contract it was the dealer's duty to drop bundles of newspapers at designated points along the

highway, to collect from accounts, to hire and fire delivery boys, and to solicit for new subscribers. The contract provided that the dealer pay the publishing company for all newspapers furnished at wholesale prices; that the dealer should conduct his business without the aide, advice, or supervision of the company and according to the dealer's own means and methods; that the company could terminate the agreement without notice in the event of certain conditions; and that either party could terminate the agreement on thirty (30) days' written notice.

Noting that the court should look to the actual conduct of the business in addition to considering any contractual arrangements, the court stated that the jury could have found that the publisher gave the dealer general directions with reference to methods and results to be obtained, or that the publisher indirectly exercised some control over the detail of the dealer's operations. It was also found that the evidence that supervisory personnel from the publisher's circulation department made frequent visits to the dealer permitted the jury to infer that these visits were related to the dealer's methods of operation.

The court further noted that the jury might have considered the fact that the dealer was required to furnish the publisher with lists of all subscribers served by him, that the publisher owns such lists, and that supervisory personnel from the circulation department had ridden with the dealer and showed him how to solicit customers.

In the case at bar, the Delivery Agent Agreement contains many

of the same provisions as the Wollowa distribution agreement. Moreover, it is the actual conduct of the parties which mandates that an employer/employee relationship was actually in existence. The same "riding herd" by the newspaper's circulation manager, Tony Alonzo, over the delivery agents and their employees took place. Taking into consideration the totality of the Cantor factors, this Court ought to conclude that Babapour was an employee of the News/Sun Sentinel.

An alternative to the Cantor test, which is commonly known as the "relative nature of the work test" places less emphasis on the factors of control by the employer and concludes that the totality of the facts surrounding the relationship between the parties determines the status of one as an employee, for Workmen's Compensation purposes.

> The factors are: 1. The character of the Claimant's work or business - how skilled it is; 2. How much of a separate calling or enterprise it is; 3. To what extent it may be expected to carry its own accident burden; 4. Its relation to the employer's business, that is, how much it is a regular part of the employer's regular work; 5. Whether it is continuous or intermittent; and 6. Whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job. 1 Larson, Workmen's Compensation Law, Section 43.52.

Applying the relative nature of the work test to the facts of this case would find that the work of the delivery agent was manual labor requiring no great skill, training or experience. The work that he performed was inherently bound up with the news publisher's business (the distribution of its newspapers to consumers).

The work performed by the delivery agent was an essential part

of the newspaper publisher's regular business, the publication, selling and distribution of its newspapers. The work was continuous, not intermittent (over ten (10) years).

Whether this Court employs the Cantor test, or the "relative nature of the work" test the relationship of an employer/employee is clearly established between the News/Sun Sentinel and its "delivery agent" Babapour, irrespective of the newspaper industry's protestations of historical considerations to the contrary.

ARGUMENT

POINT ONE (B)

UTILIZING THE FACTORS IN CANTOR V. COCHRAN, 184 SO.2D 173 (FLA. 1966), THE CLAIMANT, A NEWSPAPER STREET VENDOR, WAS AN EMPLOYEE AND NOT AN INDEPENDENT CONTRACTOR OF THE NEWS/SUN SENTINEL'S EMPLOYEE, MR. BABAPOUR, THE SO CALLED "DELIVERY AGENT."

Performing the same analysis under the Cantor test between the Claimant and the delivery agent, Mr. Babapour, yields the conclusion that the Claimant is an employee, and not an independent contractor of the News/Sun Sentinel's employee, Mr. Babapour.

Taking the same Cantor factors seriatim the analysis is as follows:

a. The extent of control which, by the agreement, the Master may exercise over the details of the work.

When the Claimant first met Mr. Babapour he was advised that he could be used as a street vendor but "I would have to work every day." (R197) At that meeting, the Claimant was advised that he was to adhere to rules laid down by Mr. Babapour including the dress requirements. (He had to wear a Sun Sentinel hat, a Sun Sentinel T-Shirt, and a Sun Sentinel apron.)

"Dress code requirements are sometimes regarded as significant in cases such as this." LaGrande v. B&L Services, Inc., 432 So.2d 1364 (Fla. 1st DCA 1983).

He was not permitted to drink alcoholic beverages on the job; there was to be no fighting; he was supposed to clean up his work area (R211); he was to time each traffic light so as to ensure

that he was out of traffic before the light turned green (R214-215); in the event that it was raining, he should stop selling newspapers because of the safety hazard to the vendors and also the lack of customer interest in buying a newspaper when it is raining (R82); he was to be at the street corner prepared to sell newspapers no later than 6:30 a.m. and that he would work until 3:30 to 4:00 p.m. (R215); the Claimant was prohibited from selling any other newspapers at his street corners because according to Mr. Babapour ". . . to me it is a conflict of interest" (R233, R48); he could not sell the newspaper at a street corner other than that of Mr. Babapour's territory (R53); and that the Claimant could not vend papers by any other means of transportation for distribution, other than walking up to the customer. (R86-87)

In the event that the Claimant did not comply with any of the rules laid down by Mr. Babapour, he, Babapour had the power according to the News/Sun Sentinel's manager, Mr. Alonzo, to terminate the street vendor or to prohibit the street vendor from selling any newspapers. (R163) "The power to fire is the power to control." Goldstein v. Gray Decorators, Inc., 166 So.2d 438 (Fla. 1964)

"The recognized distinction between an employee and an independent contractor is determined by whether the person is subject to, or whether he is free from control with regard to the details of the engagement." LaGrande, at 1367.

The above factors clearly delineate the extent of control exerted by the delivery agent/employee, Mr. Babapour, over his

employee, the Claimant, in that he controlled, what shall be done, when it shall be done, where it shall be done, and how it shall be done. See, Herman v. Roche, supra.

b. Whether or not the one employed is engaged in a distinct occupation or business.

Again, applying the same analysis as was employed in determining the relationship between Mr. Babapour and the newspaper publisher, the delivery of newspapers (contrary to Horatio Alger aspirations) is not a distinct occupation. Both Mr. Babapour and the Claimant are engaged in a relatively simplistic job of delivering papers to the end user, the consumer. The Claimant vends the papers by hawking them on a street corner, wearing the Sun Sentinel's paraphernalia.

As this court stated in Herman v. Roche, 533 So.2d 824, 825 (Fla. 1st DCA 1988), in determining whether a rough carpenter was performing the same type of work as Roche, a carpentry sub-contractor, the Court noted that

> . . . carpentry was not a special vocation distinctly different from that engaged in by Roche. Without denigrating carpentry as a valued trade, the rough carpentry appellant had undertaken for Roche did not require great skills, particularly as they were skills Roche already possessed. Appellant contributed little by way of expertise or skill that Roche did not already posses. In this situation, Appellant provided nothing more than labor toward the responsibilities that Roche had already assumed under his contract with Granados.

The above analysis, applies directly to the facts at bar. The Claimant was performing the same services that Mr. Babapour would have had to perform under his delivery agreement, were he not such an entrepreneur. The decision to parcel out work to street

vendors, rather than perform it himself, is an economic decision.

As the court stated in Roche, "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 Workers' Compensation payments."

Unfortunately for the Claimant, Mr. Babapour elected not to purchase Workers' Compensation coverage. Consequently, it is the indigent Claimant having been denied compensation, who has suffered though four (4) operations, with mounting medical bills, facing the prospect of loss of his leg, and lifelong destitution.

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.

The instant case show that the street vendors are under the direction of the delivery agents. They are not specialists without supervision. If the street vendors were not keeping their locations clean, they were drinking, they were not wearing a T-Shirt, or they were causing a traffic hazard, it was Mr. Babapour's responsibility as dictated to him by the News/Sun Sentinel to "go out there and take care of the situation." (R140)

If their sales were not up to par Mr. Babapour testified ". . . I have been telling people that, listen so-and-so was working that location and they had sold so many more papers. Is there a problem? What is your problem? You know, I would like to know why." (R94-95) The natural result of his supervision is to motivate workers to sell more papers so he makes more money.

In fact, according to the Delivery Agent Agreement it provided, in pertinent part

> . . . the delivery agents shall hire **his own employees** and shall have the right to engage such other sub-agents as he may deem necessary or desirable and the delivery agents shall exercise the sole and exclusive control and supervision of all said persons. The delivery agent shall, however, personally supervise and participate in the actual delivery of the newspaper. (Emphasis supplied)

Had Babapour not employed the Claimant, he would have been responsible for selling the newspapers himself.

Careful examination of the delivery agreement points out why Mr. Babapour hires employees. According to paragraph two thereof, rather than receiving five cents per copy for each daily newspaper he could personally sell, he engages fifty (50) to sixty (60) people to sell the newspapers, pays them nothing (he collects five cents from the street vendors for each paper sold, they keep twenty cents) and in turns pay the News/Sun Sentinel two cents per paper; thus netting three cents per paper on each paper sold (weekdays), (twenty-five (25) cents Sundays) multiplied by fifty to sixty vendors.

d. The skill required in the particular occupation.

Just as the delivery agent needed no particular talent to deliver papers to the street corners, to the street vendors, it takes no particular talent to vend newspapers to motorists passing by. Again, another factor mandating a determination of an employer/employee relationship.

e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the

person doing the work.

Since this is not skilled labor that the Claimant was involved in, there are no "tools of the trade." Rather, Mr. Babapour supplies the Claimant with the tools of promotion; a Sun Sentinel hat, a Sun Sentinel T-Shirt, and a Sun Sentinel apron. If they did not wear the paraphernalia, Mr. Babapour always carried extra garments in case somebody did not bring theirs. The work place was the street corner. The actual sites were essentially determined by Mr. Babapour's employer, the News/Sun Sentinel. (R137) The Claimant, could not on his own, pick a new street corner that was not already in use to sell the newspapers, or move from one corner to another. (R33) The Claimant could not distribute papers by bicycle or some other means of transportation, other than by walking up to the customer. (R86-87)

f. Length of time for which the person is employed.

The Claimant testified that he worked approximately four (4) days per week (R216), and it was Mr. Babapour's testimony that the Claimant had worked on and off selling the News/Sun Sentinel for a couple of years prior to his accident. (R49) Since the Claimant could be terminated by Babapour at any time without incurring any financial liability that, "is an attribute more characteristic of an employment situation than that of independent contractor." LaGrande v. B & L Service, Inc, 432 So.2d 1364, 1368 (Fla. 1st DCA 1983).

g. Method of payment, whether by the time or by the job.

The Claimant collected twenty-five cents per paper sold, plus

any tips that he might receive and was responsible to pay Mr. Babapour five cents. The Claimant was not charged for any papers he did not sell. (R221) (Emphasis added) Thus, the Claimant, like Mr. Babapour, did not bear the risk of loss as is normally associated with perishable goods sold on commission. (News, like unrefrigerated milk goes sour if not sold the same day.) This should be distinguished from the Miami Herald Company newsboy who did bear the risk of loss of unsold papers. Miami Herald Publishing v. Kendall, 88 So.2d 276 (Fla. 1956)

h. Whether or not the work is a part of the regular business of the employer.

As was previously stated in the Babapour-News/Sun Sentinel analysis, the street vendor is in the business of delivering the newspaper which is the regular part and parcel of the business of his employer, Babapour.

i. Whether or not the parties believe that they are creating the relationship of master and servant.

The Claimant testified that he believed that Mr. Babapour was a foreman for the Sun Sentinel, and that he (the Claimant) was an employee of the Sun Sentinel. He based this belief on materials that he had to wear; the cap, the T-shirt and the money bags which all bore the Sun Sentinel logo. (R145)

"If a company leads an individual to believe that he is employed by that company, that individual may assume that his immediate supervisor is employed by the same company." Singer v. Star, 510 So.2d 637 (Fla. 1st DCA 1987)

The Claimant further testified that Mr. Babapour had the power to terminate him and tell him not to come back if he repeatedly failed to show up for work, left prior to normal quitting time, or if he did miss work, and did not have an excuse (a doctor's note from the clinic). (R218, R232) Mr. Babapour never told the Claimant that he did not have Workers' Compensation coverage in existence. (R120) Babapour did nothing to dispel the Claimant's belief that he was his supervisor and that he, Babapour, was employed by the News/Sun Sentinel. Nor, did the Respondent communicate to the Claimant anything to the contrary.

j. Whether the principal is or is not in business.

Analysis of this factor indicates that Mr. Babapour was in the business of delivering newspapers and selling them and that the Claimant occupied the same role.

The foregoing paragraphs clearly delineate the existence vel non, of a sufficient group of favorable factors evidencing an employer/employee relationship between the Claimant and the News/Sun Sentinel's employee, Mr. Babapour, creating the inevitable conclusion that the Claimant and Mr. Babapour occupied co-employee status, with Mr. Babapour being the Claimant's supervisor. In turn, the News/Sun Sentinel's manager, Tony Alonzo, was their supervisor. Thus, the Claimant ought to be entitled to Workers' Compensation coverage as an employee of the News/Sun Sentinel, just as if he was a pressman. There is no logical reason to do otherwise, despite the Respondents' contention that they are entitled to special treatment exempting themselves from having to

afford worker's compensation benefits to newspaper street vendors.

CONCLUSION

The modern day street vendors hawking the Respondent's paper are not the newsboy "specialist" of Miami Herald Publishing Company v. Kendall, who were responsible for following a route, remembering the addresses of subscribers, and who bore the risk of loss of undelivered papers.

The case at bar is factually distinguishable from Miami Herald, in that there is actual control of the delivery agent by the newspaper publisher, the News/Sun Sentinel, and the concomitant control by the delivery agent/Babapour over the Claimant creating an employer-employee relationship down the line to the Claimant.

Notwithstanding the significant factual differences, it is incumbent upon this court to acknowledge that the historical underpinnings of the Miami Herald Publishing Company case are no longer present in the modern world, thereby mandating that this Honorable Court answer the certified question in the negative and reverse the order of the First District Court of Appeal's affirmance of the Judge of Compensation Claims denial of compensability based upon a lack of employee-employer relationship between the Respondent and the Petitioner (Claimant) and remand to the Judge of Compensation Claims to find compensability in favor of the Claimant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Initial Brief of Petitioner was mailed this 29th day of March, 1994, to: Albert Massey, Esquire and Edward D. Schuster, Esquire, Counsel for Respondents, New/Sun Sentinel Company and Crawford & Company, 110 Tower, 20th Floor, 110 Southeast 6th Street, Fort Lauderdale, Florida 33301 and the original and seven copies were served simultaneously by mail to the Supreme Court, 500 South Duval Street, Tallahassee, Florida 32399.

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