

**FILED**

BEFORE THE DEPARTMENT OF INSURANCE  
STATE OF NEBRASKA

MAR 30 2006  
NEBRASKA DEPARTMENT  
OF INSURANCE

IN RE: WORKERS' COMPENSATION ) CAUSE NO.: I-63  
APPEAL OF SAFEWAY CABS, INC. )  
)  
) FINDINGS OF FACT,  
) DISCUSSION,  
) CONCLUSIONS OF LAW,  
) RECOMMENDED ORDER  
) AND ORDER  
)

I. STATEMENT OF THE CASE

This is an appeal before the Department of Insurance, ("Department"), filed by Safeway Cabs, Inc., ("Safeway"), under the terms of the Nebraska Workers' Compensation Plan ("NWCP"). The dispute involves a workers' compensation insurance policy, ("Policy"), issued to Safeway by Travelers Indemnity Company, ("Travelers").

Safeway attempted to terminate an employment relationship with its drivers as of October 31, 2004, and on October 29, 2004, requested that Travelers remove those drivers as employees under the Policy. From December 2004 through August 2005, correspondence followed between Travelers, Stephen Mason as Safeway's insurance producer, the Department, and Safeway's attorney, resulting in an impasse on August 9, 2005. On August 25, 2005, Safeway's attorney filed an appeal with the Department initiating this proceeding.

On October 14, 2005, a telephonic prehearing conference was held. Safeway appeared by its attorney, Sandra Maass; Travelers appeared by its attorney, CeCelia Ibson Wagner, and its representative, Carla Townsend. The undersigned presided as hearing officer and was assisted by Christine Neighbors, attorney for the Department. Tracy Gruhn, a licensed Notary Public, recorded the conference. The parties agreed that the hearing in this case would be held on

December 16, 2005, commencing at 10:00 a.m., in a conference room at the office of Lamson Dugan & Murray, LLP, 10306 Regency Parkway Drive, Omaha, Nebraska. The parties further agreed to exchange witness and exhibit lists on or before December 2, 2005, and to waive foundational objections to any exhibits on or before December 9, 2005. A further telephone prehearing conference was held on December 12, 2005, with the same parties present. It was stated that witness and exhibit lists had been exchanged as previously agreed upon, and the case was ready for final hearing on December 16, 2005.

The appeal and responses thereto came on for hearing before the undersigned hearing officer on December 16, 2005. Safeway was represented by Mark Williams, its attorney. Testifying on behalf of Safeway was Scott Miller, Safeway's manager, and Stephen Mason, Safeway's insurance producer. Travelers was represented by CeCelia Ibson Wagner, its attorney. Testifying on behalf of Travelers was Carla Townsend, Team Coordinator. The proceedings were reported by Rachel Lettow, of Thibault, Suhr & Thibault. Exhibit 1, a Stipulation of Facts and Exhibits to be received without objection, was received in evidence. Thereafter, other exhibits and testimony were offered and received, and the parties rested.

The court reporter agreed to furnish the transcript of the proceedings to the parties by January 6, 2006. The parties agreed to submit written summation and arguments. Safeway agreed to submit its brief and closing argument on or before January 20, 2006. Travelers agreed to submit its response brief and closing argument on or before February 3, 2006. Safeway agreed to submit its rebuttal on or before February 15, 2006. The transcript and all briefs and arguments have been received by the hearing officer. Upon consideration of the same, and the record herein, the hearing officer makes the following Findings of Fact, Discussion, Conclusions of Law, and Recommended Order to the Director of the Department:

## II. FINDINGS OF FACT

1. *Neb. Rev. Stat.* §48-146.01 (Reissue 2004) states that a system shall be implemented which guarantees that all assigned risk employers possess workers' compensation insurance covering its employees. An assigned risk employer is defined in §48-146.01(1)(a) as a Nebraska employer that is in good faith entitled to, but is unable to obtain workers' compensation insurance through ordinary means.

2. In accordance with the above legislative authority, see *Neb. Rev. Stat.* §48-146.01(2)(b), Travelers entered into an agreement on or about June 28, 2000, with the Department to provide workers' compensation insurance to assigned risk employers and has served as the plan administrator and contract insurer since July 1, 2000. (Ex. LLL). This agreement forms the basis of the Nebraska Workers' Compensation Plan, sometimes referred to as "NWCP," the "Agreement," and the "Plan".

2. Under the NWCP, Travelers' purpose is to guarantee that each employer shall be covered by workers' compensation insurance, provided that the employer is in good faith entitled to, but is unable to obtain, coverage through ordinary methods. Under the NWCP, the employer's insurance producer gathers relevant information and submits an application to Travelers on the employer's behalf. Stephen Mason of Forsyth Insurance Agency has acted as Safeway's insurance producer throughout this matter.

3. Safeway made its first application for insurance through the NWCP in October 2003, seeking coverage for three classifications of employees: 7370-taxicab company and drivers; 8385-taxicab company: garage; and 8810-clerical. (Ex. FFF). Travelers issued policies to Safeway for the policy years of October 31, 2003 to October 31, 2004, and October 31, 2004

to October 31, 2005. During the first policy period, Safeway considered its drivers to be employees, Travelers calculated the premium accordingly, and was paid by Safeway.

4. The NWCP allows Travelers to review Safeway's application for eligibility and completeness. It may request additional information to assist in establishing eligibility, assigning appropriate classification codes, and calculating applicable premiums. Under the NWCP, Travelers is required to utilize classification codes, rates and information approved by the Department, which are those filed by the National Council on Compensation Insurance, ("NCCI").

5. The NWCP provides that if the insured or producer has a dispute arising out of a policy issued under the same, Travelers will explain its position. If the dispute continues, Travelers is required to ask the insured to put the dispute in writing, together with a calculation of the disputed premium. The billing for the disputed premium is suspended pending the outcome of the dispute. If the dispute still cannot be resolved, Travelers is required to write a letter to the insured and the producer outlining its position and notifying the insured of its right to an appeal to the Department. All of the above has been done by the parties as required by the NWCP.

6. At or about the time of the expiration of the first policy and policy renewal on October 31, 2004, Safeway notified Travelers that it no longer wished to purchase workers' compensation insurance for its drivers because they would be independent contractors. On October 29, 2004, Safeway furnished Travelers with a blank contract agreement which it stated would be executed by its drivers, in support of its contention that the drivers thereafter would be independent contractors rather than employees. (Ex. JJJ, Attachment A-1)

7. Travelers reviewed this document and advised Safeway on December 8, 2004, that even if the document was executed by all of Safeway's drivers, it did not change their status as employees. (Ex. JJJ, Attachment B). On January 5, 2005, Mason, as Safeway's producer, wrote to the Department setting forth Safeway's position. (Ex. JJJ, Attachment C). On January 12, 2005, the Department responded, with a copy to Travelers, setting forth certain observations on the contract applicable to law. (Ex. JJJ, Attachment D). The Department further stated that this matter was considered a dispute submitted to Travelers in writing, which would lead to a suspension of the disputed premium.

8. On April 29, 2005, Safeway's attorney furnished to the Department a revised drivers' agreement and furnished the same to Travelers on May 5, 2005. (Ex. JJJ, Attachment E and Ex. NNN). On June 9, 2005, Travelers advised Safeway that upon reviewing the revised agreement, it was still declining to accept the drivers as independent contractors, and would continue to consider them as employees. (Ex. JJJ, Attachment G). After a further exchange of correspondence and e-mails in August of 2005, on August 9, Travelers advised Safeway that the parties had reached an impasse and that it should file an appeal, submitting the issue to the Department for final resolution. (Ex. JJJ, Attachment J).

9. The revised drivers' contract of May 18, 2005, received in evidence as Exhibit NNN, was executed by all the drivers in early December of 2005, and backdated to May 18, 2005. Executed copies of said contracts were received as Exhibit OOO. Safeway never tendered to Travelers any driver-executed copies of Exhibit NNN.

10. NCCI Scopes Manual is a document that governs the classification of employees under the Plan. Under this manual, Travelers is the only party having authority to determine whether taxicab drivers are employees or independent contractors for workers' compensation

purposes. (Ex. BBB, last paragraph). Portions of this document relating to classification 8385 were received in evidence as Exhibit AAA, and those relating to classification 7370 were received as Exhibit BBB.

### III. DISCUSSION

The parties disagree on the statement of the issues presented. Safeway contends that the issue is whether its drivers are employees or independent contractors. If they are independent contractors, Travelers must cease, effective October 31, 2004, to treat the drivers as employees under the policy, relieving Safeway of the obligation to pay workers' compensation premiums to Travelers.

Travelers argues that the first issue to be determined is whether it was authorized to determine the status of Safeway's drivers for workers compensation purposes, and if so, whether anyone else also shared that responsibility. The NCCI Scopes Manual, Section 7370, (Ex. BBB) states at the bottom of page 1, "It is the carriers' responsibility to determine if the taxicab drivers are employees or independent contractors for workers' compensation purposes."

The above section, verified by Safeway's producer Mason under cross-examination, was the only evidence offered or received on this issue. Safeway offered no documentary evidence or testimony that Travelers did not have this responsibility, or that it shared the same with anyone else. As Travelers has continuously determined that Safeway drivers are employees and not independent contractors, Safeway has failed to sustain its burden that Travelers did not have the responsibility to make that determination. On that basis alone, the appeal should be dismissed.

However, so that this matter might be finally determined for purposes of appeal, Safeway's issue of whether its drivers are employees or independent contractors should be

answered by the Department in a manner that would be binding on the Workers' Compensation Court, even though the same might necessitate an appeal to a district or appellate court. The controlling case law in Nebraska is *Keim V. Hobbs*, 252 Neb. 407 (1997); *Omaha World Herald v. Dornier*, 257 Neb. 215 (1997); *Hemmerling v. Happy Cab Co.*, 247 Neb. 919 (1995); and *Stephens v. Celeryville Transports, Inc.*, 205 Neb. 12 (1979). All of these cases involve a real employee who is either seeking compensation or unemployment benefits. In those cases the record contains specific facts under which the relationship of the parties took place, rather than hypothetical facts under a proposed contract.

All of the above four decisions cited agree that the question is one of fact. The facts in this case are based upon a contract that was not signed until a few days prior to the hearing, even though the Safeway drivers may have been operating under the same since May 18, 2005. Therefore, the conduct of the drivers is based upon assumptions derived from the language of the contract, rather than testimony of specific drivers as to his or her actual activities and performance under the contract, as would happen in an actual workers' compensation court case.

The ten factors set forth by the Nebraska Supreme Court in the cases referenced above are as follows:

- 1. The extent of control the employer may exercise over the details of the work.**

Under the *Dornier* case, this is the most important factor. In the case at hand, the drivers control the performance of their services, whether or not they work at all, and whether to use Safeway's dispatch services or pick up fares through their own cellular phones. Safeway controls the turning in of bookings, charge tickets, money and trip sheets; and requires the drivers to purchase gas and make repairs. Most important, Safeway controls the availability of

the taxicabs and the hours of their use. Safeway also controls the type and installation of meters. This factor is perhaps even or preponderates slightly in favor of employment.

2. **Whether the one employed is engaged in a distinct occupation or business.**

Although Safeway contends these are two separate occupations or business, cab owners and cab drivers, this is a slight distinction for purposes of workers' compensation rating. Both parties are engaged in the same business – that of transporting passengers for hire. Even though drivers can haul their own passengers or work in other businesses, in so doing they are still engaged in the taxicab business. This criteria favors an employment relationship.

3. **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 evidence was not clear as to whether other cab companies in the area utilize employees or independent contractors. Happy Cab Co. currently has an independent contractor contract with its drivers, although Happy Cab's last attempt to contract this status was rejected by the Nebraska Supreme Court. The evidence is not sufficient to favor either an employment or independent contractor relationship.

4. **The skill required in the particular occupation.**

The skill required is the ability to operate an automobile, which is held by most citizens over sixteen years of age. No specialized training is required. It requires some skill in collecting and counting money, but that is a skill most adults possess. Consequently, this factor strongly favors the conclusion of employment.

5. **Whether the employer or the one employed applied instrumentalities, tools and place of work for the person doing the work.**



Safeway provides the meter and the cab, which is the largest and most expensive instrument or tool of the work. In a sense, the cab could also be described as the place of work; however, the territory in Omaha where the passengers are picked up and delivered in the broader sense would be the place of work, favoring employment. Safeway also provides the liability insurance, and the vehicles have Safeway's name and logo on them. Thus, this criteria favors an employment relationship.

**6. The length of time for which the one employed is engaged.**

The contract is clearly limited to a one-year period. (Ex. NNN). If there is no termination date, the cases have held that it implies employment. Consequently, this factor favors independent contractor status.

**7. The method of payment, whether by the time or the job.**

Under the contract, the driver is paid forty percent of his fares and is entitled to keep all tips. Employees are normally paid while they work, while independent contractors are paid by making a profit on the project. In this case, the ultimate fare or selling price is controlled by Safeway, and to a larger extent, the Public Service Commission. There is no tax withholding or fringe benefit deductions from the amount paid to the drivers, favoring independent contractor status. This criteria is evenly balanced and not conclusive.

**8. Whether the work is part of the regular business of the employer.**

There is no dispute that the work of driving the cab is part of the employer's regular business, indicating employee status.

**9. Whether the parties believe they are creating an agency relationship.**

Under the contract, both parties believe that they are creating an independent contractor agreement, clearly favoring an independent contractor conclusion.

10. **Whether the employer is or is not in business.**

Although the rationale and logic for this criteria is not clear, Safeway Cabs is a business enterprise, and therefore supports an employment relationship.

Safeway has the burden of proving that its drivers are independent contractors, and not employees, by a preponderance of the evidence. Since the evidence is evenly divided, Safeway failed to meet its burden.

IV. CONCLUSIONS OF LAW

1. All proceedings herein have been conducted in accordance with applicable constitutional, statutory and regulatory requirement.

2. The Department of Insurance has jurisdiction and control over this proceeding in accordance with *Neb. Rev. Stat.* §§ 44-101.01, 48-146.01, 44-7511 and 44-7532 (Reissue 2004) and the appeal filed herein under the Nebraska Workers' Compensation Plan by Safeway Cabs, Inc., on August 25, 2005.

3. Safeway has failed to sustain its burden of proving that Travelers does not have the authority to determine it drivers' status under the Nebraska Workers' Compensation Plan and the NCCI Scopes Manual.

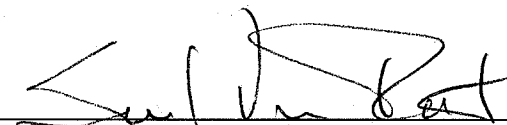
4. Safeway has failed to sustain its burden of proving that anyone other than Travelers, including Safeway and its producer, has the authority to determine Safeway drivers' status under the Nebraska Workers' Compensation Plan and the NCCI Scopes Manual.

5. Safeway has failed to sustain its burden of proving that its drivers either have been operating, or will in the future be operating, as independent contractors rather than employees.

V. RECOMMENDATION

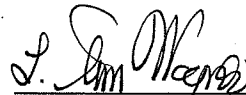
Based upon the Findings of Fact, Discussion, and Conclusions of Law above, it is therefore recommended by the hearing officer that the appeal of Safeway Cabs, Inc., filed under the Nebraska Workers' Compensation Plan on the 25<sup>th</sup> day of August, 2005, be denied and dismissed.

Dated this 27<sup>th</sup> day of March, 2006.

  
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Samuel Van Pelt  
Hearing Officer

CERTIFICATE OF ADOPTION

I have reviewed the foregoing Findings of Fact, Discussion, Conclusions of Law, and Recommended Order, and hereby certify that the Recommended Order is adopted as the official and final order of the Department of Insurance in Cause No. I-63, In Re Workers' Compensation Appeal of Safeway Cabs, Inc.

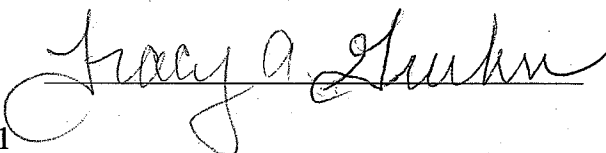
  
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L. Tim Wagner  
Director of Insurance  
State of Nebraska Department of Insurance

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Findings of Fact, Discussion, Conclusions of Law, Recommended Order and Order was served upon the following by U.S. Mail, postage prepaid, on this 30<sup>th</sup> day of March, 2006:

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