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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

BROADWAY CAB LLC,
Petitioner
Cross-Respondent,
Petitioner on Review

v.

EMPLOYMENT DEPARTMENT,
Respondent
Cross-Petitioner,
Respondent on Review.

Office of Administrative hearings
T71262

Court of Appeals
A150627

S062715

OPENING BRIEF ON THE MERITS

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The Employment Department's authority to assess unemployment insurance taxes rests on the existence of an employment relationship—that is, whether services have been performed for the putative employer in exchange for remuneration. Furthermore, an employer will still not be assessed unemployment insurance taxes if the individual performing the services is an independent contractor under Oregon law (ORS 670.600). The questions presented on appeal are thus twofold: did the Court of Appeals err when it concluded that an employment relationship existed between taxicab operators and Broadway Cab LLC under ORS 657.030, and did the Court of Appeals err when it concluded that taxicab operators are not independent contractors under ORS 670.600?

PROPOSED RULE OF LAW

Based on the facts of this matter, taxicab operators affiliated with Broadway Cab LLC are not in an "employment relationship" with the company such that the money the operators earn from paid fares is taxable to Broadway as an "employer," or, in the alternative, the taxicab operators are independent contractors.

SUMMARY OF ARGUMENT

The Court of Appeals erroneously affirmed the ALJ's finding of a tax assessment against Broadway Cab by ruling that the taxicab operators performed services for Broadway and were remunerated for those services, and the taxicab

operators were not independent contractors because they were not "customarily engaged in an independently established business."

The Court of Appeals' first conclusion is erroneous because the taxicab operators neither performed services for Broadway, nor received remuneration from Broadway for performing any services for it, as required under ORS 657.030. Although neither of these statutory requirements is supported by the facts or law, if either of these requirements is not met, then no employment relationship existed under ORS 657.030. The Court of Appeals erred in finding that Broadway "remunerated" the cab operators "for services performed."

Even if both of requirements of ORS 657.030 are arguably met by the facts of this case, the Court of Appeals' second conclusion is erroneous because the relationship between the taxicab operators and Broadway was a contractual relationship between the operators as independent contractors and Broadway as the contracting agent, in accordance with ORS 670.600. There is a four-part test to determine whether a worker is an employee or independent contractor under ORS 670.600. The Court of Appeals looked only at one element of that four-part test: the "customarily engaged in an independently established business" prong. Further, in determining whether Broadway met three of the five elements for establishing that the taxicab operators had independently established businesses, the Court of Appeals only looked at three of the five elements and determined that

Broadway did not meet those three (Broadway has to meet three, and presumably met the other two, though the Court of Appeals was not explicit on that point). Therefore, because the Court of Appeals erred in concluding that the taxicab operators did not maintain separate work locations, the Court of Appeals erred in finding that the taxicab operators were not independent contractors.

If this Court finds that the Court of Appeals erred in finding that Broadway "remunerated" the cab operators "for services performed," the ruling must be reversed because no employment relationship for which the Department could assess a tax against Broadway would then exist. If this Court finds that the Court of Appeals erred in determining that the taxicab operators were not customarily engaged in an independently established business, then the case must be remanded for a determination as to whether all elements of the independent contractor analysis have been satisfied by Broadway.

FACTS MATERIAL TO REVIEW

The taxicab industry is highly regulated. As is required by the City of Portland Code, Broadway Cab LLC is registered with the City of Portland as a company in the transportation industry. (Rec. Item 13 at 3; Rec. Dept. Ex. A1.) The City of Portland regulates the taxicab industry so heavily because it deems the industry to "constitute an essential part of the City's transportation system and

because transportation so fundamentally affects the City's well-being and that of its citizens."[1] (Rec. Broadway Ex. R11 at 1.)

In exchange for receiving one of a limited number of City permits to operate as a taxicab company within the city limits, Broadway was obligated to comply with the City's regulations or face civil penalties. (Rec. Item 13 at 4(5); Rec. Broadway Ex. R10 at 17-22, 28, and Ex. R11 at 8-10, 34.) Taxicab operators, too, are required to abide by City Code regulations, which include affiliation with a permitted taxicab company, such as Broadway. In other words, the City Code dictates and controls many aspects of Broadway's business and of the operators' business.

Among the City's extensive requirements imposed on Broadway were to:

(1) provide dispatch services 24 hours a day, seven days a week, 365 days a year. (Rec. Item 13 at 4; Rec. Broadway Ex. R10 at 28, and Ex. R11 at 23.)

(2) maintain a minimum fleet of 15 taxicabs and to have at least two-thirds of the fleet in service at all times. (Rec. Broadway Ex. R10 at 29, and Ex. R11 at 23.)

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[1] The relevant period on which the Department's tax assessment is based is from the first quarter of 2008 through the fourth quarter of 2009. (Rec. Item 13 at 1; Rec. Dept. Ex. A4.) During this period, the City's regulations concerning taxicab transportation and limited passenger transportation (LPT) changed. (Rec. Item 13 at 3-4; Rec. Broadway Ex. R10 at 4, 6; and Rec. Ex. R11 at 2, 32.)

(3) own, maintain, and inspect digital security cameras in taxicabs. (Rec Item 13 at 4; Rec. Broadway Ex. R10 at 29, and Ex. R11 at 23.)

(4) have displayed on both sides of every taxicab the "full name of the taxicab company; * * * ; the telephone number of that company where service can be requested;" and to "be painted in the colors of its company." (Rec. Item 13 at 5(9); Rec. Broadway Ex. R10 at 32-33, and Ex. R11 at 24.) Indeed, the City would not allow any two taxicab companies to have the same colors. (*Id.*)

(5) maintain a list of the drivers who operate under its permit and records reflecting the hours of service records for such drivers, among other requirements. (Rec. Item 13 at 4(7), 11(31).)

Additionally, and significantly, the City imposed a rigorous set of requirements on the drivers who operated the taxicabs,[2] including the following:

(1) The City required drivers to obtain a City-issued permit in order to lawfully operate a taxicab within city limits.[3] (Rec. Item 13 at 5(8).) Obtaining such a permit required an annual fee, a valid driver's license, passing a criminal history check, passing a driving history

[2] The direct regulation and application of penalties by the City on the operators themselves stands apart from any requirements imposed by Broadway Cab. (See Rec. Broadway Ex. R10 at 1 and Ex. R11 at 7.)

[3] Additionally, the Port of Portland also required drivers picking up customers at Portland International Airport to have a badge. (Rec. Item 13 at 4(8).)

check, meeting insurability requirements, and completing a city-accredited course on basic taxi driving skills (defensive driving, navigation, familiarity with city requirements for driver conduct, among others) as well as demonstrating familiarity with map reading, city code provisions, administrative rules, and Portland-area attractions. (Rec. Item 13 at 5(8), n. 13; Rec. Broadway Ex. R10 at 12-16, and Ex. R11 at 14, 35-36.)

(2) The City set maximum hours a driver may be on duty at 14 hours in any 24-hour period. (Rec. Item 13 at 5(8) n. 12; Rec. Broadway Ex. R10 at 35.)

(3) The City required drivers to observe specific rules of conduct while operating their taxicabs, including prohibiting the following: using "profane or obscene language offensive to the passenger;" smoking any substance or using tobacco in a vehicle (or allowing a passenger to do so); operating a vehicle while consuming or while under the influence of illegal drugs or alcohol or impaired by an legally-prescribed or over the counter drug; using the vehicle in the commission of any crime; defrauding any passenger in any way; being discourteous to a passenger; or refusing to issue a fully completed

receipt for a fare paid, if one was requested. (Rec. Item 13 at 5(8) n. 14; Rec. Broadway R10 at 33-34, and R11 at 27.)

(4) The City prohibited drivers from using anything other than the safest and most direct route between the passenger's pick-up and drop-off locations, or from charging a fare that exceeded the city-established maximum. (Rec. Item 13 at 5(8) n. 14; Rec. Broadway R10 at 33-34, and R11 at 27.)

(5) The City also imposed reporting requirements on the drivers. The taxicab operators must report to the Program Administrator (formerly the Taxicab Regulation Supervisor) any arrest, charge, or conviction for any criminal offense (including any traffic violation that occurs during the driver's operation of the taxicab); any arrest, charge, or conviction for any theft, robbery, burglary, assault, sex crime, drug offense, prostitution or related offense; any vehicle accident; or any restriction, suspension, or revocation of the driver's motor vehicle driver's license. (Rec. Item 13 at 5(8) n. 14; Rec. Broadway Ex. R10 at 41, and Ex. R11 at 7.)

Broadway had no involvement with the issuance or revocation of City permits to taxicab operators.

Similar to the City of Portland regulations, Broadway has requirements imposed through contracts with several public sector agencies, the largest and most prominent of which is Tri-Met. (Rec. Item 13 at 5(10)-7(16); Rec. Broadway Ex. R5.) Broadway also has contractual agreements with Portland Public Schools ("PPS") and Multnomah County. (Rec. Item 13 at 5(10).) As the City regulations seek to serve the public and provide transportation because "transportation so fundamentally affects the City's well-being and that of its citizens," so too do Tri-Met, PPS, and the County seek to serve specific subsets of the public, for example, those who cannot access fixed route transportation, in order to meet federal law requirements, such as the Americans with Disabilities Act. (See Rec. Item 13 at 6(11)-7(16).)

These contracts with public agencies include requirements that mirror the City's regulations (e.g., regulating driver's conduct by requiring drivers to "treat individuals with disabilities who use the service in a respectful and courteous way," in accordance with federal law requirements (Rec. Item 13 at 6(14) n. 17; Rec. Broadway Ex. R5 at 52, 5.2.9 and 53, 5.3), as well as defensive driving training (*Id.*) and requiring that drivers do not operate vehicles under the influence of illegal drugs or alcohol or impaired by an legally-prescribed or over-the-counter drug (Rec. Broadway Ex. R5 at 26), and others that are in addition to the City's requirements, but that stem from federal or state law requirements (e.g., complying

with the federal Omnibus Transportation Act of 1991 in regard to requirements for drug and alcohol screening and testing, in accordance with the Federal Transit Administration regulations). (Rec. Item 13 at 7(15); Rec. Broadway Ex. R5 at 31-40.) Again, as with the City regulations, many of the contract provisions that affect the taxicab operators are dictated by the public agency; Broadway does not have the authority to control them.

Broadway's business model was simple: it provided taxicab operators with opportunities to drive a taxi under its City-issued permit and provided administrative support services including billing, accounting, marketing, and advertising services; in return, the taxicab operators paid a weekly fee that is colloquially known in the industry as "the kitty." (Rec. Item 13 at 9(22); Tr. at 266.)

The taxicab operators were responsible for obtaining all licenses and certificates required and issued by the City to provide taxi services and were responsible for complying with all City Code requirements for drivers. (Rec. Item 13 at 8(20); Rec. Broadway Ex. R9, Ex. R10 at 12-17, and Ex. R11 at 14-20, 27.) The City's Private for Hire Driver Permit Application contemplates an individual driver's status to include owner, employee, or independent contractor. (Rec. Broadway Ex. R9.)

Each taxicab operator and Broadway entered into a Driver Agreement and a Vehicle Lease Agreement or Vehicle Agreement (depending on whether the driver owned or leased the vehicle). (Rec. Dept. Ex. A6, Ex. A7, and Ex. A8.) Each agreement specified that the parties did not share an employer-employee relationship but rather the taxicab operator was an independent contractor for Broadway. (Rec. Item 13 at 9(21); Dept. Ex. A6 at 3-4 ¶14, Ex. A7 at 3 ¶13, and Ex. A8 at 3 ¶9.) A taxicab operator either leased a vehicle from Broadway or provided his or her own vehicle. (Rec. Dept. Ex. A7 and Ex. A8.) All taxicab operators paid Broadway a weekly fee, in exchange for which Broadway provided a variety of administrative services that allowed operators to run their businesses effectively and efficiently. (Rec. Item 13 at 9(22)-(24); Rec. Dept. Ex. A6.) For example, one of the services that Broadway offered to taxicab operators was access to Broadway's computerized dispatch system, which alerted taxicab operators to potential nearby fares. (*Id.*) Broadway also offered a credit/debit card processing system, in which Broadway would process funds that operators received when a customer paid with a credit/debit card or with a voucher issued by a third party. (*Id.*)

Another service Broadway offered to taxicab operators was access to "on retainer" fares through Tri-Met, the State of Oregon (acting through Tri-Met) and PPS, among other agencies. (Rec. Item 13 at 11(32).) These agencies contracted

with Broadway to provide dispatch services for reservations, often for disabled passengers who are unable to utilize the public or school-based transportation systems to travel between home and their medical appointments or schools. (Rec. Item 13 at 5(10).) Broadway acted as a broker to match taxicab operators interested in a steady source of referrals with such entities. (Rec. Item 13 at 11(32).) Importantly, Broadway did not require that taxicab operators provide these services. (*Id.*) Indeed, Tri-Met retained control over determining whether a taxicab operator could perform services for its customers. (Rec. Item 13 at 7 n 18.)

Those taxicab operators provided service to Tri-Met customers upon dispatch or reserved dispatch, and then filled out a voucher for payment by the public agency. (Rec. Item 13 at 12(40).) These vouchers were the taxicab operators' accounts receivable, and Broadway paid the taxicab operator in full on the account. (*Id.*) Broadway received no part of the fare paid by Tri-Met to the taxicab operator. (Rec. Item 13 at 12(40).) Broadway did not require taxicab operators to use its administrative services or agency referral resources. (Rec. Item 13 at 9(24).)

In order to facilitate the processing of weekly administrative fees and credit card processing, Broadway provided each taxicab operator with an individualized account. (Rec. Item 13 at 12(40).) Taxicab operators made deposits to their account by submitting vouchers and credit card receipts to a teller window at

Broadway's offices in Northeast Portland; those amounts were credited to their account and could be drawn upon by the taxicab operator. (*Id.*) The amount on the voucher or receipt was available to the taxicab operator – without discount or deduction by Broadway. (*Id.*) Taxicab operators typically dropped off their credit card receipts a few times a week, which, for many of the taxicab operators, were the only times they visited Broadway's facility. The taxicab operators did not maintain offices or lockers at the facility, instead storing credit card receipts, cash, checks, and the like with them in the vehicles.

The amount of the weekly administrative fee under the Driver Agreement was $160, which was due in advance, regardless of how much or how little the taxicab operator drove in any given week, and regardless of how much or how little the taxicab operator earned in any given week. (Rec. Item 13 at 9(22); Dept. Ex. A6 at 3.) The weekly administrative fee bore no relationship to the amount of the taxicab operators' revenue.

The taxicab operators made a significant investment in the single most important physical asset in the taxicab industry: the vehicles. Taxicab operators chose the vehicle they wished to use, either leasing it from Broadway or purchasing a vehicle that could be retrofitted as a taxicab. (Rec. Item 13 at 10(25) and (26).) In either case, the investment was significant. The weekly lease price that operators paid to Broadway was $290; the cost to purchase a cab ranged from

$5,000 to $20,000 (depending on the type of vehicle, as well as its age), which included approximately $1,300 to paint and otherwise retrofit the vehicle in accordance with City requirements. (Rec. Item 13 at 10(28), 13(47) and 14(48).)

Each taxicab operator selected the method that worked best for him or her. Broadway had no preference about or control over whether a taxicab operator owned or leased the vehicle. The decision to lease or own belonged exclusively to the individual taxicab operator. Some taxicab operators preferred to own their vehicles so that they could perform maintenance work on the vehicles themselves and because the vehicle became an asset in which they developed equity and could sell. (*See* Rec. Item 13 at 10(29) and 14(49).)

Each taxicab operator decided when and where they operated their taxicabs. (Rec. Item 13 at 4(7), 5(8), 10(28), 11(32) and (33).) The taxicab operators were free to work as little or as much as they wish, on a schedule and in locations of their choosing, and they were free to use as much or as little of the customer-placement services (dispatch and the Tri-Met/PPS programs) that Broadway offered. (Rec. Item 13 at 10(26); 11(32) and (33).)

For example, although access to the dispatch service was a significant benefit of contracting with Broadway, and one of the services covered by a taxicab operator's weekly administrative fees, taxicab operators were under no obligation to use it. (Rec. Item 13 at 9(24).) Taxicab operators who opted to use the dispatch

service decided when and for how long to access the dispatch system, and which dispatch offers they accepted or rejected. (Rec. Item 13 at 11(32).) Even those who used Broadway's dispatch system routinely chose not to from time to time, preferring instead to focus on repeat customers (to whom they provided their personal cellular phone numbers rather than Broadway's dispatch line), or to wait at the airport, downtown hotels, or other likely places where a passenger might hail a cab without utilizing a dispatch or reservation service. Taxicab operators who wished to pick up fares at the airport were required by the Port to obtain a special airport taxi license. (Rec. Item 13 at 5(8).) Broadway had no control over where taxicab operators sought passengers or how many or few they sought.

Broadway dispatch offers were generated automatically, based on the physical location of operators who had chosen to "book into" the dispatch system and based on the length of time each such operator had been waiting to receive a dispatch. (Rec. Item 13 at 11(32) and (33).) Broadway maintained no control over the dispatch system as to skill set, seniority, customer preference, or any other criteria. Rather, the dispatch system automatically assigned dispatch based only on the stated logistical criteria, and on the operators' indications of the types of services they wanted to perform. (Rec. Item 13 at 11(32).) Even if an operator was logged into the dispatch system, the operator was under no obligation to accept an "offer" from the dispatch system to pick up a particular fare. (*Id.*)

Broadway did not direct the operators to work on particular days or at particular times. (Rec. Item 13 at 10(26).) Operators chose their own schedules, in accordance with City regulations. (Rec. Broadway Ex. R10 at 35.) Although the City established a maximum rate that operators could charge a passenger, operators were free to adjust the amount downward in order to secure a fare. Broadway played no role in this decision. Operators collected fares from their customers in one of two ways: (1) directly from a passenger in cash, by check, or with a credit/debit card, or (2) by submitting an agency account voucher for payment, which Broadway processed, without deducting any amounts. (Rec. Item 13 at 9(24) and 11(34).) Broadway processed agency vouchers and debit/credit cards as one of the administrative services the operators purchased with their flat weekly fees. (*Id.* and at 9(22).) Broadway, however, did not track or process—and had no way of doing so—payments made by the customer via cash or check, which went directly to the operator at the end of the trip. (Rec. Item 13 at 11(34).) Further, if the passenger's check bounced, if the bank declined payment on the credit/debit card, or if a passenger simply ran away from the vehicle without paying at the end of the trip, the risk of loss was entirely on the operator, who had no recourse against Broadway. (Rec. Item 13 at 12(40).)

ARGUMENT

Oregon's unemployment tax system is based on a simple premise: when a company employs an individual to perform services on its behalf, it is obligated to pay a specified sum (i.e., unemployment taxes) to the state to insure that, if that employee loses his or her job, he or she will be able to collect unemployment compensation and will not be left without a means of support. The key to this equation is the nature of the relationship between the company and the individual, because in the absence of an employment relationship, no unemployment taxes are due. *See, e.g., Golden Shear Barber Shop v. Morgan*, 258 Or 105, 111, 481 P2d 624 (1971) ("Under [the unemployment tax] statutes, only services performed for remuneration can constitute employment.").

The test for determining whether an employment relationship exists is clear. By statute, the term "employment" means "service for an employer performed for remuneration . . . ." ORS 657.030(1) . Thus, proof of an employment relationship requires two elements: 1) service performed for an employer 2) in exchange for remuneration.

However, even if an individual performs services for a company for remuneration, the putative employer will still not be assessed unemployment taxes if the individual is an independent contractor. Pursuant to ORS 657.040(1), "[s]ervices performed by an individual for remuneration are deemed to be

employment subject to this chapter unless and until it is shown to the satisfaction of the Director of the Employment Department that the individual is an independent contractor, as that term is defined in ORS 670.600." In turn, ORS 670.600 sets out a multi-part test for determining whether an individual is an employee or an independent contractor. The statute provides that:

> (2) As used in ORS chapters 316, 656, 657, 671 and 701, "independent contractor" means a person who provides services for remuneration and who, in the provision of the services:
>
> > (a) Is free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;
> >
> > (b) Except as provided in subsection (4) of this section, is customarily engaged in an independently established business;
> >
> > (c) Is licensed under ORS chapter 671 or 701 if the person provides services for which a license is required under ORS chapter 671 or 701;[4] and
> > (d) Is responsible for obtaining other licenses or certificates necessary to provide the services.

ORS 670.600(2). The "independently established business" element is further defined in sub-(3) of the statute:

> (3) For purposes of subsection (2)(b) of this section, a person is considered to be customarily engaged in an independently established business if any three of the following requirements are met:
>
> > (a) The person maintains a business location:

[4] ORS Chapters 671 and 701 regulate professional architects and contractors, respectively, and are not applicable to this case.

(A) That is separate from the business or work location of the person for whom the services are provided; or

(B) That is in a portion of the person's residence and that portion is used primarily for the business.

(b) The person bears the risk of loss related to the business or the provision of services as shown by factors such as:

(A) The person enters into fixed-price contracts;

(B) The person is required to correct defective work;

(C) The person warrants the services provided; or

(D) The person negotiates indemnification agreements or purchases liability insurance, performance bonds or errors and omissions insurance.

(c) The person provides contracted services for two or more different persons within a 12-month period, or the person routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.

(d) The person makes a significant investment in the business, through means such as:

(A) Purchasing tools or equipment necessary to provide the services;

(B) Paying for the premises or facilities where the services are provided; or

(c) Paying for licenses, certificates or specialized training required to provide the services.

> (e) The person has the authority to hire other persons to provide or to assist in providing the services and has the authority to fire those persons.

Here, as explained in more detail below, the facts show that the taxicab operators were not providing services to Broadway Cab, nor were they remunerated by Broadway for those services. Additionally, even if they were providing services for which they were remunerated, Broadway is nevertheless exempt from paying unemployment taxes because the taxicab operators are independent contractors who operated "independently established businesses."[5]

1. Taxicab Operators Did Not Perform Services for Broadway Cab.

The Court of Appeals erred by concluding that taxicab operators performed services for Broadway, rather than services for the general public – the passengers to whom the taxicab operators provided transportation at the passengers' request. As previously noted, the first element the Department is required to establish to prove the existence of an employment relationship under ORS 657.030(1) is that the workers provided service to the putative employer. The failure to satisfy this element negates the existence of an employment relationship.

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[5] The Court of Appeals only considered the "independently established business" element of the multi-part test under ORS 670.600. Therefore, the issues as to direction and control, and whether taxicab operators obtain their own licenses—two other elements of the independent contractor analysis—are not before the Court and will therefore not be dealt with in detail here, but would need to be examined on remand.

Broadway and the individual taxicab operators entered into a contractual agreement, called the "Driver Agreement." (Rec. Dept. Ex. A6, ER 30-34, attached hereto as App. A for reference). That agreement laid out the duties and responsibilities of each party. Contrary to the Court of Appeals' decision, the contract only obligates services to be provided by one party: Broadway. Pursuant to the contract, Broadway agreed to provide the taxicab operators with a bundle of services that would assist in them providing taxicab services to the general public, including a dispatch service (which they were free to use or disregard) and credit card processing if the taxicab operators chose to accept credit cards (which they were not required to do). Furthermore, the contract only contemplates remuneration being paid *by* the taxicab operators *to* Broadway for those services. Nowhere in the contract do the parties contemplate or agree to the taxicab operators performing services for Broadway in exchange for remuneration. The terms of the contract do, and should, control here.

In an attempt to shoehorn this case under the *National Maintenance*[6] umbrella, the Court of Appeals has ignored key distinguishing elements here. Broadway's relationships with the City of Portland and other public entities differ significantly from those at issue in other cases cited by the Court of Appeals. First, Broadway's relationship with the City of Portland simply allows the company a

[6] *Employment Dept. v. National Maintenance Contractors*, 226 Or App 473, 204 P3d 151, *rev den*, 346 Or 363 (2009)

permit or license to operate a taxicab company within the City. This relationship does not require the company to provide a specific service to any specific customer, but instead merely allows Broadway the right to offer transportation services to the general public within the regulatory framework dictated by the City Code.

Neither Broadway nor the taxicab operators provide services to the City; rather, the taxicab operators provide services to their individual customers—members of the general public. Broadway "contracts" with the City only in the sense that it holds a license to operate a taxicab company and is therefore obligated to comply with the City's strict regulation of the taxi industry. Broadway does not receive any compensation from the City under this "contract" for any services which it provides. In fact, the taxicab operators themselves "contract" with the City to the same extent Broadway does in that the taxicab operators are also obligated to comply with the City's regulations in exchange for the right to operate a taxicab.

The same can be said for the contractual relationships with the other public agencies. Broadway does not profit directly from those contractual relationships. In fact, Broadway is not paid by the entities with which it contracts, nor does Broadway derive any financial benefit from, or control or influence any benefit

received by, a taxicab operator who provides an individual member of the public with transportation services under the contract.

Rather, Broadway contracts with these public agencies solely to pass allocated funds from the agencies through to taxicab operators wishing to provide services to the agencies' passengers. Nor does Broadway command which taxicab operators will provide transportation services to the agencies' customers. Instead, the taxicab operators who do provide such services choose to sign up to drive for the agencies' customers. (Rec. Item 13 at 7 n 18.) Broadway does not exert any direction or control over the services performed by the taxicab operators in their performance of any services to the agencies' customers under one of these arrangements. Broadway merely processes the voucher that the customer gives to the taxicab operator and facilitates the payment by the agency in question to the individual taxicab operator. A taxicab operator's decision to provide services to one of the agencies or not does not in any way alter the administrative fees that Broadway charges that taxicab operator.

Furthermore, Broadway does not charge a royalty, fee, premium, or otherwise take any percentage of any fare earned by a taxicab operator. Taxicab operators pay Broadway the same amount of weekly fees regardless of whether they provide services to customers or not. (Rec. Item 13 at 9(22).) In fact, if a taxicab driver did not drive during the week, and therefore did not earn any income

from his passengers, he would still owe Broadway the same amount of weekly fees for services Broadway provides to the taxicab operator.

The Court of Appeals' mistaken reliance on *National Maintenance* led to the incorrect conclusion that the taxicab operators performed services for Broadway as defined in ORS 657.030. The evidence establishes the operators performed services for the passengers—the general members of the public who sought transportation from one location to another—thereby negating any employment relationship between the operators and Broadway.

2. Taxicab Operators Were Not Remunerated By Broadway Cab.

The Court of Appeals erred by concluding that Broadway remunerated the taxicab operators for services. As previously noted, the second element required to establish the existence of an employment relationship under ORS 657.030(1) requires remuneration in exchange for services provided. The failure to satisfy either element negates the existence of an employment relationship.

As to the second element, the passengers who hired the operators, not Broadway, paid the operators directly for their services, typically by cash, debit card, credit card, or with an agency-issued voucher. Broadway merely facilitated this relationship in return for a flat weekly administrative fee, and without regard to how much or how little an operator actually earned in fares. Broadway is not paid by the City for performing services, nor is Broadway paid by the members of

the general public who ride in cabs that happened to be marked with Broadway's name (a requirement of the City, not a Broadway company policy). Rather, Broadway is paid by taxicab operators for administrative services Broadway provides to them.

The Court of Appeals concluded that Broadway remunerated the taxicab operators, through payments made by individual passengers which many times never even touched Broadway's hands because the taxicab operators' services to the public "directly benefitted" Broadway by allowing Broadway to stay in business. However, that "benefit" is the same benefit the putative employers had in the *Golden Shear* case decided by this Court. Here, as in that case, the workers paid monthly administrative fees to the putative employer, regardless of how much income those workers made in fees that they charged their customers. Just as Broadway "directly benefitted" from those flat fees, so too did the barbershop. Without apprentice barbers, the barbershop would have lost the significant portion of their revenue stream (from the "space-sharing agreements" they had with the apprentice barbers who leased space from them) and would not have been able to remain open, similar to the reasoning the Court of Appeals uses to find that Broadway remunerated the taxicab operators here.

While the Court of Appeals hangs its hat on Broadway's ability to "maintain its industry position" as an extraordinary benefit that distinguishes the *Golden*

Shear case, that case remains distinctly similar to the case at hand. In *Golden Shear*, no employment relationship existed based on a company offering similar administrative services as Broadway did here in exchange for a flat fee, without accepting a portion of the individual's profits. 258 Or at 107 (no employment relationship existed between a barbershop and an apprentice barber who paid a flat fee for rent, equipment, and utilities, but kept his own hours, made his own appointments, and served his own customers).

The Court of Appeals attempts to distinguish *Golden Shear* by stating that the "contractual obligation" Broadway has with the City or public agencies resulted in a greater benefit to Broadway than the barbershop experienced in *Golden Shear*. However, the relevant comparison is not the existence of some quasi-contractual obligation, but the dependency of the putative employer's benefit on the efforts of the individual. Broadway was no more dependent on the taxicab operators than the barbershop owner was on the apprentice barber to have customers of his own. If the apprentice barber did not have customers, the barbershop owner would eventually go out of business, similar to the conclusion drawn by the Court of Appeals with respect to Broadway. In other words, the barbershop owner "benefitted" from the services of the barbers, despite a likely non-existence of some contractual obligation.

The evidence establishes the taxicab operators were paid directly by the passengers, the individuals for whom they performed the service, and paid a flat flee to Broadway solely for administrative purposes, regardless of the number of passengers transported in a week or the amount of fares collected. Therefore, no employment relationship existed between the taxicab operators and Broadway.

3. Even if Taxicab Operators Provided Services for Remuneration, They Are Independent Contractors Rather Than Employees.

The Court of Appeals did not evaluate whether Broadway exerted direction and control over the taxicab operators, nor did they analyze whether the taxicab operators obtained their own licenses, two of the elements of an independent contractor analysis. Instead, the Court of Appeals looked solely at the "independently established business" criterion on appeal, and erroneously concluded that the taxicab operators did not satisfy three of the five elements. In order to satisfy the "independently established business" criterion, Broadway must prove three of the five elements. The Court of Appeals did not address two of the five elements, presumably because Broadway easily satisfied those: the drivers bear the risk of loss related to the provision of services, and the drivers make a significant investment in the business.

a. Taxicab Operators Bear the Risk of Loss.

The taxicab operators bore the risk of loss in many respects. Taxicab operators lost money when customers failed to pay their fares (such as by writing a

bad check or leaving the vehicle without paying) or when a bank declines payment on a card that the driver accepted as payment. (Rec. Item 13 at 12 (40).) Taxicab operators could also accept a fare that was less than the maximum rate dictated by the City of Portland if they believed that the economic loss they would suffer from driving a below-maximum-rate fare was less significant than the loss they would suffer from declining the fare and not driving at all. The drivers were not insured from any of these forms of loss, which the taxicab operators bore in their entirety. Furthermore, the contract between the parties (Broadway and the taxicab operators) was a "fixed price contract," which imposed the risk of loss directly on the taxicab operators, since the operators had to pay the same weekly fee regardless of whether their weekly fares covered the expense or not, as dictated by the terms of the Driver Agreement.

b. Taxicab Operators Make a Significant Investment in the Business.

The taxicab operators also made "a significant investment in the business, through such means as purchasing tools or equipment necessary to provide the services, paying for the premises or facilities where the services are provided, or paying for licenses, certificates or specialized training required to provide the services." ORS 670.600(3)(d).

The operators paid for their own operators' licenses and City of Portland taxi driver licenses. (Rec. Item 13 at 8(20).) Additionally, if taxicab operators chose to

pick up customers at the Portland International Airport, they were required to obtain and pay for a badge from the Port of Portland. (Rec. Item 13 at 5(8).) The taxicab operators were also responsible for providing their own tools under the Driver Agreement, such as maps, cellular phones, flashlights, tire chains, or a GPS navigation system if so desired. (Rec. Dept. Ex. A6-1, ER 31, App. A.) Further, the taxicab operators had direct financial responsibility for acquiring the most important asset in the taxi business, the vehicle. Although an operator could either purchase a taxicab or lease one directly from Broadway, either arrangement reflects a significant financial investment. A vehicle owner pays anywhere from $2,500 to $25,000 to purchase and retrofit the vehicle, plus $480 per week to Broadway under the Vehicle Agreement. (Rec. Item 13 at 10(27).)

Therefore, Broadway need only satisfy one other element to establish that the taxicab operators "customarily engaged in an independently established business" operations. However, Broadway established at least two others.

c. Taxicab Operators Have the Authority to Hire and Fire Others to Assist in Providing the Services.

Under the terms of the contract, each taxicab operator had the "authority to hire and fire employees to assist [the taxicab operator] in the operation of [the taxicab operator's] taxicab business . . . ." (Red. Dept. Ex. A6-1, ER 31, App. A.) This satisfies the fifth element of the "independently established business" test. Indeed, Broadway did not restrict the taxicab operators' ability or authority to hire

their own employees or sub-contractors at the taxicab operators' discretion. Whether the taxicab operators actually hired anyone is immaterial, as they certainly had the authority to do so, which was protected by the Driver Agreement they entered into with Broadway.

d. Taxicab Operators Maintain Separate Business Locations.

Taxicab operators did not maintain offices, work stations, desks, cubicles, or lockers at Broadway's facility, nor do they share space or locations with the individual customers they serve. (Tr. at 190.) In fact, taxicab operators visit Broadway's premises only occasionally. (Rec. Item 13 at 12 (38).) A taxicab operator's work "location" is his or her vehicle, and wherever that vehicle may be operating at any given time, which is physically separate from Broadway's offices, and which he or she either owns outright or leases from Broadway.[7]

The taxicab operators expend significant amounts of money leasing their work locations—their vehicles—or purchasing them outright. Additionally, the taxicab operators maintain the vehicles by filling them with gas (the equivalent of paying a utility bill for a stationary office), cleaning them, and more. Additionally, for operator-owned vehicles, those taxicab operators provide their own maintenance, either performed by themselves or by any mechanic with whom they

[7] Some operators testified that they also maintain fully functioning home offices or at least have devoted particular space in their homes for a desk, a computer, a file cabinet, and other standard equipment one could be expected to find in such an office. (Rec. Item 13 at 13 (43).)

conduct business. While Broadway retrofitted the vehicles to fit within the City's guidelines, such as by adding a meter to the car, the taxicab operators maintained additional equipment they desired or needed to use to do their jobs, such as maps or GPS equipment.

The Court of Appeals leans heavily on the fact that the taxicabs are marked with Broadway's name and color, two requirements passed down by the City and in no way controlled by Broadway (other than ensuring the vehicles comply with the City's regulations). Furthermore, the simple fact that a trade name appears on a "work location" is not – and should not be – dispositive of whether a work location is separate or not. Indeed, all franchisees would fail this element if such a standard were used. Nevertheless, Broadway does not require taxicab operators to drive taxicabs marked with Broadway's name and distinct color (each taxicab company must have a different color under City Code), the City does. These are merely "pass-through" governmental regulations, primarily from the City of Portland and public agencies, over which Broadway has no control.

A long line of authority (including authority specific to the taxi industry) holds that "the fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship." *SIDA of Hawaii, Inc. v. NLRB*, 512 F2d 354, 359 (9th Cir 1975) (finding taxicab company was not employer of drivers, but rather an

administrative creature, providing certain facilities and opportunities for a fixed price, even where it incorporated government requirements into company's manual).[8]

Contrary to this authority, the Court of Appeals determined that a couple of the pass-through regulations—namely, that the taxicabs display Broadway's name on the side and be marked with Broadway's signature yellow color, a color no other taxicab company could use— imposed by the City of Portland and other public agencies that Broadway simply passed along showed that the taxicab vehicles were not separate from Broadway, and were an "extension" of it.

The Court of Appeals erroneously concluded that because Broadway provided some of the required equipment in the taxicabs, those vehicles were not separate from Broadway. However, it was not Broadway that controlled the equipment those vehicles must have. The City Code required top lights on all vehicles, security cameras, specific signage in the cab regarding the camera and felony assault, and taximeters. (Rec. Broadway Ex. R10 at 29, 31-33.) In other words, although Broadway may have ensured those vehicles contain the required equipment, those "pass-through" regulations are insufficient to prove that

[8] "Pass-through" regulations are also relevant to the "direction and control" test for independent contractors, as governmental regulations passed through to independent contractors by a putative employer do not demonstrate control over the means and manner of the performance of the work. However, because the Court of Appeals declined to address that issue by analyzing only the "independently established business" test, that issue is not before the Court here.

Broadway maintained those vehicles and that they were not separate work locations.

CONCLUSION

The Court of Appeals' decision should be overturned and the tax assessment vacated because the Court of Appeals erred in finding that Broadway "remunerated" the taxicab operators "for services" under ORS 657.030. In the alternative, the case should be remanded because the Court of Appeals erred in finding that the taxicab operators did not maintain separate work locations, and thus were not independent contractors under ORS 670.600.

Dated this 25th day of March, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(D)

I certify that this petition complies with the word-count limit in ORAP 5.05(2)(b) and the word-count on this brief (as described in ORAP 5.05(2)(a)) is 7,303 words.

I certify that the size of the type in this petition is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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Certificate of Filing and Service

I certify that I filed the attached Notice by Electronic filing on March 25, 2015.

I further certify that on the same date, I served a copy of this notice on the following lawyer(s) by using the electronic service function of the eFiling system (for registered eFilers) and by first class mail, with postage prepaid (for those who are not eFilers):

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