Agenda: Item 4

Fact Finding Hearing and Disciplinary action including Possible Revocation of Permits: [ACTION]

- a. Regents Cab, color scheme for violation of MPC Section 1147.4 Compliance with Workers' Compensation
- b. Grasshopper Alec Kaplan medallion number 9062, violation of Rules 5.A.3, 5.A.5, 5.F.2, 5.H.a, 5.H.2, 5.H.3, 5.H.4, 5.H.5, 5.H.10, 5.H.11, 5.H.14, 5.H.16, 5.H.17, 5.I.3, 5.I.4, and 5.K.2, 4.A.5; MPC Section1148.5, 1120, 1187.1, 1101 and 1123.



CITY AND COUNTY OF SAN FRANCISCO

TAXI COMMISSION MAYOR GAVIN C. NEWSOM

HEIDI MACHEN Executive Director

November 21, 2007

Mr. Steve Anton Regents Cab Company 98 Pennsylvania Ave. San Francisco, Ca 94107

NOTICE OF DECISION

SUBJECT: Complaint for Violation of Taxicab/Ramped Taxi Rules & Regulations Rule 5.H.16

PERMIT HOLDER: Bruie Anton, Regents Cab Company, 98 Pennsylvania St., San Francisco, CA 94107

Pursuant to the recommendation of the Taxi Commission's Hearing Officer, the following findings are submitted to the Commission:

FINDING 1:

As a function of its licensing power, the San Francisco Taxicab Commission has the authority to require that cab company permits be issued to only those companies in compliance with state laws.

FINDING 2:

Legislation and enforcement of Rule 5.H.16 is a valid exercise of San Francisco's police powers consistent with state law.

FINDING 3:

The enactment and enforcement of Rule 5.H.16 is not preempted by state worker' compensation law, and Rule 5.H.16 is consistent with state law.

FINDING 4:

The Commission and the hearing officer have jurisdiction over this case.

FINDING 5:

Given the parallels between Regents Cab Company and JKH Enterprises, Inc., Regents Cab Company exercises all necessary control under the liberalized control test of <u>JKH Enterprises Inc v. Department of Industrial Relations</u> (2006) 48 Cal.Rptr. 3d 563, and thus qualifies as an employer.

FINDING 6:

Regents argued that the S&G <u>Borello & Sons Inc v. Department of Industrial Relations</u> (1989) 48 Cal.3d 341, 348 (<u>Borello</u>) factors should not be applied mechanically lest a rigid application lead to a *pro forma* decision that the medallion holders and drivers involved were employees. But it is precisely applying the <u>Borello</u> factors flexibly that yields this result. The weight of the various secondary factors militate against an independent contractor status for any of Regents' drivers.

FINDING 7:

By a preponderance of the evidence, Regents is an employer for workers' compensation purposes within the meaning of the Labor Code; its medallion holders are employees; and the secondary drivers they hire are also employees within the integrated enterprise.

RECOMMENDATION 1:

Regents shall have 60 business days from the date the Commission approves this proposed decision to procure workers' compensation insurance for all of its affiliated drivers, including all medallion holders and their secondary drivers, and to post the appropriate certificate of insurance under Rule 5.H.16. If at the end of 60 business days, Regents is not in compliance with this ruling, its permit to operate a color scheme shall be revoked.

RECOMMENDATION 2:

The Commission would be well advised to publicize clear directives regarding workers' compensation coverage and publicize clear and consistent penalties for companies that do not insure their drivers.

This decision will be presented to the Taxi Commission on Tuesday, December 11, 2007, and the Commission may adopt, modify or deny such recommendation, or may remand the matter to the hearing officer for further proceedings. The Commission may act on the hearing officer's proposed decision and the record presented; it may not rehear the case.

TO ANY PARTY AFFECTED BY THIS DECISION

If this decision is subject to review under Code of Civil Procedure section 1094.5, then the time within which judicial review must be sought is governed by California Code of Civil Procedure, section 1094.6.

Sincerely,

Heidi Machen
Executive Director

cc: S.F.P.D. - Taxi Detail

Henry Epstein, Hearing Officer

HEARING OFFICER: Henry Epstein, for the San Francisco Taxicab Commission DATE of HEARING: 10 AM, January 5, 2007 ROOM 408, City Hall, 1 Dr. Carlton Goodlett Place, San Francisco, California 94102

CASE: Disciplinary action, for failure to post a certificate of Workers' Compensation insurance

Color Scheme:

Regents Cab Company

Permit Holder:

Mr. Bruie Anton

Type of Permit:

Color Scheme

Date Granted:

May 1, 1997

Investigating Officer:

Mr. Jack Brodnax, Commission designee

Complainants:

The San Francisco Taxicab Commission

CHARGES:

Violation of 5H16 (under the Taxicab Commission

Rules and Regulations):

The Color Scheme Holder must have a copy of Certificate of Worker's Compensation Insurance prominently displayed at the place of business so that it is visible to drivers. (amended 11/23/99).

PRIOR ADMONITIONS under the Rules and Regulations

May 28, 2003: 5H4; 5H5; 5H14

December 21, 2000: 5H4; 5A3. 5H14; 5F2

February 17, 2000: 5H4

PRIOR DISCIPLINARY ACTIONS (Penalties) under the Rules and Regulations

August 1, 2006: 5B6; 5B7; 5H10; 5H15; 5I4

EXHIBITS

- A. Complaint
- B. Regents Brief, January 2, 2007
- C. Regents Brief, February 12, 2007
- D. Transcript of the hearing
- E. Declaration of Mr. Steven Anton
- F. Regents exhibits: Medallion License Agreement; Lease Agreement; Acknowledgment of Lessee Status

Mr. Steven Anton, President of Regents, testified for the company Raymond Alexander, Jr., Esq. represented Regents Mr. Jack Brodnax brought the case for the Commission

I. SUMMARY OF PROPOSED DECISION

Regents was charged with a four year violation of Taxicab Rules and Regulations 5H16: failing to display a copy of a Certificate of Workers' Compensation Insurance at its place of business.

Throughout this decision, the hearing officer interprets 5H16, a posting requirement, as a proxy for requiring Workers' Compensation [WC] coverage for drivers. Thus, the charge that Regent's failed to post a notice of WC coverage is essentially a charge that Regents has failed to carry WC for its affiliated drivers. Rule 5H16 derives authority from MPC 1147.4, Compliance With Workers' Compensation Requirements:

All persons, firms or corporations holding taxicab color scheme permits pursuant to Section 1125(b) of this Article shall comply with all applicable state statutes concerning Workers' Compensation and any applicable regulations adopted pursuant to those statutes. (Added by Ord. 76-94, App. 2/18/94)

Regents admitted that "to the best of my knowledge our workmen's compensation was last valid in October, 2002." (Steven Anton, Exbt. A, attachment). During the hearing, Mr. Anton testified that 36 medallion holders were affiliated with Regents and that he did not carry WC on the three medallion holders whom Regents managed. He claimed not to know whether the remaining 33 carried WC for themselves or their drivers. [Exbt. D, transcript, p. 19] In the January 2, 2007 brief, Regents stated that it "admittedly does not carry insurance on medallion owners who own their own vehicles." [Exbt. A, p. 2]

Regents presented two defenses: i) the Commission lacks jurisdiction to hear this case since WC is a state-preempted field, and ii) even it the Commission has jurisdiction, Regents is not an "employer" as required by WC law and neither the medallion holders affiliated with Regents nor the drivers driving under the medallion holders are "employees" of Regents entitled to WC coverage by the company.

A. The Commission is Preempted by State Law

Regent's preemption defense presents a close issue of law. Regents argued that as a matter of law the Commission, as a local governmental entity, was not entitled to bring this case because California state law completely occupied the field of WC and preempted the application of local ordinances and penalties. Under this argument, the hearing officer lacks subject matter jurisdiction in this case.

The hearing officer holds that Regent's preemption argument is not persuasive. Since 5HC does not conflict with state law, it is not preempted by it and the Commission has jurisdiction over this case. Moreover, even if the State completely occupied the WC

field, the City has a separate jurisdictional basis for bringing this case, namely its right to impose conditions of licensure under its police powers. As a condition of licensure the City requires compliance with its regulations, among which is compliance with state law. The mere fact that the state law at issue is WC law does not disqualify the City from demanding compliance as part of its licensing authority. The City has the right to deal only with companies in compliance with state law. That right, rather than the specific requirement to provide WC coverage, is sufficient to establish jurisdiction in this case.

B. Regents' Drivers are Independent Contractors, not Employees

Regents argued that even if it did not prevail on the jurisdictional issue, it should prevail on the substantive issue of whether it was required to carry WC for its medallion holders and affiliated drivers. Regents argued that it is not an "employer" under the state Labor Code, and therefore is under no obligation to provide WC for "employees," since it has none. Thus it is not out of compliance with state law.

This defense presents very close issues of law and fact. At first glance, the Regents business model, which interposes medallion owners between the company and the drivers, appears to bypass the obligation to insure drivers, *qua* employees, under the WC system.

Regents argued that the medallion holders are independent contractors and implied that if the secondary drivers are employees at all, they are employees of the medallion holders. Regents testified that it merely leased space on its lot to the medallion holders who in turn contracted with the secondary drivers, over whom Regents lacked all control.

However, the modern trend is to define "employment" broadly and "there is a general presumption that any person 'in service to another' is a covered employee." <u>S.G. Borello</u> & Sons, Inc. v. Department of Industrial Relations (1989), 48 Cal.3d 341, at p. 354.

Historically, one "in service to another" was under control of the other and his "master" could be held liable for his actions. However, "control" serves a different public policy in the WC context. If control is present, the worker is an employee entitled to WC protections. Although the WC system protects employers from tort liability, its fundamental aim is to compensate workers injured on the job. In order to bring more workers into protected employee status, the concept of control has been liberalized and applied to business models in which it is severely attenuated, e.g., those in which the worker is under very little supervision, if any. However, once a modicum of control is found, the worker may be an "employee" for WC purposes, and eligible for WC protection.

Furthermore, although control is a primary factor, it is now only one of many factors used to determine the existence of an employer-employee relationship.

Regents argued that since its control of affiliated drivers was *de minimis* at most, it could not properly be called an employer for WC purposes. However, recent cases find an

employer-employee relationship in instances where control is minimal, but all that is necessary under the circumstances.

The hearing officer also applied the "enterprise integration" theory at the center of the most recent cases. Under this theory, when workers are integral to a company's overall enterprise the company has a duty to insure them even if they are not "employees" in any traditional sense or might not be considered employees in legal contexts outside of WC. Under this theory, control over the enterprise itself, rather than control over the worker, is paramount.

Furthermore, Regents provided little evidence for counterbalancing the scale: i.e., proof that the medallion holders were true independent contractors. There was sufficient evidence to conclude that Regents drivers, medallion holders and secondary drivers alike, were employees for WC purposes.

The most recent cases, by redefining "control," expand the definition of employee and commensurately shrink the category of "independent contractor" in order to afford WC protection to a wider class of workers. Using the attenuated definition of control and focusing on the integration of drivers and medallion holders within Regent's business model, the hearing officer finds that for WC purposes, Regents is an employer and has a duty to insure all of its affiliated drivers, including the medallion holders with whom it contracts and who in turn contract with secondary drivers. Regents may require medallion holders to carry their own WC insurance as a condition of affiliating with it, or Regents may insure them itself. However, both medallion holders and their secondary drivers must be insured. Under the hearing officer's analysis, both secondary drivers and medallion holders belong to the class of workers entitled to protection under WC law. To leave either exposed to workplace injuries without remedy under the WC system would vitiate long-standing public policy.

II. JURISDICTIONAL ARGUMENT

Regents admits that it does not carry insurance on medallion holders who own their own vehicles. Brief 2 p. 2. However, Regents argued that it is indisputable that "[the] administration of the Workers' Compensation Insurance system is a matter of statewide concern" and that "who must carry workers' compensation insurance is itself a matter of state wide concern." Where local law conflicts with a matter of state wide concern and/or the state legislature has expressed intent to preempt the field, local law must give way. [Citing, *inter alia*, Healy v. Industrial Accident Commission (1953) 41 Cal.2nd 118, 122; City and County of San Francisco v. Workmen's Compensation Appeals Board (1970) 2 Cal.3d 1001, 1010.]

Under power expressly granted to it by the Constitution, the Legislature has established a complete system of workmen's compensation which obviously is a subject of state-wide concern, and it is well settled that in such matters the general law is paramount. <u>Healy</u>, *supra*, 122. (See Eastlick v. City of Los Angeles, <u>29 Cal.2d 661</u>, 665-666, 668 [177 P.2d 558, 170 A.L.R. 225].)

Healy is easily distinguished from our case. In Healy, an injured Los Angeles police officer was found eligible for workers' compensation. Los Angeles tried to use a disability pension it was paying him as part of his WC payments. The Los Angeles Charter provided that if an employee was entitled to a pension because of an injury, and the employee was also granted WC, his pension "shall be applied in payment of the award." However, existing Labor Code section 3751 barred an employer from "exact[ing]... any contribution" from an employee to cover the cost of compensation. Thus, if the employee contributed towards his pension - the factual question in the case there was a direct contradiction between the language of the L.A. Charter and the state Labor Code. The court decided that the police officer had in fact contributed to his pension and the City was denied credit for the disability pension under the preemption doctrine. Because of the contradiction the Los Angeles city Charter gave way.

Regents presents no direct contradiction between 5H16 and the language of any provision of the state Labor Code.

The key terms here are "conflict with state law;" "paramount state concern," and "intent to preempt the field." There is obviously no *prima facie* conflict with state law in requiring companies to comply with state law. The essential question is whether Rule 5H(16) generates a deeper conflict with state law in language or purpose. This issue is dealt with below.

A. THE COMMISSION HAS ITS OWN, SEPARATE BASIS FOR JURISDICTION

Most licensing ordinances have a direct impact on the enforcement of state laws which have been enacted to preserve the health, safety and welfare of state and local citizens. This fact does not deprive a municipality of power to enact them. <u>Cohen v. Board of Supervisors of the City and County of San Francisco</u> (40 Cal.3d 277; 7097 P.2d 840).

There are two separate interests involved in this case: the state's interest in enforcing a general compensation regime for workplace injuries and the City's interest in licensing only those companies that comply with a broad range of laws, including state law (in this case WC law.) Under this analysis, a company has an obligation to comply with state law and another, separate obligation to comply with City laws insofar as they do not conflict with state law. Since all that the City is requiring is that companies comply with state law, there is no apparent conflict with state law. The City is merely exercising its right, and is well within its right, to license only those businesses in compliance with state law. Thus, when a company fails to comply with state law, the City may invoke its licensing authority to discipline that company.

A leading case in this regard is <u>Cohen v. Board of Supervisors of the City and County of San Francisco</u>, *supra*).

San Francisco's right to utilize its licensing power as a means to regulate businesses conducted within its borders can scarcely be disputed. The requirement that a license first be obtained before conducting a business or activity has long been recognized as a valid exercise of the police power." (Sunset amusement Co. v. Board of Police Commissioners, 1972, 7 Cal. 3d 64, 72 2

[101 Cal Rptr. 768, 496 P.2d 840].) This principle is embodied in Business and Professions Code section 16000: "The legislative bodies of incorporated cities may, in the exercise of their police power, and for the purpose of regulation, as herein provided... license any kind of business not prohibited by law, transacted and carried on within the limits of their jurisdictions,... and may fix the rates of such license fee... see also Government Code section 37101: ["The local legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city..."]).

The Cohen court went on to assert the "<u>validity of local licensing regulations in areas</u> related to conduct covered under state law." [emphasis added, <u>Cohen</u>, 40 Cal.3d 277 at 297; 7097 P.2d 840]

Cohen involved an alleged conflict between a S.F. ordinance that licensed and regulated escort services and a state criminal statute enacted to curb sex-related offenses. The ordinance required disclosure of information which would aid the police in investigating criminal activity and made an escort service permit contingent on the absence of convictions for sex-related offenses. Even though closely related in subject matter and purpose, the court held that the ordinance did not so duplicate state criminal statutes that the latter preempted the former. To the extent that the S.F. ordinance prohibited criminal conduct it was preempted by the criminal code. But the court affirmed the right of the City to control local businesses:

A local governmental body may properly determine that a particular business fosters, profits from and provides an environment for activities proscribed by state law. The ordinance is not transformed into a statute prohibiting crime simply because the city uses its licensing power to discourage legitimate activities associated with certain businesses.¹

Although the <u>Cohen</u> court referred mainly to cases involving criminal activity, its overall principle was arguably broader: ordinances, even if they appear to overlap state criminal statutes, may be enacted "to protect the well-being of its citizens (here taxicab drivers) from the hazards of a potentially harmful enterprise. P. 297 citing Harriman v. City of Beverly Hills (1969 276 Cal. App. 2d 918 [80 Cal.Rptr. 426, 35 A.L.R.3d 1421.]

5H16 merely requires that taxicab companies comply with state law. It does not go beyond state law; however, it discourages companies from violating state law, and invalidating it on preemption grounds might invite a violation of state WC law. Thus, far from contradicting state law, MPC 5H16 reinforces it.

"Even if no state law explicitly permits municipal enforcement [of an ordinance], this fact alone does not necessitate a finding of preemption." [Cohen, at 296]

¹ See also EWAP, Inc. v. City of Los Angeles, 97 Cal. App. 3d 179. Cities have the power to regulate so that their operation does not invite or encourage violations of state law.

The test is whether state law is so formulated as to indicate an intent to preclude local regulations, i.e., whether state law fully or partially covers the subject matter of the ordinance, such that no local regulation can be tolerated. <u>Cohen</u> at 296, citing *In re Hubbard*, 62 Cal.2d at p. 128.

Finding

As a function of its licensing power, the San Francisco Taxicab Commission has the authority to require that cab company permits be issued to only those companies in compliance with state laws.

Legislation and enforcement of 5H16 is a valid exercise of S.F.'s police powers consistent with state law

B. EVEN IF RULE 5H16 "REGULATED" IN THE AREA OF WORKERS' COMPENSATION, IT DOES NOT CONFLICT WITH STATE LAW AND IS THEREFORE NOT PREEMPTED BY STATE LAW

Under the above analysis, the City is not attempting to <u>regulate</u> in the area of WC, only to require compliance with state laws as a condition of licensure. However, assuming, *arguendo*, that the City is attempting to regulate in the same area as the state, it is barred from doing so only if there is a <u>conflict</u> between city laws and state laws. There is no preemption problem if there is no conflict between the local and state law.

The general principles governing state law preemption were well summarized in Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893, 898 (Sherwin-Williams Co.): "Under article XI, section 7 of the California Constitution, '[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.'²

The analysis articulated in *Sherwin-Williams Co.* is well summarized in *American Financial Services v. Oakland*, v. City of Oakland (2005)34 Cal.4th 1239. The hearing officer employs that summary. All AFSA quotes are from *Sherwin-Williams Co., Section IIA*. The section numbering is added by the hearing officer. "[Citations]" indicates cases cited in the original but omitted here.

A. Under article XI, section 7 of the California Constitution, '[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.'

² A city's police powers under article XI, section 7 of the California Constitution... is subject to displacement by general state law but otherwise is as broad as the police power exercisable by the Legislature itself. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140.) If the Legislature has the power to regulate a certain area, municipalities have the power to regulate that same area. (*California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1310 (*California Rifle*).)

- B. 'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.' [Citations.]
- 1. 'A conflict exists if the local legislation "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." [Citations.]
- i. Local legislation is 'duplicative' of general law when it is coextensive therewith. [Citation.]
- ii. Similarly, local legislation is 'contradictory' to general law when it is inimical thereto. [Citation.]
- iii. Finally, local legislation enters an area that is 'fully occupied' by general law when the Legislature (a) has expressly manifested its intent to 'fully occupy' the area [citation]; or (b) when it has impliedly done so in light of one of the following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality [citations]." (Sherwin-Williams Co., supra, 4 Cal.4th at pp. 897–898, fn. omitted.)

B.1.(i) Preemption if duplicative

On its face, 5H16 would appear to duplicate state law, since it reiterates the state law requirement of WC coverage under the guise of a WC posting requirement. However, "the application of preemption by duplication has been largely confined to penal ordinances." (Baldwin v County if the Tehama 1994 (31 CalApp. 4th 166, 179) scited by American Financial Services Association v. the City of Oakland et al., First Appellate District, Division One Court of Appeal of the state of California, certified for publication][AFSA]. An ordinance may be preempted by state laws as duplicative of state law if it "criminalizes precisely the same acts which... are prohibited by statute. Great Western Shows, 27 Cal.4th at page 865. (See also, Sherwin-Williams, supra, 897, 902, a local ordinances duplicates a general law if it is coextensive therewith in scope and substance). But "with particular reference to a proceeding to revoke or suspend a license or other administrative action of a disciplinary nature, it has been held in this state that such proceeding is not a criminal or quasi criminal prosecution...The purpose of such a proceeding is not to punish but to afford protection to the public upon the rationale that respect and confidence in the public is merited by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent. Borror v. The Department of Investment, Division of Real Estate, 15 Cal.App.3d 531 at 541.

B.1.(ii) Preemption if contradictory

There is no contradiction preemption. 5H16 does not mandate what the state law expressly forbids, nor forbid what the state law expressly mandates.

In *Great Western Shows*, the California Supreme Court upheld a Los Angeles County ordinance prohibiting the sale of firearms on county property against a preemption challenge even though state law permitted the type of sale barred by the ordinance. (*Great Western Shows*, 27 Cal.4th at 865–866, 870. See also *Suter v. City of Lafayette* (1997) 57Cal.App.4th 1109 (*Suter*) at pp. 1124–1125

The test applied in *Great Western Shows* was whether the ordinance *mandated* what state law expressly *forbids* or *forbids* what state law expressly *mandates*.

Under this standard, San Francisco could theoretically mandate that taxicab companies require WC for all drivers affiliated with the companies, even if under state law the drivers were characterized as independent contractors.

In any event, <u>requiring</u> the posting of WC coverage nowhere appears to conflict with a state <u>prohibition</u> against such a posting under WC law. Regents claimed that state law does not <u>require</u> such a posting, but even if true, that is beside the point. It is not prohibited under state law

B.1(iii) Preemption if state fully occupies field

(a) with express intent to occupy

Regents argues that the administration of the workers compensation insurance system is a matter of statewide concern (Healy, supra, at 122; See also, Professional Firefighters, Inc., v. City of Los Angeles, (1963) 60 Cal.2nd 276, 292-94, citing Healy.) Where local law conflicts with a matter of statewide concern and/or the state legislature has expressed intent to preempt the field, local law must give way. However, Regents cites no legislative history that would indicate an express intent on the part of the legislature to bar municipalities either from requiring companies to carry WC insurance or from making licensure contingent on carrying WC.

- (b) Preemption if state law occupies by implication:
- 1. fully covered as to indicate a matter of exclusive state concern.

Regents cites <u>Yellow Cab Cooperative Inc. I'll or Inc. v. Workers Compensation Appeals Board</u>, (1991)226 DPP 3-D, 1288. See also <u>Jones v. Brown</u> 1970, 13 Cal. App 3rd 5 13, 520, 89 Cal. Reporter 651. According to Regents, these cases describe "well-defined state level administrative procedures through which covered employee status may be determined, depending upon the circumstances." [Exbt. C, p. 3] Thus, the enforcement of WC insurance coverage is <u>restricted</u> to the Division of Labor Standards Enforcement [DLSE] or to Superior Court, under certain circumstances.

Yellow arose out of an employee injury claim initiated with the WCAB. There is no question that the Labor Code provides an exclusive remedy for injured employees and that before crafting that remedy DLSE or the Court must decide the threshold issue of whether a worker is in fact a covered employee. However, an ordinance requiring local cab companies to provide WC coverage as a condition for licensure (and in the process determining whether a company is an employer for licensing purposes) does not conflict with an exclusive state remedy for employee injuries. In fact, it complements it. On this analysis, an administrative penalty against a licensee for failing to procure WC coverage is not analogous to and does not have the same legal basis as a stop-work order administered by the DLSE or the imposition of a fine by the DLSE. Therefore the state law inhabits a different field than the local law and the former cannot logically occupy the latter.

Regents appeared to concede the City the power to invade the ostensibly "occupied area" of WC when it proposed a piece of model legislation to the Commission, as follows:

No color scheme holder shall be issued a permit unless all drivers associated with this color scheme are covered under a policy of workers compensation insurance [EXBT C, p. 5]

Indeed, it is arguable that San Francisco by requiring the posting of workers compensation certificates by all color schemes under 5H16 has already implemented what Regents advocates.

2. partially covered as to indicate clearly that a paramount state concern will not tolerate local action;

Regents has not made a showing that the state will not tolerate local enforcement action in terms of requiring companies to cover their workers as a condition of licensure.

3. partially covered and of such a nature that the adverse effect of local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality."

The hearing officer finds no way in which 5H16 has an adverse affect on "the transient citizens of the state" arriving in or passing through San Francisco, still less one which outweighs the benefits to SF of having its taxicab companies carry WC for their drivers.

Most licensing ordinances have a direct impact on the enforcement of state laws which have enacted to preserve the health safety and welfare of state and local citizens. This fact does not deprive a municipality of the power to enact them. <u>Cohen</u>, at pages 298-299 219 Cal Rptr. 467.

Finding

The enactment and enforcement of 5H16 is not preempted by state worker's compensation law. 5H16 is consistent with state law. The commission and the hearing officer have jurisdiction over this case.

III. THE FACTS ACCORDING TO REGENTS

Regents asserted the following:

Thirty six taxicabs operate under the Regents color scheme. Three of these are owned and maintained by Regents. For these three cabs, Regents "manages" medallions for medallion holders who need to fulfill the driving requirement but do not want the headaches of owning or maintaining taxicabs or run a business. Pursuant to a three-year contract subject to termination by either party on 30 days notice Regents leases the medallions from the medallion holders for a monthly fee and receives a daily/gate and gas fee for those shifts the medallion holders choose to drive. For those shifts the medallion holders did not drive, Regents subleases the medallions to secondary drivers, who acknowledged that they act as independent contractors. Under proposition K, Regents cannot and does not own any medallions.

The other 33 taxicabs are owned by medallion holder-drivers, who hire secondary drivers of their choosing under arrangements to which Regents is a complete stranger. The medallion holders pay all license fees, taxes, insurance and maintenance cost required for the operation of their vehicles. The medallion holders negotiate the terms of service and retain all gate and gas fees received from the secondary drivers. The medallion holders pay a monthly lease fee to Regents in return for what amounts to a service ensuring compliance with commission regulations. 1/2/07 Brief

Regents maintains a shift schedule for the benefit of the medallion holders, it does not assign shifts, either to the medallion holders or their self-selected replacements; although it maintains the waybill information required by the Commission, the drivers are not required to produce trip logs ... [A]lthough it provides a dispatch services required by the Commission it does not tell the medallion holders that they must respond directly to dispatches, and neither punishes, nor has the means to punish medallion owner drivers or their replacements for failing to respond. Indeed... based on available data dispatches account for less than 1% of the rides picked up by Regents drivers.

EXBT B, p. 8

IV. MR. ANTON'S TESTIMONY

Mr. Anton testified that he is the President and dispatcher for Regents and that his father and mother are Vice President and Treasurer/Secretary and that they had no other employees on staff. Trans. p. 15.

Mr. Anton testified that his understanding was that he was required to obtain WC insurance for the "medallions we managed whereas other medallion owners secured WC insurance policies on their own" Trans. p.7. He testified that Regents currently manages only three medallions for medallion owners, none of whom has WC. Of the other thirty-three medallion owners affiliated with Regents, he was not sure how many carried WC on their own. Trans. p. 8; 19

HO: How many medallions affiliated with Regents do not have WC?

Anton: Ours (the ones Regents manages) do not have. And the other thirty-three, of those, I don't know how many have WC. I suspect that some do, but I don't know exactly. It's really related to the way that we are structured. Unlike other taxicab

companies where they manage a majority of their medallions, we do not. That's just the business model that my father has decided to maintain for our company is let these guys be entrepreneurs. Let them be responsible for their own business. Trans. p. 8.

[His] philosophy was take care of your driver, take care of your vehicle, and your customers and you'll make lots of money. He wanted a company that did not charge you five dollars for signing a shift. Did not charge you another five dollars, if you wanted to pick up an airport ride from the dispatch. They did not require you to pick up a call or else you could potentially face dismissal. Trans. p. 17.

HO: Is every medallion Holder, who is affiliated with Regents also the owner of his or her own cab?

Anton: From the records I would have to say yes. I don't know everybody's relationship. Trans. p. 16.

HO: Does your company now impose any kind of penalties on drivers for, for example, failing to go to a dispatch call her or conduct issues. Are there any penalties now that are imposed on drivers? Do you ever dismiss a driver or write up a driver who doesn't answer calls?

Mr. Anton: Dispatch in our company is a very, very small part of our business... less than a half of one percent of the total business that our drivers, both medallion holders as well as drivers [sic], Trans. p. 17 (Note: Mr. Anton submitted credible supporting documentary evidence that this was the case).

HO: Have you ever dismissed a medallion holder?

Anton: No. I mean, they are my livelihood, I mean that's where I get my income from,

HO: Do you have any supervision over their conduct?

Anton: No.

HO: Any penalties at all to medallion holders?

Anton: [T]he only recourse we have as a color scheme is... secure workers comp as a condition of affiliation with Regents Cab color scheme. And as a result of that in 2002 we had eighty-five taxis and this is something the Taxi Commission is well aware of... by 2004 we were down by half. Trans. p. 17.

HO: Does every medallion holder own his or her own cab?

Anton: I would assume that they do yes.

HO: And then there are some drivers affiliated with each one of these?

Anton: Correct.

HO: And who supervises the drivers?

Anton: The medallion holders.

HO: Do you have any role in supervising them?

Anton: None whatsoever.

HO: So if a driver came drunk to the site of Regents cab, what would you do?

Anton: call the medallion holder and make him aware of that fact.

HO: would you do anything else?

Anton: not really. We don't manage. We're very clear about that. We don't hire the medallion holders' drivers. We don't collect gates from the medallion holders' drivers. We don't assign shifts. We don't repair. We don't buy their insurance. They're totally on their own how they do all of those things. What we do do is ... we collect and store their driver's waybills. We maintain a 24-hour dispatch.

HO: and that's the dispatch that is only half a percent effective...?

Mr. Anton:. Correct. We maintain a lost and found, property locker and log and we retain an office and all the recoreds as directed by the Taxi Commission. That's what we do it in terms of the drivers of the medallion holders we have no interaction with them. Trans. p. 21

HO: and what about the medallion holders themselves? Do you supervise them or no?

Anton: other then they come in every month and pay their rent, that's it.

HO: But they locate their cars on your property, is that correct?

Anton: Correct.

HO: And what's the rent for?

Anton: the rent is to cover administrative expenses and help us pay our rent.

HO: OK, and where is your profit?

Anton: Our profit is in, when we were at eighty-five our profit was, it's in numbers and that was the whole concept was that it was in numbers. Now it has been a struggle. It's been very difficult. Trans. p. 22

V. CONTROLLING CASES

Regents attempted to distinguish its drivers from the employee-drivers the court had found in <u>Yellow Cab Cooperative</u>, Inc. V. Workers' Comp. Appeals Bd. (1991) 226 Cal. App. 3d 1288. Yellow Cab had unsuccessfully tried to characterize an injured driver as an independent contractor.

Regents argued that its business structure was so unlike Yellow Cab that the multi-factor "control of work" test adopted by the court yielded a different conclusion: *viz.*, Regents was not an employer, and the medallion holders and drivers were not employees. Therefore, Regents was exempt from carrying WC for either its medallion holders or drivers and not required to post a WC certificate under 5H16.

The hearing officer found that even if the business model outlined by Regents was a *bona fide* and accurate characterization of its business practice, it did not exempt Regents from carrying WC, given the compelling public policy of covering workers for workplace injuries and the trend of cases since <u>Yellow</u> that have emphasized an "enterprise integration" test for employment status and that have further loosened the factors of control. [See, especially, <u>JKH Enterprises</u>, Inc. v. Department of Industrial Relations, 48 Cal. Rpt. 3d, 563, 2006, *infra*.

Even before the <u>Yellow</u> decision, <u>S.G. Borello & Sons, Inc. v. Department of Industrial Relations</u> (1989), 48 Cal.3d 341, laid out the public policy interests behind the requirement of finding companies to be employers.

VI. BORELLO: PUBLIC POLICY AND THE EVOLUTION OF THE CONTROL TEST

The California Supreme Court decided <u>Borello</u> in 1989, and it remains the seminal case with respect to the determination whether a hiree is employee or independent contractor, for purposes of the requirement of an employer to provide workers compensation insurance. The court made clear that while a common-law emphasis on the hirer's degree of control over the details of the work in the determination of an employment relationship remains significant, it is not the only factor that should be considered in the worker's compensation context. This is because the question of a hiree's status must be considered in light of the history and remedial and social purposes of the worker's compensation act. [JKH <u>Enterprises</u>, Inc. v. Dept. of Industrial Relations (2006) Cal Rptr. 3d 563, 578]

<u>Borello</u> involved harvesters of cucumbers. Borello, a grower, characterized his seasonal workers as independent contractors under "sharefarmer" agreements he made with them. He claimed that under the "control of work test," because the "sharefarmers" manage their own labor, share the profit or loss from the crop, and agree in writing that they are

not employees, his "sharefarmers" were independent contractors. [S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 348]

<u>Borello</u> held that in no practical sense were the 'sharefarmers' entrepreneurs operating independent businesses for their own accounts. The court held that they and their families were obvious members of the broad class to which workers compensation protection is intended to apply. It achieved this result by revisiting the common law "control of work test" and adding factors for finding employee-employer relations in light of the remedial purposes of the Workers' Compensation regime. [Id at 346]

The Borello court concluded that under workers compensation law, the control test must be applied with deference to the purposes of the protective legislation: "The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the 'history and fundamental purposes' of the statute." [Id at 353-354]

The courts have long recognized that the control test applied rigidly and isolation is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the most important or most significant consideration, the authorities have also endorsed secondary indicia of the nature of a service relationship. Id at 351.

The Court went on to enumerate various secondary factors all of which are "logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers compensation law." Id at 354-355. These include factors such as whether the workers are a regular part of the business operation; and whether the worker is performing a distinct operation or service. These factors will be analyzed under VIII, below.

Borello found that although the "sharefarmers" work was seasonal by nature it was a permanent part of the agricultural process and that this permanent <u>integration of the workers into the heart of Borello's business is a strong indicator that Borello functions as an employer.</u>" Id at 357, emphasis added.

Despite the fact that Borello did not exercise significant control of the details of the work, a minimal degree of control was not considered dispositive because the work did not require a high degree of skill and the work was an integral part of the employer's business. Thus, Borello exercised all <u>necessary</u> control of the operation as a whole and the workers were found to be employees of Borello. Id at 355-360.

The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service." Id at 357/8

Share farmers and their families exhibit no characteristics which might place them outside the [Labor Code's] intended coverage of employees. They engage in no distinct trade or calling. They do not hold themselves out in business. They perform typical farm labor for hire wherever jobs are available. They invest nothing but personal service and hand tools and incur no opportunity for profit or loss. Despite the contract's admonitions [to ensure themselves], they have no practical opportunities to ensure themselves or their families against loss of income caused by nontortious work injuries. If Borello is not their employer,

they themselves and society at large thus assume the entire financial burden when such injuries occur. Without doubt, they are a class of workers to whom the protection of the act is intended to extend. Id at 359, Emphasis added.

VII. THE CONTROL TEST LIBERALIZED: JKH ENTERPRISES, INC. V. DEPARTMENT OF INDUSTRIAL RELATIONS, 48 CAL. RPT. 3D, 563, 2006.

In JKH, the standard for finding an employer-employee relationship continues its evolution from direct control over the worker to control over the enterprise.

JKH, a courier service, was issued a stop order issued by the DLSE for failing to procure WC for its drivers, qua *employees*, under Labor Code Section 3700. When drivers signed on with JKH, they filled out a form entitled "Independent Contractor Profile" in which they ostensibly acknowledged that status. They also provided their own automobile insurance information. Some drivers remained with JKH for several years under this arrangement. JKH at 568.

JKH. drivers operated as either route drivers or special drivers. Route drivers were not required to contact JKH's dispatcher on a regular basis. They pick up the packages for JKH's route customers and are directed by the customer where and when to deliver the packages. The route drivers themselves decide how best to cover their particular territories. JKH only learns of the route drivers particular deliveries the next day through "document registers". Id at 568

JKH special drivers deal with special deliveries requested by JKH.'s customers on any given day. The special drivers pick up calls from the dispatcher usually on their own phones about where to pick up packages. However, the drivers are free to decline a particular delivery when contacted by the dispatcher even if the driver has indicated availability to the dispatcher for that day. Special drivers and not required to work on any particular schedule. They are paid by individually negotiated commissions based on the deliveries they do. Id at 569

Therefore neither the route drivers nor the special drivers appear to be under the control of the dispatch system. Nor are they governed by particular rules and nor do they receive the direction for JKH to about how to perform the delivery or ask what driving routes to take. All drivers whether route or special use their own vehicles to make the deliveries. They pay for their own gas, car service and maintenance, and insurance. They use their own cell phones for the most part to communicate with JKH. The driver's cars do not bear any JKH marking or logo. And the drivers themselves do not wear uniforms are badges that evidence their affiliation or relationship with JKH. Some of the drivers perform delivery services for other companies as well. Two of the drivers have their own business licenses and provide the delivery service on behalf of their own businesses, only one of which is itself a delivery service. Id at 569

All drivers set their own schedules and choose their own driving routes. The work is not supervised. JKH only has a vague idea of where its working drivers are during the business day. They are not required to report to the location of JKH's business office, and [the owner] has never met some of them. The drivers take time off when they want to, and they're not required to ask for permission in order to do so. Id at 569

The drivers turn in their delivery logs, JKH keeps track of those in order to bill its customers, but the drivers do not fill out or turn in any time sheets. Instead JKH charges its route customers a fee, from which it pays the route drivers their negotiated hourly fee, For special deliveries JKH charges a fee to its customers, and then generally splits that amount with the special driver who performed that delivery. Id at 569

The drivers are paid twice a month, with no deductions taken, and they are each issued a 1099 form for the year, not a W2. According to JKH, the drivers consider themselves independent contractors. Id at 569

The hearing officer in JFK applied the multifactor or "economic realities" test of <u>Borello</u>, and made the following finding:

Although some other factors in this case can be indicative of the workers being independent contractors, the overriding factor is that the persons performing the work are not engaged in occupations or businesses distinct from that of JKH. Rather their work is the basis for JKH's business. JKH obtains the clients who are in need of delivery services and provides the workers who conduct the service on behalf of JKH. In addition, even though there's an absence of control over the details, an employee and employer relationship will be found if the principal retains pervasive control over the operation as a whole, the worker's duties are an integral part of the operation, and the nature of the work makes detailed control unnecessary.(citing, Yellow Cooperative v. Workers Compensation Appeals Board, (1991)226 Cal.App 3d 1288). Therefore, the finding is that these workers are in fact, employees of JKH. Id at 571.

The appellate court upheld the hearing officer's finding, holding that the functions performed by the drivers, pickup and delivery of papers or packages and driving in between, constituted the integral heart of JKH's courier service business. [emphasis added].

By obtaining the clients in need of the service and providing the workers to conduct it, JKH retained all necessary control over the operation as a whole. The court held that under Borello, and similar to its facts, these circumstances are enough to find an employment relationship even in the absence of JKH exercising control of the details of the work and with JKH more concerned with the results of the work rather than the means of its accomplishment. Ibid; see also Yellow Cooperative, Inc. v. Workers Comp Appeals Board, supra 226 Cal 3-D 1288, 1293 to 1300. And neither JKH's nor the drivers own perception of their relationship as one of independent contracting, or any other single factor either alone or in combination mandates a different result. We therefore reject JKH's contention that its lack of control of the details of the work, the drivers use of their own cars, and the presence of the independent contractor profiles signed by the drivers dictate but one conclusion here that the drivers are independent contractors. This contention does not adequately take into account the comprehensive and authoritative holding of Borello.

As Regents pointed out, it is not in the business of soliciting ridership or obtaining fares for its drivers. [Exbt. B, p. 9]. Regents presented credible evidence that its own dispatch service accounts for less than 1% of its business and claimed that without the name recognition of the larger cab companies (like Yellow) it cannot provide riders for its cabs.

Thus, "its ability to use its dispatch service as a form of control over its drivers is non-existent." [Exbt. B, p. 9]. However, in JKH, the drivers were not under control of the dispatch service either.

JKH solicited customers for its courier service. However, other than providing a telephone book listing of its name and dispatch number, Regents does not solicit riders. However, this cuts both ways. Regents may not have to solicit riders since the drivers obtain their own passengers. But this is not due to any special professional or entrepreneurial ability that the drivers bring to Regents. It is a function of the San Francisco cab industry. If obtaining riders for the drivers is not an essential part of Regents' function, it is moot as an element of control, not evidence of a lack of control. Thus, the marginal status of its dispatch service or the fact that unlike JKH, Regents does not provide customers, is not good evidence for a lack of control that would elevate the drivers to independent contractor status.

In many other respects, Regents is directly on point with JKH:

As in JKH, thirty-three (of thirty-six) medallion owners own their own vehicles and pay for their own gas, car service and maintenance, and insurance. (Unlike in JKH, all cars bear the marking of the Regents color scheme, in this case evidence of an even closer integration of workers into the business enterprise than in JKH).

Regents maintains a shift schedule for the benefit of the medallion holders, but it does not assign shifts to them or to their secondary drivers, or tell them that they must respond directly to dispatches. In JKH, all drivers set their own schedules and choose their own driving routes, and JKH has only a vague idea of where its working drivers are during the business day.

Regents does not supervise the medallion holders and has "no interaction with" the secondary drivers and Regents is "a complete stranger" to the contracts between the medallion holders and the secondary drivers. In JKH, the owner has never met some of the drivers.

According to its testimony, all Regents drivers sign "Acknowledgment of Lessee Status" forms in which they acknowledge that they are independent contractors. Trans. p. 24; Exbt. F. These are similar to the Independent Contractor Profiles that the JFK court discounted.

Conclusion

Given the parallels between Regents and JKH, Regents exercises all necessary control under the liberalized control test of JKH, and thus qualifies as an employer.

VIII. THE SECONDARY FACTORS

Regents argued against a "one size fits all" approach to deciding employer-employee/independent contractor relationships.

The courts have long recognized that the "control" test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the "most important" or "most significant" consideration, the authorities also endorse several "secondary" indicia of the nature of a service relationship.

Thus, we have noted that "[s]trong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations.]"] (Tieberg, supra, 2 Cal.3d at p. 949, quoting Empire Star Mines, supra, 28 Cal.2d at p. 43.) Additional factors have been derived principally from the Restatement Second of Agency. These include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (Tieberg, supra, at p. 949; Empire Star Mines, supra, 28 Cal.2d at pp. 43-44; see Rest.2d Agency, § 220.) [4a] "Generally, ... the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." (Germann, supra, 123 Cal.App.3d at p. 783.) fn. 5 [Borello, 48 Cal.3d 351]

Right to discharge at will, without cause

Regents submitted a sample lease with a medallion holder (No. 39) "subject to change or cancellation with 30 day written notice." This appears to give Regents the functional equivalent of the power to "discharge" a medallion holder "at will," along with his secondary drivers. However, the "managed" medallion holder license agreement permitted only termination "for cause" with 30 day notice. But the latter represents only three of thirty-six medallions.

a. Whether the one performing services is engaged in a distinct occupation or business:

Neither the medallion holders nor their drivers are engaged in an occupation distinct from Regents. The business of drivers and medallion holders <u>is</u> the cab business, the business of Regents.

b. The kind of occupation with reference to whether or not, in the locality the work is usually done under the direction of the principal or by a specialist without supervision.

Driving is not done under the direction of the principal, Regents, but it is also not done by a specialist without supervision because driving a taxicab requires neither significant "specialist" knowledge nor supervision. "The work [does] not involve the kind of expertise which requires entrustment to an independent professional; it 'is usually done without supervision whether the arrangement was lessee or employee, and the skill required on the job is such that it can be done by employees rather than specially skilled independent workmen.' Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.(1991) 235 Cal.App.3d 1363, 1375.

c. The skill required in the particular occupation.

Other than driving a cab, no special skill is required. In addition, it is hard to credit the medallion holders with possessing any special "management skill" in hiring and dealing with secondary drivers. Id at 1375.

d. Whether the principal or the worker supplies the instrumentalities, tools, and place of work for the person doing the work.

Regents owns only three cabs, the rest are supplied by the remaining thirty-three medallion holders. However, we have seen under JKF, *supra*, that this is not dispositive. In addition, Regents supplies the lot or staging area for the drivers. They do not work out of their own homes or offices.

e. The length of time for which the services are to be performed

The medallion holders that Regents manages sign minimum three year license agreements that automatically renew. This tenure appears to bind them to the color scheme in a way that is not typical of independent contractors who come and go by the specific job or project. However, Regents supplied no data that would indicate whether the other thirty-three medallion holders or their drivers affiliated with it for lengthy periods.

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

Payment over time suggests employment status and payment by project independent contractor status. Driving shifts correspond more closely to daily work; they are usually regular, and not "project" oriented. Payment is by fares per shift. "[T]he manner of payment is not a decisive test of employment. One may be an employee for workers' compensation purposes even when the service is uncompensated." Yellow, supra, p. 442. Finally, the fact that the vast majority of the medallion holders pay Regents, rather than vice versa, is not dispositive. "An employment relationship may also exist notwithstanding the presence of a 'lease' or other arrangement calling for payments to the principal." Id, at 442. emphasis added.

g. Whether the work is a part of the regular business of the principal.

Driving a cab under a medallion is an essential and regular part of Regents business. The medallion holders and the drivers are part and parcel of the business. Regents is not merely providing a parking lot for various vehicles, cabs among them. Regents is a color scheme that has applied for a color scheme permit from the City, not a license to operate a parking lot.

h. Whether or not the parties believe they are creating an employer or employee relationship.

Under <u>Borello</u>, "the label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." Borello, *supra*, p. 349. Regents testified that "anyone who drives under our color scheme, including medallion holders" signs a form called "Acknowledgment of Lessee Status." [Emphasis added] By signing the form, the drivers "acknowledge" that they are self-employed, independent contractors. Trans. p. 24; EXBT F. Regents submitted a blank example of the form and did not provide evidence of how many drivers signed it.

The form states "Any injury suffered by the Lessee or any person under their control due to his/her negligence during his/her work... shall not be imposed... as liability against Lesser. EXBT F. The "lessee" also renounces a panoply of benefits: Social Security, unemployment insurance, and WC. After a recital of voluntariness, the Acknowledgment assigns responsibility to the driver "for any personal injuries that I may suffer at work and that I must obtain and enforce my own disability insurance at all times during the leasing period." EXBT F

Mr. Anton did not testify regarding the context in which these Acknowledgments were signed or how they were negotiated, if at all. In addition, Mr. Anton did not offer testimony, submit declarations, or present other supporting evidence from drivers imparting their understanding of their employment relationship with Regents or regarding any negotiation about that relationship or the form they purportedly signed. However, if Mr. Anton's testimony is accurate, all drivers sign the form, including those in disparate arrangements with Regents (the two types of medallion holders and the secondary drivers). All choose a uniform status that appears carefully crafted to exempt Regents from carrying WC and other forms of worker protection. Therefore, the form appears to be very weak evidence of the actual relationship between the drivers and Regents or the drivers understanding of that relationship. A formal agreement characterizing the relationship as independent contractorship "will be ignored if the parties, by their actual conduct, act like 'employer-employee.'" Yellow, supra, p. 440. The court in JKF also refused to let "the presence of the independent contractor profiles signed by the drivers dictate a result." JFK, supra, p.

Conclusion

Regents argued that the Borello factors should not be applied mechanically lest a rigid application lead to a *pro forma* decision that the medallion holders and drivers involved were employees. But is precisely applying the Borello factors flexibly that yields this

result. The weight of the various secondary factors militate against an independent contractor status for any of Regents drivers.

Finding

By a preponderance of the evidence, Regents is an employer for WC purposes within the meaning of the Labor Code; its medallion holders are employees; and the secondary drivers they hire are also employees within the integrated enterprise.

IX. RECOMMENDED DECISION

Regents shall procure Workers' Compensation for all affiliated drivers and medallion holders within 60 days, or have its permit revoked.

To motivate Regents to procure WC coverage as required under state law, the hearing officer recommends a two month probationary period (from the date the Commission decides this case) to allow Regents to procure proof of WC insurance for all of its affiliated drivers, including all affiliated medallion holders and their secondary drivers. If at the end of this period, Regents is unwilling or unable to furnish proof of WC insurance for all its affiliated drivers and medallion holders, the hearing officer recommends that its permit be revoked.

Although this recommendation may seem harsh in light of the cost to Regents to insure its drivers, given the broad public policy of protecting workers, a business's economic interest is not a proper factor in assigning responsibility for carrying WC coverage.

Regents contends that requiring it to carry workers compensation for its medallion owners or affiliated drivers would be prohibitive, and that demanding that it require medallion holders to carry WC for their drivers would result in defections to other companies, along the lines of its experience in 2002 when according to its testimony, more than one half of its medallion holders left. However, there is no evidence that Regents has a fundamental or vested right to protection. As a general rule, when the case involves or affects purely economic interests, courts are far less likely to find a right to be of the fundamental vested character. Administrative decisions which results in restricting a property owners return on his property, increasing the cost of doing business, or reducing profits is considered an impact on economic interests rather than on fundamental rights. EWAP v. City of Los Angeles, 1997, 56 CalApp. 4th 310, 325, 326-327

The language of JKH is particularly telling on this point. If one substitutes "Regents" for JKH in the following passage, its relevance becomes clear.

The purpose of the decision was to impose JKH's [read Regents] compliance with the law as a condition of doing business, not to put it out of business.... Even if this were the case, the continued operation of a business in a manner that violates the applicable regulatory scheme governing all employees is not a fundamental vested right or one that was legitimately acquired. It is true that requiring JKH to purchase workers' Compensation insurance would mean that it

would have to incur an expense, and that this expense would cause an increase in the cost of doing business and potentially a decrease in profits. But this result would affect a purely economic interest and not involve or affect a right that is fundamental or vested.... [JKH, p. 5, emphasis added]

The court in <u>Yellow Cab</u>, citing <u>Borello</u>, emphasized that "a waiver of [WC] protections should not be lightly inferred. The WC statute represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury." [Yellow Cab, at 443]

If the Commission rejects the hearing officer's decision to take jurisdiction in this case, and Regents continues to operate without WC protection for its affiliated drivers and medallion holders, the hearing officer recommends that the Commission refer Regents to the Bureau of Labor Standards Enforcement. Regents is aware that the BLSE may impose a stop work order and substantial fines if it finds Regents to be an employer under the Labor Code. Therefore, even in the absence of a revocation or other disciplinary penalty by the Commission, it is in Regents interests to procure WC coverage.

In addition, it is in Regents interest to procure WC coverage to avoid private tort claims. Were a driver to be injured during work, and Regents uninsured, the driver or his dependents has a private right of action against Regents in civil court for damages that could exceed anything imposed by the Commission in this case. [Labor Code Section 3706]. Regents might argue in that case as it has in this one that the driver is not an employee - but a jury might decide otherwise. In addition, Regents may find that its "Lessee Status" agreements with drivers, insofar as they attempt to relieve Regents of liability for work injuries, are unenforceable. Thus Regents, by not covering its drivers, dramatically increases its financial risk.

For its part, the Commission would be well advised to publicize clear directives regarding WC coverage and publicize clear and consistent penalties for companies that do not insure their drivers. Raymond Alexander, the attorney for Regents, in two very well-argued and thoughtful briefs, suggests that the Commission adopt the following language to "level the playing field" for all companies:

No color scheme holder shall be issued a permit unless all drivers associated with the color scheme are covered under a policy of workers compensation insurance. EXBT C, page 5.3

Mr. Brodnax himself argued - as justification for the heavy fines he requested - that it was unfair that Regents, by avoiding the costs of WC, had a competitive advantage over other companies who covered their workers. Thus, both parties agree on the necessity to level the playing field among all taxicab companies whatever their arrangements with drivers and medallion holders, and whatever disparate business models they embrace.

³ It is worth noting that with this suggestion Mr. Alexander appears to concede the Commission's jurisdiction over WC coverage and its authority to enforce compliance.

The hearing officer holds that Rule 5H16 and MPC 1147.4 operating together, are already sufficient to level the playing field. Mr. Alexander's language suggests that additional notice be given to all color schemes before a permit is issued or before disciplinary action is taken. However, the hearing officer finds that 5H16 and MPC 1147.4 already give sufficient notice of the requirement to insure workers, and gave notice in this case. Thus, unless a company carries WC insurance for all affiliated drivers it should not be issued a permit in the first instance (as Mr. Alexander suggests), or in Regents' case, retain the one it has.

Under Section 1090 of the S.F. Municipal Police Code, the Taxicab Commission may penalize any taxicab permit issued under Article 16 for good cause, after a noticed hearing. "Good cause" includes, but is not limited to cases in which 'the permittee violated any applicable statute, ordinance, rule or regulation pertaining to the operation of licensing of the vehicles and services regulated by [Article 16], including any rules and regulations enacted by the Chief of Police pursuant to this Article."

Regents Cab, having been provided a noticed hearing and an opportunity to fully contest the charges against it, good cause exists to impose the following order under the evidence and arguments contained in this decision for violating 5H16 of the Taxicab Commission Rules and Regulations:

Regents cab shall have 60 business days from the date the Commission approves this proposed decision to procure Workers' Compensation Insurance for all of its affiliated drivers, including all medallion holders and their secondary drivers, and to post the appropriate certificate of insurance under Rule 5H16. If at the end of 60 business days, Regents is not in compliance with this ruling, its permit to operate a color scheme shall be revoked.

Henry Epstein, Hearing Officer The San Francisco Taxicab Commission.

November 13, 2007