Agenda Item: 9

Consideration of Hearing Officer's Recommendations in Taxi Commission v. Bay Cab: [ACTION]

- **Bay Cab:** Consideration of Hearing Officer's decision regarding failure to provide worker's compensation and violation of Rules 5.A.3, 5.H.2, 5.H.3, 5.K.2, 5.H.16.

CITY AND COUNTY OF
SAN FRANCISCO

TAXI COMMISSION
MAYOR GAVIN C. NEWSOM

JORDANNA THIGPEN
Acting Executive Director

April 8, 2008

NOTICE OF DECISION

SUBJECT: Disciplinary Action

PERMIT HOLDER: Roger Cardenas, Bay Cab Company, 999 Pennsylvania St., San Francisco, CA 94107

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

FINDING 1:

By a preponderance of the evidence, Bay Cab is liable for the violation of Rule 5.A.3, not maintaining a current updated roster of permittees acknowledging receipt of Taxicab Commission Rules.

FINDING 2:

By a preponderance of the evidence Bay Cab is liable for the violation of Rule 5.H.2: no current list of all taxicab vehicles posted at the company and available for inspection.

FINDING 3:

By a preponderance of the evidence Bay Cab is in violation of Rule 5.H.3 for failing to post a current and complete drivers' roster and make it available for inspection.

FINDING 4:

By a preponderance of the evidence, Bay Cab is liable for the violation of Rule 5.K.2 for failing to keep copies on file for inspection of all lease agreements with every taxi permittee.

FINDING 5:

The Commission has not met its burden of proof that Bay Cab submitted a fraudulent document during its investigation of Bay Cab's compliance with Rule 5.H.16.

FINDING 6:

By a preponderance of the evidence, Bay Cab is an employer for worker's compensation purposes within the meaning of the Labor Code; its medallion holders are employees; and the secondary drivers are also employees within Bay Cab's integrated enterprise.

By a preponderance of the evidence, Bay Cab is liable for violating Rule 5.H.16, failing to display a copy of a Certificate of Worker's Compensation Insurance at its place of business.

FINDING 7:

Bay Cab is liable for a total of $1425 in penalties for the violations of Rules 5.A.3, 5.H.2, 5.H.3, 5.K.2, and 5.H.16

FINDINGS:

Bay Cab shall, within sixty (60) business days from the date the Commission approves these recommendations, pay a total of $1425 in penalties for violations of Rules 5.A.3, 5.H.2, 5.H.3, 5.K.2, and 5.H.16.

Bay Cab shall comply, within sixty (60) business days from the date the Commission approves this recommendation, with the requirements of Rules 5.A.3, 5.H.2, 5.H.3, 5.K.2, and 5.H.16.

Bay Cab shall have sixty (60) business days from the date the Commission approves this recommendation 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 sixty (60) business days, Bay Cab is not in compliance with this ruling its permit to operate a color scheme shall be revoked.

HEARING OFFICER: Henry Epstein, for the San Francisco Taxicab Commission
DATE of HEARING: 10 AM, November 17, 2006
ROOM 408, City Hall, #1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102

I. CASE: Bay Cab Company, Color Scheme
Roger Cardenas, Permit Holder, Manager

II. SUMMARY OF THE CASE

The Taxicab Commission charged Bay Cab with five alleged violations of the Rules and Regulations uncovered during a Taxicab Commission audit on March 10, 2006. The violations alleged were: **5H16**, failure to post notice of Workers' Compensation ["WC"] Insurance; **5H2**, failure to post a list of vehicles; and **5H3**, failure to maintain drivers' rosters. It also charged Bay Cab with **5K2**, failure to keep copies of lease agreements, and **5A3**, failure to distribute post a signed list acknowledging receipt by drivers of the Rules and Regulations. The Commission asked for substantial cumulated fines for each infraction. The Commission also alleged that Mr. Cardenas, the manager of Bay Cab, submitted a fraudulent certificate of WC to the Commission, although this was not among the explicitly enumerated charges.

The hearing officer found, by a preponderance of the evidence, that Bay Cab was liable for violation of 5H16; 5H2; 5H3; 5K2; and 5A3. The hearing officer denied the Commission designee's request for substantial cumulative fines as excessive, but assessed monthly fines with some enhancements to 5.... Etc. The hearing officer found that the allegation that Bay Cab had submitted a fraudulent document was not proved by a preponderance of the submitted evidence and declined to find Bay Cab liable for it. However, the hearing officer reserves to the Commission the right to bring a new complaint under MPC or the Rules if further evidence emerges of, *inter alia*, fraud; failing to cooperate with the Commission; or making false statements to the Commission.

Finally, the hearing officer gave Bay Cab sixty days from the Commission's adoption of this decision to procure proof of WC coverage for all of its affiliated drivers and recommended that Bay Cab's permit be revoked if it did not comply.

III. TESTIMONY AND PRESENTATION OF EVIDENCE

Testimony: Jack Brodnax, Commission Designee
Roger Cardenas, Permit holder, Manager, for Bay Cab

David B. Green, Esq. represented Bay Cab
Mr. Jack Brodnax brought the case for the Commission

IV. EXHIBITS:

A. "Bay Cab Fleet List" 2005/2006, dated 12/15/2005.
B. Fleet list, dated 10/04/2006

C. Bay Cab Driver Roster, dated 3/6/06
D. Bay Cab Driver Roster, dated 11/2/06
E. One page Receipt and Acknowledgement Form for Taxicab Rules and Regulations, with 28 signatures, dated 12/5/05 through 12/12/05
F. Blank, Bay Cab, Inc. Choice of Status agreement (drivers elect either "Self-employed Lease Driver" or "Employee Driver")
G. Blank, Bay Cab-Medallion Holder Agreement
H. Blank, Bay Cab Inc.-Taxicab Lease Agreement
I. Hearing Brief, David Green, Esq. for Mr. Cardenas: 11/17/06
J. Post- Hearing Brief, David Green, Esq. for Mr. Cardenas: 12/16/06
K. Brief ("Talking Points"), Mr. Brodnax for the Commission: 11/17/06
L. Complaint, Attachments 1-4
M. Hearing Officer Recommended Decision, June 20, 2005; Taxi Commission Notice of Decision, September 26, 2005 Bay Cab

V. COMPLAINT SUMMARY

The Complaint alleges ongoing violations of five Taxi Commission Rules uncovered during a Taxi Commission audit and interview conducted by Mr. Jack Brodnax with Mr. Cardenas on March 10, 2006. Two of these violations were previously cited and Mr. Cardenas admitted these, among others, during a prior hearing on December 3, 2004. EXBT. M. [1] The previously admitted violations are asterisked, below. In the language of the Complaint, the five violations alleged are:

5A3: No current updated roster of every permittee acknowledging receipt of rules and other printed matter.[2]

5H2: No current list posted of all taxicab vehicles posted at the company.

5H3: No current and complete drivers' roster.

5K2*: Did not maintain written copies of all lease agreements with every taxi permittee*

5H16*: Had no copies of any certificate of Worker's Compensation Insurance.*

Mr. Brodnax also alleged in the Complaint that a few weeks before his March 10, 2006 Bay Cab audit Mr. Cardenas submitted a fraudulent WC insurance certificate to the Commission, but this was not charged under either **5.A.2** (failure to cooperate with an investigation) or **5.A.9** (false statement made during an investigation) or MPC 1090(a)(iv).

VI. FOUR VIOLATIONS: EVIDENCE and DEFENSES

[1] The hearing was conducted by this hearing officer and he takes judicial notice of the attached Recommendation and the Commission Notice of Decision, Resolution 2005-60 [EXBT M].
[2] The full text of the five charged violations in contained in Appendix A.

1. 5A3: No current updated roster of permittees acknowledging receipt of Taxicab Commission Rules

Mr. Cardenas testified that at the time of the March 10, 2006 audit a clipboard he kept in the lobby of Bay Cab displayed a list of signatures pertinent to the 5.A.3 requirement. However, he admitted that the list was current only as of December 12, 2005. Mr. Brodnax objected that the list he saw was dated 2003. Mr. Cardenas admitted in his brief that the 2003 list was indeed the one Mr. Brodnax saw on March 10th, but testified that he had maintained subsequent lists, including that of December 12, 2005, submitted post-hearing [EXBT E].

Mr. Brodnax testified that on March 10, 2006, Mr. Cardenas showed him a binder or clipboard at the office, and when a document was available, he checked the "Yes" column on his Color Scheme Inspection sheet; when it was not available, he checked the "No" column [EXBT L]. Mr. Brodnax testified that the December 12, 2005 list was not available to him when he performed the audit and reiterated that all he saw was the 2003 list. He objected that the December 12, 2005 list submitted at the hearing was not authentic.

Mr. Cardenas "admitted that the top sheet or two had probably come off the clipboard and were lost." for the period between December and March 2006. However, Mr. Cardenas argued that he would have had to have forged hundreds of signatures to create or falsify the December 12, 2005 list.

The hearing officer denied Mr. Brodnax's objection to the December 12, 2005 list, but the question remained: why according to Mr. Brodnax were no lists produced for the period between December 12, 2005 and the March 10, 2006 audit?

Further damaging Mr. Cardenas' defense is the fact that the December 12, 2005 roster contained only 28 signatures, all dated between December 5th and 12th, representing only a small fraction of the 78 Bay Cab drivers listed under the drivers' rosters also submitted by Mr. Cardenas into evidence[EXBT. C, see 5.H.3. *infra*]. Rule 5.A.3 requires a signature by <u>each</u> driver working for a color scheme.

Mr. Cardenas argued that, in any event, since drivers take a mandatory class to get their A-cards at which they are informed about and given a copy of the rules, the requiring the cab company to distribute the Rules and post a list of the drivers who have received and signed for them is strictly *pro forma*.

The hearing officer does not agree that the list is *pro forma*. It appears to be part of the Commission's ongoing effort to educate drivers, keep them informed of the Rules and Regulations as well as other requirements, and augment compliance with the Rules.

Thus, even if, *arguendo*, Mr. Cardenas' is credible regarding the authenticity of the December 12, 2005 list, the list is incomplete and the loss of the lists from mid-December through mid-March is careless record keeping and violates Rule 5.A.3.

Finding

By a preponderance of the evidence, Bay Cab is liable for the violation of Rule 5.A.3, not maintaining a current updated roster of permittees acknowledging receipt of Taxicab Commission Rules.

2. 5H2: No current list of all taxicab vehicles posted at the company

Mr. Brodnax testified that Mr. Cardenas was unable to produce a list of taxicab vehicles during his March 10, 2007 audit. Mr. Cardenas testified that he maintained a second clipboard in the lobby outside his office containing past and current lists of all Bay Cab taxicabs operating under his color scheme. As evidence at the hearing he introduced a clipboard containing computer-generated lists of vehicles obtained "periodically" from the Airport Bureau of the Police Department. The hearing officer examined the clipboard, which contained various airport lists. Rather than taking the clipboard itself into evidence, he asked Mr. Cardenas to submit photographs of the clipboard *in situ*.

Mr. Cardenas testified that he kept the airport lists updated by handwriting new vehicles into the list and crossing out those no longer in service. One such list was generated on December 15, 2005 and contains handwritten marks. [EXBT. A]. A second list was generated on October 4, 2006 and also contains handwritten marks. [EXBT. B] Mr. Cardenas argued that he "obviously had [the lists] at the time of the [March 10, 2006] audit and was in compliance."

It is not obvious to the hearing officer that Mr. Cardenas had either the October 4, 2006 list or the December 15, 2005 list at the time of the audit.

In Bay Cab's favor, the lists that Mr. Cardenas submitted at the hearing contained the requisite information under 5.H.2.: the taxicab vehicle number, the motor vehicle license number, the vehicle identification number, the year and make of the vehicle, and the operating status of each taxicab vehicle.

Nevertheless, 5.H.2. also requires that "[a] copy of said list shall be available for inspection by any police officer engaged in the performance of their duty."[Emphasis added].[3]

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[3] Mr. Brodnax, as the Commission designee, functions in place of an officer of the Police Detail in regard to inspections.

Despite Mr. Cardenas' claim that he hung the list on the clipboard, Mr. Brodnax testified credibly that the current list was not made available to him for inspection when he asked for it on March 10, 2006. Mr. Cardenas responded, post-hearing, by submitting three photographs of what are appear to be lists on five clipboards hanging on a paneled wall, presumably outside his office. The photographs are undated and badly exposed. One reads "OLd VEH. ROSTERS." The evidentiary value of these photographs is negligible as regards the maintenance of ongoing vehicle rosters or their actual availability for inspection at the time Mr. Brodnax requested them. In addition, Mr. Cardenas' testimony that he obtained such lists "periodically" from the Airport Bureau, and updated them by hand, is insufficient to establish that he complied with the requirement of 5.H.2. to "post a current list of all taxicab vehicles at both their Primary Place of Business and where their vehicles are stored when not in service" and to make a copy of the list available for inspection when requested.

Finding

By a preponderance of the evidence Bay Cab is liable for the violation of Rule 5.H.2: no current list of all taxicab vehicles posted at the company and available for inspection.

3. 5H3: No current and complete drivers' rosters

The hearing on 5H3, regarding the drivers rosters, presented many of the same issues raised by 5.H.2, the list of vehicles.

Mr. Brodnax testified that drivers' lists were not made available for inspection during the March 10, 2006 audit. When asked by the hearing officer what lists he saw, Mr. Brodnax testified that he "saw nothing."

Mr. Cardenas stated that "Bay Cab's computer could print out a list of current drivers at any time and that such a list, along with past lists were kept on a clipboard in Bay Cab's office and were available for inspection at the time of the audit."[Cardenas' Post-hearing Brief, p. 2, emphasis added]. As with the vehicle lists, Mr. Cardenas maintained that "there was room on the driver roster to add any new information by hand." Id, p. 2. Mr. Cardenas offered into evidence two lists, one hand-dated 3/6/06 (about the time of the audit), the other hand-dated 11/2/06 (two weeks before the hearing). [EXBTs. C and D, respectively]. There is no indication when these lists were actually generated or when the dates were hand-written in. Aside from the dates, there are no other hand-written entries on the lists.

Mr. Cardenas stated that new information was put into the computer "from time to time by one of the other owners." [Post-hearing Brief, *supra*, p. 2].

Mr. Cardenas argued that it would have made no sense for him to withhold the driver lists when "the computer was capable of printing out such a list at any time." Post-hearing Brief, *supra*, p. 2, emphasis added. This raises the issue of exactly when the lists

submitted into evidence were generated and why they were not, according to Mr. Brodnax's testimony, actually made available the day of the audit or shortly thereafter, given Mr. Cardenas' assertion that "the computer [could] print out the list at any time."

In Mr. Cardenas' favor, except for a few omissions here and there, the lists offered into evidence appeared to include the requisite information under 5.H.3: Driver's name, home address, home telephone number, "A" card number and California driver's license number. [EXBT. B; C]

Nonetheless, 5.H.3. also requires that "A copy of said roster shall be available for inspection by any police officer.... The roster is to be made available twenty-four (24) hours a day and updated on a weekly basis."

Neither Mr. Cardenas' testimony nor the drivers' lists offered were sufficient evidence that Mr. Cardenas regularly updated the lists on a weekly basis. In addition, Mr. Brodnax was credible that the lists were not made available when he audited Bay Cab on March 10, 2006, even if, *arguendo*, they "could have been made available" per Mr. Cardenas statement [Post-hearing Brief, *supra*, p. 2. emphasis added]. Finally, the testimony and photographs referring to the clipboards share the same evidentiary disabilities here as under 5.H.2., above.

Finding

By a preponderance of the evidence Bay Cab is in violation of Rule 5.H.3. for failing to post a current and complete drivers' roster and make it available for inspection.

4. 5K2: Did not maintain copies of all lease agreements with every taxi permittee.

Rule 5.K.2. requires the color scheme to "keep copies of all lease agreements between medallion permit holder, color scheme permit holder, and all drivers on file for inspection by the Taxicab Commission or their designee. All such agreements must be in writing and copies shall be provided to all parties involved."

Mr. Brodnax testified that Mr. Cardenas produced "samples of documents" that he used but that he would not have marked "No" on his audit sheet had Mr. Cardenas produced what was required, a signed document for each and every driver.

In reply, Mr. Cardenas stated that "there in fact was available for inspection at the time of the audit a written agreement with every permit holder or other type of driver operating under Bay Cab's color scheme." [Post-hearing Brief, *supra*, p. 3] In support of this contention, Mr. Cardenas submitted three blank copies of form contracts under Bay Cab's name: a Choice of Status form (Employee-Driver or Lease-Driver) [EXBT. F]; a Bay Cab-Medallion owner Agreement for the use of the Bay Cab color scheme [EXBT. G]; a Bay Cab, Inc.-Taxicab Lease Agreement [EXBT. H].

Mr. Cardenas argued that "[t]hese documents are form contracts that describe very common arrangements that exist in the taxicab industry in San Francisco." [Post-hearing Brief, *supra*, p. 3]

Mr. Cardenas argued that "[t]he idea that [Bay Cab] had these contracts printed up with its name and then just didn't bother to have anyone sign them makes no sense." But Mr. Cardenas submitted no actual signed copies at the hearing, or post-hearing, to support his statement that there was "a written agreement with every permit holder or other type of driver operating under Bay Cab's color scheme." When Mr. Cardenas asserts that an agreement "was available" for every driver," he omits to say whether he actually made any signed agreement available at the time of inspection. Even if, *arguendo,* the agreements were available, that would not satisfy the 5.H.2. requirement that they be made available for inspection when audited..

At the hearing, Mr. Brodnax testified as follows:

HO: Mr. Cardenas has stated that he had available to you and made available to you [lease agreements] for every driver on his roster during the 2006 audit.

JB: Not correct or I would not have marked the box "No" on the Color Scheme Inspection Form. He had samples of documents that he used.... But he did not have what is required, a signed document for each and every driver.

HO: Were any such signed, filled out agreements produced that day?

JB: I honestly don't recall...

However, Mr. Brodnax added:

JB: He did not have nor show to me copies for every driver. He showed me some lease agreements. They did not rise to the level necessary for me to pass him on the audit in the number of such contracts.

Mr. Brodnax's failure to recall whether any lease agreements were actually produced or missing on the day of the audit is troubling. However, it is not fatal to the Commission's case. Mr. Cardenas had an opportunity at the hearing and post-hearing to produce actual signed agreements rather than samples to bolster his assertion that "there in fact was available for inspection at the time of the audit a written agreement with every permit holder or other type of driver operating under Bay Cab's color scheme." He did not do so.

The hearing officer finds that the blank contracts submitted by Mr. Cardenas insufficient evidence of compliance with 5.K.2. Mr. Cardenas' company name may be on the forms, but he submitted no copy of a signed contract by any particular driver. Mr. Cardenas' general assertion that such contracts are common in the industry, even if true, is irrelevant to whether, as required, Mr. Cardenas actually had on file and actually produced for

inspection a substantially complete set of copies of signed documents when Mr. Brodnax audited him.

It is more likely than not that Mr. Cardenas did not execute a complete set of leases as required under 5.K.2; and more likely than not that he was unable to produce, and did not in fact produce such a complete set for audit as required under 5.K.2.[4]

Finding

By a preponderance of the evidence, Bay Cab is liable for the violation of Rule 5.K.2 for failing to keep copies on file for inspection of all lease agreements with every taxi permittee.

VII. ALLEGATION THAT BAY CAB SUBMITTED A FRAUDULENT DOCUMENT

Mr. Brodnax alleged that "on March 16, 2006 when we requested proof of Workers' compensation coverage, from Mr. Cardenas, we received by fax an altered copy of a Workers' Compensation [sic] which was in fact fraudulent." [L, ii]

The Certificate of Workers' Compensation Insurance from State Compensation Insurance Fund [SCIF] is dated May 5, 2005 showing WC insurance effective through May 4, 2006 (policy number 1809790 – 05). It is date-stamped by the Taxicab Commission February 21, 2005. However, Mr. Brodnax states that he received it by fax on March 16, 2006. There is no discernible fax date or Commission address on the document.

Mr. Brodnax was not available at the hearing, or post-hearing, to address this discrepancy.

A letter from SCIF, dated June 22, 2004, for the period April 15, 2004 through April 15, 2005 shows policy number 1772687 – 04 cancelled effective June 5, 2004. This may have aroused Mr. Brodnax's suspicions, but the two policies are different and the second, allegedly altered policy could have been procured after the first one was cancelled.

In any event, Mr. Brodnax did not describe how the May 5, 2005-May 4, 2006 (policy number 1809790-05) was altered.

Finally, although Mr. Brodnax could have charged Bay Cab under either **5.A.2** (failure to cooperate with an investigation) or **5.A.9** (false statement made during an investigation), he did neither in the Complaint. Without more specificity or evidence the fraud charge is too vague to resolve. Merely as stated in the Complaint, Mr. Brodnax's allegation provides insufficient notice to Mr. Cardenas of what conduct of his is subject to penalty.

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[4] This does not imply that these contracts are incompetent evidence for the Workers' Compensation issue in this case under 5.H.16 (*infra*) when combined with Mr. Cardenas' testimony on this issue.

Finding

The Commission has not met its burden of proof that Bay Cab submitted a fraudulent document during its investigation of Bay Cab's compliance with Rule 5H16.

VIII. VIOLATION of RULE 5H16

Bay Cab was charged with violating Taxicab Rule and Regulation 5H16: failing to display a copy of a Certificate of Workers' Compensation Insurance at its place of business.

Mr. Cardenas testified as follows:

HO: Do you have any WC certificates for your drivers?

RC: No sir, I don't.

HO: So you're not covered, essentially.

RC: That is correct.

HO: And that's why you don't have certificates.

RC: That is correct.

HO: Because you consider [affiliated drivers] independent contractors rather than employees.

RC: Correct.

IX. RULE 5H16 and MPC 1147(4)

The hearing officer interprets 5H16, a posting requirement, as a means of supplying evidence to the Commission that companies have procured Workers' Compensation [WC] coverage for their affiliated drivers. Thus, the charge that Bay Cab failed to post a notice of WC coverage is essentially a charge that Bay Cab 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)

X. BAY CAB'S DEFENSES

1. Rule 5H16 exceeds and/or is inconsistent with its statutory authority under MPC Section 1147.4 and is therefore void.

Mr. Cardenas argued as follows.

Rule 5H16 exceeds and is inconsistent with the statutory authority under which it has been promulgated and is therefore void. SFPC Section 1147.4 requires workers' compensation only in compliance with state law. Rule 5H15 is not so limited. Moreover, if 5H16 is held to be consistent with SFPC 1147.4, then SFPC 1147.4 is inconsistent with state statute that requires workers' compensation insurance only for "employees." [Hearing Brief, EXBT. p.2; Note that Mr. Cardenas mislabels MPC as SFPC, but the designation is clear.]

In his post-hearing brief, Mr. Cardenas acknowledges that "[t]he purpose of the rule [5H16] is intended to implement SFPC 1147.4." [Post-Hearing Brief, EXBT. J, p. 7]. He also acknowledges that Rule 5H16 derives its authority from SFPC 1147.4. [EXBT. J,4.] Given this nexus of authority and policy, the hearing officer does not understand how Mr. Cardenas construes Rule 5H16 to be inconsistent with MPC 1147.4.

Moreover, even if, on its face, 5H16 does not contain language that limits it to the WC requirements of state law, this does not mean it effectively exceeds the authority of MPC 1147.4. If Rule 5H16 is intended to implement MPC 1147.4, and the latter requires compliance with "all applicable statutes concerning Workers' Compensation," it is not clear how Rule 5H16 actually exceeds MPC 1147.4, or state law itself. 5H16 could be inconsistent with state law even in conjunction with MPC 1147.4 if it mandated more than state law did on the substantive issue of who is required to carry WC. But that is precisely the issue at hand.[5] Put another way, Rule 5H16 is only inconsistent with 1147.4, and exceeds it, if Bay Cab is not an employer (and its affiliated drivers not employees) and nevertheless Bay Cab is required to post a certificate of WC insurance. Only if Mr. Cardenas presupposes that his affiliated drivers are not employees may he assert that the WC posting requirement is inconsistent with state law. But that begs the central question of this case.

Finding 1.

Bay Cab has not sufficiently established that Rule 5H16 exceeds and/or is inconsistent with its statutory authority under MPC Section 1147.4.

2. Rule 5H16 is void for vagueness

Mr. Cardenas argues that 5H16 is "void for vagueness" and thus unconstitutional under both the Due Process clause of the 14th Amendment of the U.S. Constitution and Article I, Section 7 of the California Constitution.

[5] For a fuller discussion of the consistency among Taxicab Rules and Regulations, MPC 1147.4 and California state law, see the Regents Cab case attached to this decision as Appendix B; see especially sections II. A-B of that decision.

Mr. Cardenas argues that Rule 5H16 is not "sufficiently explicit to inform those who are subject to it of what conduct on their part will render them liable to its penalties." [EXBT J, citing Connally v. General Const. Co., (1926) 269 U.S. 385.]

This argument appears to rest on the fact that the requisite employer-employee relationship is not spelled out in the language of 5H16 nor articulated as a requirement for its application. According to this reasoning, a person or company charged with violating Rule 5H16 has insufficient notice of its application and scope. Since neither Rule 5H16 nor MPC 1147.4 spells out what constitutes an employer-employee relationship, Bay Cab has insufficient notice under Rule 5H16 as to whether it is required to carry WC, and any penalty imposed for failure to post a WC certificate is unconstitutional on due process grounds.

MPC 1147.4 requires compliance with "all applicable state statutes concerning Workers' Compensation and any applicable regulations adopted pursuant to those statutes." If there is any vagueness to Rule 5H16 it derives from the state WC statutes themselves - but these have not been declared unconstitutional. The state statue creates a presumption of an employer-employee relationship where a worker "provides a service." The determination of employee status "is an inherently difficult one," but this does not mean it is standardless.[6] Indeed, in interpreting the WC statutes, the Courts have come down squarely in favor of the employer status of taxicab companies. Mr. Cardenas in his post-hearing brief acknowledges the controlling case law but tries to distinguish it on the facts of Bay Cab.[7] Bay Cab appears well aware of the criteria governing the employee versus independent contractor issue, even if it has chosen to deny that it is an employer. Bay Cab's should not trade on the alleged "vagueness" of either Rule 5H16, MPC 1147.4, or the state WC statutes themselves to claim insufficient notice in this proceeding.

Rule 5H16 alone or in conjunction with MPC 1147.4 gives companies sufficient notice that they may be charged and penalized for not carrying WC insurance for their drivers. Thus, even if the distinction between employee and independent contractor is inherently difficult, when one is given notice of a requirement to post a certificate of WC coverage, that notice is not itself vague. It is sufficient to apprize Mr. Cardenas of what conduct is required and "what conduct will render him liable for penalties." [Connally, ibid].

Furthermore, the hearing officer believes that in fact, Bay Cab and Mr. Cardenas had actual notice of the Commission's requirement to carry WC. In this respect, Mr. Cardenas' December 3, 2004 hearing for violating of Rule 5H16 (among others violations) is instructive. Even though Rule 5H16 was not set forth clearly as a separate charge in the Complaint, this hearing officer found after testimony from Mr. Cardenas that he was indeed aware that he was being charged with 5H16, and that proper notice had been given him to contest the charge.

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[6] The California Supreme Court refers to "an inherently difficult determination whether a provider of a service is an employee or an excluded independent contractor for purposes of workers compensation law. [S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 354-355.

[7] Bay Cab attempted to distinguish its case from the employer-employee relationship the court found in Yellow Cab Cooperative , Inc. V. Workers' Comp. Appeals Bd. (1991) 226 Cal.App.3d 1288.

At that hearing, Mr. Cardenas admitted that [he] carried WC for only a very small percentage of his cabs, but disputed that it was a requirement... He claimed he had never been notified by the Taxi Commission that he was required to [do so]. His only obligation, he believed, was to post WC notices. He argued that he had in fact posted a current notice regarding Worker's Compensation in his office, but was not sure it was up to date." [EXBT. M, p. 4]

This hearing officer found Mr. Cardenas liable for violation of Rule 5H16, **unless the Taxi Commission upholds his legal position**." [EXBT. M, p. 5, bold print in the original]

In fact, the Taxi Commission did not uphold Mr. Cardenas' legal position. On September 26, 2005, the Commission ordered Mr. Cardenas to "pay all fines, bring all violations into compliance within three months, and serve one year probation [from October 11, 2005 to October 11, 2006]. [EXBT N, emphasis added].

Mr. Cardenas had to know what the Commission required of him under Rule 5H16 when it issued the current Complaint on October 3, 2006, still within the probationary period of the previous Complaint. On that date, Mr. Brodnax faxed Mr. Cardenas a set of questions regarding his WC coverage pursuant to a discussion with him that he had during the March 10, 2006 audit:

i) when was the last valid WC policy in force at Bay Cab? ii) Do you currently carry a valid WC policy now? [EXBT L, attachment 2].

Mr. Brodnax stated in the Complaint that Mr. Cardenas failed to respond to his fax. [ibid, p. 2].

Indeed, Mr. Cardenas appeared to acknowledge his obligation to post a certificate of WC coverage and to cover his affiliated drivers at the time he submitted a State Fund Certificate of Workers' Compensation Insurance dated May 5, 2005 (with an expiration date of May 4, 2006) and with the name Bay Cab subscribed.

Thus, on the due process issue of whether Rule 5H16 provided sufficient notice to Mr. Cardenas, the WC certificate Mr. Cardenas submitted is competent evidence that Mr. Cardenas knew what the Commission required by Rule 5H16. He cannot claim here, as he did in 2004, that the Commission has not notified him of the 5H16 requirement. (**V.A.3**, *infra*).[8]

The hearing officer finds, therefore, that the Rule 5H16 violation charged in the Complaint satisfies the due process threshold for constitutionally sufficient notice of the charge against Bay Cab, and moreover that Rule 5H16 contains an articulated standard of what conduct subjects Mr. Cardenas to penalties and what conduct is expected of him,

[8] The fact that the hearing officer found that the Commission did not prove fraud (Finding, *supra*, p.) is irrelevant to the notice issue

i.e., not only to post a certificate of WC coverage, but to actually cover his affiliated drivers.

Finding 2.

Bay Cab has not established that Rule 5H16 is void for vagueness.

3. The Commission has not met its burden of proof

Mr. Cardenas argued that Bay Cab is not an "employer" as required by WC law and neither the medallion holders affiliated with Bay Cab nor the drivers driving under the medallion holders are "employees" of Bay Cab. Thus, he is not required to purchase WC coverage for either category of drivers under Cal. Labor Code 3700. Mr. Cardenas asserted that the Commission "presented no evidence to establish that [Bay Cab] had any employees." [EXBT. J, p. 5].

But this does not mean that no evidence at all was presented on this issue.

Mr. Cardenas testified that "he had no employees and that he ran things himself." He also testified that there was never a driver who opted be an employee." [EXBT. J, 2]. That testimony is evidence. Accurate or not, it goes to Bay Cab's relationship with its drivers.

In addition, Mr. Cardenas submitted, as typical of his contracts with drivers, a blank Lease Agreement, a blank Choice of Status Document, and a blank medallion owner-Bay Cab Agreement and claimed that it would be absurd to hold that he had these documents drawn up but did not execute them. Mr. Cardenas testified that not one of his drivers chose to be an employee, choosing independent contractor status instead. That testimony and the three documents are also competent evidence on the WC coverage requirement in this case.

Mr. Cardenas overstates the Commission's burden of production. He also overstates its burden of proof, given the competing presumption that one "in service to another" is an employee.[9] Even if no evidence were presented by the Commission, the hearing officer has sufficient evidence offered by Mr. Cardenas himself to determine whether he violated Rule 5H16.

Finding 3.

Bay Cab has not established that the Commission has not met its burden of proof.

XI. THE FACTS ACCORDING TO BAY CAB

[9] Labor Code 3357. Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.

In its post-hearing brief, Bay Cab gave this general description of business practices in the S.F. Taxicab industry:

Color Scheme Holders [CSH] can and often do, let other medallion holders use this color scheme and the name that goes along with the color scheme. For this service they charge a modest fee. In the smaller companies... like Bay Cab, the CSH does not usually own or service the vehicles (except for the one under which they operate their own medallion) own the dispatch service, provide insurance or in any manner control the drivers' activities. They are required by the SFPC and/or the Rules to ask the medallion holders to follow certain rules, but they have no means of enforcing these rules except to report the medallion holders to the Taxi Commission or the Cab Detail of the Police Department. The Medallion holders and drivers do not provide any service to the CSH; accordingly, they are not employees of the CSH for purposes of WC insurance. It is the opposite, the medallion holders and drivers receive a service from the CSH. Both parties are true independent contractors in the true sense of the term.... In [these] relationships described as being typical of the driver that exists today in the taxi industry in San Francisco, the driver controls the medallion, owns the vehicle, provides repair and maintenance for the vehicle, pays for an independent telephone and dispatch service, obtains and pays for liability insurance and furnishes all other necessary supplies. [Emphasis added].[EXBT. J, p.].

This statement is problematic for several reasons.

Bay Cab submitted a Medallion Holder Agreement that on its face appears to contradict the underlined phrases above. Item 4 of that agreement reads as follows: "Bay Cab-Roger Cardenas, mgr. – agrees to provide the following service: A. Dispatch service." [EXBT G].[10]

Moreover, the generalized description provides little else of probative value. It contains non-specific clauses that are difficult to assess: "In the smaller companies... like Bay Cab... the CSH does not usually own or service the vehicles... own the dispatch service.... provide insurance... or in any manner control the drivers' activities." The last phrase, referring as it does to the important issue of control in WC cases, has the added defect of being conclusionary.

A somewhat clearer picture of Bay Cab's actual business practice emerges from Mr. Cardenas' testimony at the hearing.

The hearing officer asked Mr. Cardenas to explain how drivers ended up being designated as independent contractors rather than employees of Bay Cab. Mr. Cardenas testified that he offered prospective drivers an election of status, i.e., he presented them with a form that explained the difference between independent contractor ("self-employed lease driver") versus employee. [EXBT F]. However, as of the date of the hearing, not a single driver had chosen to be an employee.

The form states that the lease driver acknowledges "that you are not an employee for the purposes of workers' compensation, unemployment insurance, state employee disability insurance and that you are giving up those benefits" and that if they elect lease driver status "you will be deemed ineligible for those statutory benefits."

[10] Whether Bay Cab owns the dispatch service or merely "provides" it is inessential. Bay Cab asserts that the drivers pay for an independent dispatch service; in its Lease Agreement Bay Cab provides the dispatch service, indicating a closer nexus between the company and its drivers.

A larger paragraph states, in rather forbidding terms, what will be required of any driver who elects employee status. The requirements are *inter alia* that the fare/bookings drivers receive from passengers will be company property, not the driver's property. The company will assign what shift the driver will be working, and pay him or her at the end of the week after deductions for federal and state income taxes, FICA, etc. Drivers are required to report tips to the IRS.

Drivers who choose employee status are instructed, in English, to handwrite the following words underneath their signature indicating acceptance of the contract: "I have read and understand this document and understand English." It is not clear what drivers of limited English are expected to do or write.

Mr. Cardenas testified that those who do not sign as employees (*i.e.*, all his drivers) sign as independent contractors under the rubric "Self-employed Lease-Driver." Under that heading they are referred to another form entitled "Bay Cab, Inc-Taxicab Lease Agreements" which is to govern their relationship with Bay Cab. [EXBT H]. Underlined in bold is the following sentence: **Lessee expressly understand** [sic] **and agrees that as an independent contractor, Lessee is not entitled to Workers' Compensation Coverage provided by the Company**.

Yet another agreement binds medallion holders to Bay Cab. [EXBT G]

The hearing officer explored whether the choice of status agreements and the lease agreements operated as contracts of adhesion, i.e., take-it-or-leave-it contracts which, because of the superior bargaining power of one side, leave the other side no choice or negotiating room:

HO: Do you tell drivers the benefits of lease driver versus employee driver?

RC: Yes.

HO: Do you explain you give up unemployment, WC and state disability benefits?

RC: Yes.

HO: 100% choose lease status?

RC: That is correct.

Mr. Cardenas testified that there was an $85 gate fee for those who elected to be lease drivers versus a $91.50 gate fee for employees. This represented a $6.50 saving per shift for choosing lease fee status and forfeiting important employee rights.

Mr. Cardenas' testimony did not resolve doubts that these agreements were really arm's length contracts as opposed to contracts of adhesion.

The hearing officer elicited further testimony regarding the relationship of medallion holders, who signed a second agreement with Bay Cab, to the secondary drivers. [EXBT G].

HO: How closely connected are medallion holders with secondary drivers? Are [the drivers] just a floating cast of characters? Are long term drivers associated with long time medallion holders?

RC: Yes. [to the final question]

Mr. Cardenas testified that medallion holders normally had one extra driver working for them, except for those that confined themselves to single-shifts of their own.

David Green, Esq., representing Mr. Cardenas at the hearing, suggested that the medallion holders might be seen as partners with their secondary drivers, that they were the "equitable owners" while they and the drivers under them shared expenses and the vehicle itself.

These facts point to considerable integration between medallion holders and drivers and - given the contracts between the company and the medallion holders - integration across all three. The enterprise integration standard for determining the presence of an employee relationship is discussed below.

XII. CONTROLLING LAW: INDEPENDENT CONTRACTOR VERSUS EMPLOYEE

Bay Cab 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. Bay Cab maintained that since it is not, under either of these arrangements, an "employer" under the state Labor Code, it is therefore 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 presence of medallion owners between the company and the drivers appears to bypass the obligation to insure all drivers, *qua* employees, under the WC system.

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." S.G. Borello & 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.

Even if Bay Cab's control of affiliated drivers was minimal at most, it could properly be called an employer for WC purposes. 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 applies 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, Bay Cab provided little evidence for counterbalancing the scale: i.e., proof that the medallion holders were true independent contractors. Bay Cab argued that in "typical" relationships in San Francisco, "the driver controls the medallion, owns the vehicle, provides repair and maintenance for the vehicle, pays for an independent telephone and dispatch service, obtains and pays for liability insurance and furnishes all other necessary supplies." [EXBT. J, p. 6-7] This statement is overly generalized, conjectural and as indicated above, disingenuous. By focusing on "typical" relationships, it avoids giving evidence of Bay Cab's actual relationship with its medallion holders and drivers, i.e., its own pattern and practice. It does not provide a quantum of evidence that Bay Cab's drivers are independent contractors.

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 Bay Cab business structure, the hearing officer finds that for WC purposes, Bay Cab 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. Under the hearing officer's analysis, both secondary drivers and medallion holders are employees, i.e., they 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. Both medallion holders and their secondary drivers must be insured.

XIII. YELLOW CAB

Bay Cab attempted to distinguish its drivers from the employee-drivers the court had found in Yellow Cab Cooperative , 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.

Bay Cab 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.*, Bay Cab was not an employer, and the medallion holders and drivers were not employees. According to Mr. Green's post-hearing brief, "Yellow Cab owned or controlled the medallion, owned the vehicle used, provided repair and maintenance service, provided telephone and dispatch service, provided liability insurance and furnished 'all necessary supplies.'"

Bay Cab argued that much has changed in the taxicab industry, especially in San Francisco, since the Yellow Cab decision. Again:

> In the relationships described above as being typical of the driver that exists today in the taxicab industry in San Francisco, the driver controls the medallion, owns the vehicle, provides repair and maintenance for the vehicle, pays for an independent telephone and dispatch service, obtains and pays for liability insurance and furnishes all other necessary supplies. [EXBT. J, p. 6-7]

Even if this were a *bona fide* and accurate characterization of its actual business practice, it does not exempt Bay Cab from carrying WC, given the compelling public policy of covering workers for workplace injuries and the trend of cases since Yellow that have emphasized an "enterprise integration" test for employment status and that have further loosened the factors of control. [See, especially, JKH Enterprises , Inc. v. Department of Industrial Relations, 48 Cal. Rpt. 3d, 563, 2006, *infra.*

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

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

The California Supreme Court decided Borello 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 Enterprises, Inc. v. Dept. of Industrial Relations (2006) Cal Rptr. 3d 563, 578]

Borello 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]

Borello 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 integration of the workers into the heart of Borello's business is a strong indicator that Borello functions as an employer." 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 necessary 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 non-tortious 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.

XV. 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 Borello, 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. [Emphasis added].

Bay Cab presented ambiguous evidence on whether its drivers operated under Bay Cab's own dispatch service (or one "provided" by Bay Cab) as opposed to an independently-procured dispatch services. From its Medallion Holder agreements [*supra*, EXBT. G], it appears that at least medallion holders operated under a Bay Cab dispatch service. That is an even tighter nexus than in JKH, where couriers did not appear to be under control of its dispatch service at all.

JKH solicited customers for its courier service. However, other than providing a telephone book listing of its name and dispatch number, Bay Cab does not appear to solicit riders. However, this cuts both ways. Bay Cab does 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 Bay Cab. It is a function of the San Francisco cab industry. If obtaining riders for the drivers is not an essential part of Bay Cab' function, it is moot as an element of control, not evidence of a lack of control. Thus, the ambiguous status of its dispatch service or the fact that unlike JKH, Bay Cab may 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, the facts of JKH are directly relevant to Bay Cab.

Bay Cab asserted that cab drivers in San Francisco (and presumably its own drivers) "controls the medallion, own the vehicle, provide repair and maintenance for the vehicle, pay for an independent telephone and dispatch service, obtain and pay for liability insurance and furnish all other necessary supplies." [EXBT J, p. 6].

If its choice of status form is to be believed, Bay Cab does not assign shifts to its drivers. Only if a driver accepts employee status will "the company assign you what shift you will be working." [EXBT F]. In JKH, all drivers set their own schedules and choose their own driving routes, and JKH had only a vague idea of where its working drivers are during the business day.

In JKH, the owner had never met some of the drivers. Mr. Cardenas testified that he met the secondary drivers and explained the choice of status and lease-driver agreements to them. Thus the nexus between the company and its secondary drivers is closer than between the company and its couriers in JKH. This is especially true if Mr. Cardenas' testimony is correct on the ratio of medallion holders to secondary drivers. Mr. Cardenas

testified that the usual ratio of medallion holder to driver was 1:1. In this respect, there appears a greater degree of integration than in JKH.[11]

According to its testimony, all Bay Cab drivers signed the choice of status agreement and the Taxicab lease agreement in which they acknowledge that they are independent contractors. EXBT. F. These are similar to the Independent Contractor Profiles that the JFK court discounted.

Conclusion

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

XVI. THE SECONDARY FACTORS

In light of its depiction of relationships within the taxicab industry as "chaotic," Bay Cab argues against a monolithic approach to deciding employer-employee/employer-independent contractor relationships.

Borello anticipates this problem:

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

[11] Moreover, it is worth noting that both the Lease Agreement and the Medallion agreement require the driver and medallion holder respectively to report all accidents, and cooperate with the Bay Cab when asked to assist in the company in making settlement; securing and giving evidence; and attending hearings, depositions or trials. This evidences a degree of legal integration that would not be expected with regard to a true independent contractor.

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

The right to discharge at will, without cause

Bay Cab submitted a sample lease agreement the term of which was one week or seven days. This term automatically renewed unless either party timely informed the other of its desire not to renew. This appears to give Bay Cab the functional equivalent of the power to "discharge" a driver "at will." In addition, the Bay Cab-Medallion holder Agreement "terminate[s] upon notice from either party.

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 Bay Cab. The business of drivers and medallion holders is the cab business, the business of Bay Cab.

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, Bay Cab, 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.*

The Bay Cab-Taxicab Lease Agreement reads as follows:

"Company possesses equipped taxicabs and operates under rights granted by the City of San Francisco... Company shall deliver the leased taxicab in good working order, properly licensed, and with a full tank of fuel. The taxicab shall be equipped with a taximeter, a radio, identifying decals and seals and other equipment prescribed by the Regulatory authorities. Company will try to provide the same vehicle to Lessee for each lease period.

Under JKF, ownership of the vehicle by the company is not dispositive. However, from the terms of its lease agreement it appears that Bay Cab is the owner of some of the cabs, and thus "supplies the instrumentalities, tools, and place of work for the person doing the work". This belies Bay Cab's argument that the situation in San Francisco has changed drastically since Yellow was decided sixteen years ago, even if, *arguendo*, currently more drivers "control the medallion and own the vehicle." [EXBT J, p. 6].

In addition to supplying vehicles, Bay Cab supplies the lot or staging area for the drivers. They do not work out of their own homes, offices, parking spaces or private garages as independent contractors might be expected to do.

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

Although drivers leases are short term, seven day agreements, Mr. Cardenas answered "yes" to the hearing officer's question of whether "long term drivers are associated with long term medallion holders." 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.

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.

Even so, "the 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, even if the medallion holders in fact pay Bay Cab, rather than *vice versa*, this 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 Bay Cab business. The medallion holders and the drivers are part and parcel of the business. Bay Cab is not merely providing an assembly point for various vehicles. Bay Cab is a color scheme that has applied for a color scheme permit from the City.

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

Under Borello, "the label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." Borello, *supra*, p. 349. Bay Cab testified that all its drivers and medallion holders chose independent contractor or Lessee status." [Emphasis

added] By signing the Choice of Status and Taxicab Lease agreement the drivers "agree" that they are self-employed, independent contractors. [EXBTS F, H]

Mr. Cardenas did not offer testimony, submit declarations, or present other supporting evidence from drivers imparting their understanding of their working relationship with Bay Cab or regarding any negotiation about that relationship or the form they purportedly signed. However, if Mr. Cardenas's testimony is accurate, all secondary drivers sign the lease agreement form. All choose a uniform status that appears carefully crafted to exempt Bay Cab from carrying WC and other forms of worker protection. It is not clear whether all the medallion holders sign the lease agreement form (those owning their own vehicles would appear not to), yet they too sign a form which requires them to "pay for their own insurance." Therefore, these forms appears to be very weak evidence of the actual relationship between the drivers and Bay Cab 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

The weight of the various secondary factors articulated in Borello argues against an independent contractor status for any of Bay Cab's drivers.

Findings

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

By a preponderance of the evidence, Bay Cab is liable for violating 5.H.16, failing to display a copy of a Certificate of Workers' Compensation Insurance at its place of business.

XVII. REQUEST FOR PENALTIES and BAY CAB'S DEFENSES

Mr. Brodnax requested that Bay Cab be cited and fined for the above violations on a continuous basis following a penalty for first and second offenses. For the **5H16** violation he calculated the offenses at $75 for the first offense, $150 for the second, and then for the third, $450 per day through October 3, 2006, totaling **$380,650**, and continuing until Bay Cab "comes into compliance or accepts a settlement offer from the Taxicab Commission."

Mr. Brodnax does not specify cumulated amounts for each violation of **5A3, 5H2,** and **5H3** respectively, nor the total cumulated amount for all three. He does cite each of these violation at $75, but with no increase for second or third violations. He left out the penalty for **5K2** completely. Finally, he provides no overall total other than offering to

"settle in compromise [all violations] for $200,000." This total settlement offer appears to include **5H16** as well.

Mr. Brodnax justified the large penalties by describing Bay Cab as "grossly negligent" and having "made more than one million dollars in illegal profits by failing to follow Rule 5H16." At the hearing he also asserted that Bay Cab gained an unfair business advantage over its competitors because it did not pay WC and they did. He did not offer evidence on this proposition.

Bay Cab objected that unfair business competition was not specifically charged in the Complaint and that in any event an administrative hearing was not an appropriate forum to bring an action for violating state law against unfair business practices [EXBT post-hearing brief].

The hearing officer sustains the first of these objections on its face and therefore finds it unnecessary to reach the second.

In addition, Bay Cab objected that **i)** the Complaint provided insufficient notice of the penalties being sought for particular violations; **ii)** the Complaint cited no controlling legislative authority for continuous or cumulative fines of this magnitude; and **iii)** the fines were excessive under the 8th Amendment of the U.S. Constitution and Article One, Section 17 of the California Constitution.

i. Notice of Penalty amount

As regards **5K2**, there is no notice of the penalty amount in the Complaint and Bay Cab's objection to being subject to a **5K2** penalty on the basis of the language of the Complaint is sustained on due process grounds.

As regards **5A3, 5H2,** and **5H3,** the Complaint does call for $75 penalties for first violations, but does not articulate subsequent enhancements for subsequent violations. On the basis of the language of the Complaint, only the initial $75 for each initial violation may be imposed.

For the **5H16** violation the Complaint requests $75 for the first offense, $150 for the second, for the third $450, and then $450 continuing on a daily basis. Although the first three penalties are intelligible, the continuing violation penalty that adds nearly $380,000 lacks controlling authority and is excessive (see, *infra*).

ii. No legislative authority for continuous or cumulative fines

Mr. Brodnax settles on the series $75, $150, $450 imposed for "regulations [*sic*] classified as "Minor," "Moderate" and "Major" under Commission Rules."[12] However, he misunderstands the timeline for imposing these fines:

Under MPC 1187(a), the Taxi Commission may impose administrative penalties for violations of the Commission's rules and regulations, in accordance with the procedures established under MPC Section 1188.

For regulations classified as Moderate under the Commission's Rules, there shall be a penalty not to exceed $75 for the first violation, $150 for a second violation of the regulation within one year of the first violation, and $450 for a third or additional violation of the regulation within one year of the first violation

Mr. Brodnax audited Bay Cab on March 10, 2006. He begins the first of the series of fines on June 5, 2004; calls for a second fine on "June 6" (no year written, but presumably 2005), and calls for a third fine with no beginning date (presumably June 7, 2006?) but running continuously until October 3, 2006, the date of the Complaint. The first two fines appear to be imposed as once-per-year fines, until June 7, 2006 when the last fine (at $450) begins to accumulate on a daily basis. But this is not coherent. According to MPC 1187(a) all three violations must be within one year, although additional fines may accumulate at $450 per incident after the first $450 fine; but these must also be within the one year period dating from the first offense.

The Complaint evidences a serious misreading of the MPC 1187. However, there is an even deeper due process defect underlying the demand for cumulative penalties. In order to cumulate fines, a definition must be provided regarding what constitutes a separate violation of each of the various Commission rules so as to calculate how many total violations there have been and when the first violation has ended and the second (and third...) begun. Without such a definition, there is no way to impose fines other than for the first offense, and *a fortiori* no way to impose augmented fines for subsequent violations. It also precludes fines for "continuous" offenses, since the definition of a continuous violation requires a definition of what is a separate or discrete violation. Unfortunately, the Complaint cites no authority and applies no consistent standard for identifying discrete violations, dating them, and then totaling them.[13] Nor does it define what constitutes "continuous."

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[12] It is likely that "regulations" is a typo, and violations rather than regulations are intended under the "Minor," "Moderate," and "Major" rating scheme of MPC 1187. This ambiguity is not helpful to due process.

[13] Note that the definition of what is an "incident" may differ from rule to rule, depending on its content (e.g., a posting requirement versus a signing requirement), and what constitutes an "incident" may differ even within a Rule. For example, in addition to requiring posting of lists and making them available for inspection on a daily basis, some of the Rules contain additional time requirements: **5A3** requires distribution of information to drivers "from time to time." **5H3** requires updating of drivers' rosters on a weekly basis. Thus, the definition of what is an incident and what is an offense may differ within rules as well as among them.

Findings

MPC 1187 requires 2nd and 3rd penalties to be imposed within one year of the 1st violation. The Complaint fails to impose its 2nd and 3rd penalties within the one year period and thus the added penalties are illegitimate.

The absence of an articulated standard for what constitutes separate incidents of a particular violation within a year period precludes a fair due process identification of the basis for separate charges. The absence of such a clear standard also precludes a fair procedure for augmenting fines and/or imposing "continuous" penalties.

iii. the fines are excessive under the 8th Amendment of the U.S. Constitution and Article One, Section 17 of the California Constitution.

Bay Cab also argued that the fines were excessive on constitutional grounds. A defect in the accumulation of penalties, per the above analysis, is one basis for the constitutional argument, but there are others. Mr. Cardenas testified that his company took in approximately $42,000 per year, gross income. Even if that figure was increased by an order of magnitude, Mr. Brodnax's offer to "settle in compromise" a fine of $200,000 would likely bankrupt Bay Cab. The California Supreme has rejected such penalties as "confiscatory."

A 1978 California Supreme Court case provides guidance on the assessment of administrative penalties. [Hale v. Morgan, 22 Cal.3d 388, 584 P.2d 512, 149 Cal.Rptr. 375].

The imposition of very substantial fines bring administrative laws into a penal context in which they are subject to a higher level of constitutional scrutiny. Hale involved a $100 per day statutory penalty levied against a landlord who willfully shut off his tenant's utility service in order to evict him. The landlord was fined $17,300 for 173 days after he disassembled the water pipes and electrical line leading to his tenant's recreational vehicle. The Court found the penalty constitutionally excessive and violative of due process.

The Court ruled that "where a statute is penal, the Court adopts the narrowest construction of its penalty clause to which it is reasonably susceptible in light of its legislative purpose." [Hale, 394]. However, it stated that the legislature does not violate due process so long as [the penalty] is procedurally fair and reasonably related to a legislative goal.

It ruling that penalties must be appropriate to the legislative purpose, the Court placed particular emphasis on legislation meant to encourage compliance with regulations as opposed to "exacting tribute," and found suspect any penalties that amounted to confiscation.

The Complaint demands that penalties continue "until Bay Cab comes into compliance or accepts a settlement offer from the Taxicab Commission." [Emphasis added]. Thus it appears, at least from the underlined clause, that the Commission's goal in this Complaint is to enforce compliance with its Rules (including the WC requirement), not "confiscation."

However, on its face, the Complaint demands a penalty not rationally related to the goal of compliance, a violation of due process, Hale p. 398] Penalties are excessive "which result in de facto revocation and are excessive when measured against the licensee's conduct and the purposes sought to be achieved by the penalty provisions. [Walsh v. Kirby (1974) 13 Cal.3d 95, 119 Cal.Rptr. 1, 529 P.3d 33. pp. 103-104

"Uniformly, we have looked with disfavor on ever mounting penalties and have narrowly construed the statues which either require or permit them." 401. The Court also warned against "replacing the exercise of a reasoned discretion by an adding machine." Id at 402, and rejected any unlimited 'open ended' penalties which, in particular circumstances, may clearly exceed any appropriate and proportionate sanction for [the wrongful act]. [Id. At 403][14]

The Court commended penalties that were capped by finite limits or formulas: duration (e.g., 30 days); fixed multiples (e.g., 3x actual damages); "per-violation" penalties in which the violation is clearly defined (e.g., days in which oil was actually deposited in state water rather than "for so long as the spill remained on the water."). The Court also recommended laws that contained penalties that were discretionary up to a specified maximum, e.g., statutes that treat violations as misdemeanors with maximum fines.

The hearing officer finds that the "defiance of due process requirements compel the exaction of penalties which, in [this] case, demonstrably overbalance and outweigh reasonable goals of punishment, regulation, and deterrence."

Finding

The penalties requested in the Complaint are excessive under the 8th Amendment of the U.S. Constitution and Article One, Section 17 of the California Constitution.[15]

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[14] In Walsh v. Kirby, the Court held that "the delegation of an unlimited power to determine how great a penalty to impose would be an unlawful delegation of legislative discretion" and "certainly the exercise of such an unlimited power through the device of unlimited cumulative penalties would likewise be unlawful. Walsh v. Kirby (1974) 13 Cal3d 95, 119 Cal.Reptr. 1, 529 P.3d 33, pp. 103-104; 105.

[15] Note that this finding does not preclude the recommendation, *infra*, that Bay Cab's license be revoked under MPC 1090 if it does not procure WC for its drivers. The Hale decision rejects the use of penalties as a *de facto* instrument of revocation. It does not disallow suspension or revocation *per se*, especially where the threat of revocation is used as a means to effect compliance with (here WC) law and revocation is authorized under a separate code section.

XVIII. PENALTIES ASSESSED BY THE HEARING OFFICER UNDER MPC 1187

Given the problems with the framework for, and quantity of penalties requested in the Complaint, the hearing officer assesses penalties based on the criteria provided by MPC 1187.

Under MPC 1187, "[t]he Taxi Commission may impose administrative penalties for violations of the Commission's rules and regulations, in accordance with the [hearing] procedures established in Section 1188."

MPC 1187 provides the following criteria:

In determining the amount of the penalty in an individual case, the Commission shall take into account:

(i) Whether the permit holder has in the past violated the full-time driving requirement, other provisions of Article 16, the Taxi Commission's rules and regulations, or state law relevant to the operation of a taxicab permit;

(ii) Whether the permit holder concealed or attempted to conceal his or her non-compliance with the Commission's rules and regulations; and,

(iii) Such additional factors as the Commission may determine are appropriate.
(Added by Ord. 111-04, File No. 040343, App. 7/1/2004).

i. Past violations

Bay Cab has a history of violating Rules 5H16, 5K2 and 5H3, charged in the current Complaint. Rules 5H16 and 5K2 were charged in the 2004 Complaint and admitted at the hearing on December 3, 2004. The 2004 Complaint documents earlier violations of these rules: a December 20, 2000 Formal Admonishment citing violations of 5H16 and 5H3 as well as a May 29, 2003 Citation and Notice to Appear for violation of 5H16. [EXBT. M].

Numerous other violations not charged in the current Complaint were documented in the 2004 Complaint: 5H4, 5H14, 5H1 (per the attached December 20, 2000 Formal Admonishment); 5A4, 5B6, 5B7, 5H1 (per the attached November 4, 2002 Formal Admonishment); 5H11 (per the attached May 29, 2003 Citation).

The Taxicab Commission's Notice of Decision of September 26, 2005 ordered Bay Cab to bring all violations established in the 2004 Complaint into compliance within three months, and ordered Bay Cab to serve a one year probationary period. In the absence of an appeal Probation began on October 11, 2005 and ended on October 11, 2006.

ii. Concealing non-compliance with Commission rules and regulations

The hearing officer has not found actual fraud in this case (*supra*, **VII**). However, the submission of the May 5, 2005-May 4, 2006 WC policy, in light of Mr. Cardenas' later testimony that he did not cover his workers and had no certificates for them (*supra*, **VIII**), may have been an attempt to mislead the Commission regarding 5H16.

iii. Additional factors

On the record in this case, Bay Cab has operated with complete disregard for numerous Commission Rules and Regulations since 2000. It has been a "repeat offender" for many of these. The company appears to have been in violation of 5H3 and 5H16 since 2000, and 5K2 since 2004. According to the findings in the current case, as of the date of its November 17, 2006, Bay Cab had not corrected 5H16, 5K2 and 5H3. Moreover, it has broken additional and different rules than it has in the past: 5A3 and 5H2.

The fact is that Bay Cab persisted in violating rules beyond the three month period required for compliance, and was found to be in violation during the period of probation ending October 11, 2006. Bay Cab was audited on March 10, 2006, nearly three months past the deadline for compliance, and well within the probationary period. As of the November 17, 2006 hearing, Bay Cab was still not in compliance.

Based on factors i-iii, the hearing officer recommends the following fines:

5A3 (new): $75

5H2 (new): $75

5H3 (repeat): $525 ($75 per year since 2000)

5K2 (repeat): $225 ($75 per year since 2004)

5H16 (repeat): $525 ($75 per year since 2000)

Total: $1425

Finding

Bay Cab is liable for a total of $1425 in yearly penalties for the violations of 5A3; 5H2; 5H3; 5K2; and 5H16.

XIX. RECOMMENDATIONS

A. Discussion

To motivate Bay Cab 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 Bay Cab to procure proof of WC insurance for all of its

affiliated drivers, including all affiliated medallion holders and the secondary drivers. If at the end of this period, Bay Cab 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 there is undoubtedly a financial cost to Bay Cab 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.

Bay Cab does not have a fundamental or vested right to economic 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 owner's 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 "Bay Cab" for JKH in the following passage, its relevance becomes clear.

The purpose of the decision was to impose JKH's [*read* Bay Cab's] 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 Yellow Cab, citing Borello, 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 and Bay Cab continues to operate without WC protection for its affiliated drivers and medallion holders, the hearing officer recommends that the Commission refer Bay Cab to the Bureau of Labor Standards Enforcement. Bay Cab is aware that the BLSE may impose a stop work order and substantial fines if it finds Bay Cab 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 Bay Cab interests to procure WC coverage.

In addition, it is in Bay Cab interest to procure WC coverage to avoid private tort claims. Were a driver to be injured during work, and Bay Cab uninsured, the driver or his dependents may have a private right of action against Bay Cab in civil court for damages

that could exceed anything imposed by the Commission in this case. [Labor Code Section 3706]. Bay Cab 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, Bay Cab may find that its "Lessee Status" agreements with drivers, insofar as they attempt to relieve Bay Cab of liability for work injuries, are unenforceable. Thus Bay Cab, by not covering its drivers, dramatically increases its financial risk.

Mr. Cardenas argued that Rule 5H16 and MPC 1147.4 are not sufficiently explicit to inform him of what he had to do and what conduct would subject him to penalties. The hearing officer holds that Rule 5H16 and MPC 1147.4 gave sufficient notice to Mr. Cardenas, especially in light of the prior 5H16 violation and the September 26, 2005 resolution ordering Bay Cab into compliance within three months. Mr. Cardenas has had ample time to procure WC insurance for all drivers affiliated with Bay Cab. The hearing officer believes that granting him sixty more days to do so at this point is more than fair.

B. Authority

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."

Bay Cab Cab, having been provided a noticed hearing and an opportunity to fully contest the charges against it, good cause exists to impose the following orders under the evidence and arguments contained in this decision for violating 5H2; 5H3; 5A2; 5A3; and 5H16 of the Taxicab Commission Rules and Regulations:

C. Orders

1. Bay Cab shall, within sixty (60) business days from the date the Commission approves this recommendation, pay a total of $1425 in penalties for violations of 5A3; 5H2; 5H3; 5K2; and 5H16.

2. Bay Cab shall comply, within sixty (60) business days from the date the Commission approves this recommendation, with the requirements of 5A3; 5H2; 5H3; 5K2; and 5H16. In the event of non-compliance, the Commission shall fashion a "repeat offender" penalty schedule that increases or enhances fines beyond the yearly assessment used in this case by the hearing officer.

3. Bay Cab shall have sixty (60) business days from the date the Commission approves this recommendation 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, Bay Cab 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.

February 26, 2008

Appendix I

5.A.3. Every person (known as the color scheme holder) to whom a distinguishing color scheme has been assigned pursuant to Municipal Police Code Section 1125, shall within sixty (60) days of the adoption of these regulations, transmit a copy of these regulations to each taxicab driver operator and medallion holder using said color scheme and obtain a written acknowledgment including signature and printed name of each such permittee that they have read and understand the regulations, and from time to time distribute other printed matter to each taxicab driver operator in the manner outlined above in this paragraph, when requested by the Taxicab Commission or their designee. Color Scheme Holders shall ensure that every taxicab operating under their color scheme contains a copy of these regulations. Each Color Scheme Holder shall notify the Taxicab Detail, in writing, upon completing the requirements of this section.

5.H.2. The Color Scheme Holder shall post a current list of all taxicab vehicles at both their Primary Place of Business and where their vehicles are stored when not in service, (if different from their Primary Place of Business). Said list shall include, but not limited to, the taxicab vehicle number, the motor vehicle license number, the vehicle identification number, the year and make of the vehicle, and the operating status of each taxicab vehicle for which a permit is held. A copy of said list shall be available for inspection by any police officer engaged in the performance of their duty.

5.H.3. A current roster shall be maintained at the principal place of business. It shall contain the following information: Driver's name, home address, home telephone number, "A" card number and California driver license number, of all permitted drivers who currently operate taxicab vehicles. A copy of said roster shall be available for inspection by any police officer engaged in the performance of their duty. The roster is to be made available twenty-four (24) hours a day and updated on a weekly basis.

5.H.16. 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)

5.K.2. Keep copies of all lease agreements between medallion permit holder, color scheme permit holder, and all drivers on file for inspection by the Taxicab Commission or their designee. All such agreements must be in writing and copies shall be provided to all parties involved.

Appendix II

Regents Cab Decision

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." S.G. Borello & 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. Healy, *supra*, 122. (See Eastlick v. City of Los Angeles, 29 Cal.2d 661, 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. Cohen v. Board of Supervisors of the City and County of San Francisco (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 Cohen v. Board of Supervisors of the City and County of San Francisco, *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 "validity of local licensing regulations in areas related to conduct covered under state law." [emphasis added, Cohen, 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 Cohen 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. Cohen 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 regulate 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 conflict 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.'

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[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) [cited 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, requiring the posting of WC coverage nowhere appears to conflict with a state prohibition against such a posting under WC law. Regents claimed that state law does not require 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 Yellow Cab Cooperative Inc. I'll or Inc. v. Workers Compensation Appeals Board, (1991)226 DPP 3-D, 1288. See also Jones v. Brown 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 restricted 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. Cohen, 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 Yellow Cab Cooperative , 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 Yellow that have emphasized an "enterprise integration" test for employment status and that have further loosened the factors of control. [See, especially, JKH Enterprises , Inc. v. Department of Industrial Relations, 48 Cal. Rpt. 3d, 563, 2006, *infra.*

Even before the Yellow decision, S.G. Borello & Sons, Inc. v. Department of Industrial Relations (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 Borello 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 Enterprises, Inc. v. Dept. of Industrial Relations (2006) Cal Rptr. 3d 563, 578]

Borello 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]

Borello 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 integration of the workers into the heart of Borello's business is a strong indicator that Borello functions as an employer." 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 necessary 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 Borello, 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 is 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 Borello, "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 Yellow Cab, citing Borello, 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