

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
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delivery truck or a common well, and the primary use is domestic. In contrast, water in the Southeast Alaska basin is abundant, and distribution systems commonly are leaky; residents, commonly leave their faucets running to prevent the pipes from freezing. In addition, water-intensive industries in the Southeast Alaska basin are served by public supply.

DOMESTIC AND COMMERCIAL

Total domestic and commercial water use, including conveyance losses and consumptive use, from public-supplied and self-supplied sources was 78 Mgal/d (fig. 4). Domestic use was about 39 Mgal/d, of which 29 Mgal/d was delivered by public-supply systems and 10 Mgal/d was self-supplied. Commercial withdrawals were about 31 Mgal/d, virtually all from public-supply sources. Conveyance losses were 7.6 Mgal/d.

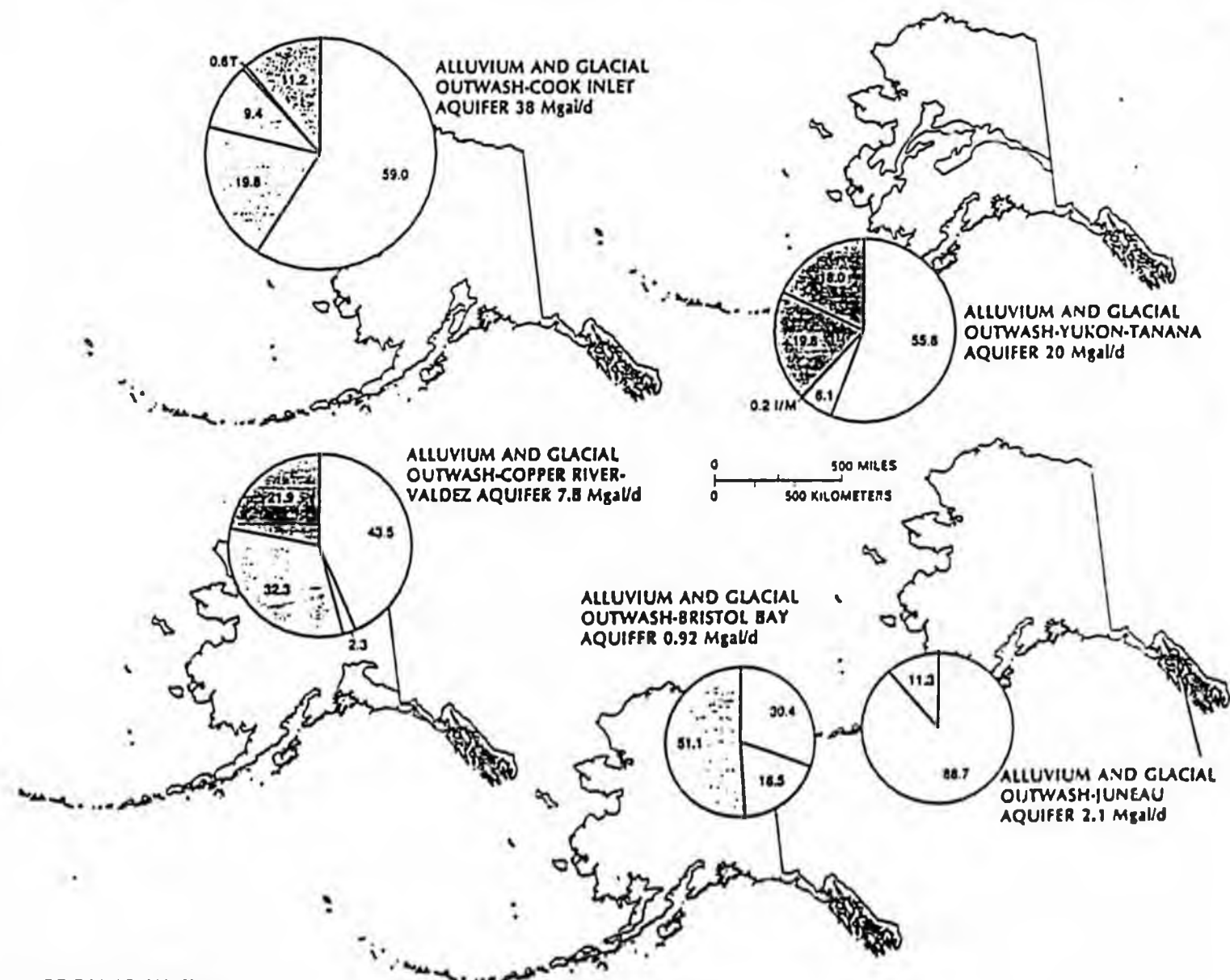
The average per capita domestic use for the population served by public supply was about twice that for the population that was self-supplied. This difference can be explained, in part, by conditions under which water is delivered to homes that use these two

types of supply. Public-supply systems typically serve a household that has standard plumbing. In contrast, many self-supplied households haul water from a lake, spring, river, or well and may have no plumbing.

INDUSTRIAL AND MINING

The estimated industrial and mining use was 141 Mgal/d in 1985. This represents 34.7 percent of total offshore water use (fig. 4). Industry used about 122 Mgal/d, of which 87 percent was self-supplied from surface-water sources. About 89 percent of the industrial water use was in the Southeast Alaska basin. Wood-pulp mills and seafood-processing industries in this basin used more than 100 Mgal/d in 1985. The petroleum industry was a major water user in the South Central basin.

Mining accounted for about 19 Mgal/d of water use. The Yukon basin had the largest area of mining activity and accounted for 76 percent of this water use. Adequate water supplies to support the exploration, development, and production in the Arctic Slope



B. GROUND WATER

Figure 3. Freshwater withdrawals by category of use and hydrologic unit in Alaska, 1985—Continued.

basin are commonly difficult to locate. Surface water is used primarily by placer-mining operations for washing sediments.

THERMOELECTRIC POWER

The fossil-fueled powerplants included in the survey used an estimated 31 Mgal/d (fig. 4) to produce 3,430 GWh of electricity during 1985. About 97 percent of the water was used by two plants in the Yukon basin, whereas 80 percent of the power produced by fossil fuel was produced by six plants in the South Central Alaska basin. These differences reflect the availability of water, the age of the powerplants, and perhaps different reporting methods. The water was used mainly for cooling purposes, and most was returned to surface-water sources.

AGRICULTURAL

Agricultural use during 1985 was an estimated 157 Mgal/d (fig. 4). Fish hatcheries dominated this category by using about 156 Mgal/d, of which 66 percent was used in the Southeast Alaska basin. Although the hatcheries in the Southeast Alaska basin exclusively use surface water, facilities elsewhere use ground water, which has a more consistent temperature and quality.

Agricultural water use for purposes other than fish hatcheries or irrigation totaled 0.21 Mgal/d, 48 percent of which was on Kodiak Island. Only 0.03 Mgal/d was used for irrigation; all of the reported irrigated farm acreage is in the Matanuska Valley, which is 40 miles north of Anchorage.

WATER MANAGEMENT

The Alaska Water Use Act (AS 46.15.010-270), which was enacted in 1966, established procedures to appropriate State water.

The Act defines the doctrine of prior appropriation ("first in time, first in right") authorized by the State Constitution and delegates administration of the Act to the Alaska Department of Natural Resources (ADNR). The Act established procedures for maintaining existing water rights and for obtaining new water rights to all surface and ground water in Alaska. Water appropriations are limited to the specific use for which an individual applies. Additionally, the ADNR issues permits authorizing development and beneficial use of water. Issuance of a certificate of appropriation by the ADNR to the applicant is the final step in the water-rights process.

The original regulations implementing the Water Use Act were amended extensively on December 29, 1979, and incorporated as 11 AAC 93, Water Management. Recent amendments to the Water Use Act relate to geothermal development, reservation of water for instream uses, and administrative and judicial basinwide water-rights adjudication.

To manage the State's water resources effectively, the ADNR's Division of Land and Water Management (DLWM) requires technical descriptions and analyses and interpretations of various hydrologic conditions. The Department's Division of Geological and Geophysical Surveys (DGGs), Water Resources Section, provides the necessary data, analyses, and interpretations. Many long-term data are collected and interpreted by the U.S. Geological Survey, in cooperation with other Federal, State, and municipal agencies. Water managers of the DLWM use this information for water appropriation and water management decisions. Additionally, the DGGs, in cooperation with the U.S. Geological Survey and other State and Federal agencies, has developed and implemented the Alaska Water Resources Evaluation Plan to coordinate water-data collection and water-resource investigations in the State (Alaska Department of Natural Resources, Division of Geological and Geophysical Surveys, and U.S. Geological Survey, 1985).

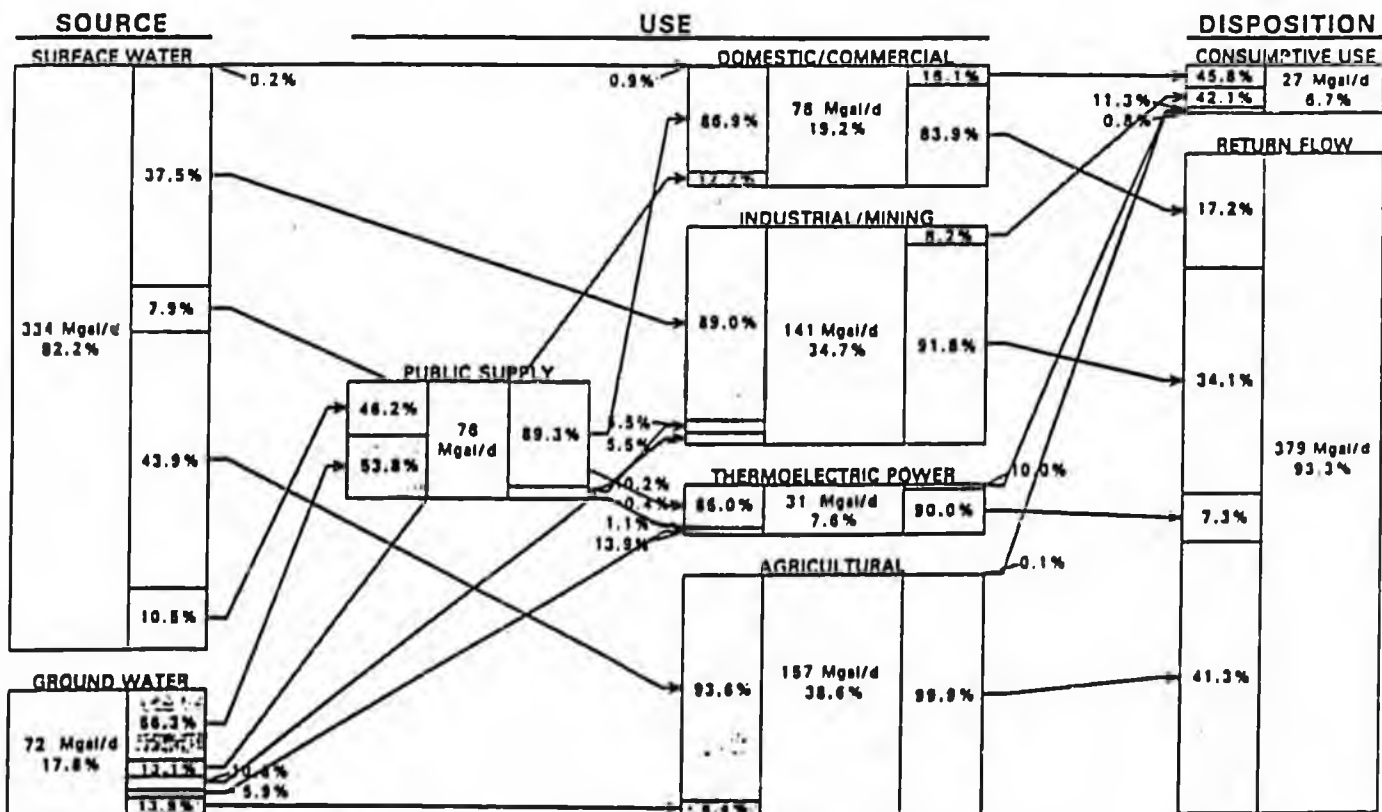


Figure 4. Source, use, and disposition of an estimated 408 Mgal/d (million gallons per day) of freshwater in Alaska, 1985. Conveyance losses in public-supply distribution systems and some public water uses, such as fire fighting, are included in the total shown for domestic and commercial use; losses in irrigation distribution systems are included in the total shown for agricultural return flow. All numbers have been rounded and values may not add to totals. Percentages are rounded to the nearest one-tenth of 1 percent (0.1%) between 0.1 and 99.9 percent. (Source: Data from U.S. Geological Survey National Water Data Storage and Retrieval System.)

Although few streams in Alaska are overappropriated, potential water-use problems exist. In the event of water shortages or drought, Ship Creek at Anchorage and Indian River at Sitka could possibly be examples in which the amount of legally obtainable water may exceed the water available for use. Water issues in Alaska also include hydroelectric projects, placer mining, oil development, salmon aquaculture, and proposed mining developments in the Southeast Alaska basin.

Most ground-water shortages in Alaska currently involve water for public supply and domestic use. Some areas within the Municipality of Anchorage are experiencing great ground-water demand for public and single-family domestic water supplies. As water levels declined, domestic wells become dry. The ADNR and Municipality of Anchorage are working cooperatively to solve several water-supply and distribution problems. Another area experiencing declining ground-water levels and saltwater intrusion is the Auke Bay area near Juneau (Dearborn, 1985), where the ADNR established Alaska's first "Critical Groundwater Management Area" to restrict further water-well drilling and development of ground water.

SELECTED REFERENCES

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Hydraulic "giant" used to remove overburden and expose gold-bearing gravel north of Fairbanks, Alaska. (Photograph by Gary Prokosch, Alaska Department of Natural Resources.)

Prepared by Leslie D. Patrick and Elisabeth F. Snyder, U.S. Geological Survey, and Mary Lu Harle, Alaska Department of Natural Resources

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on the petition and" near the beginning of the first sentence, substituted "the proposed change" for "said change" at the end of the first sentence, deleted "make the necessary arrangements to" preceding "provide the superintendent" and "stenographic" preceding "record of the proceedings" in the second sentence, substituted "the superintendent's report" for "his report thereon" at the end of the second sentence, deleted "such" preceding "petition," and "thereby" following "injuriously affected" in the fourth sentence, substituted "if" for "unless" preceding "the right" and "will be" for "shall not be" in the fourth sentence, deleted the former fifth and sixth sentences, deleted "in such area" preceding "represent the state board" in the last sentence, and added "in

any appeal" to the end of the subsection; and added subsection (g).

Applied in *Green River Dev. Co. v. FMC Corp.*, 660 P.2d 339 (Wyo. 1983).

Quoted in *Town of Pine Bluffs v. State Bd. of Control*, 647 P.2d 1365 (Wyo. 1982).

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For comment, "Wyoming's New Instream Flow Act: An Administrative Quagmire," see XXI *Land & Water L. Rev.* 455 (1986).

§ 41-3-115. Applications for use of water outside the state.

(a) The legislature finds, recognizes and declares that the transfer of water outside the boundaries of the state may have a significant impact on the water and other resources of the state. Further, this impact may differ substantially from that caused by uses of the water within the state. Therefore, all water being the property of the state and part of the natural resources of the state, it shall be controlled and managed by the state for the purposes of protecting, conserving and preserving to the state the maximum permanent beneficial use of the state's waters.

(b) None of the water of the state either surface or underground may be appropriated, stored or diverted for use outside of the state or for use as a medium of transportation of mineral, chemical or other products to another state without the specific prior approval of the legislature. Provided, however, neither approval by the legislature nor compliance with the application procedures under subsections (m) through (r) of this section shall be required for appropriations that will transfer or use outside the state less than one thousand (1,000) acre-feet of water per year.

(c) No holder of either a permit to appropriate water or a certificate to appropriate water, nor any applicant for a right to appropriate the unappropriated water of this state, may transfer or use the water so appropriated, certificated or applied for outside the state of Wyoming without prior approval of the legislature of Wyoming.

(d) through (k) Repealed by Laws 1985, ch. 4, § 1.

(m) Notwithstanding subsections (d) through (k) of this section, applications for the appropriation of water for use out of state shall be submitted to the state engineer. The application shall contain sufficient information to enable the state engineer to fully analyze the proposed appropriation. Within sixty (60) days of receipt of the application, the state engineer shall determine if the application is complete and acceptable. If the application is unacceptable, the state engineer shall notify the applicant as to what is needed so an acceptable application may be submitted.

the subsection; and

Dev. Co. v. FMC
1983).

Bluffs v. State Bd.
Wyo. 1982).

note, "Water Law
Priority with Refer-
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Green River Dev.
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(n) Upon determination that the application is acceptable, the state engineer shall cause to be made, at the applicant's expense, a comprehensive review of the application. The state engineer shall have no more than one hundred twenty (120) days to complete this review.

(o) Upon completion of the state engineer's review, the state engineer shall issue a preliminary analysis of the application. The analysis shall address the factors set forth in subsection (r) of this section, contain a summary of the application and any other information the state engineer deems relevant. The preliminary opinion, or a reasonable summary, shall be published, at the applicant's expense, for three (3) consecutive weeks in a newspaper of general circulation in the county where the proposed appropriation of water is located. At the conclusion of the publication period, the state engineer shall hold a public hearing, at the applicant's expense, in the county where the proposed appropriation is located.

(p) In rendering a final opinion, the state engineer shall consider all comments received at the public hearing and those received in writing within twenty (20) days of the public hearing.

(q) The state engineer shall render a final opinion and submit it to the legislature within one hundred twenty (120) days of the public hearing. The final opinion shall address all factors set forth in subsection (r) of this section and shall contain a recommendation that the legislature grant or deny the proposed out-of-state use.

(r) The legislature shall consider the proposed appropriation following receipt of the state engineer's opinion and recommendation. Notwithstanding subsections (d) through (k) of this section, legislative consent for the proposed appropriation of water for use out of the state shall be based upon consideration of the factors necessary to assure meeting the state's interests in conserving and preserving its water resources for the maximum beneficial use. Factors to be considered by the legislature shall include the following:

(i) The amount of water proposed to be appropriated and the proposed uses;

(ii) The amount of water available for appropriation from the proposed source, and the natural characteristics of the source;

(iii) The economic, social, environmental and other benefits to be derived by the state from the proposed appropriation;

(iv) The benefits to the state by the use of the water within the state that will be foregone by the proposed appropriation;

(v) The benefits presently and prospectively derived from the return flow of water in intrastate use which will be eliminated by the proposed out-of-state use;

(vi) The injury to existing water rights of other appropriators that may result from the proposed use;

(vii) Whether the use formulated and carried out promotes or enhances the purposes and policies of the state's water development plans and water resources policy, and that the use will not unreasonably

interfere with other planned uses or developments for which a permit has been or may be issued;

(viii) Whether the proposed use will significantly impair the state's interest and ability to preserve and conserve sufficient quantities of water for reasonably foreseeable consumptive uses and other beneficial uses recognized by law to include but not limited to domestic, livestock, agricultural, municipal and industrial purposes;

(ix) Whether the proposed use will adversely affect the quantity or quality of water available for domestic or municipal use;

(x) Whether, to the greatest extent possible, the correlation between surface water and groundwater has been determined, to avoid possible harmful effects of the proposed use on the supply of either.

(s) Nothing in this act shall be construed to interfere with compacts, court decrees and treaty obligations. (Laws 1974, ch. 25, § 1; 1982, ch. 58, § 1; 1983, ch. 167, § 1; 1985, ch. 4, § 1.)

Cross references. — As to state engineer, see art. 8, § 5, Wyo. Const., and § 9-1-901. As to environmental quality council, see § 35-11-111.

The 1985 amendment, effective May 23, 1985, repealed subsections (d) through (k).

Editor's notes. — There is no subsection (i) or (l) in this section as it appears in the printed acts.

Meaning of "this act". — The term "this act," referred to in subsection (s), means Laws 1983, ch. 167, which appears as subsections (a) through (c), and subsections (m) through (s), of this section.

Law reviews. — For comment, "Allocating Buried Treasure: Federal Litigation Involving Interstate Ground Water," see XI Land & Water L. Rev. 103 (1976).

For article, "So Its Not 'Ours' — Why Can't We Still Keep It? A First Look at *Sporhase v. Nebraska*," see XVIII Land & Water L. Rev. 137 (1983).

For comment, "*Sporhase v. Nebraska* ex rel. Douglas: State Control of Water Under the Constraints of the Commerce Clause," see XVIII Land & Water L. Rev. 513 (1983).

ARTICLE 2. RIGHTS TO FOREIGN WATERS

Law reviews. — For article, "A Critical Look at Wyoming Water Law," see XXIV Land & Water L. Rev. 307 (1989).

ARTICLE 3. RESERVOIRS

Law reviews. — For article, "Industrial Siting Legislation: The Wyoming Industrial Development Information and Siting Act — Advance or Retreat?" see XI Land & Water L. Rev. 27 (1976).

For article, "Dam Safety: The Critical Imperative," see XIV Land & Water L. Rev. 341 (1979).

For article, "A Critical Look at Wyoming

Water Law," see XXIV Land & Water L. Rev. 307 (1989).

Am. Jur. 2d, ALR and C.J.S. references. — Necessity and sufficiency of environmental impact statements under § 102(2)(C) of National Environmental Policy Act of 1969 (42 USC § 4332(2)(C)) in cases involving water and waterworks projects, 67 ALR Fed 54.

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in section 34-32-103 (9), C.R.S., there shall be no requirement to replace the amount of historic natural depletion to the waters of the state, if any, caused by the preexisting natural vegetative cover on the surface of the area which will be, or which has been, permanently replaced by an open water surface. The applicant shall bear the burden of proving the historic natural depletion.

Source: L. 69, p. 1196, § 8; C.R.S. 1963, § 148-11-25; L. 89, p. 1425, § 4.

Law reviews. For article, "A Review of Recent Activity in Colorado Water Law", see 47 Den. L.J. 181 (1970). For comment, "Maximum Utilization Collides With Prior Appropriation in A-B Cattle Co. v. United States", see 57 Den. L.J. 103 (1979). For article, "The Emerging Relationship Between Environmental Regulations and Colorado Water Law", see 53 U. Colo. L. Rev. 597 (1982). For article, "The Physical Solution in Western Water Law", see 57 U. Colo. L. Rev. 445 (1986). For article, "Quality Versus Quantity: The Continued Right to Appropriate — Part I", see 15 Colo. Law. 1035 (1986).

For article, "Colorado's Law of "Underground Water": A Look at the South Platte Basin and Beyond", see 59 U. Colo. L. Rev. 579 (1988).

"Quality" requirement of statute is not violated when person slows down movement of water, resulting in the settling of silt to the bottom and leaving only clear water for the senior appropriator. In re A-B Cattle Co. v. United States, 196 Colo. 539, 589 P.2d 57 (1978).

Applied in Purgatoire River Water Conservancy Dist. v. Kuiper, 197 Colo. 200, 593 P.2d 333 (1979).

Water Rights - Generally

ARTICLE 81

Diversion of Waters from State

Law reviews: For article, "Water Export", see 13 Colo. Law. 1004 (1984); for article, "State Water and State Lines: Commerce in Water Resources", see 56 U. Colo. L. Rev. 347 (1985).

37-81-101.	Diversion of water outside state - application required - special conditions - penalty.	37-81-103.	Effect of apportionment credits upon diversions of water from state.
37-81-102.	Officials charged with enforcement.	37-81-104.	Fee for diversion - fund created.

37-81-101. Diversion of water outside state - application required - special conditions - penalty. (1) (a) The general assembly hereby finds and declares that the location and availability of water in this state varies greatly from place to place and that the state as a whole suffers a shortage of water. The general assembly further recognizes that, because of Colorado's unique location at the headwaters of four of the nation's major western rivers and because all the major river systems in Colorado flow out of the state, and that, in order to insure the availability of these scarce water resources for the use of citizens of the state of Colorado, compacts have been entered into with the downstream states on all the major rivers originating in Colorado.

(b) It is also recognized that it has been the continuing historical policy of the state of Colorado to conserve and prevent waste of its water resources to provide adequate supplies of water necessary to insure the continued

health, welfare, and safety of all of its citizens. Accordingly, the general assembly hereby determines that, for the purpose of conserving the scarce water resources of this state and to thereby insure the continuing health, welfare, and safety of the citizens of this state, it is unlawful for any person, including a corporation, association, or other entity, to divert, carry, or transport by ditches, canals, pipes, conduits, natural streams, watercourses, or any other means any of the water resources found in this state into any other state for use therein without first complying with this section and section 37-81-104.

(2) To effectuate the purposes of subsection (1) of this section and section 37-81-104, no person may divert, carry, or transport any surface or ground water from this state by ditches, canals, pipes, conduits, natural streams, watercourses, or other means without meeting the requirements for obtaining a permit to construct a well if the source of water is to be ground water or if a well permit is not required without first obtaining an adjudication from the water court for the right to use water outside the state. In the case of a well for which a permit has been issued for a use of ground water within Colorado, a change of use for a use outside the state must be approved by the water court or, if it is designated ground water, the change must be approved by the Colorado ground water commission. A person desiring to divert, carry, or transport any water outside Colorado shall file an appropriate application therefor and comply with the requirements of this section in addition to any other requirements, terms, and conditions provided or authorized by law pertaining to such application.

(3) Prior to approving an application, the state engineer, ground water commission, or water judge, as the case may be, must find that:

(a) The proposed use of water outside this state is expressly authorized by interstate compact or credited as a delivery to another state pursuant to section 37-81-103 or that the proposed use of water does not impair the ability of this state to comply with its obligations under any judicial decree or interstate compact which apportions water between this state and any other state or states;

(b) The proposed use of water is not inconsistent with the reasonable conservation of the water resources of this state; and

(c) The proposed use of water will not deprive the citizens of this state of the beneficial use of waters apportioned to Colorado by interstate compact or judicial decree.

(4) Any diversion of water from this state which is not in compliance with this section shall not be recognized as a beneficial use for purposes of perfecting a water right to the extent of such unlawful diversion or use.

Source: L. 17, p. 539, § 1; C. L. § 1618; CSA, C. 90, § 1; CRS 53, § 147-1-1; C.R.S. 1963, § 148-1-1; L. 79, p. 1364, § 1; L. 83, p. 1410, § 1; L. 85, p. 287, § 7.

Cross references: For water of streams being public property, see § 5 of art. XVI, Colo. Const.

Am. Jur.2d. See 56 Am. Jur.2d. Waters, § 352.

C.J.S. See 93 C.J.S., Waters, § 59.

Law reviews. For article, "A Missouri Valley Authority — Its Effect Upon Water Appropri-

ation. Use. State Control and Vested Rights", see 18 Rocky Mt. L. Rev. 1 (1945). For article, "Flood Control Projects and River Compacts", see 22 Rocky Mt. L. Rev. 462 (1950). For note, "Water Pollution Control in Colo-

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The state has the ownership and the right to control its own natural streams, and power and authority to regulate the distribution of their waters, within its own territory, for beneficial purposes. *Kansas v. Colorado*, 206 U.S. 46, 27 S. Ct. 655, 51 L. Ed. 956 (1907); *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220, (1912)(cases decided prior to earliest source of this section).

Constitutional provisions, implementing statutes, and decisions of this court, all recognize the great public and private benefits which emanate from conserving and putting to beneficial use, at the earliest practical time, all of the waters of the natural streams of the state of Colorado. *Metropolitan Sub. Water Users Ass'n v. Colorado River Water Conservation Dist.*, 148 Colo. 173, 365 P.2d 273 (1961).

A natural watercourse may be used as a conduit or outlet for the drainage of lands, at least where the augmented flow will not tax the stream beyond its capacity and cause the flooding of adjacent lands. *Ambrosio v. Perl-Mack Constr. Co.*, 143 Colo. 49, 351 P.2d 803 (1960).

The owner of the upper or dominant estate has a legal and natural easement or servitude in the lower or servient estate for the drainage of surface waters, flowing in its natural course and manner. *Ambrosio v. Perl-Mack Constr. Co.*, 143 Colo. 49, 351 P.2d 803 (1960).

The city of Denver has a legal as well as a natural easement for servitude on the lands downstream for drainage or surface water

flowing in its natural course. *City & County of Denver v. Stanley Aviation Corp.*, 143 Colo. 182, 352 P.2d 291 (1960).

Where one purchases his land in the lowest point next to a river, his land is burdened with the easement of carrying the water which naturally flows from all of the land above it. *Ambrosio v. Peri-Mack Constr. Co.*, 143 Colo. 49, 351 P.2d 803 (1960); *City & County of Denver v. Stanley Aviation Corp.*, 143 Colo. 182, 352 P.2d 291 (1960).

It is a general doctrine in which the authorities almost universally concur that a city is not bound to protect from surface waters those who may be so unfortunate as to own property which is below the general level of the street. *City & County of Denver v. Stanley Aviation Corp.*, 143 Colo. 182, 352 P.2d 291 (1960).

The taking of the water for use in the operation of the hatchery is for a public purpose. *Farmers Irrigation Co. v. Game & Fish Comm'n*, 149 Colo. 318, 369 P.2d 557 (1962).

When the game and fish commission diverted water from a creek and channeled it through a hatchery where it was so polluted as to render it unfit for the purposes to which it had theretofore been applied by plaintiffs, plaintiffs' property rights therein were destroyed or seriously damaged. *Farmers Irrigation Co. v. Game & Fish Comm'n*, 149 Colo. 318, 369 P.2d 557 (1962).

Notwithstanding a claim of sovereign immunity from a suit for damages resulting from the torts of agents of the state, upon a showing that the water rights of plaintiffs had been taken or damaged by game and fish commission through pollution of the water, entitled them to relief in the form of "just compensation" for the property so taken or damaged, and to injunctive relief against a continuance thereof. *Farmers Irrigation Co. v. Game & Fish Comm'n*, 149 Colo. 318, 369 P.2d 557 (1962).

The relationship between this section and a Nebraska statutory provision concerning exportation of water is applied in *Sporhase v. Nebraska*, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed.2d 1254 (1982) (decided under former § 37-90-136).

37-81-102. Officials charged with enforcement. It is the duty of the state engineer, the division engineers, and the water commissioners of this state to see that the waters of the state are available for the use and benefit of the citizens and inhabitants of the state for its growth, prosperity, and general welfare, and it is the further duty of said officials to prevent the waters thereof from being diverted, carried, conveyed, or transported by ditches, canals, pipes, conduits, natural streams, watercourses, or other means into other states for use therein unless there is specific authorization therefor, as provided in section 37-81-101. Upon its being brought to the knowledge

of the state engineer of Colorado that any person, corporation, or association is unlawfully carrying or transporting any of such waters into any other state for use therein, or is intending so to do, it is his duty to immediately call the matter to the attention of the attorney general, in behalf of and in the name of the state, who shall apply to any district court or to the supreme court of the state of Colorado for such restraining orders or injunctions, both preliminary and final, as may be necessary to enforce the provisions of this section and section 37-81-101, and jurisdiction is conferred upon said courts for such purposes.

Source: L. 17, p. 539, § 2; C. L. § 1619; CSA, C. 90, § 2; CRS 53, § 147-1-2; C.R.S. 1963, § 148-1-2; L. 79, p. 1365, § 2; L. 83, p. 1411, § 2.

Water officials, charged with the duty of protecting and enforcing the rights of appropriators guaranteed by the constitution, statutes, and court decrees of Colorado, cannot plead, as excusing the discharge of that duty, a compact between states, which compact invades those rights without questioning the power of the state to grant them originally. *La Plata River & Cherry Creek Ditch Co. v. Hinderlider*, 93 Colo. 128, 25 P.2d 187(1933).

The general assembly, in order to protect the rights of the state in our natural streams and their waters, and the interests which its citizens have acquired thereunder, may make a valid appropriation of money for the purpose of protecting and defending them. *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220 (1912) (case decided prior to earliest source of this section).

37-81-103. Effect of apportionment credits upon diversions of water from state. (1) For the purpose of evaluating applications made pursuant to section 37-81-101, no water occurring in any aquifer or being a part of or hydraulically connected to any interstate stream system may be diverted or appropriated in Colorado for a use which contemplates or involves the transportation of such water into or through another state or states through which such interstate stream system flows, for use of such diverted water in such other state or states whether as a vehicle or medium for the transportation of another substance, or for any other use, unless the amount of water so diverted or appropriated and transported through or into such other state or states is credited as a delivery to such other state or states by Colorado, of water to which such other state or states may be or claim to be entitled from such interstate source under an existing interstate compact or otherwise. Water mixed with other substances in the process of forming a slurry for the purpose of transporting any substance as a suspended solid shall not be deemed to have lost its character as water.

(2) The burden shall be upon the claimant or other person seeking to divert or appropriate water or seeking a water right based upon a claimed diversion or appropriation coming within the provisions of subsection (1) of this section to prove that a means exists and is accepted by each state, including Colorado, through which said stream system and said diverted water flows or will flow by which the credit required in this section will be entered and recognized by each such state.

(3) This article shall not be applicable to water contained in agricultural crops, animal and dairy products, beverages, or processed or manufactured products or to products transported in cans, bottles, packages, kegs, or barrels.

Source: L. 77, p. 1694, § 1; L. 83, p. 1412, § 3.

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C.J.S. See 93 C.J.S., Waters, § § 170, 181.
Law reviews. For comment, "Do State
Restrictions on Water Used by Slurry Pipe-
lines Violate the Commerce Clause?", see 53

U. Colo. L. Rev. 655 (1982). For article,
"Water Export", see 13 Colo. Law. 1004
(1984).

37-81-104. Fee for diversion - fund created. (1) To effectuate the purposes of this article, the general assembly hereby authorizes a fee of fifty dollars per acre-foot to be assessed and collected by the state engineer on water diverted, carried, stored, or transported in this state for beneficial use outside this state measured at the point of release from storage or at the point of diversion.

(2) All moneys collected pursuant to subsection (1) of this section shall be credited to the water diversion fund, which fund is hereby created. The general assembly shall annually appropriate all moneys in said fund for water projects for the state. Said appropriation shall be consistent with part 13 of article 3 of title 2, C.R.S.

Source: L. 85, p. 287, § 6.

ARTICLE 82

Appropriation and Use of Water

Cross references: For water rights provisions in the constitution, see sections 5 to 8 of article XVI; for water compacts, see articles 60 to 69 of this title; for conservancy and irrigation districts, see articles 40 to 48 of this title; for conveyance of water rights as real property, see § 38-30-102; for exemption from taxation of ditches, canals, and flumes, see § 39-3-104.

37-82-101.	Waters of natural surface streams subject to appropriation.	37-82-104.	Not to impair vested rights.
		37-82-105.	Interference with flow - damages.
37-82-102.	Priority of right to spring water.	37-82-106.	Right to reuse of imported water.
37-82-103.	Appropriation of natural springs.		

37-82-101. Waters of natural surface streams subject to appropriation.

(1) The water of every natural stream, as referred to in sections 5 and 6 of article XVI of the state constitution, includes all the water occurring within the state of Colorado which is in or tributary to a natural surface stream but does not include nontributary ground water as that term is defined in section 37-90-103. All nontributary ground water shall be subject to such administration and use as the general assembly may provide by law. Such nontributary waters, when released from the dominion of the user, become a part of the natural surface stream where released, subject to water rights on such stream in the order of their priority.

(2) A stream system which arises as a natural surface stream and, as a natural or man-induced phenomenon, terminates within the state of Colorado through naturally occurring evaporation and transpiration of its waters.

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FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO : HB 553

Revision Date: _____
Title: "An Act exempting employees of taxi cab businesses from ... wage and hour laws"
Sponsor: House Transportation Committee
Requestor: House Labor & Commerce

Department Affected: Labor
BRU: Labor Standards & Safety
Component: Wage & Hour
COMPONENT SERIAL NO. 345

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Randy Carr, Acting Director Phone: 264-2452
Division: Labor Standards & Safety Date: 4/7/92
Approved by Commissioner: G. W. Mahlen
Agency: Department of Labor Date: 4/7/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

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3/27/92

Rep Foster

CS FOR HOUSE BILL NO. 553 ()

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): HOUSE TRANSPORTATION COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act exempting certain individuals engaged in the taxicab business from coverage under
2 the state wage and hour laws."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 * Section 1. AS 23.10.055 is amended by adding a new paragraph to read:

5 (13) an individual driving a taxicab, who is not paid for that work on an hourly
6 basis, for an employer engaged in the business of operating taxicabs.

7-LS2118D

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3/27/92

Rep Foster

CS FOR HOUSE BILL NO. 553 ()

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): HOUSE TRANSPORTATION COMMITTEE

A BILL

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6 basis, for an employer engaged in the business of operating taxicabs.

BILL NO: CS for House Bill No. 553 ()

DATE: April 27, 1992


TITLE: "An Act exempting certain individuals engaged in the taxicab business from coverage under the state wage and hour laws."

CONTACT: Arbe Williams
465-2700

Committee Substitute for House Bill No. 553 () would exempt a cab driver, who is not paid on an hourly basis, from the Alaska Wage and Hour Act. The intent of this legislation is to allow a licensed cab driver to operate as a contractor.

As a contractor, the cab driver operates independently; controls the work done; and has an opportunity to make a profit, or suffer a loss, depending on the driver's skills. The Department of Labor supports the opportunity for contractors to operate in an independent business arrangement.

APPROVED:



C. W. Mahlen, Commissioner
Department of Labor

POSITION PAPER/Department of Labor

STATE OF ALASKA

DEPARTMENT OF LABOR

DIVISION OF EMPLOYMENT SECURITY
AFFILIATED WITH U.S. EMPLOYMENT SERVICE

WALTER J. HICKEL, GOVERNOR

P.O. BOX 3-7000
JUNEAU, ALASKA 99802-1218
PHONE:

465-2712

FAX: (907) 465-4537

File No: AKDO (1R3)

April 22, 1992

The Honorable David Finkelstein
Chair, Labor & Commerce Committee
House of Representatives
P.O. Box V
Juneau, AK 99801

Attention Catherine Reardon:

Per your telephone request this morning, enclosed is a copy of AS 23.20.525(a)(10).

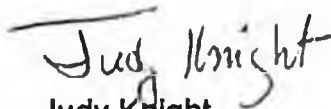
This is the "ABC" test we used for determining "employees" vs. "contractor" status. I have also included pertinent sections of our policy manual.

Additionally, I have provided copies of two significant Commissioner decisions regarding taxi cabs, King Cab in 1989 and Independent Cab of Seward in January 1992. Further clarification is provided in the Superior Court decision in Sourdough-Ingersoll Cab issued in 1987.

Determining whether taxi cab drivers are employees or contractors is a never-ending issue for the Employment Security Division.

Good luck!

Sincerely,


Judy Knight
Director

Enclosures

cc: Arbe Williams, Special Assistant to the Commissioner

continuing relationship with the person for whom the services are performed;

(4) service performed after December 31, 1971 and through December 31, 1977 by an individual in the employ of this state or any instrumentality of this state, or in the employ of this state and one or more states or their instrumentalities, for a hospital or institution of higher education in this state except service described in AS 23.20.526(d) if the service is excluded from the term "employment" solely by reason of 26 U.S.C. 3306(c)(7) (Federal Unemployment Tax Act, Internal Revenue Code);

(5) service performed before January 1, 1978, in the employ of a political subdivision of this state or a wholly owned instrumentality of a political subdivision of this state, if coverage was elected under AS 23.20.325;

(6) service performed by an individual in a calendar quarter after June 30, 1962 in the employ of an organization exempt from income tax under 26 U.S.C. 501(a) (Internal Revenue Code), other than an organization described in 26 U.S.C. 401(a), or under 26 U.S.C. 521, if the remuneration for the service is \$250 or more; notwithstanding the provisions of this paragraph, services performed after December 31, 1971 by an individual in the employ of a religious, charitable, educational or other organization described in 26 U.S.C. 501(c)(3) (Internal Revenue Code) which is exempt from income tax under 26 U.S.C. 501(a), constitutes employment for the purposes of this chapter even though remuneration for the services is less than \$250 in a calendar quarter, but only if the organization had four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not the weeks were consecutive, within either the current or preceding calendar year, regardless of whether the individuals were employed at the same moment of time;

(7) service of an individual who is a citizen of the United States, performed outside the United States, except in Canada, after December 31, 1971 in the employ of an American employer, or of this state or of any of its instrumentalities or any of its political subdivisions, other than service which is considered "employment" under the provisions of (11) or (12) of this subsection or the parallel provisions of the law of another state, if

(A) the employer's principal place of business in the United States is located in this state; or

(B) the employer has no place of business in the United States, but

(i) the employer is an individual who is a resident of this state; or

(ii) the employer is a corporation which is organized under the laws of this state; or

(iii) the employer is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any one other state; or

(C) none of the criteria in (A) and (B) of this paragraph is met but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on service described in this paragraph, under the law of this state;

(8) notwithstanding the provisions of (11) of this subsection, all service performed by an officer or member of the crew of an American vessel or in connection with the vessel, if the operating office, from which the operations of vessels operating on navigable waters inside, or inside and outside the United States are ordinarily and regularly supervised, managed, directed and controlled, is inside this state;

(9) notwithstanding any other provisions of this section, service with respect to which tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this chapter;

(10) service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that

(A) the individual has been and will continue to be free from control and direction in connection with the performance of the service, both under the individual's contract for the performance of service and in fact;

(B) the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed;

(11) an individual's entire service performed inside or both inside and outside this state if the service is localized in this state; service is considered to be localized inside a state or territory if

(A) the service is performed entirely inside the state or territory; or

(B) the service is performed both inside and outside the state or territory but the service performed outside the state or territory is incidental to the individual's service inside the state or territory; for example, where it is temporary or transitory in nature or consists of isolated transactions;

(12) an individual's entire service performed inside or both inside and outside this state if the service is not localized in a state or territory but some of the service is performed in this state and

(A) the individual's base of operations is in this state; or

(B) if there is no base of operations, then the place from which the service is directed or controlled is in this state; or

(C) the individual's base of operations or place from which the service is directed or controlled is not in a state or territory in which some part of the service is performed, but the individual's residence

ACCOUNTS AND CONTRIBUTIONS POLICY MANUAL

AGE:	46	ARTICLE:	9 GENERAL PROVISIONS	SECTION:	525
EFFECTIVE DATE:	10/90		"EMPLOYMENT" DEFINED Service/Types of Employment/ Delivery and Transportation	SUBSECTION:	(a) (10)

Taxicab

07/31/87 Yellow Taxi v. ESD Superior Ct. Yellow Taxi, etc. 3.54
 The employer had a taxicab business and leased cabs to drivers for 12 hour shifts. The drivers paid a percentage of their receipts. The employer maintained the cabs. The city code required the exercise of control. The work was in the employer's usual course and place of business. The drivers were not independently engaged, due to the city code and certificates of operation. All three exclusions failed.
 Meredith C. Marshall(87.13), King Cab, Inc.(89.78)

04/25/86 85H-TAX-368 Com. Dec. T & H Cab 86.7
 The drivers purchased the cabs from the owner, could work either shift and set their own hours within the shift. The company was licensed by the city of Sitka. The drivers paid for gas and daily maintenance and gave 40% of their fares to the company. They were within the company's direction and control, worked in the employer's usual course of business, and were not independently in business. The employment was not excluded.

04/16/80 79T-136 Com. Dec. Independent Cab Co. 80.4
 The employer leased taxicabs to the drivers for specific hours. The drivers could not sublet the cabs and could not use them for any other purpose. The employer did exercise such control as was necessary for the pursuit of the business. The work was in the usual course of the business. The employment did not meet the exclusions.
 Raymond Ramos(5.88)

06/06/75 #31 Com. Dec. Calvin G. Burt 75.22
 The employer had a taxi which he leased to another for 50% of the gross receipt. The employer paid all the maintenance. The employee did not have a taxicab license. The employer could have replaced the worker and did exercise such control as was necessary. The work was done in the course of the employer's business. The exclusion failed.

10/16/59 Com. Dec. Yellow Cab Co. 59.01
 The employer had drivers who drove company-owned cabs, and other drivers who owned their own cabs:

Those who drove company-owned cabs were stipulated to be employees.

Although the city ordinance required that the master license holder be responsible for insurance and record keeping, the driver-owners were free from the direction of the company except for such rules necessary for the dispatch service. They were held not to be employees.

ALASKA UNEMPLOYMENT TAX CASE MANUAL

Date: 09/12/89	89H-TAX-019/King Cab, Inc	Page: 89.78	(
23.20.525(a)(10)		Com.Dec.	

CASE HISTORY

A missing wage report filed with the employment security agency gave rise to an audit of King Cab Inc, conducted by George Lampe beginning July, 1988 and culminating in his field audit report submitted February 14, 1989. As a result of this audit, King Cab was issued a notice of assessment February 15, 1989 finding it liable for contributions and interest for the four quarters of 1987 and the first two quarters of 1988 totalling \$21,915.43.

Petitioner, by and through it's attorney of record Mark Grober, timely appealed this matter on March 8, 1989. The hearing in the matter took place on July 6, 1989 at Fairbanks. George Lampe appeared and testified on behalf of the State of Alaska. Bob Garrett appeared on behalf of the petitioner. King Cab was represented by Mr. Grober.

The issue before me is whether taxicab drivers performed taxable "employment" for King Cab under the terms of AS 23.20.525(a)(10), commonly referred to as the "ABC" test.

FINDINGS OF FACT

King Cab began operating as a taxi cab company in the Municipality of Fairbanks and related North Star Borough environs in 1979. The business was operated initially as a sole proprietorship by Mike Garrett, who is still the owner of the business, now operated as a corporation. He is also the sole owner of the master operator's license which allows King Cab to operate in the Municipality of Fairbanks.

King Cab owns a fleet of automobiles painted with the corporate logo, equipped with two way radios and taxi meters. The company has a garage where it repairs these vehicles and also an office where a central dispatcher is located and dispatches cars to customers who telephone to request a taxi cab. Bob Garrett has been the manager for the last seven months and is the brother of the owner. At the central office, he keeps close track of available cars as well as available drivers. In order to be available, a vehicle must not only be in operating condition, but must be inspected, licensed, and properly insured. These available cars are then matched with drivers and the periods they themselves specify which they are willing to drive.

New drivers are being recruited continually through newspaper advertisements. Possible new drivers are initially interviewed to determine their driving record. King Cab is required by Fairbanks Municipal ordinance to carry liability insurance. The carrier will not insure a driver whose driving

ALASKA UNEMPLOYMENT TAX CASE MANUAL

Date: 09/12/89	89H-TAX-019/King Cab, Inc	Page: 89.79
23.20.525(a)(10)		Com.Dec.

record is poor. Applicants must also show that they have the appropriate chauffeur's license. If they do not have such a license, they are referred to the Fairbanks Police Department which issues such licenses for a fee. King Cab assumes no responsibility for or pays any fee necessary to obtain such licenses.

Potential drivers are then taken for an orientation drive to determine their knowledge of operating a vehicle for hire and the use of the taxi meter and the two way radio (which use may differ among the various cab companies). Also at this initial interview, new drivers are presented with the "taxicab lease agreement." They are asked to read it, whether or not they have any questions about it, and to sign it.

That lease agreement was itself put together by Bob Garrett several years ago from examples of agreements he had obtained from other cab companies. Until January of 1989 it had undergone no changes other than some slight variation in form. The terms of that agreement require King Cab to furnish an appropriately equipped car to be operated as a taxicab as well as two-way radio dispatch service. King Cab further agrees to provide liability insurance and to maintain the taxicabs in working order and repair. The taxicab drivers on the other hand agree to pay for their own gasoline, provide their own comprehensive and theft insurance if they so desire and pay a set rental fee for the use of the vehicle. This rental fee has in the past varied according to supply and demand as well as competition from other cab operations, standing at the time of the hearing at \$50.00 per 11.5 hour shift.

The use of this "flat fee" in payment for the use of a taxicab was instituted sometime in May of 1987. Before that time the drivers engaged in a fee-splitting arrangement with King Cab, both parties taking a certain prearranged percentage of the daily receipts. In either case, the cab driver collects the fare amounts and pays King Cab their fee, usually at the end of the shift. Payment is made at the King Cab office either by handing it over to office personnel or depositing it in a drop box.

In January 1989, the lease agreement was altered to reflect the fact that, by city ordinance, cab drivers have always been required to keep daily "trip sheets" so as to account for consumer sales taxes they may owe. These trip sheets record each fare, the time that it took, the number of passengers, where they went and the meter totals. These trip sheets are kept on forms provided by King Cab and are filed with King Cab along with the fees the drivers owe the company. When King Cab was operating a split-fee arrangement, the trip sheets would be used to calculate each party's share. These records are kept by King Cab.

Changes in the meter rate must be submitted to city authorities 30 days in advance. Each taxicab meter is required to be certified twice yearly. This service used to be provided by the city police department but now is subcontracted to Midnight Sun. Also, these vehicles must be regularly inspected for safety not only so they may operate within the Fairbanks municipality but also on Fort Wainwright, a military base, and at the state operated International Airport. The Fairbanks Transportation Board was

ALASKA UNEMPLOYMENT TAX CASE MANUAL

Date:	09/12/89	89H-TAX-019/King Cab, Inc	Page:	89.80
	23.20.525(a)(10)			Com.Dec.

entrusted with the enforcement of many of the provisions of the Fairbanks municipal Code. The board has been disbanded in a step towards industry deregulation.

In the actual operation of the taxicab business, King Cab breaks their service area up into zones. Operating vehicles are dispatched according to the zone they are in. Cab drivers can and often do take fares solicited directly from prospective passengers on the street.

Petitioner testified that the drivers did drive for other companies, however there was no further elucidation of this activity. Judging from the affidavits from some of the drivers that were submitted, many believe they are "...a private business person..." in business for themselves. If a cab driver is operating a vehicle in a haphazard manner either as determined by the dispatcher or by the receipt of a complaint, the usual procedure is to call the cab driver into the office and let him "cool off." Cab drivers often deal with difficult people.

SERVICE

The first, issue is whether any service at all was being provided petitioner by the individuals in question.

Petitioner asserts a leasing arrangement, not a service contract, exists between the drivers and themselves. The state was more inclined to look beyond the terms of the written contract, turning the case on the course of the actual conduct taking place between the parties.

I hold that there is enough question regarding the performance of service to apply the Exceptions test to the facts of this case.

ABC TEST

Under the provisions of AS 23.20.525(a)(10), service constitutes employment, for unemployment insurance purposes, unless and until the petitioner shows "to the satisfaction of the department" that all of the, "A B C," provisions apply to the particular services, and are conjunctively met. ESC v. Wilson, 461 P. 2d 425 (Alaska 1969) and Clayton v. State, 528 P. 2d 84 (Alaska 1979).

ELEMENT "A"

Element "A" requires a showing that the person's actions are and will be free from control, even the right to be controlled. This is to be measure against that level of supervision which the nature of the work requires. Rahier Trucking v. United, States, 344 F. 2d 644 (1969).

Since being issued, the benchmark taxi cab case has been Yellow Taxi et. al.v. E.S.D., Superior Ct. Dec. 1KE-86-104 Civ., 1C Unemp. Ins. Rptr. (CCH) ¶8131 (AK 87) which reviewed Comm'r. Dec. 85H-TAX-100.

ALASKA UNEMPLOYMENT TAX CASE MANUAL

Date:	09/12/89	89H-TAX-019/King Cab, Inc	Page:	89.81
	23.20.525(a)(10)			Com.Dec.

Briefly, Yellow Taxi operated its business in Ketchikan as the holder of a "Certificate of Public Convenience and Necessity." Under this certificate, the company was constrained to provide a certain specified level of service to the Ketchikan area, such as 24 hour operation, liability insurance, and to keep a daily manifest. The company in turn offered to lease properly outfitted taxi cabs to drivers, who in turn paid one-half of all cash receipts back to Yellow Taxi. The decision which the Commissioner of Labor issued in the case held Yellow Tax to be a liable employer. Concluding that Yellow Taxi had not met segment "A" of the ABC test, the commissioner said, "The code [Ketchikan municipal ordinance] has the effect of requiring the holders to possess and exercise considerable control over all taxicabs operated under their certificate without regard to how much independence the holders choose to allow a driver to exercise under a lease. . . . If the holders did not have to require the daily manifest and the drivers only paid a fixed fee at regular intervals for use of both the holders' taxicabs and services, the operation might better resemble the typical "car rental" agency the holders contend they are."

In the instant case, the drivers do not split the fares they generate on a shift with petitioner, but rather pay a flat daily fee, of the kind mentioned in Yellow Taxi, supra. Thus, with a fixed overhead, and exposed to a real possibility of loss along with gain, the drivers assume responsibility over a important element to the operation of any business-- a bottom line.

Petitioner still requires drivers to keep daily trip sheets, however. With the demise of the transportation board of Fairbanks and the general deregulation of that industry which elimination of the board indicates, the control this requirement exhibits is questionable.

But as will be addressed more fully in relation to the "B" element, below, the payment of sales taxes by the drivers and the trip sheets used in accounting for them still greatly affect the business of petitioner by threatening, through Sec. 8.601 of the Fairbanks municipal code, the revocation of their master operators license. This is due to, "Delinquency on the part of the holder of a master operator's license, or on the part of individual chauffeurs or drivers, in payment of consumer sales taxes imposed on fares collected for the transportation of passengers in vehicles operated under the license." Though the trip sheet is therefore now mainly beneficial to the city government in assessing consumer tax liability, the holder of the master operator's license is held responsible. Again, with the demise of the transportation commission the threat to petitioner's master license, which is at the heart of the reason for control, is left somewhat in doubt since there does not seem to be any enforcement agency. But if petitioner were truly convinced the Municipality of Fairbanks were not in a position to enforce this ordinance, they would not force the drivers of their vehicles to continue the completion of the trip sheets. The evidence simply does not warrant the conclusion that the discontinuation of the transportation board has meant the end of regulation of the taxi business in the Fairbanks area.

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I hold Petitioner has not met their burden of proof regarding element "A" of the above referenced Exceptions test.

"B"

Element "B" requires a holding that services were performed either outside petitioner's usual course of business or outside of all the normal places of business of the enterprise.

In another taxi cab case, In Re Alaska Cab Company, 87H-TAX-110, 1C Unemp. Ins. Rptr. (CCH) ¶8130.06 (1987) the commissioner of labor held that the description of Alaska Cab's business was to be found in the certificate they held and under which they operated. "From this it is clear Alaska Cab is in the business of providing taxi cab service throughout the City of Ketchikan and that this is indistinguishable from the actual work performed by the various drivers providing this service on their behalf."

The instant case simply does not differ from Alaska Cab, supra insofar as the description of the business or the regulations are concerned. Section 8.102 (a) of the Fairbanks municipal code reads;

License Required. No person, partnership, or corporation, shall operate, or cause to be operated, upon the streets of the City of Fairbanks, any taxicab, motorbus or other for-hire vehicle ostensibly engaged in the business of transporting passengers, unless the applicant shall first obtain, through application to the transportation commission of the City of Fairbanks, and thereafter hold effective, a master operator's license authorizing the operation of such vehicle, or vehicles, upon the streets..."

So in Fairbanks, in spite of deregulation, the municipal ordinances still govern the taxi business, and by this code only the holder of a master operator's license is allowed to operate taxicabs or other for-hire vehicles within the city. By whatever name one calls it, whether a certificate of public convenience or a master operator's license, only those duly licensed can put taxi cabs on the streets.

I acknowledge that King Cab has attempted to make a fundamental change in the scope of their business, one probably differing from that found in Alaska Cab supra. Yet it is evident from the facts and the very conduct of petitioner's business that they are inescapably hemmed in by the same kind of stringent ordinances found in Alaska Cab. Were it not for these regulations, the flat fee which they have assessed since May of 1987 for the use of their services would force the drivers to assume the responsibility of their own profitability and create a new class of entrepreneurs. They have not been, however, able to draw a distinction between the operation of a taxi cab on the streets, and the operation of a cab leasing and dispatching service given their overall operational responsibility which clearly includes that which they have argued should be instead somehow excluded.

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Turning to whether the service of these individuals was performed outside all the usual places of business of the petitioner. The Commissioner held, in In re Fairbanks Publishing Comany, Comm'r. Decision 87H-TAX-152 (1987), 1C Unemp. Ins. Rptr. (CCH) ¶8138.02, "...that it is unrealistic to say that the Petitioner's [a daily newspaper] 'place of business' includes all places where photographs may be

taken (a basketball game, scene of an accident, etc.). It is reasonable to say that a job site away from the main business is an extension of that business if it is integral to the main business."

In the instant case, given same regulatory provisions which I find are controlling, there can be no question that the cabs on the street are integral to the operation of petitioner's cab company. Thus the second part of element "B" has not be met either.

"C"

Element "C" is established where an individual is shown to be customarily involved in an independently established trade, occupation, or profession. Shedding some light on the meaning of this language, the supreme court for the state of Oregon held that independent contractor status ordinarily exists if a person is an entrepreneurial enterprise enjoying such a degree of economic independence that the enterprise can survive any relationship with a particular person or acting for the services. Revlon Services v. Employment Division, 55. 2 (Oregon 1977).

There is no ownership of the "means" of operating a taxi business by the drivers. The equipment belongs to petitioner; the master operator's license, the liability insurance, even the facilities to maintain the equipment. Without these trappings which entities such as King Cab possess, there is only a minimal financial involvement on the part of the drivers. Thus, as stated by the Superior Court in the Yellow Taxi case, supra, "Should a driver not be able to obtain a lease for a cab, ne would have nothing to show as an independent operator unless he were able to walk down the street and obtain a taxicab from another company. All in all, the drivers displayed none of the requisites of being independent contractors."

Also in the Yellow Taxi case, as in the instant case, drivers could and did drive for other companies. But the decision regarding element "C" reached in the Yellow Taxi case found that, "...the certificate and the code defeat the possibility of an independent trade, business, or profession of taxi driving in the City of Ketchikan divorced from ownership of the taxicabs." As noted above, the Fairbanks municipal code provisions are effectively the same as the Certificate of Public convenience found in Alaska Cab, supra, and therefore stand just as much for the prevention of an independent cab driving business in this case.

But does this come to grips with the issue concerning the effect of the alleged lease? I believe it does.

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What petitioner has attempted to do in regard to element "C" is to pull itself up by its own bootstraps. It has used contracts of adhesion with drivers which, in the process of binding the drivers, also attempts to prop them up as their own separate business enterprises. But a single lease simply does not leave an individual "customarily engaged in an independently established trade, occupation, or profession." For the most part these drivers viewed themselves as independently established, and contracted with King Cab on that basis. But, the affidavits submitted by some drivers regarding their own business status are conclusionary and short on facts and must be tempered by AS 23.20.395 which categorically prevents an individual from contractually abnegating his or her employment security rights and thereby frustrate the purpose of the Employment Security Act. The evidence of the activity of the drivers is just as easily explained as being merely serial employment.

I hold the petitioner has not met the provisions of element "C" of the "ABC" test.

SUMMARY

In sum, I hold the petitioner has not met any of the three elements to the "ABC" test as to any of the taxicab drivers.

ORDER

IT IS HEREBY ORDERED that the division's Notice of Assessment for the four quarters of 1987 and the first two quarters of 1988 in the total amount of \$21,915.43 is SUSTAINED.

ALASKA DEPARTMENT OF LABOR
OFFICE OF THE COMMISSIONER
BOX 21149
JUNEAU AK 99802-1149

DECISION OF THE COMMISSIONER OF LABOR
No. 91H-TAX-57

IN THE MATTER OF:

Independent Cab of Seward
PO Box 115
Seward AK 99833

ACCOUNT No. 0001126113

CASE HISTORY

On June 29, 1991, as a result of an audit performed by William Milewski, Field Auditor for the Accounts and Contributions Section of the Employment Security Division, notices of assessment were issued to Independent Cab of Seward. The assessments covered the calendar year 1990 and the first quarter 1991. On August 31, an additional assessment was issued covering the second quarter 1991. The assessments total, at the time of the hearing, \$8,637.78 including penalties and interest.

Independent Cab appealed these assessments on September 9, 1991. Hearing took place by telephone on December 2 before Dan A. Kassner, Hearing Officer on the behalf of the Department. Appearing for Independent Cab was James Weaverling, co-owner and manager. Appearing for the Employment Security Division was Don Newton, Senior Field Auditor.

The assessments under appeal cover a number of Independent Cab drivers. By stipulation entered into by Independent Cab and the Employment Security Division, the testimony of Christine Vaughn, a current driver, was accepted as representative of the testimony of all the drivers.

The issue before the Department is whether taxicab drivers performed taxable service for Independent Cab under AS 23.20.525(a)(10).

FINDINGS OF FACT

Independent Cab is a small, two-vehicle taxi cab company in Seward. It is owned jointly by Mr. Weaverling and Charlene Almquist. The company operates under a permit issued by the City of Seward (the City). The permit is issued on payment of an annual \$100.00 per vehicle fee. Although Mr. Weaverling initially testified that this is all that the City requires to operate a cab company, he later testified that the City also requires that the cabs have a side sign with the Independent Cab logo, that the fares be posted in each cab, and that a report be generated showing the time-in, time-out, and number of passengers. The City also requires 5% of the receipts, which amount is paid by Independent Cab. The permit does not limit operation to any specified area.

Independent Cab is in the business of providing personal transportation services. The service is provided through two drivers. Initially, the vehicles were owned by Independent Cab. However, in an effort to ensure that the drivers are not considered "employees," Independent Cab decided to sell its vehicles to the drivers. A contractual bill of sale was drawn up which provides that the drivers will pay \$250.00 per month until the vehicle is paid off. The vehicles were sold for \$5000.00 each.

Each driver is asked to sign an "Equipment and Accessories Lease Agreement." The agreement provides that Independent Cab will lease to a driver the necessary equipment (radio, trip meter, top light, and the side sign with the Independent Cab logo as required by the City) at a specified rate per lease term, provide telephone and radio service, and pay for all licenses, taxes, and fees for the equipment and accessories. In return, the driver will maintain, repair or replace, and return all equipment and accessories in good condition, possess an Alaska Business License and such other licenses as the State of Alaska may require for the operation of a taxicab, and operate the taxicab courteously, safely, and legally.

The lease agreement provides that the lease is for a 12-hour period, is automatically renewable for the same 12-hour period day to day, but not for more than six days. The lease fee is specified as 50% of the driver's fares. This amount is paid to Independent Cab at the end of each shift.

Finally, the lease agreement provides that Independent Cab and the driver acknowledge that the relationship between them is that of lessor-lessee, and that no relationship of employer-employee, principal-agent, or master-servant exists. Under the agreement Independent Cab will not make contributions for either unemployment compensation or workers compensation, and the driver will not apply for such. Paragraph 14 of the agreement is a severability clause providing that if any part of the agreement is found to be illegal that portion shall not effect the validity of the remainder of the agreement.

The City does not require that trip meters be installed in the vehicles, but does require that fares be posted. The fares, as agreed upon between the drivers and Independent Cab, are set at \$1.50 flag drop and \$1.25 per mile.

The drivers make up their own schedules, providing them to Ms. Almquist only for information purposes so that Independent Cab knows who is on shift at any given time. A driver is not required to work any shift even if scheduled. If a driver does not want to work a shift, it is the responsibility of the driver to obtain a replacement if the driver so desires. However, if no replacement is found and the driver still does not want to work a shift, there is no risk to the driver. As Mr. Weaverling put it, "If we have two cabs out, we have two cabs out. If we have only one cab out, so be it." If a driver sub-lets a vehicle to another driver, the substitute driver pays the driver, not Independent Cab.

A driver is free to accept or decline any dispatch call received from Independent Cab. A driver may give rides free, or may charge less than the metered rate by "contracting" for a set rate with the passenger before the trip begins and simply not turning the meter on, but may not charge more than the metered rate would be. Mr. Weaverling, however, admitted that charging a rate other than that posted would be against City ordinance. He contended that the driver would be in jeopardy to the City for such activities, not Independent Cab.

Either party has the right to terminate the lease agreement. Complaints are routed to the driver. No other action is taken by Independent Cab in regards to any specific complaint. Mr. Weaverling does, however, retain the right to discharge a driver.

Independent Cab carries liability insurance on each of the vehicles. The insurance is paid for by Independent Cab. Independent Cab also pays for oil, light bulbs, etc. The drivers pay for repairs and gas. Any major accident is also the responsibility of the driver.

A driver is free to accept a radio call from any other company. Although it has never been done, Mr. Weaverling opined that Independent Cab would provide radio and dispatch service to a driver who owned his own vehicle under another taxicab company name.

PROVISIONS OF LAW

AS 23.20.525. "Employment" defined. (a) In this chapter, unless the context otherwise requires, "employment" means

...
(10) service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that

(A) the individual has been and will continue to be free from control and direction in connection with the performance of the service, both under the individual's contract for the performance of the service and in fact;

(B) the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

CONCLUSIONS OF LAW

SERVICE

Independent Cab is in the business of providing transportation for hire. It provides this through drivers. Without the drivers, Independent Cab would not be able to provide transportation, and would have no source of income. Therefore, the drivers provide a service to Independent Cab.

ABC TEST

Under the provisions of AS 23.20.525(a)(10), service constitutes employment unless and until the petitioner shows "to the satisfaction of the department" that all of the "ABC" provisions apply to the particular services, and are conjunctively met. ESC v. Wilson, 461 P.2d 425 (Alaska 1969); Clayton v. State, 528 P.2d 84 (Alaska 1979).

ELEMENT A

Element "A" requires a showing that the person's actions are and will be free from control and from the right to control. This is to be measured against that level of supervision which the nature of the work requires. Rahier Trucking v. United States, 344 F.2d 644 (1969).

In King Cab, Inc. vs. State of Alaska, Dept. of Labor, 4FA-89-1746, Alaska Super. Ct, February 5, 1991, the court found that King Cab exercised control in that the company required the drivers to obtain specific licenses, keep a daily log of activities which are collected and stored by the company, charge a specific fare, drive an assigned cab at assigned times, and adhere to certain behavior requirements. The court also pointed out that the company determined the amount of the lease for the cab, and owned all equipment.

Independent Cab argues that it exercises no control over the drivers. It argues that the drivers own their own cabs, that the rates are set by the drivers and Independent Cab, that a driver is free to accept or decline any dispatch call, may give free rides or charge a different rate (illegal or not), may or may not work a shift as previously scheduled, and may obtain a replacement driver if desired. A driver is also responsible for any repairs, minor or major, although the company will replace certain minor equipment.

Mr. Weaverling initially testified that the City of Seward does not require of Independent Cab anything more than payment of a \$100.00 fee for a license to operate. However, he later testified that the City also requires that fares be posted in the various cabs, that a driver cannot charge more than the posted amount, that the cab must be outfitted with a standard logo, and that the City requires 5% of the receipts. It is doubtful that the City would move only against a specific driver if that driver were, for example, to remove the Independent Cab logo from his vehicle, but still continue to perform services for Independent Cab. Furthermore, even though the drivers, under the sales agreement, may now own their own cabs, the drivers are still required to have that logo.

Nor is it reasonable to assume that the City would move only against an individual driver if the driver were to charge a rate higher than that posted. While the City may move against a driver, it is only reasonable to assume that the City would move against Independent Cab as well for failure to comply with the terms of its license. The facts show, therefore, that Independent Cab has a real interest in ensuring that a driver charges the amount posted and for which amount the meters are set

The City requires payment of 5% of the receipts. This amount is paid by Independent Cab. Therefore, Independent Cab has a real interest in ensuring that the drivers pay to it the percentage amount agreed upon. If this were truly an independent contractor situation, each driver, as a separate business, would be responsible for the taxes collected by the City.

Ownership of a vehicle weighs heavily in whether a driver is an employee or an independent contractor. In re Yellow Cab Co., Comm'r. Dec. 26, October 16, 1959. The risk of profit or loss rests more heavily on the driver in such cases. However, ownership is only one factor. The profit or loss to Independent Cab in this case is dependent on the very cabs of which it has tried to divest itself through the sales agreement. If a flat fee per shift regardless of receipts was paid by a driver to "subscribe" to Independent Cab's dispatch service, it would more closely resemble the independent contractor status, Independent Cab feels it has established.

However, the lease agreement requires that a driver pay 50% of the fares to Independent Cab. The more that a driver drives a cab, the greater the profit to the company. Conversely, the less a driver drives a cab, the greater the risk of loss to the company. Therefore, although the driver may own the cab, it is still Independent Cab that stands to lose.

Independent Cab placed great weight upon its lease agreement in contending that the drivers are independent contractors. However, the provisions of that agreement are such as to impose control over them. The driver must obtain the necessary State business license, must exercise behavioral control, and maintain, and repair or replace the leased equipment. In requiring the driver to maintain a certain behavior, Independent Cab retains the right to not renew a lease and to discharge if that behavior is not maintained. How work is performed is an element of control.

Independent Cab exercises control over its drivers, and has not met the burden of establishing element "A" of the test.

ELEMENT B

This element requires a showing that the services were performed either outside the usual course of business or outside all the places of business of Independent Cab.

Independent Cab is in the business of providing transportation services. It conducts that business through the services of drivers. Therefore, the services were performed within the usual course of business of Independent Cab.

Regarding the second half of this element, Mr. Weaverling argued that the drivers do not just drive the cab around the inside of the building. However, the place of business of any company is not just where its office may be, but any place where it conducts business. A company which is in the business of providing transportation, necessarily conducts that business both at the point of pick-up and the point of delivery, as well as at the dispatch office. In re Tachick Freight Lines, Comm'r. Dec. 86H-TAX-171, November 28, 1986, aff'd., Tachick Freight Lines, Inc., et al vs. ESD, 3AN87-2336 CI, Alaska Super. Ct., March 25, 1988, Tachick Freight Lines Inc. et al vs. ESD, 773 P2d 451 (Alaska 1989).

Independent Cab is in the business of providing transportation for hire. It performs this service wherever a passenger is picked up, transported, and then dropped off. To say that the environs wherein a particular cab may travel is not the "usual place of business" of Independent Cab is to ignore what the business is.

The services are performed both within the usual course and within the usual places of business. Independent Cab has not met its burden under element "B".

ELEMENT C

Element C requires that the worker be involved in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed. Shedding some light on the meaning of this language, the Supreme Court for the State of Oregon held that independent contractor status ordinarily exists if a person is an entrepreneurial enterprise enjoying such a degree of economic independence that the enterprise can survive any relationship with a particular person contracting for the services. Revlon Services v. Employment Division, 567 P. 2d 1072 (Oregon 1977).

There are some elements here of an independently established business. The drivers own their own vehicles, and are responsible for major repairs. A driver may pick up his own passengers, can charge or not charge as desired, establishes his own schedule, and may lease the vehicle he owns. On the other hand, the license to operate is vested in Independent Cab; Independent Cab maintains liability insurance; and it owns the metering equipment, the top light, and the logo.

The license and the equipment transform what otherwise may have been an independently established business. It is doubtful that the driver's "business" would survive the demise of Independent Cab, particularly considering that the license to operate is issued to Independent Cab. Under the City ordinance, a license to operate a cab company must be issued. It is true that the drivers are required to have their own State business license. However, the license to operate a taxicab company is issued to Independent Cab. If this were truly an independent contractor situation with Independent Cab offering only dispatch service, then each driver would be required to have a City license. In re T & H Cab, Comm'r. Dec. 85H-TAX-368, April 25, 1986.

The drivers are not involved in an independently established trade, occupation, profession or business of the same nature as Independent Cab. Independent Cab has not met its burden under element "C".

SUMMARY

It is the holding of the Department that Independent Cab Company has not met any element of the "ABC test" established under AS 23.20.525(a)(10). The drivers perform services for Independent Cab of Seward as its employees, and Independent Cab is liable for contributions, penalties, and interest.

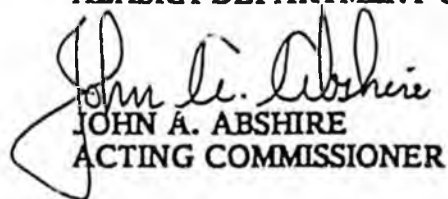
DECISION

The Employment Security Division's notices of assessment for the calendar year 1990 and the first quarter 1991 are **SUSTAINED**.

FURTHER APPEAL may be had from this decision by filing a Notice of Appeal in Superior Court for the State of Alaska within 30 days from the date of mailing of this decision as provided in AS 23.20.445, AS 44.62.560-570 and the Rules of Appellate Procedure of the State of Alaska. Unless an appeal is filed within the said 30-day period, this decision is final.

Dated and Mailed in Juneau, Alaska on January 23, 1992.

ALASKA DEPARTMENT OF LABOR


JOHN A. ABSHIRE
ACTING COMMISSIONER

ALASKA UNEMPLOYMENT TAX CASE MANUAL

DATE: 07/31/87	Yellow Taxi and Sourdough-Intersoll Cab, Inc. Yellow Taxi v. ESD	PAGE: 3.54
23.20.005(a), 23.20.230, 23.20.395(a), 23.20.525(a)(10), Legal Principles		Alaska Superior Court

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

Yellow Taxi and Sourdough-Intersoll Cab as appellants in the instant case have appealed the decision of the Commissioner of Labor in case number 85-H-TAX-100, holding that the appellants are employers for purposes of unemployment compensation relative to the taxicab drivers who operate the taxicabs owned by the appellants. The appellants contend that the taxicab drivers are independent contractors who are individually responsible for unemployment, withholding and other taxes and not the appellants. In furtherance of their position, the appellants offer the signed lease agreements whereby the drivers are identified as independent contractors. Appellants further contend that the drivers are exempt from unemployment coverage under the "ABC" guidelines of A.S. 23.20.525(a)(10).

Appellee Employment Security Division (ESD) adopted the finding of facts and holding of the Commissioner of Labor's decision in Yellow Taxi and Sourdough Cab, Inc. v. ESD, 85-H-TAX-100 (Feb. 5, 1986), the subject of this appeal.

In that opinion, the Commissioner of Labor found that appellants failed to meet each part of the "ABC" guidelines of the Alaska Employment Security Act (ACT), A.S. 23.20.525(a)(10), and were, therefore, subject to the payment of the employment security tax. The Commissioner did reduce the period of liability for appellants to be only from April 1, 1985, and did require that the payments be based on an audit of appellants.

There is no dispute as to the facts in the instant case, therefore, the Court will not repeat the facts herein.

ALASKA UNEMPLOYMENT TAX CASE MANUAL

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The question of the status of the drivers or operators of taxicabs relative to unemployment compensation statutes has been widely litigated in the various states. These decisions vary in many respects. Any decisions in and of themselves are subject to the applicable state statutes and regulations; thus are not always pertinent precedents entitled to reliance.

In reaching a decision in this matter, the Court will employ the reasonable basis test with respect to those questions of law which involved agency expertise.

The crux of this case involves the application of the exemption provisions of A.S. 23.20.525(a)(10), known of as the "ABC" test, to the particular facts of the case. For appellants to obtain an exemption from the payment of taxes under the Act, it is necessary for the appellants to prove to the satisfaction of the Department of Labor that the employees meet all three parts of the "ABC" test. Clayton v. State, 598, P.2d 84 (Alaska 1979). Failure to do so results in the classification of "employees" rather than "independent contractors" requiring the appellants to pay the requisite taxes under the Act.

The first aspect of the "ABC" test required the appellants to prove that the drivers were free from control and direction in the performance of their service. The driver is merely an operator and has no proprietary interest in the business itself. The provisions of the Ketchikan Municipal Code require the owner of the Certificate of Public Convenience and Necessity for a taxicab business to provide a service to the public. Without the certificate, there can be no taxicab business. The onus is upon the holder of the certificate, in this case the appellants, to insure the provision of service which is effected through the control of the taxicab drivers.

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Although the drivers sign a lease agreement, the provisions therein are such as to impose control over them. They first must have the requisite operators license, be acceptable to the appellants insurance carrier, and carry out their functions in the manner outlined by the appellants including reporting damage, taking care of their own violations, keeping their cabs clean or paying a cleaning charge, accept calls, and conduct themselves in a proper manner. The rate of compensation is also set by the appellants being 50% of the meter reading at the end of the shift as well as one-half other non-meter charges.

Appellants argue that the drivers are free from control as they can take breaks when they wish, drive as little or as much as they desire, operate where they wish, and quit or work, and even work for another taxicab company. The Court accepts these aspects as true. However, appellants stated at their administrative hearing that should a driver not perform in a satisfactory or productive manner, he would not have his lease renewed. The freedom alleged might be there for the taxicab drivers; but the exercise thereof would result in termination of employment.

The Court, therefore, finds that the control of the drivers in this case is with the appellants, that rather than being free to operate as independent contractors, the drivers are subject to the control of the appellants at all times.

The second provision of the "ABC" test is the "B" test which required the appellants to prove that the drivers were operating outside the course or place of the appellants' business. Appellants contend that their office is their place of business, and not the taxicabs, and that the taxicabs are the place of business of the drivers. The appellants have the Certificate of Public Convenience and Necessity. This is for the

ALASKA UNEMPLOYMENT TAX CASE MANUAL

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purpose of operating a taxicab business. They own, service and repair all of the taxicabs, keep them in proper operating condition, and place them on the streets under qualified drivers.

The taxicabs are distinctly painted with marks identifying them as the appellants and advertising their availability. The appellants also supply and maintain the dispatching service for the use of the drivers even though the drivers do the dispatching from the taxicabs.

Whether they disclaim the taxicabs as their place of business or not, the appellants office is not fulfilling the requisites under the certificate, but their office and the taxicabs together constitute the place of business of the appellants who have thus failed to sustain an exception under "B" of the "ABC" test.

Test "C" under the "ABC" required the appellants to prove that the taxicab drivers were customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed. Great reliance was placed on the dissent in Employment Security Commission of Wyoming v. Laramie Cabs, 700 P.2d 399 (Wyo. 1985). The Court points out that was and remains a "dissenting opinion" based on the same facts, but different reasoning from that of the majority in the case which is the precedent. Second, the case of Laramie Cabs presented stronger facts for the taxicab company than does the present case. The taxicabs were leased by the drivers for a 24-hour period and renewal was automatic in the absence of a determination of either party to terminate the lease at the end of the 24-hour period. In the instant case, the lease was for a 12-hour period if a cab were available, and the lease terminated with the opportunity of being renewed the following day.

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As previously indicated, the drivers in the instant case had no independent business absent the provision of a taxicab by the appellants. All of the equipment belonged to the appellants, the drivers had none. The drivers were not able to obtain public liability and property damage insurance, but were required to contribute towards the premium payments of the appellants' policies when employed. The equipment was not only owned by the appellants, but also serviced, supplied and maintained by them. Should a driver not be able to obtain a lease for a cab, he would have nothing to show as an independent operator unless he were able to walk down the street and obtain a taxicab from another company. All in all, the drivers displayed none of the requisites of being independent contractors.

The appellants have, therefore, been unable to sustain their burden under any one of the "ABC" provisions, resulting in finding the drivers to be employees of the appellants and not independent contractors.

The questions of equitable estoppel has also been raised by appellants who indicate that they had relied upon the determinations the field representative of the ESD, Al Varnau, made in the years 1981 through 1984, that the drivers were independent contractors and Yellow Taxi and Sourdough-Ingersoll Cab were exempt from payment of the employment security tax. Their reliance on the decision of Al Varnau prompted their purchase of the two taxicab companies which they would not have otherwise acquired. In April 1985, another ESD field representative, Gregory Scott, made a study and review of the appellants status and reversed the determinations of Al Varnau. This resulted in the Commissioner of Labor issuing an order on February 4, 1986, holding that appellants were employers for the

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purpose of unemployment compensation. He did reduce the arrearages due under the new holding to those accruing from April 1, 1985, and required that any assessments be made only on the basis of an audit of the appellants business. It is the contention of appellants that their reliance on the status found by Al Varnau was to their detriment and prejudice when the interpretation of Gregory Scott was made effective by the Commissioner. They contend that the Department should be equitably estopped from implementing or enforcing this order.

The Court initially cannot find that the action of the field representative in the years 1981, 1982, 1983 and 1984 in examining the records and contracts of the appellant amounted to a promise upon which appellants could place complete reliance. First, they understood that the matter was being reviewed annually so was always open to question. In other words, nothing was written in stone. Second, there must have been a realization that another field representative could bring forth a contrary ruling as did Gregory Scott in 1985. Reliance on a never to be changed finding was misplaced. Even assuming that the appellants had relied on the findings of Al Varnau, the position of the Department was not such as to amount to an action or promise upon which estoppel could be based.

Finally, in order for the Court to countenance the doctrine of estoppel, it is necessary to determine that enforcement is in the interest of justice. State v. First National Bank of Ketchikan, 629 P.2d 78, 81 (Alaska 1981); Flover v. Sager, 667 P.2d 1198 (Alaska 1983). The purpose of the enforcement of the employment compensation payments is to benefit

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the employees who are subsequently put out of work. The failure to require such payments and to thus protect the employees from the consequences of unemployment is a detriment to their best interests, and certainly not in the interest of justice. The Court feels that should the burden of the payments be onerous to appellants, a slight variation of the percentage of the receipts could be required of the taxi drivers in order that the appellants can continue in operation and meet the payments. The actions of the Commissioner in making the payments prospective and effective only from April 1, 1985, following the change in determination of the status of the operation of the appellants and not requiring retroactive payments was in accord with a proper implementation of the changed position of the Department.

The Court, therefore, finds that the decision of the hearing officer of the Employment Security Division of the Department of Labor issued on February 5, 1986, in the instant case was correct and proper; that the taxi drivers of Yellow Taxi and Sourdough-Ingersoll cab, Inc., were properly determined to be employees pursuant to A.S. 23.20.525(a)(10); and that the State of Alaska, Department of Labor, is not estopped from finding that the taxi drivers were employees rather than independent contractors, and holding the appellants to the payment of the Employment Security Act.

IT IS, THEREFORE, ORDERED that the appeal in the instant case be dismissed, and this matter remanded to the Employment Security Division of the Department of labor, State of Alaska, for appropriate action in accordance herewith.

DATED at Ketchikan, Alaska this 31st day of July, 1987.

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ORDER DENYING REOPENING

On February 12, 1986, Mr. John T. Flora, representing the above businesses, moved that my February 5 decision in this matter be reopened. In effect. Mr. Flora argues that a "reasonable basis" for not applying coverage and liability continued beyond April 1, 1985 and should be continued "into the future." The argument is rejected out of hand. Were I to accede to this type of reasoning, the division would never be able to hold anyone covered or liable. The motion is DENIED.

The appeal rights stated in and from my February 5, 1986 decision in this matter remain unchanged.

FURTHER APPEAL may be had from this decision by filing a Notice of Appeal in Superior Court for the State of Alaska within 30 days from the date of mailing of this decision as provided in AS 23.20.445, AS 44.62.560-.570 and the Rules of Appellate Procedure of the State of Alaska. Unless an appeal is filed within the said 30 day period, this decision is final.

Dated and Mailed in Juneau, Alaska on February 27, 1986.

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On March 22, 1985, both of the above businesses (hereafter, "holders," since each is a holder of a "Certificate of Public Convenience and Necessity" issued by the City of Ketchikan) appealed timely to me from notices of coverage and of assessment issued to them by the Employment Security Division in February and March 1985. Therein, the holders were held liable to the unemployment insurance fund for contributions, interest, and penalty retroactive to October 1, 1981. This matter was heard at Ketchikan, Alaska on August 30, 1985. The holders were represented by Mr. Fred Starbard and Mr. John T. Flora; the division by audit staff Gregory S. Scott, Glen Knickerbocker, and Susan Solberg.

ISSUES

The issue before me is whether, under AS 23.20.525(a)(10), drivers perform "service" for the holders, and, if so, whether the service is "employment," and, if so, whether, under AS 23.20 generally, the coverage and assessment should be retroactive in the amount assessed.

STATUTORY PROVISIONS

AS 23.20.525: "EMPLOYMENT DEFINED. (a) In this chapter, unless the context otherwise requires, 'employment' means . . . (10) service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that

(A) the individual has been and will continue to be free from control and direction in connection with the performance of service, both under his contract for the performance of service and in fact;

(B) the service is performed either outside the usual course of business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."

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FINDINGS OF FACT

Under Ketchikan Municipal Code § 5.24 (hereafter, "code") the holders have been issued a "Certificate of Public Convenience and Necessity" (hereafter, "certificate") by the City of Ketchikan to conduct the two taxicab businesses herein involved. Under the code, a holder is required to maintain a 24-hour place of business (which may be mobile) for receiving calls and dispatching cabs. A holder is likewise responsible to provide a prospective passenger with service within a reasonable time or advise the prospective passenger of the reasons for not so doing. If a call is refused when a cab is available, a holder's certificate can be revoked (KMC 5.24.250). A holder is required to have bodily injury and property damage bond or insurance for the business (KMC 5.24.050); to obtain a city license for each taxicab (KMC 5.24.060); and to keep a daily manifest showing the origin, destination, number of passengers, and amount of fare for each taxicab trip (KMC 5.24.010 and .260). In other words, I find that the city looks to a holder as being in the taxicab business and holds a holder responsible for providing this service to the public. Although a driver may lose his city license for illegal or improper conduct, a holder stands to lose his entire business if proper service to the public is not provided or the provisions of the code are not met. Finally, I find that a holder's cabs must have a distinctive color scheme (KMC 5.24.030).

The holders lease taxicabs to drivers for 12 hour shifts. Drivers may lease a taxicab provided one is available; may enter into a lease as often or as seldom as the individual desires; may park the taxicab or use it for personal use for the entire period of the lease; and, may drive a taxicab for the holder one shift and a different taxicab for a different holder on another shift. The lease is extendable by mutual consent and can be cancelled by either party without prior notice. Any violation of law which might reflect unfavorably on the holder breaches the lease. Under the lease, the holder agrees to provide all equipment; normal and reasonable repair and maintenance; gas, oil, antifreeze, and tires; and a call and dispatching service. The driver agrees to maintain self and the taxicab in neat and clean condition; conduct self in a courteous and careful manner; obey all laws; operate the cab in a reasonable and prudent manner; inspect the equipment and report defects, damage, or missing equipment at the start of each shift; return the cab in good condition and repair; and clean the cab inside and out at the end of the shift. The driver pays \$4.00 a day for public liability and property damage insurance; a \$100 refundable deposit for the duration of the lease (refund dependent upon a settlement of accounts with the holder); a fee if the cab is not cleaned at the end of the shift; the cost of defects, damage, or missing equipment not previously reported; any and all taxes arising out of the driver's activity; any fines or penalties arising out of the driver's activity; and, one-half of all cash receipts. Finally, the lease disclaims driver entitlement to unemployment benefits.

In actuality, the holders do not provide a call and dispatching service but, rather, an unmonitored base station which relays calls directly to the taxicabs. The drivers handle all calls and dispatch themselves. In addition to the above, I find that some of the drivers have business licenses; advertise their services on TV; use business cards, pins, and jackets to advertise their services; and have their own clientele and repeat business which they take with

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them from the holder to any other holder. Finally, I find that the holders' records have at all times been available to the division for audit; that the lease was reviewed by a division auditor at least three times before 1985; and, that the holders had repeated verbal assurance from a division auditor that their drivers were considered to be performing self-employment rather than "employment" as defined under AS 23.20.

REASONING AND CONCLUSIONS

The holders have made certain arguments which I wish to address before reaching the issues as set forth above. First of all, the holders have argued that AS 23.20 (hereafter, the "Act") should be interpreted liberally (AS 23.20.005 and .010) so as to encourage economic enterprise. To the extent that the Act as a whole (not just its policy provisions in isolation from the rest of the Act) permits me to do this, I agree. However, a statute of this nature falls within a class of social and economic legislation which is remedial in its nature, and as such must be so interpreted as to extend its benefits as far as possible within the bounds imposed by expressed legislative restrictions. Jackson v. Administrator, 128 So2d 915, cited at 76 AmJur2d Unemployment Compensation § 6 at footnote 38. Although it is not the direct or primary purpose of the Act to control or regulate employer-employee relationships (Abrahamsen v. Board of Review, 283 P2d 213 [UT 1955]), the Legislature has created a paternalistic system (Krisman v. U.C.C., 171 SW2d 575 [MO 1943]), in recognition that "involuntary unemployment is a serious menace to the health, morals, and welfare of the people of the state," AS 23.20.010. The Legislature has specifically provided that tax inclusion or exclusion under the Act be specifically determined, in this instance, under the statute as set forth above. Whether AS 23.20.525(a)(10) defeats the purpose of the Act or is ripe for legislative revision is not for me to say.

Similarly, citing IC A. Larson on Workmen's Compensation Law, § 46.30 at p. 8-213, the holders argue that the plain lease statement that the parties intend the relationship of independent contractor and not employee should be given great weight in this case. However, again, the Legislature has specifically provided (AS 23.20.395) that I look beyond the lease agreement and any agreement therein by the individual driver to waive, release, or commute benefit rights.

The holders argue that I should be bound in this matter by Verna v. Yellow Cab, Worker's Compensation Board Decision No. 79-12-0007 (AK [1981] un-rept). However, Verna and similar worker's compensation "employment" cases are determined under the "relative nature of the work" test and not under the "service . . . whether or not the common-law relationship of master and servant exist," so called "ABC," test that is mandated by the legislature for unemployment insurance cases. Stated differently, the Employment Security Division is not bound by rulings of other agencies based on different legislative enactments. Arizona Dept. of Economic Security v. Little, 539 P2d 954 (AZ 1975). In the same manner, the holders' argument (hearing exhibit No. 25, pg. 5) that "service for wages" (National Trailer Convoy v. Undercofler, 137 SE2d 328 [GA 1964]) should apply is without merit. Under the statute involved in this matter, "service for wages" need not be established, only "service."

Service

Now, turning to the issues set forth above, I hold that the individual drivers perform "service" for the holders. For the holders to argue, as they have, that they are not taxicab companies or in the business of operating taxicabs is to totally ignore the existence, meaning, and intent of the certificate which the holders have obtained from the City of Ketchikan. Clearly, under this certificate, it is the holders who are in the taxicab business and the drivers merely perform a service for that business. Kaus v. UCC, 299 NW 415 (IA 1941). Radley v. Commonwealth, 181 SW2d 417 (KY 1944).

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ABC Test

"Service" therefore being established, the drivers perform "employment" unless and until it is shown to the satisfaction of the Department that all three of the exception provisions ("A" and "B" and "C") apply in the conjunctive. ESC v. Wilson, 461 P2d 425 (AK 1969). Clayton v. State, 598 P2d 84 (AK 1979).

In regard to the "A" provision, the holders have cited (hearing exhibit No. 25, pp. 5-12) the following cases which they contend support exemption. National Trailer, supra; Davis Cab v. Leach, 184 NE2d 444 (OH 1962); Magruder v. Yellow Cab, 141 F2d 324 (4th Cir. 1944); Alford v. Victor Cab, 228 SE2d 43 (NC 1976); U.S. v. Davis, 154 F2d 314 (1946); Industrial Commission v. Warren Zone Cab, 191 NE2d 852 (OH 1963); and Cole v. Peachtree Cab, 173 SE2d 279 (GA 1970). I will not address the holders' contentions relative to these cases. Suffice it to say, there is substantial case law on both sides of the "control" question.

The code has the effect of requiring the holders to possess and exercise considerable control over all taxicabs operated under their certificate without regard to how much independence the holders choose to allow a driver to exercise under a lease. The holder must license, insure, and maintain the cab and is ultimately responsible to the city for its safe and proper operation. Control over the taxicabs involves control over the drivers. NLRB v. Deaton, 502 F2d 1226-27 (5th Cir. 1974), cert. denied 422 U.S. 1047 (1975), as cited in the concurring and dissenting opinion on Star Line Trucking v. DILHR, 325 NW2d 872 (WI. 1982). Additionally, however, the holders have established a certain pattern of operation, and have engaged persons to participate therein, knowing that if they respond normally, they will conform to the established, workable, and profitable pattern. Foster v. Michigan ESC, 166 NW2d 316 (MI 1968). Finally, the holders' right to control (whether exercised or not) is clearly present in the daily manifest which they are required to collect from the drivers and the set percentage which they receive from the drivers. Revenue Ruling 71-572 (CB 1971-2, 347). If the holders did not have to require the daily manifest and the drivers only paid a fixed fee at regular intervals for use of both the holders' taxicabs and services, the operation might better resemble the typical "car rental" agency the holders contend they are.

In regard to the "B" element, the holders argue that their only place of business is the physical address where records are kept and cab maintenance is performed and that they are not in the business of operating taxicabs. However, again, these contentions are unrealistic in light of the certificate and the

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code under which the holders are regulated. Clearly, the City of Ketchikan views the holders to be in the business of operating taxicabs and the holders' place of business to include each and every taxicab operated under that certificate. ESC v. Laramie Cabs, 700 P2d 399 (WY 1985). Stated differently, from the perspective of the actual operation, the holders' businesses consist of providing transportation to customers as requested. The taxicabs are leased to qualified drivers solely for the purpose of supplying such service. The taxicabs are distinctively colored, thus advertising their availability for such service, and a customer initiates the service by calling the holder (even though the call is relayed directly to the driver). ESD v. Laramie, supra at 407.

In regard to the "C" element, the holders argue that drivers can, and sometimes do, drive for other holders. However, again, even if the holders were to show that all the drivers drive for other holders as well, the certificate and the code defeat the possibility of an independent trade, business, or profession of taxi driving in the City of Ketchikan divorced from ownership of the taxicabs. Radley, supra. The driver has no business life apart from or proprietary interest in driving one of the holders' cabs. Kaus, supra. The driver's financial involvement is minimal. Young v. ESD, 187 NE2d 489 (IN 1963). Likewise, the driver's "enterprise" will not survive termination of his relationship with the holder. Schaffenhauer v. DES, 543 P2d 343 (WA 1975) as cited in Clayton supra. In regard to this element, the instant case appears to be on all fours with ESC v. Laramie, supra at 407-9.

To summarize all of the above, the holders have been unable to show that any of the exception elements ("A," "B," or "C") apply, let alone all three in the conjunctive. Also, as stated above, this is largely due to the code under which the holders operate. Therefore, I must hold that the drivers perform "employment" for the holders within the meaning and intent of AS 23.20.525(a)(10). Accordingly, I will now turn to the question of when the holders became liable employers under the Act, and what the holders owe the unemployment insurance fund.

Retroactive Coverage

The holders argue that coverage in the instant matter should not be given retrospective effect. I agree. Unless the question of coverage is fairly clear and without conflicting court decisions in other states, "There is something inherently unfair in forcing an employer, at his peril, to know the coverage provisions of the Employment Security law better than the . . . division itself." Sumpter v. ESC, USDC Op. No. A-14, 443 as supp. (D. 3d Div. AK 1959), Vol IC CCH UI Repts. AK ¶ 8013. In the instant matter, the holders had assurances from the division that the drivers were independent contractors, and, as noted above, there is conflicting case law regarding taxicab driver liability. Stated differently, a taxpayer has the right to treat individuals as independent contractors so long as there is a "reasonable basis" (such as reliance upon prior advice of the division) and other requirements (such as the furnishing of records) are met. Revenue Ruling 83-152 (CB 1983-2, 172). Accordingly, this being the situation in the instant matter and the court having denied retroactive coverage and liability similarly in Sumpter, supra, I hold that the holders are covered and liable only effective April 1, 1985, the beginning of the calendar quarter following the date of the division's determinations of coverage.

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Arbitrary Assesment

Applying the same precedent and principles (Sumpter and Rev. Rul. 83-152, supra), since the holders' records were at all times available to the division and this has truly been a questionable catagory of employment, I hold that the holders' liability should be determined through a proper audit and not by arbitrary assessment. AS 23.20.230 authorizes the division to make arbitrary reports for an employer when the employer "fails or neglects to make or file a report or return required by this chapter." Clearly, the Legislature did not intend for the division to use arbitrary reports in a circumstance such as is before us in the instant matter. No negligence is invovled and any failure by the holders was the result of their justifiable reliance upon agency advice. Stated perhaps a little more pointedly, the Legislature intended the power to make arbitrary reports to be a means of last resort, not a weapon.

ORDER

IT IS HEREBY ORDERED THAT the division's notices of coverage are MODIFIED. The holders are employers for purposes of unemployment compensation coverage relative to taxicab drivers effective April 1, 1985.

IT IS FURTHER HEREBY ORDERED THAT the division's notices of assessment are SET ASIDE. The question of the holders' liability for contributions, interest, and penalty is hereby REMANDED to the division for a proper audit and a new assessment.

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

September 10, 1991

James G. Campbell
1150 Woodland Avenue
Ketchikan, Alaska 99901-6642

Re: Taxi companies and possible
filing of lawsuits
Our file: 663-92-0106

Dear Mr. Campbell:

The deputy attorney general has asked me to respond to your letter dated August 26, 1991. I have reviewed earlier correspondence between yourself and the commissioner of the Department of Labor. I was unsuccessful in my attempts to contact you directly by telephone.

Your complaints against the Ketchikan taxi cab companies involve several labor issues, including unemployment security contributions, wage and hour obligations, and workers' compensation responsibility. In a nutshell you claim that Ketchikan taxi cab drivers should be considered as employees as opposed to independent contractors. While I do not have the benefit of any factual investigation regarding your allegations, I will attempt to generally respond to your inquiries.

EMPLOYMENT SECURITY DIVISION

The Employment Security Division (ESD) generally considers taxi cab companies to be employers. An ESD determination is based on a three part test that evaluates the amount of control exerted by the would-be employer and is fact specific. See Clayton v. State, 598 P.2d 84 (Alaska 1979). It is my understanding that the Ketchikan taxi cab companies have provided employer contributions for purposes of unemployment insurance.

REPLY TO:

1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

1st NATIONAL CENTER
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295
465-3603

James G. Campbell
Ketchikan, Alaska
Our file: 663-92-0106

September 10, 1991
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WORKERS' COMPENSATION COVERAGE

With certain exceptions, an employer in Alaska is required to provide workers' compensation coverage either through insurance or self-insurance. Has there been an "on the job" injury for which workers' compensation benefits have been denied? Is there evidence that the Ketchikan taxi cab companies do not have workers' compensation coverage? Please forward any evidence of noncompliance or inquiries to:

Division of Workers' Compensation
Department of Labor
P.O. Box 25512
Juneau, Alaska 99802-5512
Telephone: 465-2790

WAGE AND HOUR COMPLAINTS

It is my understanding that the Division of Labor Standards and Safety has an on-going investigation for possible violations of wage and hour statutes. Snova Lochaby-Smith (465-4839) has an open file on a complaint from you and may be contacted for more information. There is also an open file in response to a complaint from Kaye Ellison.

INCOME TAX WITHHOLDING

You should contact the federal Internal Revenue Service in regard to your complaints about federal income tax withholding requirements.

CONCLUSION

There is an open file regarding your complaints involving the wage and hour statutes. It is my understanding that your personal complaint involves a failure by the owner of a taxi cab company to rehire you after a layoff in 1989. The State of Alaska can neither represent you in a personal contract dispute nor can we offer legal advice. Perhaps you have already retained a private attorney in this matter. In regard to a potential violation of state statutes it is helpful if you provide as much documentary evidence as possible to the appropriate agency referred to above. Also, for purposes of clarification, specify whether the claim involves yourself, Ms. Ellison, or Mr. Dunn.

James G. Campbell
Ketchikan, Alaska
Our file: 663-92-0106

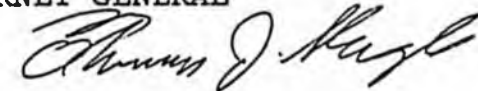
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Please contact me if you have any additional questions.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By:



Thomas J. Slagle
Assistant Attorney General

TJS:jh

cc: Douglas B. Blankenship
Deputy Attorney General

Honorable Nancy Bear-Usera
Commissioner
Department of Labor

Snova Lochaby-Smith
Labor Standards and Safety Division
Department of Labor

10-9-91

Here is a copy of the
letter to Mr. Campbell
per your request

Joan

Christ
Bongin

David - What
was the deal
w/ this one?

Donna Heffer

Have Catherine
look into briefly
to see if he
has a point.

James G. Campbell
1150 Woodland Ave.
Ketchikan, AK 99901-6642
Phone 225-2446

August 26, 1991

Charles E. Cole
Attorney General
DEPARTMENT OF LAW
P.O. Box K
Juneau, AK 99811

RE: Taxi companies and possible
filing of civil lawsuits-

Dear Mr. Cole:

Please find the enclosed packet which we are forced to consider using if legal counsel must be brought into the problems we have encountered with the City of Ketchikan and the State of Alaska.

We do not want to use this route, but all the inaction on their parts have forced us to now bring that possibility to the front as our only other available option.

In the name of fair play, I thought at least one more state contact should be made to see if these problems can still be resolved, not that we haven't tried all proper channels.

After you read the enclosure you will see some of the picture more clearly. For the most part it concerns the contract legality and why they are allowed by the city and the state to continue to apply this contract to the detriment of all cab drivers in Ketchikan. The State of Alaska used to recognize taxi drivers as employees for years and years, then in 1983 it was changed by the cab companies without any bargaining whatsoever. Then in 1987, the Employment Security Division shot down their contract and said taxi drivers are NOT self-employed independent contractors. Yet they are still allowed to use that contract and the only change we saw was that we could draw unemployment after very much ado with the owners, they usually fight it tooth and nail. We still are forced to pay the high self-employment taxes, we are not provided workmens compensation coverage and we are still forced to pay for liability insurance that does not even cover us. This is not right, we have pointed out everything and nothing is being done. Ample opportunity is not even an issue, we are lucky to even get an answer from any of the department divisions. Several letters and phone contacts have been made and only two people have bothered to answer, and usually with the standard baloney of people who will not, or do not want to rock the proverbial boat.

We are treated as independent contractors by the company and yet the state will quote laws that govern employees left and right. But even then, they will not enforce their own laws when it comes to protecting employees as the state says we are.

This is a cut and dry issue in our eyes. The State of Alaska says we are employees, the State of Alaska lets them treat us as self-employed. The city and state must change this policy of turning their back on what is going on with the taxi companies treatment of their employees.

We will begin seeking counsel within 30 days from now if we can't get some satisfactory answers that the State of Alaska will take some action and put a stop to these clear violations on the cab owner's part very soon, we will have no other alternative.

Attorney General continued -

We ask that the taxi companies start abiding by state law and throw out their illegal contract, start guaranteeing a minimum wage, start providing workmens compensation, start paying into F.I.C.A., begin withholding federal taxes, stop illegally forcing taxi drivers to pay their insurance, stop all illegal deductions, and start to keep accurate records.

A cease and desist order of some kind will satisfy us with the state. We still may go after the City of Ketchikan and one cab company for damages however.

We have studied, restudied, questioned and spent a lot of time and money trying to get some justice done on a simple issue of how an employer treats an employee. The time is running out for pleading and repleading our case. We are not seeking to be a thorn in anyone's side, simple justice will suffice. I do hope you see our side. We stay within the boundaries of the law, so should the greedy cab owners and all who are choosing to either ignore us and hope we fade away, or know we are right and simply choose to ignore the facts.

One cab owner lied under oath to a hearing officer and provided a falsified record of earnings for a cab driver who appealed a denial for unemployment benefits and the driver consequently lost the first appeal and has reappealed to the Commissioner of Labor. This was something that can be easily proven. The owner inflated one month by close to \$1,000.00, this was pointed out in the appeal and we have not seen any action whatsoever against the owner and the driver still has not gotten a determination. He quit because he was making less than the state minimum wage. It is this kind of injustice that will keep us pushing this just as far as necessary. We have filed claims with the Wage & Hour Division in attempting to get back what the owners illegally took and we have not had any kind of clue of where we stand. We are near the end of waiting for nothing.

Thank you for your attention and we will be looking forward to your reply.

Sincerely,



James G. Campbell
Kaye Ellison
Melvin A. Dunn

cc: Drue Pearce, Labor and Commerce Committee, Senate
David Finkelstein, Labor and Commerce Committee, House
FILE

Enclosures: Copy of form letter seeking counsel -

Dear Counselor:

We are seeking an attorney on a contingency basis who would be willing to represent us in a civil lawsuit against the City of Ketchikan and possibly the State of Alaska for neglecting to enforce their own statutes in allowing three local taxi companies to violate the law since about April of 1983.

The City of Ketchikan is the governing body who issues the Certificates of Necessity and Public Convenience (permits) to the owners of the cab companies on a yearly basis as a lease for \$20 per year for each permit. The City of Ketchikan is supposed to oversee the cab companies and make sure that they are not violating any city, state, or federal laws. They wrote the Ketchikan Municipal Code that the companies must adhere to, to the letter, or the city has the power to revoke the permits. We have enclosed a copy of the codes governing taxicabs.

The main part of it is that the cab owners have classified their drivers as self-employed independent contractors so they would not have to pay into Workmens Compensation, unemployment insurance, or social security. Their was no bargaining or negotiating, it was just sign this agreement, or not work. They introduced this unconscionable contract in about April of 1983. Prior to that, drivers were treated as employees and had some benefits and protection. Then sometime in 1987, the Employment Security Division for the State of Alaska, shot down that Taxicab Lease Agreement and made them start contributing to unemployment insurance. Yet the cab companies continued to use it in the name of greed and it was allowed to continue by the City of Ketchikan and the Alaska Department of Labor.

On the local level, we have talked to the Chief of Police, who is supposed to sign each of these Lease Agreements for a driver to be legal, yet they have not seen this contract since about 1984 or 1985. The Chief of Police is supposed to conduct a yearly cab inspection to make sure that they are safe and this is not adhered to. I lost one job because of it and I have it documented, I was fired because I protested that the cabs were not being maintained and were downright dangerous to drive. We pleaded for an inspection that was four months overdue and then we waited another four months and finally forced one. It has now been over a year and a half since they have conducted another inspection. Besides the Chief of Police, we have contacted the Assistant Chief, the Mayor of Ketchikan, four City Council Members, the City Manager and the assistant City Manager and the City Clerk. No one outside the Chief of Police has ever seen this contract let alone approved it. The only answer we got was from the Assistant City Manager who wrote a brief letter and stated the only thing the City is responsible for is the safety inspection which he said would take place in July of this year, it has not taken place yet. The last safety inspection was about November of 1989.

Another violation by the cab companies is forcing each driver to pay \$5.00 per car per shift for liability insurance that the City of Ketchikan requires them to have. This insurance only covers the cab companies and the City, it completely excludes the drivers from any protection. In the first place, if we were truly independent contractors, we would buy our own insurance. The cab companies are not insurance agents, or brokers, so we contend that they cannot sell us insurance. And if we were employees, we could not be forced to pay their insurance. If a driver has an accident, the owner forces them to pay for damages. The owners force drivers to pay for bad checks, turn-ins that they may claim were short, lost items from the cabs are also deducted. The drivers are not given any recourse. We also pay the required 5% City Sales Tax, but the owners claim that deduction at the end of the year. If we were independents, that would be our write off. Several current and former drivers are in tax difficulties because they cannot afford to pay the high self-employment taxes every year. Several do not even pay federal taxes, the owners like these drivers if they know they do not pay taxes, they will not even issue them a 1099 Form that the I.R.S. requires to be issued to so called Independent Contractors. This is what is keeping one cab owner from suing me is that he knows I can send him to federal prison on that issue.

**James G. Campbell
1150 Woodland Avenue
Ketchikan, AK 99901-6642 Ph.(907)225-2446**

The cab owners are aware that we are after them by trying to get the City of Ketchikan to enforce their own Municipal Codes. They know we are appealing to several State Officials, and they know we have filed the Form SS-8 with the District Director of the I.R.S. to let them make the determination of employee, or independent contractor.

On the state level, we have talked to, or written to: Nancy Bear-Usera, the Commissioner of the Department of Labor; Judy Knight, the Director of the Employment Security Division; Robert W. Libbey, the Director of the Labor Standards and Safety; Snova Lochaby-Smith, the Wage and Hour Regional Supervisor; Mike Weaver, Wage and Hour Investigator; Dennis L. Smythe, Chief of Safety and Health Compliance; Richard Arab, Deputy Director of Occupational Safety and Health; Susan McLain, Division Director of Workers Compensation; Sam LaChapelle, a state Insurance Investigator; Don Koch, Marketing Surveillance - State Division of Insurance; and a few O.S.H.A. Inspectors. We started this in about April of this year when we obtained a blank Taxicab Lease Agreement and studied it closely and began to do some intensive questioning into it's legality. The cab owners do not give copies of the contract to drivers, we have been asking for our personnel file records for over three months with no luck. The state says we have a right to our personnel files, but they say we need an attorney to actually get them however. The only response we get from the State of Alaska is pretty much that "we will look into it" kind of answers. We even pointed out several wage violations including falsifying records. On July 9, 1991, we got a letter from Commissioner Usera stating "The Labor Standards and Safety Division can pursue wage violations, and is presently investigating those outlined in your complaint." There are other violations, but the falsifying records was the most serious one that we could prove when they submitted a false earnings report to a hearing officer to deny a driver unemployment benefits who quit because he was making less than the state minimum wage.

The City of Ketchikan says that they cannot do anything on how they conduct business, and the State of Alaska says that they will look into it. That is where we stand pretty much and nothing has been done to rectify the clear violations by the cab companies. We do have our suspicions and some evidence that someone in the city is getting a pay-off and one owner does have some connections with a fairly influential State Representative.

We do seek damages for losing our jobs as taxi drivers because laws were allowed to be violated and we believe we have a cause of action for tort with at least one cab owner. There are three cab companies in Ketchikan and they all operate under the same Taxicab Lease Agreement, they are Alaska Cab- owner, Meredith Marshall, Sourdough Cab, Inc., owners-Fred Starbard and John Flora, Yellow Taxi-owner, Jim Taniguchi. I have driven taxi in Ketchikan since May of 1983, mostly for Yellow Taxi, and then with Sourdough Cab. Which means I did consider myself a full time professional driver and would have continued driving for some time to come. It all came to a head when we did begin to question our treatment when the owners of Sourdough Cab took an additional 5% off of our commission, that is what brought our investigating out to an actual commitment. He has since given back the 5% as he knows he opened a can of worms and was attempting to close it. This lease was invented by the owners of Sourdough Cab in 1983 when they also owned Yellow Taxi. They sold both companies to Jim Taniguchi in 1987 and then illegally repossessed Sourdough Cab in 1989 and are now trying to get Yellow Taxi back, but Mr. Taniguchi is fighting it and has postponed the inevitable by filing a chapter 11 bankruptcy in about December of 1990. Mr. Taniguchi owes the I.R.S. over \$200,000 and has several other creditors waiting in line. Mr. Flora and Mr. Starbard have went through several attorneys trying to get their way. They are the ones who are responsible for introducing this unconscionable contract.

Besides actual damages, we seek punitive damages against the City of Ketchikan and possibly the State of Alaska. We could only pay on a contingency basis as we do have very limited resources at this time. Local attorneys are a joke and not worth approaching on this matter.

**James G. Campbell
1150 Woodland Avenue
Ketchikan, AK 99901-4642 Ph.(907)225-2446**

If you believe we do have a case and are interested, we are certainly interested. We fully believe we have been wronged and these wrongs are ongoing and no one with the authority to at least issue them a cease and desist order or something is even lifting a finger to correct it.

We are sure that the I.R.S. determination will find that we are indeed employees and that the owners had no reasonable basis for classifying us a self-employed independent contractors and will hopefully find them liable for 100% of taxes that should have been withheld plus penalties and interest for every one who worked for them for the last three years. That is the only government entity that we have left who can at least stick them like they have uncaringly stuck it to everyone since 1983. Then the City of Ketchikan will have no choice but, to reissue these permits to some good and fair owners. By the way, the City of Ketchikan is allowing Sourdough Cab to sit on six (6) permits that they are not using, they hold twelve (12) permits and only use an average of five (5) of them. This should be another violation in itself that the City has chosen to ignore and we have pointed out this fact to them.

There are three of us involved in this possible suit, besides myself there is Kaye Ellison and Mel Dunn. We were all three laid off and I was filling in part-time for Sourdough Cab and we were waiting for business to pick up to go back to full-time driving and also drawing unemployment benefits. Kaye Ellison was "laid off" and not called back because she testified on a teleconference for another driver who was appealing an unemployment denial. Melvin Dunn was also let go and is still trying to get his back unemployment that the owners lied under oath about and provided falsified records to make it look like he earned more than he did. One month was inflated by \$1,000. We pointed this out on his appeal and the State chose to do nothing. The owner has also tried to have all three of us blackballed from any jobs by giving a spiteful recommendation to any potential employer. I was not called back to work at all after the owners of Sourdough Cab learned that I was questioning our treatment as independent contractors. If we were in fact self-employed, the State of Alaska should have required us to have an Alaska Business License, it never has asked that of us. Possibly this could constitute a wrongful termination suit. These owners have stolen the most and have the most assets.

Our case is pretty well documented so they cannot say that they were not aware of what was going on, it has been pointed out to them very concisely and they are all sitting on their hands.

If you do not think we have a case, please tell us. If you think we have a case and if you think we can win, please consider it. If you think we have a case and can win, but cannot take it at this time, please refer it to a colleague who you think could take it and win.

At any rate, thank you for your time and consideration and we do look forward to hearing from you when you have had time to look at the facts we have presented.

Sincerely,

James G. Campbell

cc: FILE

for Wage
Claims

MS. Petitioner,

OF the COUNTY
S. Respondent;

arty in Interest.

2206.

of California.

1987.

Cal.Rptr. 700; Cal.,
P.2d 986.

atter is transferred
d, Second Appellate
for reconsideration
perior Court (1987)
Rptr. 332, 729 P.2d

OSK, PANELLI

der assignment
Judicial

TERS et al.,
nts.

Appellants.

f California,
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1957.

231 Cal.Rptr. 615.

Weed for review

Labor Standards & Safety 2/12/92
Independent Contractor Test

JEFFCOAT v. STATE, DEPT. OF LABOR Alaska 1073

Cite as 732 P.2d 1073 (Alaska 1987)

Phylene JEFFCOAT, Sam Jeffcoat and
Lawn, Inc., d/b/a the Lonely
Lady, Appellants,

v.

STATE of Alaska, DEPARTMENT OF
LABOR, Appellee.

No. S-1444.

Supreme Court of Alaska.

Feb. 20, 1987.

Department of Labor brought action on behalf of dancer, alleging club violated provisions of wage and subsistence statutes. Department and club each moved for summary judgment to determine whether employee/employer relationship existed for purposes of labor laws. The Superior Court, Fourth Judicial District, Fairbanks, Mary E. Greene, J., entered partial summary judgment for Department, and club appealed. The Supreme Court adopted the Superior Court's Memorandum Decision holding that dancer who spent less than one hour on stage dancing and spent remaining of eight-hour shift soliciting table dances and tips was employee of club, rather than independent contractor, for purposes of wage and subsistence statutes.

Affirmed.

1. Labor Relations ⇐1122

"Employer" should be broadly interpreted to effectuate remedial purposes of Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

2. Workers' Compensation ⇐305

"Nature of the work" test applies to determine whether worker should be designated employee or independent contractor in workers' compensation cases.

3. Labor Relations ⇐1125

In determining whether worker is employee or independent contractor for purposes of labor laws, focal inquiry is whether worker whose status is in question is

within class of persons meant to be protected by labor laws. AS 23.05.140(d), 23.10.065, 23.10.110(a), 23.10.380.

4. Labor Relations ⇐1124, 1125

"Employee," as opposed to independent contractor, for purposes of labor laws, is worker dependent upon finding employment in business of others. AS 23.05.140(d), 23.10.065, 23.10.110(a), 23.10.380.

See publication Words and Phrases for other judicial constructions and definitions.

5. Labor Relations ⇐1125

In determining whether worker is employee or independent contractor, for purposes of labor laws, court must examine how specialized nature of work is and whether worker is in business for herself. AS 23.05.140(d), 23.10.065, 23.10.110(a), 23.10.380.

6. Labor Relations ⇐1125

To determine whether worker is employee or independent contractor, for purposes of labor laws, court must balance degree of alleged employer's right to control manner in which work is to be performed, alleged employee's opportunity for profit or loss depending on his managerial skill, alleged employee's investment in equipment or materials required for his task, or his employment of helpers, whether service rendered requires special skill, degree of permanence of work in relationship, and whether service rendered is integral part of alleged employer's business; no single factor is controlling. AS 23.05.140(d), 23.10.065, 23.10.110(a), 23.10.380.

7. Labor Relations ⇐1102

Purpose of Fair Labor Standards Act is to protect those who, as matter of economic reality, are dependent upon business in which they render service. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

8. Labor Relations ⇐1126

Fact that dancer received tips for stage performances and table dances did not mandate finding that dancer was independent contractor, rather than employee,

for purposes of wage and subsistence statutes, where dancer's contract was for fixed sum, regardless of dancer's talents, and dancer's working hours did not vary. AS 23.05.140(d), 23.10.065, 23.10.110(a), 23.10.380.

9. Labor Relations ⇐1126

Use of booking agency was not determinative of worker's status as employee or independent contractor, for purposes of wage and subsistence statutes, once worker was on the job. AS 23.05.140(d), 23.10.065, 23.10.110(a), 23.10.380.

10. Labor Relations ⇐1124, 1125

For purposes of labor laws, employees are generally hired for indefinite periods, whereas independent contractors work for periods established by contract. AS 23.05.140(d), 23.10.065, 23.10.110(a), 23.10.380; Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

11. Labor Relations ⇐1125

Parties' intent to contract is not determinative factor in deciding whether worker is employee or independent contractor, for purposes of labor laws. AS 23.05.140(d), 23.10.065, 23.10.110(a), 23.10.380; Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

12. Labor Relations ⇐1121

Employee is not permitted to waive employee status, for purposes of labor laws. AS 23.05.140(d), 23.10.065, 23.10.110(a), 23.10.380; Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

13. Labor Relations ⇐1126

Management's requirement that dancers purchase business licenses did not mandate finding that dancer was independent contractor, rather than employee, for purposes of labor laws. AS 23.05.140(d), 23.10.065, 23.10.110(a), 23.10.380.

14. Labor Relations ⇐1126

Dancer who spent less than one hour of each eight-hour work shift on stage, and otherwise independently solicited table

1. AS 23.10.065, AS 23.10.110(a), AS 23.05.140(d)

dances and tips, was employee of club, rather than independent contractor, for purposes of wage and subsistence statutes, even though dancer provided her own costumes and signed contract to work for only six weeks, with option to extend to eight weeks; club controlled working hours of dancer, dancer's role was integral to club's sale of liquor and club had many rules controlling dancer. AS 23.05.140(d), 23.10.065, 23.10.110(a), 23.10.380.

Dennis E. McKelvie, Downes and McKelvie, Fairbanks, for appellants.

Randy O. Olsen, Asst. Atty. Gen., Fairbanks, Harold M. Brown, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C.J. and
BURKE, MATTHEWS, COMPTON and
MOORE, JJ.

OPINION

PER CURIAM.

We have considered each of appellant's arguments and points on appeal. The record fully supports the Memorandum Decision and Order entered by Judge Mary E. Greene, which we adopt as the opinion of this court. It is set forth in full below.

MEMORANDUM DECISION AND ORDER

This matter comes before the court upon both plaintiff's and defendant's motions for summary judgment. Plaintiff, the Alaska Department of Labor, on behalf of Cathy Adler, brought suit alleging defendant violated provisions of Alaska's wage and subsistence statutes.¹ For the Department of Labor to maintain the action, defendant must have been in an employee/employer relationship with Adler. Each party requests the court to determine whether or not an employee/employer relationship exists for purposes of Alaska's labor laws.

The basic facts are undisputed. Cathy Adler, a dancer, was in Las Vegas. There

and AS 23.10.380.

she was recruited by a booking agency to dance for the defendant, the Lonely Lady (hereinafter the "Club"), in Alaska. The Club is owned by the Jeffcoats, who are also defendants. Adler was presented with the terms and conditions of the contract. Under the terms of the contract Adler agreed to work six days a week for a six-week period and to receive a flat weekly rate. Adler was told by management to obtain a business license.

Adler was required to clock in and to work eight hour shifts. The Club required three dances from her a night. She danced the first two dances largely clothed; the third dance was done while topless. Each dance lasted from nine to fifteen minutes, for a total of less than an hour of stage dancing. Adler spent the remaining hours soliciting table dances and drinks. Payment for the table dances was made by the individual customer, and Adler and the other women were allowed to keep such monies for themselves. The table dances and tips composed the primary source of income for the women.

The women were encouraged to have customers buy them drinks. Solicitation of drinks was made on a "pennies" basis. For each \$5.00 billed to the customers, a woman received a penny. The pennies turned in at the end of each shift were considered gauges of a woman's popularity. The more popular dancers were assigned to better shifts, and the Club considered the pennies evidence that a woman was not in breach of her contract.

Plaintiff contends Adler was an employee of the Club. Defendants maintain Adler was an independent contractor.

Alaska's labor laws are based on the federal Fair Labor Standards Act (FLSA) of 1938. *McGinnis v. Stevens*, 543 P.2d 1221, 1238 (Alaska 1975); *Webster v. Bechtel*, 621 P.2d 890 [895] (Alaska 1980). Alaska has looked to federal case law for aid in interpreting Alaska's labor laws. See, *McGinnis v. Stevens*, [543 P.2d at 1238].

[1] The distinction between employees and independent contractors has been

viewed from various perspectives. In essence, the distinction varies depending upon the context of the dispute. Tort concepts of the distinction between employees and independent contractors have proven somewhat inappropriate in labor cases, as those concepts arose in an effort to limit employer liability under the doctrine of respondeat superior. [Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*,] 41 Col.Rev. 1015 [1025-26] (1941). For the remedial purposes of the FLSA to be effectuated, there should be a broad interpretation of the term "employer," the term should be used "in the broadest sense ever . . . in any act." *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 665 (5th Cir.1983).

[2] Alaska has devised a "nature of the work" test to determine whether a worker should be designated an employee or an independent contractor under the worker's compensation statutes. *Grothe v. Olafson*, 659 P.2d 602 [605] (Alaska 1983). Alaska has not, however, directly addressed the distinction between employee and independent contractor for purposes of Alaska's counterpart to the FLSA. We must turn to federal authorities for appropriate case law.

[3-7] The focal inquiry is whether the worker whose status is in question is within the class of persons meant to be protected by the Act. The court must determine whether the worker is dependent upon finding employment in the business of others. If the facts show such a dependency, the worker is an employee. *Castillo v. Givens*, 704 F.2d 181, 190 (5th Cir.1983). Two factors are critically significant: (1) how specialized is the nature of the work; and (2) whether the worker is in business for herself. *Id.* To aid analysis the courts have broken these factors into a six-part inquiry:

- 1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
- 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- 3)

the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business.

Donovan v. Dialamerica Marketing, Inc., 757 F.2d 1376, 1382 (3d Cir.1985). No single factor is controlling. *Id.* These factors will be considered in turn, without losing sight of the fact that the Act is to protect those who, as a matter of economic reality, are dependent upon the business in which they render service. *Castillo v. Givens*, [704 F.2d] at 189; *Robicheaux v. Radcliff*, [697 F.2d] at 665.

1. *The degree of the alleged employer's right to control the manner in which the work was to be performed.*

Defendant argues that the Club exerted little control and presents the following facts for consideration. The women designed or purchased their own costumes, they created their own dancing routines and could request specific music from the disc jockey. Dancers were allowed to drink alcoholic beverages on the job, but they were not required to tend bar nor to act as cocktail waitresses. Table dances and tips were independently solicited by the women and constituted a major part of their income.

The factors indicating control are quite persuasive. Some control was exercised over costumes. The dancers were required to wear dresses on weekends, and country and western gear on Wednesdays. The music was at the Club's discretion. The Club rules provided that the disc jockey was free to play whatever he wanted, and dancers were not to complain. The dances were also controlled to an extent. While specific dance steps were at the dancers' discretion, dancers were required to do three dances onstage each shift: the first dance was to be performed fully clothed, the second dance involved removal of some

item(s) of clothing, and the third dance was to be done while topless. Additionally, and significantly, the Club controlled the working hours of the dancers.

The "pennies" practice is extremely persuasive evidence of control. As was described earlier, the dancers, when not dancing, encouraged the customers to drink and to buy the dancers drinks. Each \$5.00 billed a customer on the woman's behalf was marked by a penny. The more pennies a woman accrued the more "popular" she was assumed to be, and the Club rewarded her with better shifts. The evidence before the court indicates that the dancers' stage performances did not last more than an hour each shift. Each shift was eight hours. The remaining seven hours were spent either table dancing or soliciting pennies. The time spent soliciting pennies is indicative of control; in essence the women were selling liquor for the Club. Even the table dances were controlled; dancers were to strip to their waists, and only to their waists, and could not wear bikinis.

There are many other Club rules which indicate control. Should a dancer's friend have visited during a period when the dancer was offstage, the friend had to buy the dancer a drink. The dancers could only drink house drinks during working hours, and no complaints could be made about the drinks unless, for example, the glass was chipped. The women were also required to finish the drinks. In short, defendants exercised considerable control.

2. *The alleged employee's opportunity for profit or loss depending upon her managerial skill.*

[8] The contract was for a fixed sum. It did not matter how good the dancer was, or how many pennies the dancer collected, the sum and the hours would not vary. Dancers could, of course, receive tips for their stage performances and table dances. However, waitresses and bellhops also received tips for their services, and the existence of tips alone does not mandate independent contractor status.

3. *The alleged employee's investment in equipment or materials required for his task, or his employment of helpers.*

The dancer provided her own costumes. As defendant stated during her deposition, the dancer's trousseau could have been completed with purchases from Penneys. There is no indication the costumes varied significantly from street clothes. This factor does not weigh in favor of a finding of independent contractor status. Courts have found employee status even where welding equipment worth several thousand dollars was purchased by the worker, where the major part of the worker's time was spent in a manner not requiring use of the investment. *Robicheaux v. Radcliff Material, Inc.*, [697 F.2d at 665-66]. In the instant case, time spent soliciting drinks (pennies) did not require the use of the accoutrements of stripping.

[9] Defendant also points to airfare and agent fees as evidence favorable to its position. However, airfare to Alaska is a given for any outsider and cannot be considered an investment in materials. The costs associated with the booking agency also do not represent an investment in equipment or materials. Though it is often the case that performers are booked into positions which result in independent contractor status, use of the booking agency is not determinative of the worker's status once the worker is on the job.

4. *Whether the service rendered required a special skill.*

Defendant states that dancing is an art, and that not everyone can perform it. The Club, however, hired dancers without knowing whether or not they had danced previously. Apparently the skill required for topless dancing was slight. Since neither long training nor highly developed skills were required, this factor must also weigh against independent contractor status. See *Donovan v. Sureway Cleaners*, 666 F.2d 1368, 1372 (9th Cir.1981).

5. *The degree of permanence of the working relationship.*

[10] Adler signed a contract to work for a six week period, with an option to extend to eight weeks. Generally employees are hired for indefinite periods, whereas independent contractors work for periods established by contract. However, as plaintiff has argued, the period at issue is longer than some union calls. The court in *Castillo v. Givens*, [704 F.2d] at 191, held that cotton pickers hired from mid-June to mid-August qualified as employees for purposes of the act. At best this factor weighs only slightly in favor of independent contractor status.

6. *Whether the service rendered is an integral part of the alleged employer's business.*

Defendant believes that the dancer's services were largely cosmetic to the real function of the Club, which was to sell liquor. The facts do not support defendant's view. The facts clearly establish the integral nature of the womens' role to the sale of liquor, as evidenced by the pennies practice, and by the fact that patrons must pay double the normal drink price to purchase drinks for the dancers.

[11,12] Turning to other arguments made by defendant, the parties' intent to contract is not a determinative factor. An employee is not permitted to waive employee status. *Robicheaux v. Radcliff Material, Inc.*, [697 F.2d] at 667. The fact that the parties "may not have had the intention to create an employment relationship is irrelevant...." *Donovan v. New Floridian Hotel, Inc.*, [676 F.2d 468, 470-471 (11th Cir.1982)].

[13] The fact that management made the dancers purchase business licenses does not require the court to find independent contractor status. If the court found that business licenses resulted in independent contractor status "... this interpretation would permit wholesale evasion of the requirements of the F.L.S.A." *Castillo v. Givens*, [704 F.2d] at 192.

[14] On balance and in consideration of these factors, the court determines that Cathy Adler was an employee of the Club for purposes of Alaska's labor laws. Workers "... are often found to be 'employees' although they possess attributes common to independent contractors." *Robicheaux v. Radcliff Material, Inc.*, [697 F.2d at 665 n. 4].

In this matter, there is no genuine issue of material fact with respect to the issue of employee/contractor status. For reasons set forth above, the court concludes that plaintiff prevails on this issue as a matter of law. However, there are legitimate factual disputes as illustrated by defendants' statement of genuine issues which preclude the award of total summary judgment.⁽²⁾ Therefore,

IT IS HEREBY ORDERED that plaintiff is granted partial summary judgment on the issue of employment status. Defendants' motion for summary judgment is denied.



Leonard P. BRIGGS, Appellant,

v.

STATE of Alaska, DEPARTMENT OF
PUBLIC SAFETY, DIVISION OF
MOTOR VEHICLES, Appellee.

No. S-1243.

Supreme Court of Alaska.

Feb. 20, 1987.

Driver's license was revoked and revocation was affirmed by the Superior Court, Third Judicial District, Kodiak. Roy H. Madsen, J. Motorist appealed. The Supreme Court, Rabinowitz, C.J., held that: (1) absent reasonable steps by state to pre-

2. [These "genuine issues" have since been re-

serve breath sample or make provision for defendant to independently verify breathalyzer test results, the results were inadmissible in revocation proceeding; (2) the *Champion* decision imposing such requirements was retroactively applicable to August 6, 1982; and (3) the state was collaterally estopped from relitigating in the license revocation proceeding whether the state took reasonable steps to preserve a breath sample, where those issues were resolved in motorist's favor at suppression hearing in criminal proceeding.

Reversed.

1. Automobiles §144.2(9)

Criminal Law §100

Absent reasonable steps by the state to preserve breath sample or to make provision for defendant to independently verify breathalyzer test results, the test results are inadmissible in license revocation proceeding as well as criminal prosecution.

2. Courts §100(1)

Decision in *Champion v. Department of Public Safety* that breath test results are inadmissible absent reasonable steps by the state to preserve breath sample or make provision for defendant to independently verify breathalyzer test results is retroactively applicable to all cases which were pending on, or in which the test was administered after, the August 6, 1982 date of Court of Appeals decision putting police on notice that they could no longer rely in good faith on procedures that did not preserve breath samples or provide for second test.

3. Judgment §648

State was collaterally estopped from relitigating in license revocation proceeding whether the state took reasonable steps to preserve breath sample so as to render breathalyzer test results admissible, where those issues were resolved against the state at suppression hearing in criminal prosecution and state did not appeal suppression ruling; for purposes of collateral estoppel, the Department of Public Safety and the state were in privity.

solved by stipulation of the parties.]

Employment Security Division
Independent CONTRACTOR TEST

§ 23.20.525

ALASKA STATUTES

§ 23.20.525

*Unemployment
Insurance
ESD Taxes*

(ii) the employer is a corporation which is organized under the laws of this state; or

(iii) the employer is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any one other state; or

(C) none of the criteria in (A) and (B) of this paragraph is met but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on service described in this paragraph, under the law of this state;

(8) notwithstanding the provisions of (11) of this subsection, all service performed by an officer or member of the crew of an American vessel or in connection with the vessel, if the operating office, from which the operations of vessels operating on navigable waters inside, or inside and outside the United States are ordinarily and regularly supervised, managed, directed, and controlled, is inside this state;

(9) notwithstanding any other provisions of this section, service with respect to which tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this chapter;

(10) service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that

(A) the individual has been and will continue to be free from control and direction in connection with the performance of the service, both under the individual's contract for the performance of service and in fact;

(B) the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed;

(11) an individual's entire service performed inside or both inside and outside this state if the service is localized in this state; service is considered to be localized inside a state or territory if

(A) the service is performed entirely inside the state or territory; or

(B) the service is performed both inside and outside the state or territory but the service performed outside the state or territory is incidental to the individual's service inside the state or territory; for example, where it is temporary or transitory in nature or consists of isolated transactions;

NOTES TO DECISIONS

Place of business. — Premises leased by a lumber mill operator for the purpose of hiring workers to harvest the timber thereon to be delivered to the mill for processing were considered a place of business for the purpose of unemployment tax liability. *Clayton v. State*, 598 P.2d 84 (Alaska 1979).

Discretion of department of labor under subsection (a)(10). — It is evident from the statutory requirement of a showing "to the satisfaction of the department" under subsection (a)(10) that the Department of Labor is vested with broad discretion in deciding whether an "employment" relationship exists. *Clayton v. State*, 598 P.2d 84 (Alaska 1979).

Proof required under subsection (a)(10). — Under subsection (a)(10) of this section, a business proprietor must prove

the factors listed in (A), (B) and (C) to win an exemption from the tax. *Clayton v. State*, 598 P.2d 84 (Alaska 1979).

The statutory definition is controlling, and the employer must show that all three prongs of the "ABC test" in subsection (a)(10) are met. *Tachick Freight Lines v. State*, Dep't of Labor, 773 P.2d 451 (Alaska 1989).

Where an employer could not demonstrate that workers hired for a particular job were customarily entrepreneurs engaged in an independently established business, but that the unavailability of work created unemployment for them, he failed to carry the burden of proof to establish the requirements of subsection (a)(10)(C) of this section. *Clayton v. State*, 598 P.2d 84 (Alaska 1979).

Collateral references. — Taxicab driver as employee of owner of cab, or independent contractor, within social security and unemployment insurance statutes. 10 ALR2d 369.

Insurance agents or salesmen as within coverage of social security or unemployment compensation acts. 39 ALR3d 872.

Part-time or intermittent workers as covered by or as eligible for benefits under state unemployment compensation act. 95 ALR3d 891.

Trucker as employee or independent contractor. 2 ALR4th 1219.

ESD

Sec. 23.20.526. Exclusions from definition of "employment".
(a) In this chapter, unless the context otherwise requires, "employment" does not include

(1) domestic service in a private home, except as provided in AS 23.20.525(a)(15);

(2) newsboys' services in selling or distributing newspapers on the street or from house to house;

(3) service not in the course of the employing unit's trade or business performed in a calendar quarter by an individual, unless the cash remuneration paid for the service is \$50 or more and the service is performed by an individual who is regularly employed by the employing unit to perform the service; an individual is here considered to be regularly employed to perform service not in the course of an employing unit's trade or business during a calendar quarter only if the individual performs the service for some portion of the day on each of some 24 days during the quarter or during the preceding calendar quarter.

(4) service performed by an individual in the employ of the individual's son, daughter, or spouse, and service performed by a child under the age of 18 in the employ of the child's father or mother;

(5) service with respect to which unemployment insurance is payable under an unemployment insurance program established by an Act of Congress;

(6) service performed in the employ of a foreign government including service as a consular or other officer or employee or a nondiplomatic representative;

(7) service performed in the employ of an instrumentality wholly owned by a foreign government if

(A) the service is of a character similar to that performed in foreign countries by employees of the United States government or its instrumentalities; and

(B) the department finds that the United States Secretary of State has certified to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States government and its instrumentalities;

(8) service performed by an insurance agent, insurance solicitor, a real estate broker, a real estate salesman, or a securities salesman to the extent the person is compensated by commission, unless the service is required to be covered under the Federal Unemployment Tax Act as amended;

(9) notwithstanding AS 23.20.525(a)(11), service performed by an officer or member of the crew of an American vessel on or in connection with the vessel, if the operating office, from which the operations of the vessel operating on navigable waters inside or outside the United States are ordinarily and regularly supervised, managed, directed, and controlled, is outside this state;

(10) service performed on or in connection with a vessel not an American vessel by an individual if the individual performed service on and in connection with the vessel when outside the United States;

(11) service performed in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this chapter, except that to the extent that the Congress of the United States permits states to require an instrumentality of the United States to make payments into an unemployment fund under a state employment security law, all of the provisions of this chapter apply to the instrumentalities, and to service performed for the instrumentalities in the same manner, to the same extent, and on the same terms as to all other employers, employing units, individuals, and service; however, if this state is not certified for any year by the Secretary of Labor under 26 U.S.C. 3304(c) (Federal Unemployment Tax Act, Internal Revenue Code), the payments required of the instrumentalities with respect to the year shall be refunded by the department from the fund

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in the same manner and within the same period as is provided in AS 23.20.225 with respect to contributions erroneously collected;

(12) service performed in the employ of another state, or political subdivision of another state, or an instrumentality of another state or political subdivision which is wholly owned by another state or its political subdivision, or a service performed in the employ of an instrumentality of another state or its political subdivisions to the extent that the instrumentality is, with respect to the service, exempt under the Constitution of the United States from the tax imposed by 26 U.S.C. 3301 (Federal Unemployment Tax Act, Internal Revenue Code);

(13) service performed in the employ of an international organization;

(14) service covered by an election approved by the agency charged with the administration of any other state or federal employment security law, in accordance with an arrangement under AS 23.20.090(a) during the effective period of the election;

(15) service performed by an individual in agricultural labor, except as provided in AS 23.20.525(a)(16); the term "agricultural labor" means remunerated service

(A) on a farm, in the employ of any person in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(B) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of the farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of the service is performed on a farm;

(C) in connection with the production or harvesting of any commodity defined as an agricultural commodity in 12 U.S.C. 1141j (§ 15(g), Agricultural Marketing Act), as amended, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if the operator produced more than one-half of the commodity with respect to which the service is performed except as stated in (b) of this section;

(E) in the employ of a group of operators of farms, or a cooperative organization of which the operators are members, in the performance of service described in (D) of this paragraph, but only if the operators

produced more than one-half of the commodity with respect to which the service is performed;

(F) on a farm operated for profit if the service is not in the course of the employer's trade or business;

(16) service performed after December 31, 1971, by nurses, technicians, and other professional employees of hospitals no part of the net earnings of which inures to the benefit of a private shareholder or individual, unless the service is required to be covered under the Federal Unemployment Tax Act;

(17) service performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of that boat under which

(A) that individual does not receive any cash remuneration except as provided in (B) of this paragraph;

(B) that individual receives a share of the boat's, or the boats' in the case of a fishing operation involving more than one boat, catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of that catch; and

(C) the amount of that individual's share depends on the amount of the boat's, or the boats' in the case of a fishing operation involving more than one boat, catch of fish or other forms of aquatic animal life; but only if the operating crew of that boat, or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat, is normally made up of fewer than 10 individuals;

(18) service performed as a prospective or impaneled juror in a court;

(19) service performed for a corporation by an employee of the corporation if

(A) the corporation is incorporated under AS 10.06;

(B) the corporation is not a government corporation; and

(C) the employee is an executive officer of the corporation;

(20) *[Repealed, § 1, ch 165, SLA 1990].*

(b) Notwithstanding any other provision of this section, the provisions of (a)(15)(D) and (E) of this section are not applicable to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

(c) In (a)(15) of this section, "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(d) For the purposes of AS 23.20.525(a)(4) — (6) and (14), the term "employment" does not apply to service performed

(1) by a duly ordained, commissioned, or licensed minister of a church in the exercise of the person's ministry or by a member of a religious order in the exercise of duties required by the order;

(2) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who, because of their impaired physical or mental capacity, cannot be readily absorbed in the competitive labor market by an individual receiving the rehabilitation or remunerative work;

(3) as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or any agency of a state or political subdivision of the state, by an individual receiving work relief or work training;

(4) for a state hospital by an inmate of a prison or correctional institution;

(5) in the employ of a school, college, or university, if the service is performed by a student who is enrolled and is regularly attending classes at the school, college, or university;

(6) by an individual under the age of 22 who is enrolled at a non-profit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at the institution, which combines academic instruction with work experience, if the service is an integral part of the program, and the institution has so certified to the employer, except that this paragraph does not apply to service performed in a program established for or on behalf of an employer or group of employers;

(7) in the employ of a hospital, if the service is performed by a patient of the hospital, as defined in AS 23.20.520;

(8) in the employ of the state or a political subdivision of the state if the service is performed by an individual in the exercise of duties

(A) as a "public official" as defined in AS 39.50.200(a) or any other elected official;

(B) as a member of the Alaska Army National Guard or Alaska Air National Guard or Alaska Naval Militia; or

(C) as an employee serving on only a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency;

(9) in the employ of

(A) a church or a convention or association of churches; or

(B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or a convention or association of churches. (§ 15 ch 106 SLA 1971; am § 1 ch 55 SLA 1976; am §§ 19 — 23, 25 ch 122 SLA 1977; am § 80 ch 9 SLA 1980; am § 3 ch 145 SLA 1980; am § 1 ch 91

SLA 1982; am § 30 ch 115 SLA 1982; am § 14 ch 106 SLA 1984; am § 26 ch 100 SLA 1989; am § 1 ch 165 SLA 1990)

Revisor's notes. — For conditional repeal of 1977 amendments, see the Revisor's note at AS 23.20.278.

The paragraphs of subsection (a) were renumbered in 1990 to reflect the deletion of repealed paragraphs.

Effect of amendments. — The 1989 amendment, effective June 13, 1989, added paragraph (a) of subsection (a).

The 1990 amendment, effective June 22, 1990, repealed former paragraph (a)(23), which read "service performed as an official at an amateur sports event."

Legislative history reports. — For the governor's transmittal letter concerning the repeal of former (a)(23) of this section by § 1, ch. 165, SLA 1990 (SB 542), see 1990 Senate Journal, p. 3189.

Collateral references. — Who is independent contractor rather than employee within unemployment compensation act. 124 ALR 632.

Test of independent contractor relationship. 124 ALR 1029; 147 ALR 828.

Sec. 23.20.530. Wages defined. (a) In this chapter, "wages" means all remuneration for service from whatever source, including, but not limited to, insured work, noninsured work, or self-employment; commissions, bonuses, back pay, and the cash value of all remuneration in a medium other than cash shall be treated as wages; gratuities customarily received by an individual in the course of service from persons other than the individual's employing unit may be treated as wages received from the employing unit only to the extent the individual reports the gratuities to the employing unit. The reasonable cash value of remuneration in a medium other than cash, and the reasonable amount of gratuities, shall be estimated and determined in accordance with regulations adopted by the department; notwithstanding AS 23.20.350(a), back pay awards shall be allocated to the weeks or quarters with respect to which the pay was earned. If the remuneration of an individual is not based upon a fixed period of time or if the individual's wages are paid in irregular intervals or in a manner that does not extend regularly over the period of employment, the wages shall be allocated to weeks or quarters in accordance with regulations adopted by the department. The regulations must, so far as possible, produce results reasonably similar to those that would prevail if the individual's wages were paid at regular intervals. When an employer has filed for bankruptcy, unpaid wages earned for services performed for the employer are considered wages for the quarter in which they were earned.

(b) In this c. does not include

(1) the amount of an individual's contribution to an employing unit for the payment, to the extent under a plan that makes provision or for such individual classes of the retirement, (B) organization expense (D) death;

(2) the amount of an individual's contribution to an employing unit for the payment, to the extent under a plan that makes provision or for such individual classes of the retirement, (B) organization expense (D) death;

(3) the amount of an individual's contribution to an employing unit for the payment, to the extent under a plan that makes provision or for such individual classes of the retirement, (B) organization expense (D) death;

(4) the amount of an individual's contribution to an employing unit for the payment, to the extent under a plan that makes provision or for such individual classes of the retirement, (B) organization expense (D) death;

(5) the amount of an individual's contribution to an employing unit for the payment, to the extent under a plan that makes provision or for such individual classes of the retirement, (B) organization expense (D) death;

(6) remuneration for service not

(7) the amount of an individual's contribution to an employing unit for the payment, to the extent under a plan that makes provision or for such individual classes of the retirement, (B) organization expense (D) death;

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(B) the monthly salary must be multiplied by 12 and divided by 2080 to compute gross hourly wages.

(3) If at the time of injury the employee received bonuses, commissions, gratuities, or room and board during the course of employment, gross hourly wages are computed by dividing the gross weekly earnings, as determined under AS 23.30.220, by 40. (Eff. 7/1/88, Register 107)

Authority: AS 23.30.005
AS 23.30.041

8 AAC 45.890. DETERMINING EMPLOYEE STATUS. For purposes of AS 23.30.265(12) and this chapter, the board will determine whether a person is an "employee" based on the relative-nature-of-the-work test. The test will include a determination under (1)—(6) of this section. Paragraph (1) is the most important factor and is interdependent with para. (2), and at least one of these factors must be resolved in favor of an "employee" status for the board to find that a person is an employee. The board will consider whether the work

(1) is a separate calling or business; if the person performing the services has the right to hire or terminate others to assist in the performance of the service for which the person was hired, there is an inference that the person is not an employee; if the employer

(A) has the right to exercise control of the manner and means to accomplish the desired results, there is a strong inference of employee status;

(B) and the person performing the services have the right to terminate the relationship at will, without cause, there is a strong inference of employee status;

(C) has the right to extensive supervision of the work then there is a strong inference of employee status;

(D) provides the tools, instruments, and facilities to accomplish the work and they are of substantial value, there is an inference of employee status; if the tools, instruments, and facilities to accomplish the work are not significant, no inference is created regarding the employment status;

(E) pays for the work on an hourly or piece rate wage rather than by the job, there is an inference of employee status; and

(F) and person performing the services entered into either a written or oral contract, the employment status the parties believed they were creating in the contract will be given deference; however, the contract will be construed in view of the circumstances under which it was made and the conduct of the parties while the job is being performed;

(2) is a regular part of the employer's business or service; if it is a regular part of the employer's business, there is an inference of employee status;

(3) can be expected to carry its own accident burden; this element is more important than (4), (5), and (6) of this section; if the person performing the services is unlikely to be able to meet the costs of industrial accidents out of the payment for the services, there is a strong inference of employee status;

(4) involves little or no skill or experience; if so, there is an inference of employee status;

(5) is sufficient to amount to the hiring of continuous services, as distinguished from contracting for the completion of a particular job; if the work amounts to hiring of continuous services, there is an inference of employee status;

(6) is intermittent, as opposed to continuous; if the work is intermittent, there is a weak inference of no employee status. (Eff. 3/16/90, Register 113)

Authority: AS 23.30.005(h)
AS 23.30.265

8 AAC 45.900. DEFINITIONS. (a) In this chapter

(1) "Act" means the Alaska Workers' Compensation Act, as amended, AS 23.30.005 — 23.30.270;

(2) "board" means any single three-member panel, or a quorum thereof, of the Alaska Workers' Compensation Board;

(3) "carrier" means an insurance carrier meeting the requirements of AS 23.30.025 with respect to authorization to provide insurance fulfilling the obligation of an employer to secure the payment of compensation under the Act;

(4) "chairman" means the commissioner or any person designated by the commissioner to preside as board chairman in a particular proceeding;

(5) "claim" includes any matter over which the board has jurisdiction;

(6) "commissioner" means the commissioner of the Department of Labor;

(7) "department" means the Department of Labor of the state;

(8) "division" means the division of workers' compensation within the administrative branch of the Department of Labor;

(9) "effecting settlement" means the ability to timely pay all medical benefits and timely pay compensation in accordance with AS 23.30.155;

(10) "executive officer" means the president, vice-president, secretary, treasurer, or a corporate employee who is responsible for the corporation's affairs generally, has a close connection with the board of directors and other officers and who is specifically designated as an executive officer by the articles of incorporation or corporation bylaws;

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Sec. 23.30.230. Persons not covered. (a) The following persons are not covered by this chapter:

- (1) part-time baby-sitters;
- (2) cleaning persons;
- (3) harvest help and similar part-time or transient help;
- (4) persons employed as entertainers on a contractual basis; and
- (5) commercial fishermen, as defined in AS 16.05.940.

(b) The exclusion of certain persons under (a) of this section, may not be construed to require inclusion of other persons as employees for purposes of compensation under this chapter. (§ 33(3) ch 193 SLA 1959; am § 1 ch 47 SLA 1986; am § 1 ch 77 SLA 1986)

Revisor's notes. — Paragraph (a)(5) 1986 amendment rewrote this section. was enacted as (b). Renumbered and The second 1986 amendment added minor word changes made in 1986. paragraph (5) of subsection (a).

Effect of amendments. — The first

NOTES TO DECISIONS

Quoted in *Searfus v. Northern Gas Co.*, Sup. Ct. Op. No. 630 (File No. 1148), 472 P.2d 966 (1970).

Cited in *Gordon v. Burgess Constr. Co.*, Sup. Ct. Op. No. 401 (File No. 716), 425 P.2d 602 (1967).

Stated in *Gordon v. Burgess Constr. Co.*, Sup. Ct. Op. No. 401 (File No. 716), 425 P.2d 602 (1967).

Collateral references. — 81 Am. Jur. 2d, Workmen's Compensation, §§ 160, 161, 163.

99 C.J.S., Workmen's Compensation, § 69.

Sec. 23.30.235. Cases in which no compensation is payable. Compensation under this chapter may not be allowed for an injury

- (1) proximately caused by the employee's wilful intent to injure or kill any person;
- (2) proximately caused by intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician. (§ 33(2) ch 193 SLA 1959; am § 20 ch 93 SLA 1982)

Effect of amendments. — The 1982 amendment rewrote this section, which formerly read "No compensation may be paid if the injury was occasioned solely by the intoxication of the employee or by the wilful intention of the employee to injure or kill himself or another." Section 29 of ch. 93 makes the 1982 amendment to this

section applicable only to injuries sustained after July 1, 1982.

Collateral references. — 81 Am. Jur. 2d, Workmen's Compensation, §§ 53, 231-235.

Serious and wilful misconduct of employee as bar to compensation, 4 ALR 116.

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