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# Opinion

## Missouri Court of Appeals Western District

**Case Style:** Mary Jeanette Haggard d/b/a Jenny's Housecleaning, and Jenny's Housecleaning, Inc., Appellants, v. Division of Employment Security, Respondent.

**Case Number:** WD66738 and WD66739

**Handdown Date:** 04/24/2007

**Appeal From:** Labor and Industrial Relations Commission

**Counsel for Appellant:** Joel I. Krieger

**Counsel for Respondent:** Cynthia A. Quetsch and Marilyn G. Green

### Opinion Summary:

Mary Jeanette Haggard, doing business as Jenny's Housecleaning, and Jenny's Housecleaning, Inc. (collectively "Jenny's"), appeal the decision of the labor and industrial relations commission, finding that persons engaged as house cleaners through those businesses performed services for wages in employment by the businesses, thus subjecting the businesses to the Missouri Employment Security Law. Jenny's contends that the workers were independent contractors and the commission erred in affirming the decision of the appeals tribunal of the division of employment security ("DES") that the workers were employees because the overwhelming weight of the evidence favored independent contractor status. Jenny's further claims that the commission's decisions should be reversed because the hearing officer in the appeals tribunal hearing acted impermissibly as an advocate for DES, and a manager of DES and not a licensed attorney, represented DES in the appeals tribunal hearing.

### REVERSED AND REMANDED

**Division Three holds:** Because DES is not a "corporation, partnership or other business entity authorized by law," it was not entitled, under Rule 5.29(c), to be represented by someone other than a licensed attorney in the hearing before the appeals tribunal and, therefore, it was the unauthorized practice of law for DES to appear without an attorney in the proceeding before the appeals tribunal and the appeals tribunal decisions are null and void. Consequently, in affirming the decisions of the appeals tribunal, the commission acted in excess of its powers, and its decisions are void.

### Citation:

**Opinion Author:** Patricia Breckenridge, Judge

**Opinion Vote:** REVERSED AND REMANDED. Newton, P.J., and Ellis, J., concur.

**Opinion:**

Mary Jeanette Haggard, doing business as Jenny's Housecleaning, and Jenny's Housecleaning, Inc. (collectively "Jenny's"), appeal the decision of the Labor and Industrial Relations Commission ("Commission"), finding that persons engaged as house cleaners through those businesses performed services for wages in employment by the businesses, thus subjecting the businesses to the Missouri Employment Security Law. Jenny's contends that the workers were independent contractors and the Commission erred in affirming the decision of the appeals tribunal of the Division of Employment Security ("DES") that the workers were employees because the overwhelming weight of the evidence favored independent contractor status. Jenny's further claims the Commission erred in finding that the workers were employees because DES judicially admitted that the evidence "militated towards" a finding that the workers were independent contractors. Jenny's further asserts that the decision should be overturned because the hearing officer in the appeals tribunal hearing acted impermissibly as an advocate for DES, and a manager of DES, and not a licensed attorney, represented DES in the appeals tribunal hearing.

Because DES is not a "corporation, partnership or other business entity authorized by law," it was not entitled to be represented by someone other than a licensed attorney in the hearing before the appeals tribunal. Rule 5.29(c). Therefore, it was the unauthorized practice of law for DES to appear without an attorney in the proceeding before the appeals tribunal. Consequently, the appeals tribunal decisions are null and void, and the Commission was without jurisdiction over Jenny's appeals. In affirming the decisions of the appeals tribunal, the Commission acted in excess of its powers, and its decisions affirming the appeals tribunal decisions are also null and void. Accordingly, the Commission's decisions are held to be void, and the proceedings are remanded to the Commission for a rehearing of the cases by an appeals tribunal.

### **Factual and Procedural Background**

Ms. Haggard founded Jenny's Housekeeping in January 2000 to provide cleaning services, primarily to residential customers. Ms. Haggard began the business as a sole proprietorship operated out of her home and, on January 1, 2002, began engaging individuals to work as house cleaners. Ms. Haggard incorporated the business as Jenny's Housecleaning, Inc., on April 5, 2004.

On March 3, 2005, DES issued two determinations, one relating to Jenny's business prior to incorporation and the other after incorporation. Both determinations were that the remuneration paid to workers by Jenny's in the performance of house cleaning services was "wages" in employment as defined by the Missouri Employment Security Law, thus subjecting Jenny's to the payment of employment taxes. Jenny's timely filed appeals to those determinations, and a hearing was held before an appeals tribunal on September 23, 2005. At the hearing, Jenny's was represented by an attorney and presented three witnesses, the owner, Ms. Haggard, and two workers, Deanna Cruz and Christy Eggers. Dan Schwartze, a contributions supervisor with managerial duties with DES, represented DES. In addition to testifying regarding DES records, at the invitation of the hearing officer, Mr. Schwartze asked questions of witnesses and made a closing argument on behalf of DES.

On October 17, 2005, the appeals tribunal affirmed the findings of DES in two written decisions. Jenny's filed a timely application for review of the two decisions by the Labor and Industrial Relations Commission. On February 27, 2006, the Commission issued its decisions affirming the appeals tribunal's decisions. Jenny's timely appealed both decisions,

and those appeals were consolidated, here.

### Standard of Review

This court's review of actions of the Commission is governed by provisions in the Missouri Constitution and by Missouri statute. Article V, section 18, provides for judicial review of the Commission's decision and states in pertinent part:

All final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.

Moreover, under section 288.210, RSMo 2000:(FN1)

The findings of the commission as to the facts, if supported by competent and substantial evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the appellate court shall be confined to questions of law. The court, on appeal, may modify, reverse, remand for rehearing, or set aside the decision of the commission on the following grounds and no other:

- (1) That the commission acted without or in excess of its powers;
- (2) That the decision was procured by fraud;
- (3) That the facts found by the commission do not support the award; or
- (4) That there was no sufficient competent evidence in the record to warrant the making of the award.

This court is not bound by the Commission's conclusions of law or the manner in which the Commission applied the law to the facts of the case, and this court reviews those issues without deference to the Commission's conclusions. **CNW Foods, Inc. v. Davidson**, 141 S.W.3d 100, 102 (Mo. App. S.D. 2004).

### DES Must Be Represented by Attorney In Hearing Before Appeals Tribunal

Jenny's raises five points on appeal. The fifth is dispositive. It contends that the Commission erred in affirming the decisions of the appeals tribunal because the hearing officer permitted a managerial employee of DES to represent the division, rather than a licensed attorney. Jenny's asserts that this constituted the unauthorized practice of law and that the appeals tribunal, and the Commission in affirming the decisions, acted without or in excess of its power to hear the case. Jenny's argues that the Commission's decisions should, therefore, be set aside. In response to Jenny's claim, the Commission contends that Supreme Court Rule 5.29(c) authorizes DES managers to represent DES in any employment security proceeding.

In **Reed v. Labor & Industrial Relations Commission**, an "unemployment compensation manager" for a corporation filed an application for review by the Commission of a decision of the appeals tribunal for DES, which had granted unemployment compensation to a former worker. **789 S.W.2d 19, 20 (Mo. banc 1990)**. A majority of the Commission ruled in favor of the corporation and denied the claimant benefits. **Id.** One Commission member, however, dissented, claiming that the Commission did not have jurisdiction to hear the appeal because a corporation "must act through an attorney when appealing to the Commission." **Id.** The claimant appealed the Commission's decision to the circuit court, which affirmed. **Id.** The claimant then appealed the circuit court's decision to this court. **Id.** After the court of appeals

dismissed the claimant's appeal, the Supreme Court accepted transfer of the case. **Id.**

In addressing the question whether the Commission has jurisdiction of an appeal filed on behalf of a corporate employer by a non-attorney employee of the corporation, the Court first noted that it "is the final arbiter in determining what constitutes the practice of law[.]" **Id.** The Court then stated that while natural persons may represent themselves in legal matters, a corporation, which is not a natural person, but a "creature[] of statute," "may not represent itself in legal matters, but must act solely through licensed attorneys." **Id. at 21.**

The Court then set forth the particular circumstances under which an individual will be considered to be engaged in the practice of law. **Id.** Specifically, the Court held that:

"[O]ne is engaged in the practice of law when he, for a valuable consideration ... appears in a representative capacity as an advocate in proceedings pending or prospective, before any court, commissioner, referee, board, body, committee, or commission constituted by law or authorized to settle controversies, and there, in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their clients under the law."

**Id.** (quoting **Clark v. Austin, 101 S.W.2d 977, 982 (Mo. 1937)**). See also section 484.010.1, RSMo 2000 (defining "practice of the law"). The Court further held that, because a corporation cannot practice law, when an employee of the corporation, who is not an attorney, represents the corporation in legal matters, it is the unauthorized practice of law. **Reed, 789 S.W.2d at 21** (citing **Clark, 101 S.W.2d at 982**). Moreover, "[a] judgment rendered in such a proceeding is void." **Id.** (quoting **Clark, 101 S.W.2d at 982-83**). In examining the particular circumstances in **Reed**, the Court determined that filing an "application for review to the Commission constitutes assertions of legal rights" and, therefore, "allowing a non-attorney corporate employee to file an application for review with the Commission is the unauthorized practice of law." **Id. at 23.**

Subsequent to the decision in **Reed**, the Supreme Court adopted Supreme Court Rule 5.29 regarding the unauthorized practice of law. Effective January 1, 1997, Rule 5.29(c) makes an exception for proceedings before DES:

*In any employment security proceeding before the state division of employment security, a corporation, partnership or other business entity authorized by law may be represented by an officer of the entity or a person in the full time employment of the entity in a managerial capacity who shall be afforded the opportunity to participate in the proceeding.*

(Emphasis added.)

By the plain language of the rule, a hearing before the appeals tribunal of DES qualifies as "any employment security proceeding before the state division of employment security." Rule 5.29(c). Rule 5.29(c), however, does not specifically denominate DES in the list of entities that may be represented by someone other than a licensed attorney. Under Rule 5.29(c), only "a corporation, partnership or other business entity authorized by law" may be represented by an officer or full-time manager of the entity in an employment security proceeding. Thus, the relevant question is whether DES is a "corporation, partnership or other business entity authorized by law." Rule 5.29(c).

Supreme Court rules are to be interpreted by applying "principles similar to those used for state statutes." **State ex rel. Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470, 471-72 (Mo. banc 2002)**. "[I]n interpreting a rule, [this court is] to ascertain the intent of the Court, giving the language used its plain and ordinary meaning." **Jones v. Jackson County Circuit Court, 162 S.W.3d 53, 61 (Mo. App. W.D. 2005)** (citation omitted). In **Parker v. Unemployment Compensation Commission, 214 S.W.2d 529, 532 (Mo. 1948)**, the Missouri Supreme Court determined that DES is a "public quasi corporation." The Court further explained that, "public quasi corporations may be created for public

purposes only, connected with the administration of government." **Id. at 533.** Under the plain and ordinary meaning of the phrase "corporation, partnership or other business entity authorized by law," it is clear that Rule 5.29(c) is limited to *private* business entities and would not include entities connected with the administration of government. Such an interpretation is also consistent with how the Supreme Court has interpreted the term "corporation" in Missouri's statutes and Constitution. Specifically, the Court has found that, "[u]nless otherwise specified, where the term 'corporation' is used in our statutes and Constitution it uniformly refers to private or business organizations, *not to public corporations.*" **State ex rel. Ormerod v. Hamilton, 130 S.W.3d 571, 572 (Mo. banc 2004)** (emphasis added). Therefore, the exception in Rule 5.29(c), permitting a "corporation, partnership or other business entity authorized by law" to be represented by an officer or full-time managerial employee, does not permit a public quasi corporation to be represented by someone other than a licensed attorney in employment security proceedings, such as the hearing before the appeals tribunal.

Here, during the hearing before the appeals tribunal, Mr. Schwartze was the representative of DES and, on its behalf, asked questions of witnesses and made a closing argument. Such actions clearly fall within the definition of the practice of law. **See Reed, 789 S.W.2d at 21.** Therefore, because DES is not permitted by Rule 5.29(c) to be represented in an employment security proceeding by a full-time managerial employee, it was the unauthorized practice of law for it to appear without an attorney in the proceeding before the appeals tribunal. Consequently, the decisions rendered by the appeals tribunal were "null and void," and the Commission was without jurisdiction over Jenny's appeals. **Id. at 21-23. See also Strong v. Gilster Mary Lee Corp., 23 S.W.3d 234, 241-42 (Mo. App. E.D. 2000).** Therefore, in affirming the decisions of the appeals tribunal, the Commission acted in excess of its powers and its decisions affirming the appeals tribunal decisions are also null and void. **Reed, 789 S.W.2d at 23.** Jenny's fifth point is granted.

Accordingly, the Commission's decisions are held void, and the proceedings are remanded to the Commission for a rehearing of the cases by an appeals tribunal. Due to the disposition of Jenny's fifth point, Jenny's remaining points on appeal need not be addressed. In addition, Jenny's filed a motion with this court for attorney's fees, under section 536.087. In objection to Jenny's motion, DES claims that section 536.087 is inapplicable in this case because that statute does not apply to matters arising under the Missouri Employment Security Law, Chapter 288. Nevertheless, regardless of whether section 536.087 applies in this case, because there has been no final disposition, Jenny's is not a "prevailing party" and, therefore, Jenny's motion for attorney's fees is denied.

All concur.

#### **Footnotes:**

**FN1.** All statutory references are to the Revised Statutes of Missouri 2000.

#### **Separate Opinion:**

None

***This slip opinion is subject to revision and may not reflect the final opinion adopted by the Court.***

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