

**IN THE SUPREME COURT  
OF THE STATE OF NEVADA**

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JEFF MYERS, Individually and on behalf of  
others similarly situated,

No. 80448

District Court #

Electronically Filed  
Mar 11 2021 02:24 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Appellant,

vs.

RENO CAB COMPANY, INC.,

Respondent.

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ARTHUR SHATZ and RICHARD FRATIS,  
Individually and on behalf of others  
similarly situated,

No. 80449

District Court #CV15-01385

Appellants,

vs.

ROY L. STREET, Individually and d/b/a  
CAPITAL CAB,

Respondent.

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**APPELLANTS' SUPPLEMENTAL BRIEF PURSUANT  
TO THE COURT'S ORDER OF FEBRUARY 26, 2021**

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## SUMMARY OF SUPPLEMENTAL ARGUMENT

This Court's opinion in *Doe Dancer I v. La Fuente, Inc.*, 137 Nev. Adv. Op. 3, 2021 WL 772878 (February 25, 2021) completely resolved the issues raised in this appeal and requires a reversal of the district court's orders and judgment. The district court dismissed appellants' case based upon an erroneous understanding of the test of employment for the purposes of Article 15, Section 16 of the Nevada Constitution, the Minimum Wage Amendment (the "MWA"). *Doe Dancer I* held that employment under the MWA is determined using the "economic realities" test. The district court, in dismissing appellants' case, held the economic realities test was not to be used in determining whether the appellants were employees with a right to make claims under the MWA. Its finding the appellants were not employees, but independent contractors with no rights under the MWA, is erroneous as a matter of law under *Doe Dancer I*. The district court's decision must be reversed and the district court instructed upon remand to determine whether the appellants were employees for MWA purposes under the economic realities test.

## ARGUMENT

### **I. Under *Doe Dancer I* employee status for MWA purposes is always determined by using the “economic realities” test.**

This Court in *Doe Dancer I*, after a detailed discussion of its precedents and the relevant policy considerations bearing on how “employee” status should be determined for MWA purposes, concluded by finding “[i]n sum, we hold that the federal economic realities test applies to define the scope of the MWA’s constitutional definition of employee.” 2021 WL 772878, p. 3–4.

The district court in its orders of June 12, 2017 found whether the appellants were employees for MWA purposes was not determined under the economic realities test but by applying NRS 608.0155. JA 405–410, 420–425. On December 16, 2019, the district court granted summary judgment and dismissed appellants’ case, finding under *Yellow Cab of Reno v. Second Judicial Dist. Ct.*, 262 P.3d 699, 704 (2011) and NRS 706.473 and NAC 706.3753 appellants were independent contractors and not employees under the MWA. JA 587–601. Both of those decisions are erroneous as *Doe Dancer I* has held the determination of employee status for MWA purposes must be made by using the economic realities test.

**II. The district court’s reliance on NRS 706.473 and Yellow Cab of Reno does not distinguish this case from Doe Dancer I.**

The district court’s resolution of this case under reasoning that differed from that used by the district court in *Doe Dancer I* is irrelevant. The result in *Doe Dancer I* was dictated by this Court’s finding as to the “MWA’s constitutional definition of employee.” 2021 WL 772878, p. 3–4. That “constitutional definition” is the supreme law of Nevada in respect to who is an “employee” entitled to invoke the protections of the MWA. It cannot be supplanted by NRS 608.0155, as the district court erroneously held in *Doe Dancer I*. Nor can it be supplanted by this Court’s earlier holding on Nevada’s common law in respect to *respondent superior*, as the district court in this case believed was found in *Yellow Cab of Reno* or by NRS 706.473.<sup>1</sup>

The district court’s finding that the appellants were independent contractors cannot be sustained. The “employee” status alleged in this case only involves rights secured by the MWA and must be determined using the MWA’s “constitutional definition” of employment, the “economic realities” test. The

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<sup>1</sup> Respondents’ reliance on NRS 706.473, and not NRS 608.0155, renders their claim that appellants were independent contractors even weaker than such claim in *Doe Dancer I*. NRS 706.473 was enacted prior to the MWA and unlike NRS 608.0155 is properly subject to implied repeal from the MWA’s later enactment. *Id.*, 2012 WL 772878 p. 9.

district court’s decision must be reversed and remanded with instructions for the district court to determine whether the appellants are employees for MWA purposes by applying the “economic realities” test as guided by *Doe Dancer I*.

**III. The district court’s independent contractor finding must also be reversed in respect to the appellants’ NRS 608.040 claims.**

Appellants make claims as employees for the wage payment penalties provided for by NRS 608.040 (30 days unpaid wages) based on the respondents’ failure to pay them the minimum wages owed under the MWA. JA 8–9, 17–18. *Doe Dancer I* does not directly opine on whether the MWA’s constitutional definition of employee also controls employee status for the purpose of NRS 608.040 claims based on MWA violations. But its reasoning strongly supports such a holding by the Court.

As *Doe Dancer I* observed, citing *Terry v. Sapphire Gentlemen’s Club*, 336 P.3d 951, 955 (Nev. Sup. Ct. 2014), the MWA and its constitutional protections, granting a right to “all remedies available under the law”<sup>2</sup> for MWA violations, intended to expand the minimum wage rights and remedies of Nevada employees.

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<sup>2</sup> Nev. Const. Art. 15, Sec. 16, Par. (B): “An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief.”

2021 WL 772878, p. 4. The right to an MWA based remedy for employees under NRS 608.040 was created by the force of Nevada’s Constitution when the MWA was enacted in 2006. As *Doe Dancer I* made clear, the Nevada Legislature’s later enactment of NRS 608.0155 in 2015 could not completely redefine who was an “employee” entitled to MWA protections. Nor could it partially limit the rights granted under the MWA to employees in 2006 at the time of its placement in Nevada’s Constitution, such as the right to make claims under NRS 608.040 for MWA violations.

If the Court declines to hold that persons who meet the MWA’s definition of employee may assert NRS 608.040 claims arising from MWA violations, it must still reverse the district court’s finding the appellants were independent contractors for NRS 608.040 purposes. Neither NRS 706.473 nor *Yellow Cab of Reno* properly support a finding that the appellants are independent contractors and not employees for the purposes of NRS 608.040. See, Appellants’ Opening Brief, p. 7–13, Appellants’ Reply Brief p. 2–3. While those arguments address the appellants’ status as employees for MWA purposes, they are equally applicable to their status as employees under NRS 608.040. And to the extent the proper test for employee status under NRS 608.040 is the one set forth in NRS 608.0155, reversal is required so the district court can apply that test.



## CONCLUSION

Wherefore, for all the foregoing reasons, the Orders and Judgment appealed from should be reversed in their entirety.

Date: March 11, 2021

Respectfully Submitted,

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## **Certificate of Compliance With N.R.A.P Rule 28.2**

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point Times New Roman typeface in wordperfect.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 1135 words.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 11<sup>th</sup> day of March, 2021

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**Certificate of Service**

I certify that on March 11, 2021, I served a copy of the foregoing  
APPELLANTS' SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S  
ORDER OF FEBRUARY 26, 2021 upon all counsel of record by ECF System  
which served all parties electronically.

Dated this 11<sup>th</sup> day of March, 2021

/s/ Leon Greenberg  
Leon Greenberg, Esq.

## ADDENDUM

### NEVADA STATUTES AND CONSTITUTION EXCERPTS

#### **Nevada Constitution, Article 15, Section 16**

##### § 16. Payment of minimum compensation to employees

###### Currentness

A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents (\$5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents (\$6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over \$5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.

B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and

unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

C. As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.

D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.

Credits

Approved and ratified 2006.

### **N.R.S. 608.0155**

608.0155. Persons presumed to be independent contractor

Currentness

1. Except as otherwise provided in subsection 2, for the purposes of this chapter, a person is conclusively presumed to be an independent contractor if:

(a) Unless the person is a foreign national who is legally present in the United States, the person possesses or has applied for an employer identification number or social security number or has filed an income tax return for a business or earnings from self-employment with the Internal Revenue Service in the previous year;

- (b) The person is required by the contract with the principal to hold any necessary state business license or local business license and to maintain any necessary occupational license, insurance or bonding in order to operate in this State; and
- (c) The person satisfies three or more of the following criteria:
  - (1) Notwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations, the person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract.
  - (2) Except for an agreement with the principal relating to the completion schedule, range of work hours or, if the work contracted for is entertainment, the time such entertainment is to be presented, the person has control over the time the work is performed.
  - (3) The person is not required to work exclusively for one principal unless:
    - (I) A law, regulation or ordinance prohibits the person from providing services to more than one principal; or
    - (II) The person has entered into a written contract to provide services to only one principal for a limited period.
  - (4) The person is free to hire employees to assist with the work.
  - (5) The person contributes a substantial investment of capital in the business of the person, including, without limitation, the:
    - (I) Purchase or lease of ordinary tools, material and equipment regardless of source;
    - (II) Obtaining of a license or other permission from the principal to access any work space of the principal to perform the work for which the person was engaged; and
    - (III) Lease of any work space from the principal required to perform the work for which the person was engaged.

The determination of whether an investment of capital is substantial for the purpose of this subparagraph must be made on the basis of the amount of income the person receives, the equipment commonly used and the expenses commonly incurred in the trade or profession in which the person engages.

2. A natural person is conclusively presumed to be an independent contractor if the person is a contractor or subcontractor licensed pursuant to chapter 624 of NRS or is directly compensated by a contractor or subcontractor licensed pursuant to chapter 624 of NRS for providing labor for which a license pursuant to chapter 624 of NRS is required to perform and:

(a) The person has been and will continue to be free from control or direction over the performance of the services, both under his or her contract of service and in fact;

(b) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprises for which the service is performed; and

(c) The service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service.

3. The fact that a person is not conclusively presumed to be an independent contractor for failure to satisfy three or more of the criteria set forth in paragraph (c) of subsection 1 does not automatically create a presumption that the person is an employee.

4. As used in this section:

(a) "Foreign national" has the meaning ascribed to it in NRS 294A.325.

(b) "Providing labor" does not include the delivery of supplies.

Credits

Added by Laws 2015, c. 325, § 1, eff. June 2, 2015. Amended by Laws 2019, c. 528, § 10.5, eff. July 1, 2019.

N. R. S. 608.0155, NV ST 608.0155

Current through the end of the 80th Regular Session (2019)

### **N.R.S. 608.040**

Penalty for failure to pay discharged or quitting employee

Currentness

1. If an employer fails to pay:

(a) Within 3 days after the wages or compensation of a discharged employee becomes due; or

(b) On the day the wages or compensation is due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quit or was discharged until paid or for 30 days, whichever is less.

2. Any employee who secretes or absents himself or herself to avoid payment of his or her wages or compensation, or refuses to accept them when fully tendered to him or her, is not entitled to receive the payment thereof for the time he or she secretes or absents himself or herself to avoid payment.

Credits

Added by Laws 1919, c. 71, § 2 [part]. NRS amended by Laws 1985, p. 383.  
N. R. S. 608.040, NV ST 608.040  
Current through the end of both the 31st and 32nd Special Sessions (2020)

### **NRS 706.473**

Leasing of taxicab to independent contractor: Authorization in certain counties; limitations; approval of agreement; liability for violations; intervention in civil action by Authority

Currentness

1. In a county whose population is less than 700,000, a person who holds a certificate of public convenience and necessity which was issued for the operation of a taxicab business may, upon approval from the Authority, lease a taxicab to an independent contractor who does not hold a certificate of public convenience and necessity. A person may lease only one taxicab to each independent contractor with whom the person enters into a lease agreement. The taxicab may be used only in a manner authorized by the lessor's certificate of public convenience and necessity.
2. A person who enters into a lease agreement with an independent contractor pursuant to this section shall submit a copy of the agreement to the Authority for its approval. The agreement is not effective until approved by the Authority.
3. A person who leases a taxicab to an independent contractor is jointly and severally liable with the independent contractor for any violation of the provisions of this chapter or the regulations adopted pursuant thereto, and shall ensure that the independent contractor complies with such provisions and regulations.
4. The Authority or any of its employees may intervene in a civil action involving a lease agreement entered into pursuant to this section.

Credits

Added by Laws 1993, p. 2649. Amended by Laws 1997, c. 482, § 186; Laws 2011, c. 253, § 300, eff. July 1, 2011.

### **NAC 706.3753**

Leasing of taxicab to independent contractor: Requirements for lease agreement; enforcement. (NRS 706.171, 706.475)



## Currentness

1. Each lease agreement entered into by a certificate holder and an independent contractor pursuant to NRS 706.473 must:

- (a) Be maintained by the certificate holder.
- (b) Be in writing and in a form approved by the Authority.
- (c) Identify the use to be made of the taxicab by the independent contractor and the consideration to be received by the certificate holder. The use to be made of the taxicab must conform to the authority granted by the certificate to operate the taxicab.
- (d) Be signed by each party, or his or her representative, to the agreement.
- (e) Specifically state that the independent contractor is subject to all laws and regulations relating to the operation of a taxicab which have been established by the Authority and other regulatory agencies and that a violation of those laws and regulations will breach the agreement.
- (f) Specifically state that the certificate holder is responsible for maintaining:
  - (1) All required insurance associated with the taxicab and the service which is the subject of the agreement in accordance with NAC 706.191;
  - (2) A file which contains the qualifications of the independent contractor to drive the taxicab; and
  - (3) A file for records concerning the maintenance of the taxicab.
- (g) Specifically state that the lease agreement does not relieve the certificate holder from any of his or her duties or responsibilities set forth in this chapter and chapter 706 of NRS.
- (h) Specifically state that the taxicab provided pursuant to the lease agreement:
  - (1) Will be painted with the name, insignia and certificate number of the certificate holder; and
  - (2) Is in a good mechanical condition that will meet the requirements for operating taxicabs set forth by this State or the county or municipality in which the taxicab will be operated.
- (i) Specifically state that the independent contractor shall not transfer, assign, sublease or otherwise enter into an agreement to lease the taxicab to another person.
- (j) Specifically state that the independent contractor:
  - (1) Shall not operate the taxicab for more than 12 hours in any 24-hour period; and
  - (2) Shall return the taxicab to the certificate holder at the end of each shift to enable the certificate holder to comply with the provisions of NAC 706.380.
- (k) Contain any other provision which the Authority may determine to be necessary for the protection of the health and safety of members of the public.

2. If the Authority has reason to believe that a lease provision required by this section is being violated, the Authority may, after a hearing:
- (a) Impose an administrative fine pursuant to NRS 706.771;
  - (b) Order the certificate holder or the independent contractor to cease and desist from action taken in violation of this section; or
  - (c) Revoke or suspend the authority of the certificate holder to operate a taxicab to enter into a lease agreement pursuant to NRS 706.473.

Credits

(Added to NAC by Pub. Service Comm'n, eff. 5-5-94; A by Transportation Serv. Auth. by R071-98, 10-28-98; R078-98, 1-28-99; A by Nev. Transportation Auth. by R111-10, 12-16-2010)

Current with amendments included in the State of Nevada Register of Administrative Regulations, Volume 276, dated January 31, 2021 and Supplement 2020-08, dated August 31, 2020.

Nev. Admin. Code 706.3753, NV ADC 706.3753