
Michael F. Polk
University of Nebraska College of Law

TABLE OF CONTENTS

I. Introduction ............................................. 1000

II. Facts .................................................. 1001
   A. Brauner's Newspaper Carrier Agreement with the Tribune ........................................ 1001
   B. Larson's Relationship with the Tribune .................................................. 1002
   C. Litigation of Larson's Claim ........................................... 1003

III. Background ............................................. 1003
   A. Statutory Interpretation of the Scope of Review ........................................ 1003
   B. Employee/Independent Contractor Analysis ........................................ 1006
   C. Substitute Workers as Employees ............................................ 1010

IV. Analysis .............................................. 1012
   A. Clarifying the Ambiguity ........................................... 1012
   B. Ten-Factor Analysis Applied to Larson ........................................ 1015
   C. Other Considerations of the Ten-Factor Analysis ........................................ 1021
   D. Substitute Employee Doctrine Established in Larson ........................................ 1022

V. Conclusion ............................................ 1024

© Copyright held by the Nebraska Law Review.


The Author would like to thank his wife, Susan, and his two children, Molly and Ben, for all their love and support while he was attending law school.
Determining whether an individual is an employee or an independent contractor is of primary importance when the individual is injured while performing assigned or contracted work. Under Nebraska law, an employee who is injured in the course of her employment is entitled to compensation from the employer. Once an injury occurs in the course of work, the injured individual has an incentive to argue that she is an employee. If her argument is accepted, she will be entitled to receive compensation from her employer or, more likely, the employer's insurance provider. The employer or employer's insurance provider has an opposite incentive: they want the individual classified as an independent contractor so they may avoid liability for the injury.

The Nebraska Supreme Court in Larson v. Hometown Communications, Inc. addressed these two competing interests. In Larson, the court was faced with determining whether a young girl, Jennifer Larson, injured while delivering newspapers for the Fremont Tribune, was an independent contractor or an employee. At stake was whether the paper and its insurance provider would have to provide insurance coverage for Larson's injuries, which left her in a persistent vegetative state. The Tribune maintained she was an independent contractor and argued against awarding benefits under Nebraska's Workers' Compensation Act. Larson, through her father as next friend, urged the court to classify her as an employee.

In determining Larson's status as an employee or independent contractor, the court relied upon the ten-factor analysis first established in Erspamer Advertising Co. v. Department of Labor. Along with analyzing the facts under this ten-factor analysis, the Larson court had to rule on an ambiguity between two Nebraska statutes: section 48-179 and section 48-185. Also important to the holding was whether a substitute employee is entitled to benefits under Nebraska's Workers' Compensation Act.

The Larson court clarified the statutory ambiguity in the workers' compensation law, held that substitute employees can receive workers' compensation benefits, and held that Jennifer Larson was an employee under the ten-factor analysis. Although this ruling creates no new law, Larson is important because it clarifies issues of Nebraska workers' compensation law.

The court in Larson clearly establishes the ten-factor analysis as controlling in determinations of employee or independent contractor status. Larson stands apart from other holdings because it emphasizes how each factor of the test should be applied to the facts. Larson

also develops many individual factors of the test more fully than previous holdings concerned with employee/independent contractor determinations.

The court resolved the latent ambiguity in section 48-179 and section 48-185 by clarifying the appellate process in workers' compensation cases. Equally important was the holding that substitute employees were eligible to receive workers' compensation benefits. The court correctly held that substitute workers who are authorized by employers have the same rights as employees injured during the course of work.

_Larson_ is the clearest application of issues concerning employee/independent contractor analysis to date. Part II sets out the facts of this case. Part III describes the background of the statutory analysis, the development of the ten-factor test, and the background of the substitute employee doctrine. Part IV is an analysis of the court's reasoning concerning the statutory analysis, the ten-factor test, and the substitute employee doctrine. Part V concludes by summarizing the holding in _Larson_ and by noting that the holding is a logical extension of past precedent.

II. FACTS

Jennifer Larson started delivering newspapers for the _Fremont Tribune_ through her friendship with Valerie Brauner, who had an established newspaper route with the _Tribune_. When Jennifer was twelve-years-old, she was struck by an automobile while she was delivering newspapers for the _Tribune_, a publication of Hometown Communications, Inc. and Hometown Operations, Inc. Jennifer sustained severe and permanent injuries and as a result was left in a persistent vegetative state.

A. Brauner's Newspaper Carrier Agreement with the _Tribune_

During July 1989, Valerie Brauner entered into an "Independent Carrier Agreement" with the _Tribune_. The _Tribune_ agreed to furnish a delivery schedule and Brauner, as carrier, agreed to deliver all newspapers according to the schedule. Under the agreement, the _Tribune_ was to furnish Brauner with the required quantity of newspa-

7. Id. at 949, 540 N.W.2d at 346.
8. Id. at 945-49, 540 N.W.2d at 343-45.
pers. Brauner agreed to pay for the papers, but she was free to engage in other business activities as long as the papers were delivered on time. Additionally, the agreement provided for the dissolution of the relationship by either party upon twenty-four days notice. The Tribune supplied Brauner with a “Carrier Handbook,” a “Vacation Handbook for Your Substitute,” collection receipt cards, and a collection calendar.

The “Carrier Handbook” is a multiple page book detailing every aspect of the delivery process. The handbook states that the carrier is not an employee of the Tribune, but is an “Independent Contract Merchant.” The handbook instructs the carrier on when the papers are to be delivered and where the papers are to be placed for the customer. The carrier is given detailed instructions on how to deal with situations when a customer stops a subscription or papers pile up on a porch. The carrier is also instructed to find and train substitutes if she goes on vacation. The collection calendar indicates when collections should occur. The collection cards are provided so the carrier can keep track of payments by subscribers and so the carrier can know how she is supposed to interact with each customer.

The Tribune provides all supplies, which are charged to the carrier. These supplies include rubber bands, plastic bags, carrier bags, collection cards, introduction pads, and collection pads. Every carrier is required to maintain a savings account balance to cover these bills. The Tribune also provides sales tips and promotional fliers to encourage the carrier to solicit new business and awards bonuses for each new customer the carrier obtains.

The “Vacation Handbook for Your Substitute” instructs the substitute carrier on the basics of newspaper delivery. The regular carrier is instructed on a number of steps to follow before she turns over her route to a substitute carrier. The regular carrier is required to review every aspect of the handbook with the substitute. In addition, the carrier is required to notify the Tribune when a substitute is used.

Valerie Brauner, Jennifer Larson’s friend, was instructed on this material before beginning work for the Tribune. Nevertheless, Brauner had trouble completing her route and became tired of having sole responsibility for it. Splitting her route with Jennifer Larson became the solution to Valerie Brauner’s delivery problems.

B. Larson’s Relationship with the Tribune

Brauner and Larson discussed dividing the delivery schedule. The girls’ mothers then worked out a schedule to split the route. Brauner retained the collection duty, but the profits of the route were divided equally between the two girls. In August 1990, the Tribune was noti-
fied by letter of the arrangement, although Larson never signed a carrier agreement. The Tribune never objected to the arrangement, and the district manager responsible for the girls' route once asked the girls whether their arrangement was satisfactory. The arrangement lasted fewer than six months because of the accident involving Larson.

On February 22, 1991, Larson was struck by an automobile while delivering newspapers. She sustained traumatic brain injuries and was left in a persistent vegetative state. Demand was made upon the Tribune for workers' compensation insurance coverage. The Tribune denied coverage on the grounds that Larson was an independent contractor and not entitled to benefits. Because coverage was denied, David Larson, Jennifer's father, filed suit to force the Tribune and its insurer to cover the injuries.

C. Litigation of Larson's Claim

David Larson, as Jennifer's father and next friend, filed suit with the Workers' Compensation Court for benefits. The trial before a single judge was bifurcated to determine first if Larson was an employee of the Tribune, and if she was, then to determine her average weekly wage. The judge ruled that Larson was an employee of the Tribune and entered a final award for benefits on June 28, 1993. The Nebraska Workers' Compensation Review Panel reversed the award, finding as a matter of law that the trial judge erred by ruling Jennifer was an employee of the paper. David Larson appealed the ruling. The court of appeals reversed the review panel and reinstated the trial judge's decision. The Tribune and its insurer appealed to the supreme court, which affirmed the court of appeals' ruling that Larson was covered under Nebraska's Workers' Compensation Act and entitled to benefits under the Act.

III. BACKGROUND

A. Statutory Interpretation of the Scope of Review

Section 48-101 of the Nebraska statutes provides that when an employee sustains a personal injury in an accident in the course of his employment, the employee shall receive compensation from his employer. Simply put, if an employee is injured while working, the employer is obligated to provide compensation under Nebraska's workers' compensation laws. Once an injury occurs, the interested parties have a right to settle all matters of compensation between themselves provided they have the consent of the insurance carrier.

10. Id. at 949-50, 540 N.W.2d at 346.
12. Id. § 48-136.
Frequently, however, the employee's claim is disputed. The insurance carrier or employer may refuse to settle because they feel no benefits are warranted. Nebraska's workers' compensation statutes establish the law used to resolve disputed claims. The first step is to submit the disputed claim to a trial court. Nebraska law gives exclusive original jurisdiction of workers' compensation claims to the Nebraska Workers' Compensation Court, which serves as the trial court and fact-finder for deciding disputed claims between employers and individuals. All disputed claims must first be submitted to this court for a finding, award, order, or judgment.

Once a finding, award, order, or judgment is entered, either party can file an application for review of the decision before the compensation court's review panel. New evidence cannot be entered at the review hearing, and the review panel may, but is not required to, write an opinion. According to section 48-179, the review panel "may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law." The review panel may affirm, modify, reverse, or remand the judgment on the original hearing.

Under section 48-185, an appeal from the judgment of the Nebraska Workers' Compensation Court next proceeds to the Nebraska Court of Appeals and then to the Nebraska Supreme Court. The scope of review for these two courts is set forth in section 48-185, which provides the following:

A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award.

Once a compensation court decision proceeds to the appeals or supreme court, any judgment must fall within these statutory guidelines.

Interpreting section 48-179 and section 48-185 has led to some confusion in the courts. Section 48-185 clearly applies to the appellate process in the appeals court and supreme court. How this statute op-

13. Id. § 48 et seq.
14. Id. § 48-161.
15. Id.
16. Id. § 48-179.
17. Id.
18. Id.
19. Id.
20. Id. § 48-185.
21. Id.
erates in relation to section 48-179, however, is unclear. The issue is whether the workers' compensation trial court or the review panel should be given the full force and effect of a jury verdict. Section 48-185 states that "[t]he judgment made by the compensation court after review shall have the same force and effect as a jury verdict in a civil case." Ambiguity results because the statute fails to state specifically which ruling, that of the trial court or that of the review panel, is to be given the full force and effect of a jury verdict.

While the Nebraska Supreme Court had not addressed this statutory ambiguity before Larson, the Nebraska Court of Appeals had ruled on this issue. The court in Pearson v. Lincoln Telephone Co. held that the compensation court's review panel could not "go beyond its statutory mandate for review." Section 48-179 clearly mandates that the review panel can modify or reverse the trial court's decision only if the judge was clearly wrong on the evidence or the decision was contrary to law. The Pearson court also held that "the single judge of the compensation court is the fact-finding trial court and the review panel is performing the first level of appellate review." The court reasoned that, unlike the trial judge, the review panel does not see or hear witnesses and is not in the position of a fact-finder. It follows then, that the deference given to a fact-finder could be given only to the trial court and not to the review panel. To reach its conclusion, the appeals court went through a complete analysis of legislative intent and delivered a well-reasoned opinion.

The court of appeals in Larson accepted the reasoning of the Pearson court and quoted extensively from the Pearson opinion to support its position. The defendants in Larson, however, continued to argue that the findings of the review panel should have the force and effect of a jury verdict. Thus, the issue of the ambiguity between section 48-

22. Id.
23. 2 Neb. Ct. App. 703, 513 N.W.2d 361 (1994). The decision in Pearson did not involve issues in determining whether an individual was an independent contractor or an employee. A trial judge of the workers' compensation court had dismissed a claim for benefits by an employee of Lincoln Telephone Company who had lost his hearing. The claim was dismissed because the medical evidence did not specify the amount of hearing loss, if any, the plaintiff had sustained. The Nebraska Workers' Compensation Review Panel reviewed the evidence, vacated the trial judge's order, and remanded the matter. Lincoln Telephone appealed, and the court of appeals held that the review panel exceeded its statutory mandate for review. Id. at 713, 513 N.W.2d at 369.
24. Id. at 712, 513 N.W.2d at 367.
27. Id.
28. Id. at 710-11, 513 N.W.2d at 366.
179 and section 48-185 pertaining to the scope of review was addressed directly by the Nebraska Supreme Court in Larson.

B. Employee/Independent Contractor Analysis

In Bohy v. Pfister Hybrid Co., the Nebraska Supreme Court first held that no single test determined whether a worker was an employee or independent contractor. Instead, all of the facts in each case must be analyzed to make the determination. Since Bohy, the supreme court has developed and faithfully applied a consistent analytical approach for determining employee or independent contractor status.

This approach first was used in Erspamer Advertising Co. v. Department of Labor, which considered ten factors when analyzing the facts in the case. These factors were adopted directly from section 220 of the Restatement (Second) of Agency. In Hemmerling v. Happy Cab Co., a recent case determining the employment status of a cab driver, the supreme court presented the following factors to consider:

(1) the extent of the control which, by the agreement, the employer may exercise over the details of the work, (2) whether the one employed is engaged in a distinct occupation or business, (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision, (4) the skill required in the particular occupation, (5) whether employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work, (6) the length of time for which the one employed is engaged, (7) the method of payment, whether by the time or by the job, (8) whether the work is part of the regular business of the employer, (9) whether the parties believe they are cre-

30. Bohy v. Pfister Hybrid Co., 179 Neb. 337, 340, 138 N.W.2d 23, 26 (1965). In Bohy, the supreme court reviewed a contract agreement between Bohy and Pfister Hybrid Company and other aspects of Bohy's work to determine if he was an employee or independent contractor of the company. Bohy had entered into a contract to be a dealer for the company's seed corn. He was killed in a grade crossing accident and subsequently his wife applied for workers' compensation benefits. After reviewing all aspects of Bohy's work, the court held he was an independent contractor. Id. at 341, 138 N.W.2d at 27.

31. All cases researched for this Note concerning the determination of employee/independent contractor analysis contained this language from Bohy v. Pfister Hybrid Co., 179 Neb. 337, 138 N.W.2d 23 (1965), in some form. Bohy appears to be the original source of this language, but may not always be cited in applicable cases.

32. 214 Neb. 68, 71-72, 333 N.W.2d 646, 648-49 (1983). In Erspamer, the court expanded the test for analyzing whether an individual is an independent contractor or employee. Section 48-604(5) does provide a test for determining the employment status of an individual (in Erspamer, this test is referred to as the "ABC test"). See Neb. Rev. Stat. § 48-604(5) (Reissue 1993). The court in Erspamer broadened the statutory test by reading into its definition the ten-factor employee/independent contractor test contained in the Restatement. See Restatement (Second) of Agency § 220 (1958). The statutory test is virtually ignored in favor of the ten-factor test introduced by the supreme court in Erspamer.

EMPLOYMENT STATUS

When analyzing these factors, the court must view the facts of each case in light of prior holdings. As noted above, no single factor is dispositive. Some factors, however, obviously will be weighed more heavily than others.

The first and arguably the most important factor is the control the employer exercises in overseeing the work of the employee. In Eden v. Spaulding, the supreme court recognized that the right of control is the chief factor in making the determination of employee or independent contractor status. The court tempered this language by noting that an employer is allowed to exercise the control necessary to assure compliance with the contract terms. This factor exists on a continuum. The more control exerted over the work by the employer, the more likely the court will view the worker as an employee. Exercising little or no control over the work will result in viewing the worker as an independent contractor.

The second factor is whether the individual is engaged in a distinct occupation or business. This factor is concerned primarily with whether the worker offers similar services to other businesses. In Eden, the court held that an individual with separate incomes from


35. Eden v. Spaulding, 218 Neb. 799, 804, 359 N.W.2d 758, 762 (1984). See also Maricle v. Spiegel, 213 Neb. 223, 233, 329 N.W.2d 80, 87 (1983). The Eden court went through the ten-factor analysis to determine whether a delivery driver was an employee or independent contractor. Ronald Eden was struck by a truck driven by Dennis Spaulding, who was employed by Ernest Fundum. The accident occurred while Spaulding was in Omaha to pick up newspapers under a distribution agreement with the Omaha World Herald. At trial, the jury awarded Eden a $3 million judgment against Spaulding, Fundum, and the World Herald. The World Herald appealed the verdict. The court applied the ten-factor analysis, and found that Fundum was an independent contractor of the World Herald. The case against the World Herald was reversed and remanded for dismissal. See Eden v. Spaulding, 218 Neb. 799, 807, 359 N.W.2d 758, 764 (1984).

36. Eden v. Spaulding, 218 Neb. 799, 804, 359 N.W.2d 758, 762 (1984); Stephens v. Celeryvale Transp., Inc., 205 Neb. 12, 20, 286 N.W.2d 420, 425 (1979). The Stephens court evaluated the terms of a contract between Stephens and Celeryvale Transport to determine whether Stephens was an employee or independent contractor of the trucking firm. This case was decided before the court had established the ten-factor analysis test. Important to the present analysis is that the court looked at both the contract terms and outside evidence to make its decision. Neither the contract language nor other evidence was used exclusively to determine that the plaintiff in Stephens was an independent contractor. The court weighed all of the evidence to reach its conclusion. Id. at 22-23, 286 N.W.2d at 425-26.
separate business contracts was engaged in a distinct business.\textsuperscript{37} If a worker offers similar services to more than one business, the court will tend to view the worker as an independent contractor.

Factors three, four, and five all involve the interaction between the employer and the work. The more an employer is involved with the actual work, the more likely the worker will be considered an employee. Factor three is concerned with whether, in the locality, the work is done under direct supervision or by a specialist without supervision. To determine independent contractor status, the employer must exert very little direct supervision. Fixed delivery routes, regulations, or restrictions placed upon the worker will be indicative of employee status.\textsuperscript{38}

The next factor is the skill required by the individual in performing the work. If the work can be done by employees rather than specially skilled workmen, the determination likely will be that the worker is not an independent contractor.\textsuperscript{39} Another important consideration, the fifth factor, is whether the worker supplies her own instrumentalities, tools, and place of work. A highly skilled worker generally will have her own tools, which tends toward finding independent contractor status.\textsuperscript{40}

The sixth factor is the length of time for which the worker is employed. If a worker can be terminated without penalty, the worker usually is considered an employee.\textsuperscript{41} Individuals who are subject to "at will" termination by the employer are characterized as being in an employee relationship. Generally, an independent contractor can be discharged only under the terms provided in the contract with the employer.

The method of payment by the employer is the next factor. In \textit{Stephens v. Celeryvale Transport, Inc.}, the court held that employees normally are compensated while they work, but an independent contractor's compensation usually depends upon the profit made from

\textsuperscript{38} \textit{Id.}
\textsuperscript{39} Employers Ins. of Wausau v. Greater Omaha Transp. Co., 208 Neb. 276, 303 N.W.2d 282, 284 (1981). In \textit{Wausau}, the court held that a cab driver was an employee, not an independent contractor of a cab company. The court's analysis of relevant factors was ill-developed in this case, although the outcome supports the notion that driving a cab does not require specially skilled independent workmen. The company gave each driver a comprehensive forty-page instruction manual covering every aspect of the driver's job. \textit{Id.} at 278, 303 N.W.2d at 283.
\textsuperscript{40} Voycheske v. Osborn, 196 Neb. 510, 244 N.W.2d 74, 76 (1976). \textit{See Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 895, 11 N.W.2d 810, 811-12 (1943)(listing behavior typical of an independent contractor).}
EMPLOYMENT STATUS

1997]

A contract. It should be noted, however, that “payment of wages on a piece or quantity basis is not inconsistent with the status of an employee.” If a worker is compensated on a continuous basis, then the court tends to regard that worker as an employee.

Whether or not the work is part of the regular business of the employer is the eighth factor. If the individual is performing work essential to the operation of the business, the individual likely is an employee.

The ninth factor considers whether the parties believe they are creating an agency relationship. This factor is one of the most difficult to determine because the worker invariably will argue that she felt she held the status of an employee. The facts underlying the relationship itself are used to determine whether an agency relationship exists irrespective of the words or terminology used by the parties to characterize their relationship. The facts are of primary importance when a contract exists between the worker and employer. This contract could delineate either an employer-employee or employer-independent contractor relationship.

In Hemmerling v. Happy Cab Co., the court held that if the parties formed a contract, it would be considered of prime importance, but warned that the contract could not be used to conceal the true relationship between the parties. In the same opinion, the court also held that when a written contract described the relationship as that of an independent contractor, and nothing in the performance was inconsistent with the contract, then the individual would be held to be an independent contractor as a matter of law. Contracts establishing

43. Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 896, 11 N.W.2d 810, 812 (1943) (finding that a worker who was paid to paint trailers at a rate of $2.50 per trailer was not inconsistent with the status of an employee).
The factors provide a perspective on the true nature of the relationship, irrespective of the contract language. The factors are not quantitative, and the court will look beyond the contract language to consider the facts. Together, the factors can form a rapport with the true nature of the relationship.

The court always will look beyond the contract to the facts to determine the true nature of the relationship irrespective of the contract language.

The tenth and final factor considers whether or not the employer is in the business. Simply put, is the work under contract part of the employer's business? This factor is difficult to distinguish from factor eight, but the court continues to include it in the analysis. Most notably, the court has considered this factor to determine whether the employer withholds taxes from payments to the worker. The deduction of social security taxes and withholding of income tax indicates an employee relationship, while failure to do so indicates that an independent contractor relationship exists.49

When applying this ten-factor test, no single factor is dispositive on the issue of whether the worker is an employee or independent contractor. The factors also are not quantitative. A majority of factors favoring either employee or independent contractor status still may not persuade a court of the respective status. Before ruling, the court will consider the factors in light of all the facts.

C. Substitute Workers as Employees

There is little direct Nebraska law on the issue of whether a substitute employee is entitled to compensation under the Nebraska Workers' Compensation Act. When employers require employees to find substitutes when the employees are unable to perform their duties, the question becomes whether an injured substitute employee can receive benefits under the Act. Under section 48-115(2), an individual with an implied or express contract to work for an employer who is engaged in any business shall have the same power as employees under the Nebraska Workers' Compensation Act.50

If the court finds an implied contract between the employer and the substitute, the substitute is entitled to benefits under section 48-115. The implied contract arises when the employer accepts or acquiesces in the substitution of one worker for another. A person working as a substitute may be an employee under a workers' compensation act when the


employer knows of or encourages substitutes to fill in for employees.\footnote{51} By encouraging the substitution, the employer in effect creates an implied contract with the substitute. Once an implied contract is shown, the substitute is entitled to benefits.

The court of appeals in \textit{Larson} cited two cases that support the specific assertion that substitutes recognized by employers have the same status as employees under a workers' compensation act.\footnote{52} In \textit{Bobik v. Industrial Commission},\footnote{53} the Ohio Supreme Court held that "it is a well-settled rule of law that if a master expressly or impliedly assents to an arrangement whereby a person is procured by an employee to act as his substitute . . . such substitute . . . occupies the position of an employee of the master.\footnote{54} The second case dealt directly with the question of substitute newspaper carriers. \textit{Veit v. Courier Post Newspaper}\footnote{55} involved a mother who was injured while delivering newspapers as a substitute for her son. The mother initially was denied compensation by the compensation court. It was undisputed that the newspaper as a standard practice encouraged newspaper carriers to engage substitutes when they were unable to make deliveries.\footnote{56} On the question of the relationship between the substitute and the employer, the New Jersey appellate court held that there was an implied contract between the substitute, the mother, and the newspaper because the paper routinely allowed carriers to engage substitutes and therefore had implied notice of this specific substitution.\footnote{57}

The key consideration for a substitute employee to be eligible for benefits under a workers' compensation act is to find at minimum an implied contract with the employer. An implied contract most likely will arise from an employer policy allowing substitutes as found in \textit{Veit} or by an assent to a particular substitution as held in \textit{Bobik}. The issue before the court in \textit{Larson} was Larson's relationship to the \textit{Fremont Tribune} because she had no express contract with the paper. Because of her relationship with her friend Brauner, who did have a contract, Larson's relationship with the \textit{Tribune} was more akin to that of a substitute carrier.

\footnotesize
\begin{itemize}
\item \footnote{51} 99 C.J.S Workmen's Compensation § 74 (1959).
\item \footnote{53} 64 N.E.2d 829, 832 (Ohio 1946).
\item \footnote{54} Id. at 832.
\item \footnote{56} Id. at 63.
\item \footnote{57} Id.
\end{itemize}
In Larson v. Hometown Communications, Inc., the Nebraska Supreme Court correctly applied existing workers' compensation law to the facts. In rejecting the assumption that newspaper carriers are independent contractors as a matter of law due to contract language, the court remained consistent in its approach of identifying and analyzing whether an individual is an independent contractor or an employee.

The analysis of a worker's status as either an employee or independent contractor rests on the ten-factor analysis first established in Erspamer Advertising Co. v. Department of Labor. Before the test could be applied, however, the Larson court needed to clarify its scope of review with regard to section 48-179 and section 48-185. The court held that the decision of the workers' compensation court trial judge was entitled to the force and effect of a jury verdict while the three judge review panel was not. The supreme court further held that the worker's compensation review panel is the first level of appeal and is controlled by section 48-179, while further appeals to the court of appeals and the supreme court are controlled by section 48-185. The supreme court, in regard to the application of section 48-179 and section 48-185, applied a consistent and logical approach in accord with past precedents. With the statutory issue clarified, the ten-factor employee/independent contractor analysis was applied.

Finally, the court addressed the question of whether Larson was a substitute employee and therefore not under a contract for hire with the paper. Once again, in a very straightforward and concise manner, the supreme court applied Nebraska law and found that under the facts, a substitute carrier was an employee of the paper.

Larson is not a revolutionary precedent in Nebraska worker's compensation law. The holding clarifies areas of the law, however, and illustrates a logical and sound approach in the application of the ten-factor analysis.

A. Clarifying the Ambiguity

The first issue the Larson court addressed was the scope of review by courts hearing appeals from a decision by the trial judge of the workers' compensation court, which required an analysis of section 48-
179 and section 48-185. These two statutes control the appellate process in workers' compensation cases. The defendants challenged that the decision of the review panel had the force and effect of a jury verdict. The court disagreed with the defendant's argument and instead opted to follow the reasoning of the court of appeals on this matter.64

The court of appeals in *Pearson v. Lincoln Telephone Co.* held that the review panel of the workers' compensation court was bound to the same standard of review of the trial court's decision as the supreme court and the court of appeals.65 The review panel thus becomes the first level of appeal in workers' compensation cases, and the review panel should not substitute its view of the facts for the trial court's.66 If sufficient evidence supports the award, the review panel should affirm the decision, order, or award of the trial court.

The review panel is limited by section 48-179 in its review of cases.

No new evidence may be introduced at such review hearing. The review panel may write an opinion, but need not do so, and may make its decision by a brief summary order. The compensation court may reverse or modify the findings, order, award, or judgment of the original hearings only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law.67

The review panel quite clearly is not empowered to substitute its view of the facts for the view taken by the trial court. If the evidence in the record supports the trial court's decision, the review panel should affirm the decision, award, or order of the court.68 Once the decision is appealed, section 48-185 controls the scope of review.

The judgment made by the compensation court after review shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award.69

The supreme court in *Larson* adopted the court of appeals' stance on the scope of review:70 section 48-179 controls the review procedure of workers' compensation decisions and section 48-185 controls further appellate review. The appellate court therefore reviews the findings of the trial court to determine if sufficient evidence supported the award.

64. *Id.* at 952, 540 N.W.2d at 347.
66. *Id.*
69. NEB. REV. STAT. § 48-185 (Reissue 1993).
The evidence from the trial must support the facts before the appellate court will determine whether the facts support any award.

The supreme court agreed with the court of appeals in affirming that the workers' compensation review panel's decisions did not deserve the force and effect of a jury verdict. After all, it is at the trial level in the workers' compensation court that facts are litigated. The review panel acts as the first level of appeal in these cases. Thus, the panel is limited by statute to the scope of its review. The supreme court made the only decision possible under Nebraska's statutory scheme. The workers' compensation review panel acts as the first level of appeal and is not allowed to make determinations of fact. That power rests solely and correctly with the judge at the trial level.

The confusion as to which court should make determinations of fact originates in the sentence in section 48-185 that states that "[t]he judgment made by the compensation court after review shall have the same force and effect as a jury verdict in a civil case." This section is vague in the sense that it does not state specifically whether the trial court or the review panel is the court with the force and effect of a jury verdict. The drafters of the statute should have clarified this by replacing "compensation court" with language such as "compensation trial court." Because of the inherent vagueness of this sentence, the court of appeals and the supreme court were left to interpret the language of the statute. The Supreme Court adopted the reasoning of the appeals court in Pearson v. Lincoln Telephone Co. and in Larson v. Hometown Communications, Inc. With the ambiguity clarified, the court could address its scope of review for the present case.

Under subsections (3) and (4) of section 48-185, the Larson court first was required to review the evidence to determine if it was sufficient to warrant the issue of benefits to Larson. Next, it had to determine if the findings of fact supported the award. It is important to note, as the court did, that the determination of an individual's status as an employee or independent contractor normally is a question of fact, but it also can be a question of law if the employer-employee relationship is clear.

Larson narrows the scope of review for the workers' compensation review panel. Under Larson, the review panel is limited in its review

72. Id.
73. NEB. REV. STAT. § 48-185 (Reissue 1993).
76. Id.
77. Id.
and is controlled by section 48-179. Later appeals are controlled by section 48-185.

B. Ten-Factor Analysis Applied to Larson

In determining whether a newspaper carrier was an employee or independent contractor, the Nebraska Supreme Court used the ten-factor analysis it first established in *Erspermer Advertising Co. v. Department of Labor.*78 No single factor is determinative of employee or independent contractor status.79 The ten factors the court considered in analyzing the carrier's relationship to the *Fremont Tribune* originated from *Hemmerling v. Happy Cab Co.*80 The Larson court applied a step-by-step analysis of each factor to determine if newspaper carriers for the *Fremont Tribune* were independent contractors or employees. This was significant because the court provided a roadmap for assessing the status of independent contractor or employee status, which had been lacking in past rulings.

The first factor of control historically has been the most important in determining employment status. The supreme court in *Eden v. Spaulding* held that the right of control generally is the chief criterion in determining the outcome of such cases.81 An employer does not have to give up total control to assure the status of an independent contractor. Employers are allowed to retain the control necessary to assure performance of the contract.82

The real question is the degree of control. The Larson court looked at the facts to determine if the *Tribune* maintained direct control over its carriers. Because the newspaper maintained control over the routes, delivery times, and the cost of the paper, the court held that sufficient evidence supported the trial judge's finding on control. The trial court had held that the control exercised by the *Tribune* was more than what was necessary to assure delivery of its newspapers.83

To prevail on this factor, the defendants needed to show that the carriers were in fact the "Independent Contract Merchants" the carrier handbook portrayed them to be. The *Tribune* maintained that it retained only the control necessary to assure compliance with the contract.84 The handbook, however, contained numerous instructions on

---

80. 247 Neb. 919, 530 N.W.2d 916 (1995). See also supra Part III (listing the ten factors used in analysis).
84. Id.
how the carriers were to conduct themselves, including guidelines regarding substitutes, bundling papers, collecting from customers, and other facets of the delivery process. The *Tribune* exercised control in almost every aspect important to the work. The relationship was independent in name only. Only the workers' compensation review panel failed to recognize this.

The remaining nine factors appear to revolve around the issue of control. It even could be argued that these factors are merely indicia of control to which the court looks when considering the first factor. The holding in *Larson*, however, does not support this point. If the court was giving merely a cursory reading to the other nine factors, it would not have considered each point separately. The holding in *Larson* is proof that the court will consider each factor separately.

The second factor considers whether the carriers were engaged in a distinct business or offered similar services to other businesses. Neither of the girls held other jobs; they were a part of a system of delivering newspapers. The court thus held that sufficient evidence supported the finding that the girls were not performing a function in which they were specialists, and therefore, were not engaged in a distinct business.85

Whether the work is done under direct supervision is the third factor. The *Tribune* maintained it did not exercise control over the carriers, but the court held otherwise.86 A district manager was responsible for more than seventy carriers. If one of the carriers missed a delivery, it was the manager's duty to insure delivery. When complaints were registered, the manager notified the carrier. Although the supervisory relationship was neither formal nor day-to-day, the control maintained by the manager was sufficient to show work normally was supervised.87 For the carriers to be independent under this test, they probably would have needed to field and handle complaints themselves. Yet, the carrier handbook also indicated that the employer maintained control under this factor. Almost every aspect of the delivery process was spelled out in the handbook, and managers expected carriers to follow the handbook directives. Thus, the handbook became the regulations for delivering newspapers.

85. *Id.* This contrasts factually with *Eden v. Spaulding*, 218 Neb. 799, 805, 359 N.W.2d 758, 762 (1984). In *Eden*, the individual working for the company had more than one source of income. The individual's distinct business was not exclusively tied to the company. In *Larson*’s case, however, the *Fremont Tribune* was the exclusive source of income. See supra note 35.


87. *Id.* In *Eden v. Spaulding*, 218 Neb. 799, 805, 359 N.W.2d 758, 763 (1984), the court pointed out that the company had little or no supervision over the individual. See supra note 35.
The skill required to perform the job is also a factor. In Employers Insurance of Wausau v. Greater Omaha Transportation Co., the court held that the less skill required in a job, the greater the indication the worker is an employee and not an independent contractor.\textsuperscript{88} A job in which children carry newspapers hardly can be deemed highly skilled. This is the position the court adopted.\textsuperscript{89}

The next factor is whether the employer supplied the instrumentalities, tools, or place of work. In Larson, the Tribune provided all of the necessary equipment for the delivery of its papers. This ranged from the designated routes of the carriers to rubberbands and other basic supplies. Normally, an independent contractor furnishes his own supplies. The court held that the Tribune supplied the instrumentalities.\textsuperscript{90}

The sixth factor was the length of time for which the worker was engaged. Although the carrier agreement stated that the agreement could be terminated upon twenty-four days notice by either party, in practice, the Tribune terminated unsatisfactory carriers without notice.\textsuperscript{91} The ability to terminate without penalty indicates an employee relationship. The court held that the Tribune had this power, and Larson's continuous employment also indicated an employee relationship.\textsuperscript{92}

\textsuperscript{88} 208 Neb. 276, 279, 303 N.W.2d 282, 284 (1981).
\textsuperscript{89} Larson v. Hometown Communications, Inc., 248 Neb. 942, 956, 540 N.W.2d 339, 349 (1995). An interesting parallel can be made between Larson and Employers Insurance of Wausau v. Greater Omaha Transportation Co., 208 Neb. 276, 303 N.W.2d 282 (1981). In both cases, the employer furnished the worker with an extensive instruction manual detailing how the work was to be performed, and in each case, the court held that the worker was not a highly skilled individual. The court in Larson did very little comparison with the holding in Wausau. Combining parts of the holdings in these two cases would appear to indicate a detailed instruction manual is strong evidence of employee status.

\textsuperscript{90} Larson v. Hometown Communications, Inc., 248 Neb. 942, 957, 540 N.W.2d 339, 349-50 (1995). See Voycheske v. Osborn, 196 Neb. 510, 244 N.W.2d 74 (1976). In Voycheske, a part-time maintenance worker was held to be an independent contractor. The factors the court used in reaching this conclusion included the following: Voycheske set his own hours, did specialized or complicated work for the employer, the work was on a job-by-job basis, and Voycheske supplied his own tools and supplies. \textit{Id}. By contrast, the Fremont Tribune supplied all necessary materials to Larson.

\textsuperscript{91} Larson v. Hometown Communications, Inc., 248 Neb. 942, 957, 540 N.W.2d 339, 350 (1995). See also Schneider v. Village of Shickley, 156 Neb. 683, 687, 57 N.W.2d 527, 530 (1952)(stating that one reason an electrician was held to be an employee was that the employer could discharge the worker at will without liability); Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 896, 11 N.W.2d 810, 812 (1943)(holding that a worker hired to paint trailers and who could be terminated without liability favored employee status).

The method of payment is the seventh factor. The Tribune paid the carriers a fixed rate for each paper delivered and set the price for each paper. The carriers had no control over price. The court upheld the trial judge’s determination that this effectively created payment based on a piece rate basis. The profits from the route did not rely so much upon the contract, but on the price controls maintained by the Tribune. Once again, this was strong evidence of an employee relationship.

The eighth factor is whether the work was part of the regular business of the employer. The court held that the delivery of newspapers was an integral part of the business.

The ninth factor requires more analysis because of the existence of a contract between the carriers and the paper. This factor relies upon whether the parties believe they are creating a master-servant relationship. The Larson court followed its ruling in Hemmerling v. Happy Cab Co., which set forth that contract language cannot be used to conceal the true nature of the relationship. The Tribune maintained that it considered its carriers independent contractors, while the carriers thought of themselves as employees of the paper. The Tribune introduced evidence that it was the newspaper industry’s standard to consider newspaper carriers as independent contractors. The contract with Brauner stated she was an independent contractor and not an employee. Brauner, at trial, contested that issue and stated she thought of herself as an employee. She reasoned that the Tribune expected her to deliver her route as directed, and if she did not, she would be fired.

With conflicting views, the court must determine which of the two competing visions of the relationship is correct. Directly applying the reasoning from Hemmerling, the court analyzed the contract in Hemmerling and determined that the contract terms actually created an employer-employee relationship in the case of a cab driver and the dispatching company, even though historically, cab drivers were considered independent contractors. The court reasoned that the con-

93. Id.
94. Id. at 958, 540 N.W.2d at 350.
95. Id. at 959, 540 N.W.2d at 351; Hemmerling v. Happy Cab Co., 247 Neb. 919, 927, 530 N.W.2d 916, 922 (1995). See also Stephens v. Celeryvale Transp., Inc., 205 Neb. 12, 19, 286 N.W.2d 420, 424 (1979); Bohy v. Pfister Hybrid Co., 179 Neb. 337, 338 N.W.2d 23 (1965)(stating that generally, contract language will be important, but not the exclusive source of evidence in determining whether a worker is an employee or independent contractor under the terms of a written contract).
97. Id. at 959, 540 N.W.2d at 351.
tract and its language were of primary importance, but such a writing could not be used to conceal the true nature of the relationship.99

By looking past the language of the carrier agreement between Brauner and the Tribune, the court refused to accept contract language as determinative of employment status. Cases determining whether an individual is an employee or independent contractor rest on the facts in each situation. Just because newspaper carriers sign agreements labeling themselves as independent contractors, the existence of such an agreement should not bar a court from a full investigation of the facts.

While Brauner signed and agreed to abide by the Tribune's "Independent Carrier Agreement," the court was correct in going beyond the mere words of the agreement to the substance of the arrangement to find that carriers for the paper did not have the requisite control to characterize them as independent contractors. As shown earlier, the Tribune controlled virtually every aspect of the carrier's job. Hemmerling is clear precedent for moving beyond the contract to the core of the relationship itself. The supreme court continuously has held that the facts of each situation determine whether an individual is an independent contractor or employee. Under this analysis, if the court had accepted the contract language as binding, it would have been out of line with its past rulings.

The trial judge, as quoted by both the court of appeals and supreme court, summarized the reading of the contract: "It is beyond sophistry and closer to outright dishonesty to characterize a 10-year-old party to a contract as a 'little merchant' and thus an independent contractor." When the relationship between Brauner and the Tribune is analyzed carefully, it shows that the paper had extensive control over her actions. The supreme court agreed with the trial judge that the contract language did not control the issue of whether or not the carriers were independent contractors, and contract language that charac-

99. Id. at 927, 530 N.W.2d at 921. Cf. Stephens v. Celeryvale Transp., Inc., 205 Neb. 12, 12, 286 N.W.2d 420, 421 (1979). In Stephens, the court held that if a contract exists between a claimant and employer that defines the relationship as that of an independent contractor and nothing in the performance by the parties is inconsistent with the relationship described in the contract, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee. See also Knowlton v. Airport Transp. Co., 235 Neb. 96, 99, 454 N.W.2d 278, 280 (1990)(finding that a driver leasing a van from company was an independent contractor under terms of the contract); Spulak v. Estep, 216 Neb. 523, 526-27, 344 N.W.2d 475, 477 (1984)(holding it was unnecessary to go through the ten-factor analysis because the terms of the contract and all actions in accordance with the contract supported the finding that the worker was an independent contractor).

terizes the relationship as one of an independent contractor cannot disguise the actual nature of the relationship.\footnote{101}

The final factor to be analyzed is whether the employer is in the business. Although associated with this factor is whether the employer withholds income tax from the individual's paycheck, this sub-factor was irrelevant in \textit{Larson} because state and federal tax regulations exempt the normal withholding of income from the earnings of newspaper carriers younger than eighteen.\footnote{102} Moreover, the \textit{Tribune} hardly could argue that it is not in the business of selling and delivering newspapers.

The defendants also argued that the court's decision was inconsistent with previous holdings, particularly \textit{Anthony v. Pre-Fab Transit Co.},\footnote{103} \textit{Eden v. Spaulding},\footnote{104} and \textit{Stephens v. Celeryvale Transport, Inc.}.\footnote{105} These rulings, however, did not delve into the status of newspaper carriers as employees. The court found the fact pattern in each case was dissimilar to the \textit{Larson} facts and therefore did not control its decision. This finding rested upon the principle that the determination of whether a worker is an employee, as distinguished from an independent contractor, must be made based on all the facts of the case. The supreme court in each case analyzed the facts and concluded that in each instance, the individual was better characterized as an independent contractor rather than an employee. It should be noted that the court in \textit{Anthony}, \textit{Eden}, and \textit{Stephens} applied the same tests in its analysis as it did in \textit{Larson}.\footnote{106}

In applying past precedent, it is important to note that the issue of whether a newspaper carrier is an independent contractor or employee is a question of fact, not a matter of law. The supreme court wisely did not conclude in its analysis of Jennifer Larson's situation that all newspaper carriers are employees as a matter of law. Instead, the determination rests upon the facts in each case. Under the court's analysis, a change in facts easily could result in finding that the newspaper carrier is an independent contractor. In cases resting upon the status of an individual as an employee or independent contractor, the

\begin{table}
\centering
\begin{tabular}{|l|}
\hline
103. 239 Neb. 404, 476 N.W.2d 559 (1991)(upholding a contract between an individual and a trucking firm that defined the relationship as that of an independent contractor). \\
104. 218 Neb. 799, 359 N.W.2d 758 (1984)(holding that the ten-factor analysis showed that an individual who had a hauling contract with an employer was an independent contractor). \\
105. 205 Neb. 12, 286 N.W.2d 420 (1979)(holding that an individual under contract to a trucking firm was an independent contractor). \\
\hline
\end{tabular}
\end{table}
Nebraska Supreme Court is clear in its holdings that facts always drive these determinations.

The trial court will not be overturned unless its findings of fact are clearly wrong. The supreme court in *Larson* agreed with the trial court in characterizing newspaper carriers of the *Tribune* as employees and concluded that this finding was supported by sufficient competent evidence.

C. Other Considerations of the Ten-Factor Analysis

Several additional issues are worthy of discussion concerning the supreme court's application of the ten-factor analysis in *Larson*. First, the court focused solely on cases from Nebraska. Second, the court did not focus on Jennifer Larson's position as a newspaper carrier to guide its decision. Finally, the supreme court and the court of appeals ignored Larson's argument for the adoption of a different test in workers' compensation cases. Focusing on missing aspects from the holding in *Larson* may illustrate how the court will rule in future cases.

In its application of the ten-factor analysis in *Larson*, the supreme court cited only Nebraska cases. The court must have determined that adequate holdings from previous cases guided its opinion. If the court continues to follow this approach, attorneys would be prudent to base arguments on appeal exclusively on Nebraska cases. Although the ten-factor approach to independent contractor/employee determinations is cumbersome at best, the court appears comfortable applying the test based on past precedent.

Along with citing only Nebraska cases in its ten-factor analysis, the court also ignored cases from other jurisdictions on the issue of whether a newspaper carrier was an independent contractor or employee as a matter of law. The court of appeals in *Larson* did address this issue and concluded that cases from other jurisdictions each turned on its own set of facts. The supreme court did not focus on the nature of Jennifer Larson's work, but instead focused upon facts surrounding her relationship with the *Tribune*. As a result, relationships between workers and employers will be defined by the specific facts of each case and not by the type of work.

Finally, the supreme court and the court of appeals ignored Larson's attorney's arguments that Jennifer was an employee under the relative nature of work test. Under this test, "the modern ten-

107. *Id.* at 950-59, 540 N.W.2d at 346-51.
dency is to find employment when the work being done is an integral part of the regular business of the employer and when the worker, relative to the employer, does not furnish an independent business or professional service." Several reasons suggest that the relative nature of the work test may be superior to the ten-factor control test. These reasons concern the vagueness of the ten-factor control test and the ability of employers to avoid the financial costs of employees by hiring individuals as independent contractors. The utility of using the relative nature of work test is apparent when compared to the ten-factor approach. Yet, Nebraska courts have not recognized this utility in determinations of employee/independent contractor status.

D. Substitute Employee Doctrine Established in Larson

The remaining issue to consider is Jennifer Larson's status as a substitute employee. She had no express contract with the Tribune, but had agreed with Valerie Brauner to deliver papers for half of Brauner's route. The trial court defined Larson's status as a substitute employee of Brauner and, because the Tribune had actual knowledge of the arrangement, the court concluded that Larson was an employee of the paper.

Larson had no express contract with the paper. Brauner had trouble delivering the route. As a result, she and Larson shared it. Brauner, however, maintained exclusive contact with the paper. Larson notified the paper of the arrangement and wrote a letter to the paper detailing the relationship. The district supervisor even asked Brauner whether the arrangement of sharing the route was satisfactory. The review panel held that the Tribune had knowledge only that an independent contractor may have had someone helping to deliver the papers. The supreme court disagreed with that conclusion.

The court found that the Tribune knew of and never objected to the arrangement and, therefore, they acquiesced to it. Section 48-115(2) provides that every person who is engaged in a business under any contract for hire, expressed or implied, oral or written, shall have the same election of remedies under the Workers' Compensation Act as other employees. The key to this provision is the idea that a contract could be expressed or implied, including a contract with minors. It is recognized that a person working as a substitute for another may

110. 1B ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 45.00 (1993).
111. Id. § 45.10.
113. Id. at 963, 540 N.W.2d at 353.
be an employee under a workers' compensation statute, at least when the employer knows of and acquiesces to the substitution.\textsuperscript{115}

The \textit{Tribune} actively encouraged its carriers to provide substitutes when the carriers were unable to deliver the paper themselves. In \textit{Larson}, the \textit{Tribune} actually acquiesced to Brauner's relationship with Larson. It is not a great leap to hold that Larson had an implied contract with the \textit{Tribune}. The court followed the reasoning of the Ohio Supreme Court in \textit{Bobik v. Industrial Commission}: when a master expressly or impliedly assents to an arrangement that directs an employee to act as his substitute, the substitute occupies the position of the employee to the master.\textsuperscript{116} The court also followed the New Jersey court's ruling in \textit{Veit v. Courier Post Newspaper}: when newspaper companies in the ordinary course of their business give the carriers authority to engage substitutes, an implied contract arises between the substitute and the employer.\textsuperscript{117}

The \textit{Larson} court held that an implied agreement existed between Larson and the \textit{Tribune} because the girls had split the route for six months.\textsuperscript{118} Thus, Larson had the same status as any other carrier employed by the paper. The court reasoned that because Brauner was an employee, so too was Larson. The significant point seems to be that the court would appear to hold all newspaper carrier substitutes as employees. If a newspaper directs its carriers to engage substitutes, the substitutes in turn will become employees if the carrier is considered to be an employee.

The court easily could have stopped before pushing this point. Because the \textit{Tribune} had actual knowledge of the arrangement between Larson and Brauner, an implied agreement easily could have been found. Under section 48-115(2), a finding of an implied contract for hire results in the individual assuming the rights of an employee under Nebraska law.\textsuperscript{119} The court went on, however, to rule on the issue of substitute employees and followed the position held in treatises.\textsuperscript{120} If the court would have relied only upon a finding of implied contract between Larson and the \textit{Tribune}, the section of the opinion in \textit{Larson} discussing substitute employees would have been largely worthless. The court, however, seized its opportunity to rule on the issue of substitute employees and clarified the law for future cases. If the employer authorizes the employee to use a substitute employee, the substitute stands in the employee's shoes in regard to the em-

\textsuperscript{115} 99 C.J.S. \textit{Workmen's Compensation} § 74 (1958).
\textsuperscript{116} 64 N.E.2d 829 (Ohio 1946).
\textsuperscript{120} 99 C.J.S. \textit{Workmen's Compensation} § 74 (1958).
ployer. Therefore the court ruled not only in this case, but also fashioned a rule to apply to similar cases in the future.

V. CONCLUSION

The Nebraska Supreme Court ruled correctly in Larson. Any other outcome would have been inconsistent with past rulings. Larson is the latest in a line of cases dealing with the issue of whether an individual is an employee or independent contractor. The ruling is evolutionary in nature. It clarifies statutory questions, applies an existing test to the specific facts, and creates precedent on the issue of substitute employees.

The Larson court ruled that Jennifer Larson, in her relationship with the Fremont Tribune, was an employee as a matter of law. The Tribune exerted too much control over its carriers to classify the paper as an independent contractor. The court insured that it will analyze each case involving a determination of employee/independent contractor status based on its specific set of facts. But the court stopped short of holding that all newspaper carriers are employees as a matter of law. Yet Larson, as a case on point, makes it easier to argue that newspaper carriers are employees; nevertheless, that argument by no means is conclusive. Rather, the court will look to the facts of each case before deciding whether an individual is an employee or independent contractor.

The precedential value of Larson is that it clarifies certain areas of workers' compensation law. The impact on Nebraska law is that since Larson, it is now easier to determine whether a court will hold that an individual is an employee or independent contractor. Additionally, once the Nebraska Workers' Compensation Court makes a decision, the appellate procedure is clear. The workers' compensation court rules on the facts, and any appeals then go to the compensation court review panel, then to the court of appeals, and finally to the Nebraska Supreme Court. Larson also narrows the scope of review for the compensation court review panel. The review panel is limited in its review, and under section 48-179, the panel cannot disturb factual conclusions made by the workers' compensation trial court.

The supreme court also held that substitute employees working with the approval of the employer have the same rights as regular employees under Nebraska law. The significance of this ruling for employees and employers is readily apparent. If an employer is required to provide workers' compensation coverage for employees, the employer likewise should be compelled to provide coverage for workers filling the substitute employee role. It should be a logical conclusion of law that employers are required to provide compensation coverage for substitute employees when the employer allows the employee to choose the substitute.
Jennifer Larson's accident was tragic. The court correctly looked beyond the accident and instead focused upon the facts behind Larson's relationship with the *Fremont Tribune* in delivering its newspapers. The result of the court's analysis is a holding that does not break with past precedents, but instead becomes the leading case in this area of Nebraska law. *Larson v. Hometown Communications, Inc.* is the best example to date in determining whether an individual is an employee or independent contractor.

*Michael F. Polk '98*