DIVISION OF EMPLOYMENT SECURITY
NC DEPARTMENT OF COMMERCE

PRECEDENT DECISION NO. 22

IN RE PARIS
(Adopted October 31, 1991)

STATEMENT OF CASE:

This case came on for a hearing before the undersigned on Friday, February 10, 1989, at the local office of the Employment Security Commission in Chapel Hill, North Carolina. The matter came on for a hearing pursuant to an order referring the matter to the undersigned to determine whether Thelma Paris was an employee of or independent contractor with Mary D. Emmerson.

Appearing at the hearing before the undersigned and offering testimony were: Thelma Paris; Fred B. Emmerson, Jr.; and Michael Clayton, Field Tax Auditor with the Employment Security Commission. The Employment Security Commission was represented by C. Coleman Billingsley, Jr., Staff Attorney. Fred B. Emmerson, Jr. is an attorney representing his mother, Mary D. Emmerson, and also offered testimony. Thelma Paris appeared pro se. All parties were given ten (10) days from the date of the hearing to present a proposed opinion. No party submitted a proposed opinion.

FINDINGS OF FACT:

1. Thelma Paris began working for Mary D. Emmerson as a nurse's assistant. She began on November 19, 1986, and last worked on or about February 4, 1988. She has a certificate in home health care and is certified as a nurse's assistant by the State of New York. She answered an ad in the Village Advocate to obtain this position.

2. Mary D. Emmerson and her husband are both ill and have required care. Paris performed such duties as bathing, cooking, and taking care of Mary D. Emmerson. She did her personal grooming. She would also, from time to time, do grocery shopping. She prepared breakfast and lunch and normally worked 7:00 a.m. to 3:00 p.m. five to six days per week. She gave medication

according to the instructions of the physician. The grocery shopping was done with the mother.

3. Paris also would perform services for Fred B. Emmerson such as bathing him, giving him medication and performing other related services.

4. During the time Paris worked for Emmerson, she last received $6.00 per hour. She was paid every two weeks and was paid by submitting a time sheet.

5. Her household duties involved cleaning, vacuuming, washing dishes and various other household chores.

6. As the Emmersons became more ill, her household duties decreased, and she spent more time performing services for the Emmersons directly related to their health needs.

7. When Paris began this relationship with the Emmersons, she was interviewed by Fred B. Emmerson, Jr. She wanted to be paid without Social Security or taxes withheld. She understood that she would have to pay her own taxes and would have no benefits such as vacation, insurance, etc. She was responsible for arranging for other care givers to be there and was responsible for arranging for a replacement when she could not be there. She has, on occasion, submitted a time sheet and paid the replacement out of the money that she received.

8. This employment relationship began with the expressed understanding that Paris was an independent contractor and not an employee. She acted in a supervisory type capacity for the other individuals who worked for the Emmersons. Mary Emmerson is unable to talk and both Fred B. Emmerson and Mary Emmerson require a great deal of help. Thelma Paris was replaced by a licensed practical nurse because an individual with more extensive training in health care was needed.

9. Fred Emmerson, Jr., retained the right to discharge or separate Thelma Paris for gross negligence and to ensure that she properly cared for his parents. He did not retain the right nor did he supervise and control the daily activities of the claimant.

OPINION:

G.S. 96-8(5) defines "employer" as an employing unit which has individuals in his employment for a certain number of weeks or a certain amount of wages for a calendar quarter. G.S. 96-8(6) defines "employment" as service performed for wage under any contract of hire in which the relationship of the individual performing such service and the employing unit for which such service is rendered is the legal relationship of employer and employee. If an employing unit is an employer with individuals in employment, he is liable for unemployment insurance contributions.

It becomes necessary, then, to consider the elements of employment under the common law. One of the landmark cases in determining the question of the indicia necessary to constitute employment under the common law is Hayes vs. Board of Trustees of Elon College, 22 4 N.C. 11 (1944). In that case, the court held that independent contractors must:

1. Be engaged in an independent business, calling or occupation.
2. Have the independent use of his special skill, knowledge or training in the execution of the work.
3. Be doing a specified piece of work at a fixed price or a lump sum upon quantitative basis.
4. Not be subject to discharge because he adopts one method of work rather than another.
5. Not be a regular employee of the contracting party.
6. Be free to use such assistants as he may think proper.
7. Be in full control of the assistants.
8. Be able to select his own time to perform.

The court went on to say that the presence of no particular one of these indicia is controlling nor is the presence of all required.

Taking each of the items cited in Hayes vs. Board of Trustees of Elon College, the following observations must be made:

1. Paris was a nurse's assistant.
2. She performed duties as a nurse's aide taking care of Fred B. and Mary D. Emmerson.
3. She was paid by the hour.
4. According to the testimony, she could be discharged or separated because of negligence.
5. Not applicable.

6. Paris was free to have other individuals work in her place and did arrange for the other individuals to work there.
7. The other individual reported to Paris, but they were considered to be independent contractors, too.
8. The Emmersons required around the clock care and Paris and Fred Emmerson, Jr., saw to it that they received around the clock care.

In Scott v. Waccamaw Lumber Company, 232 N.C. 162 (1950), it was held that in the question of an employer and employee or independent contractor relationship, the test is whether the party for whom the work is being done has a right to control the work with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right to control, it is immaterial whether he actually exercises it.

And in 1958, the court expressed the test in everyday language when in Pressley v. Turner, 249 N.C. 102, it said: "Tersely stated, the test which will determine the relationship between parties while work is being done by one which will advantage another is "'who is boss of the job?'"

G.S. 96-8(5)o. provides that employer means "with respect to employment on or after January 1, 1978, any person who during any calendar in the current calendar year or the preceding calendar year paid wages in cash of one thousand dollars ($1,000) or more for domestic service in a private home..."

Revenue Ruling 61-196 states that registered nurses and licensed practical nurses who perform private duty nursing are generally not employees for federal employment tax purposes. However, the facts and the circumstances in every case must be considered. Nurses' aides, domestics, and other unlicensed individuals, are, in general, insufficiently trained or equipped to render professional or semi-professional services, and their services are not those of an independent contractor. Where an individual performs such services as bathing the individual, arranging bedding and clothing, preparing and serving meals, and occasionally giving oral medication left in their custody, these individuals are not independent contractors and the employer is liable for federal employment taxes.

This case is one that does not easily lend itself to a decision. Certain criteria would indicate that this claimant was an employee and others would indicate that she was independent contractor. The undersigned reaches the result that is reached

because he believes that the parties clearly intended for this to be a relationship of employer/independent contractor and not employer/employee.

ORDER:

It is now, THEREFORE, ORDERED, ADJUDGED AND DECREED that Mary D. Emmerson was not the employer of Thelma Paris and Thelma Paris was an independent contractor with Mary D. Emmerson.

[This tax opinion was upheld by the appellate courts: State ex rel. Emp. Sec. Comm'n v. Paris, 101 N.C. App. 469, 400 S.E.2d 76, aff'd, 330 N.C. 114, 408 S.E.2d 852 (1991)].