

0019 6946 15 (Sept. 25, 2017) – Employer failed to show that internet video production services were not employment under G.L. c. 151, § 2(b) and (c). Even if the work was a new endeavor for the company, that many in the employer’s regular workforce became deeply involved turned the endeavor into its usual course of business. Where claimant spent time every day working at premises leased or owned by employer, services were not performed outside of all the places of the employing unit’s enterprise. Under prong (c), requiring claimant to produce hundreds of videos took so much time that claimant was incapable of offering his services to other clients. *[Note: the District Court affirmed the Board of Review’s decision.]*

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Judith M. Neumann, Esq.
Member
Charlene A. Stawicki, Esq.
Member

Issue ID: 0019 6946 15

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant’s services for the employer ended on October 6, 2015. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 26, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency’s initial determination and denied benefits in a decision rendered on June 30, 2017. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant’s services for the employer did not constitute employment within the meaning of G.L. c. 151A, § 2, and, therefore, he did not have sufficient qualifying wages within his base period to be monetarily eligible for benefits pursuant to G.L. c. 151A, § 24(a). After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner’s conclusion, that the claimant’s work for the employer producing internet videos did not constitute employment within the meaning of G.L. c. 151A, § 2, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant filed a claim for unemployment insurance benefits on April 19, 2016. The effective date of the claim was April 17, 2016.
2. The base period of the claim extended from April 1, 2015, through March 31, 2016.
3. Between on or about January 12, 2015 and October 6, 201[5], the claimant – a professional with years of experience in television production – performed work on behalf of the employer, a local website company providing information to prospective small business owners.
4. On January 12, 2015, the claimant and the owner's CEO signed a contract which outlined the services to be provided by the claimant's company to the employer.
5. Although the claimant had discussed with the employer's CEO the possibility of being retained through a direct employment contract, the parties ultimately agreed that the employer would obtain the claimant's services through a contract with the claimant's television production business.
6. The parties decided that the employer would contract with the claimant's company rather than with the claimant directly primarily due to the claimant's desire to pursue other business and/or employment opportunities while also performing work for the employer.
7. As a result, the contract contained a "**No Exclusivity**" provision, which stated, in pertinent part, "The [employer] recognizes that the [employer's company] may be soliciting or providing work for other customers while working on this Contract."
8. The contract provided that the employer was retaining the service of the claimant, through his company, as a means of engaging in "possible planning and production of a television show to help market its principle business," which, to that point, had been the provision of internet text articles offering advice and insight regarding issues affecting small businesses.
9. The contract, which, by its terms, could be ended by either party at any time for any reason, further specified, "The [employer] would like to consider the feasibility of trying to launch and then produce a television show, for the purpose of marketing or increasing exposure, specifically of increasing traffic or visitors, to its [company] website, its principal business asset."

10. Moreover, the contract indicated that the employer lacked experience in television production and, as such, was retaining the services of the claimant's company to evaluate the feasibility of producing a television show and that, in the future, it may "further engage the [claimant's company] to develop a detailed plan for [a] television show, promoted and based around the [employer's] website," and may "retain[the claimant's company] to provide expertise and overall direction in creating such a show."
11. The contract further provided that the employer "expects the [claimant's company] to be able to proceed in this work largely on its own independent initiative including making definitive strategic and tactical recommendations at each step of the process," and that, "While the [employer] is providing very minimal direction or control over how the [claimant's company] achieves the designated objectives, it does expect the [claimant's company] to show significant and definitive progress, and to keep the [employer] informed of its progress on a regular basis."
12. Under the terms of the contract, the claimant's company was directed to "provide the ongoing services of either [the claimant] or a mutually agreed upon television expert with at least similarly deep industry expertise and experience."
13. At the time he signed the contract with the employer – and at all times thereafter – the claimant was the sole employee of his company.
14. Regarding the financial terms of the agreement, the contract specified that the employer would pay the claimant's company a "fixed fee [. . .] after every two weeks of service of **\$6,650**," and that bonuses may be paid out based upon the claimant's company's success in securing the broadcast of the employer's putative television show on a network.
15. Moreover, the contract stated, "The [claimant's corporation] will absorb all of its own expenses and not pass on any such expenses on to the [employer], except for possible unusual expenses that both parties specifically agree to in advance [. . .]."
16. After signing the contract, the claimant moved to Massachusetts from California to begin performing services on behalf of the employer.
17. During initial discussions with the employer, the claimant suggested that the parties produce some initial video material in the form of a "demo reel" that could be used as to help facilitate the ultimate sale of a television show to networks.
18. As a result of such advice, the employer decided to proceed with the production of videos to accompany the various text articles contained on its website.

19. Therefore, the claimant was tasked with the production of the internet videos, a process which he was not specifically experienced in.
20. While performing work for the employer, the claimant maintained office space in the same communal office center that housed the 10 employees of the employer. After a short period of time when the employer financed the claimant's office space, it was ultimately paid for directly by his company.
21. While working for the employer, the claimant was issued a business card and obtained a matching Gmail email address as his co-workers but was not required to wear a uniform. The claimant supplied his own laptop and telephone for use in his work.
22. Although he was asked to attend a weekly meeting at the employer's office on Mondays, the claimant was not required to maintain a particular set of hours.
23. The claimant's primary work activity consisted of producing videos – starring the employer's CEO discussing the particular small business issue referenced in the topic article – which were recorded largely on Tuesdays, Thursdays [sic], or Thursdays at either a local television studio or the CEO's house.
24. The rental fee for the space at the television studio, which was suggested as the shooting location by the employer's CEO, was paid for directly by the employer.
25. When shooting the videos, although the CEO often made modifications to scheduling and content, the claimant largely both set the video shooting schedule and directed the action in the videos.
26. In addition to recording the videos, the claimant also played a role in preparing the studio set, including putting together and taking apart a table and applying makeup to the video participants. The claimant lacked expertise in such matters, but obtained training from employees of the television studio regarding same.
27. After recording the videos, the claimant brought them to the employer's secondary location, where its employees would engage in various aspects of post-production work often supervised by and with the input of the claimant.
28. Over the course of the claimant's employment, the employer also engaged the claimant in other tasks related to the videos, including authoring captions and titles for the videos on the website.
29. Because he spent long hours producing and recording the videos and on the other tasks assigned by the employer, the claimant was unable to take advantage of the “**No Exclusivity**” provision of the contract and did not

- perform any work outside of his work on behalf of the employer while he remained contracted to it.
30. In or about February of 2016, dissatisfied with the nature of the work he was doing and his inability to pursue other opportunities while contracted to the employer, the claimant requested that the CEO make him – contractually – a direct employee of the employer.
 31. The CEO denied the claimant’s request, balking at changing their contractual relationship in light of the increased cost that would result to the employer from having to pay the claimant benefits.
 32. Ultimately concluding that the claimant failed to engage in sufficient editing of the videos that he helped record and produce, the employer terminated the contract as of October 6, 2016.
 33. At all times during the operation of the contract, the claimant was the sole employee of his company providing services to the employer.
 34. During that timeframe, the claimant was never paid any money or benefits directly by the employer, and instead derived all pay from his own company.
 35. In total, the employer paid the claimant’s company \$129,604.78 as compensation for the claimant’s work on behalf of the employer.
 36. The claimant did not perform any other work for which he was paid during the base period of his claim.
 37. On April 26, 2016, DUA issued the claimant a Monetary Determination finding the claimant ineligible for weekly unemployment insurance benefits, finding that the claimant did not have any qualifying base period wages from the employer.
 38. The DUA further specified, in a determination issued on June 24, 2016, that the claimant’s work for the employer did not “constitute ‘employment’ within the meaning of [Section 2] of the Massachusetts Unemployment Insurance Law,” because, “[the employer] did not retain sufficient right to direct and control the performance of the [claimant] to make” the claimant an employee of the employer.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner’s ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner’s findings of fact and credibility assessment except as follows. We assume that the duplicate reference to Thursdays in Finding of

Fact # 23 is a typographical error, as both parties testified that the video recordings typically took place on Tuesday, Wednesday, and Thursday. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the employer has met its burden under all three prongs of G.L. c. 151A, § 2.

Employment is defined in G.L. c. 151A, § 2, which states, in relevant part, as follows:

Service performed by an individual . . . shall be deemed to be employment subject to this chapter . . . unless and until it is shown to the satisfaction of the commissioner that—

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

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

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

Under this statutory provision, the burden of proof is on the employer and the test is conjunctive. Thus, the employer must meet all three prongs of this “ABC” test. Should it fail to meet any one of the prongs, the relationship will be deemed to be employment. Coverall North America, Inc. v. Comm’r of Division of Unemployment Assistance, 447 Mass. 852, 857 (2006).

Prong (a)

We analyze prong (a) under common law principles of master-servant relationship, including whether the worker is free from supervision “not only as to the result to be accomplished but also as to the means and methods that are to be utilized in the performance of the work.” Athol Daily News v. Board of Review of Division of Employment and Training, 439 Mass. 171, 177 (2003), quoting Maniscalco v. Dir. of Division of Employment Security, 327 Mass. 211, 212 (1951). “The essence of the distinction under common law has always been the right to control the details of the performance,” but “the test is not so narrow as to require that a worker be entirely free from direction and control from outside forces.” Athol Daily News, 439 Mass. at 177–178.

In the present case, the terms of the parties’ contract expressed the objective that the claimant would exercise considerable independence in developing and producing a television show to market the employer’s website, and that the employer would provide minimal direction and control over how the claimant achieved that objective. See Findings of Fact ## 8–9 and 11. However, prong (a) requires that we consider whether the claimant was free of control both in contract and in fact. The findings are mixed. Suggesting some exercise of control, the review examiner found that the employer had the claimant use its business card and Gmail address, and

that the employer's CEO often made modifications to the video scheduling and content, required the claimant to attend a weekly meeting, and assigned him the task of writing captions and titles for the videos. Finding of Fact ## 21, 22, 25, and 28. On the other hand, he found that the claimant had no set hours, furnished his own phone and laptop, paid for some office space after a short period, and "largely" set the schedule and directed the action for the videos.¹ See Findings of Fact ## 20, 21, 22, and 25.

During the hearing and on appeal, the claimant argued that the very nature of the work he did for the employer was different from his expertise and what he was contracted to do, that it was the employer's idea to have him make internet videotapes instead of working on the production of a TV show, and that the claimant had no choice in the matter. Essentially, he urges us to view the very nature of his assigned work as an exercise of employer control. In his testimony, the claimant described the difference between producing a marketable TV show and making internet videos. In the end, however, the review examiner accepted the employer's description of the claimant's services, finding them to be substantially similar to the services set forth in his contract. See, for example, Finding of Fact # 17, where the review examiner describes the claimant's suggested "demo reel" as initial video material. Our standard of review is whether the findings are supported by substantial evidence. "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Id.* at 627–628, *quoting New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981)(further citations omitted.) The review examiner's view of the evidence is not wholly unreasonable. For this reason, we cannot say that the review examiner reached the wrong conclusion under prong (a).

Prong (b)

Under prong (b), the employer may satisfy its burden by proving either that the services performed are outside the usual course of the employer's business, or that they are performed outside of all places of the employer's enterprise. See *Athol Daily News*, 439 Mass. at 179. The employer has not met its burden under this prong.

Prior to retaining the claimant's services, the usual course of the employer's business was to provide information in the form of text articles on a website to prospective small business owners. Findings of Fact ## 3 and 8. The review examiner concludes that the production of video was something new and that its purpose "was to support the creation of television programming, a totally new endeavor for the company." Since the parties agreed that the claimant's services never reached the television programming stage and that the majority of his time was spent working on about 500 videos,² we consider only whether the video production work was outside the usual course of the employer's business.

¹ We assign no weight to the fact that the claimant was not required to wear a uniform, because both parties testified that no one at the employer's company wore a uniform.

² During the hearing, both parties agreed that the conversion of text articles into video involved making about 500 videotapes. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See *Bleich v. Maimonides School*, 447 Mass. 38, 40 (2006); *Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training*, 64 Mass. App. Ct. 370, 371 (2005).

The making of videos based upon the content in the employer's text-based website articles was itself a new endeavor. The videos were to be another website tool for providing information to prospective small business owners. After making the decision to produce them, the findings show that the employer's CEO quickly got involved, including modifying the content and starring in each one. Findings of Fact ## 23 and 25. Other company employees handled the camera, helped with the sets, and performed the post-production editing work.³ With the active participation of the employer's regular workforce, often working side-by-side with the claimant, the production of these videos can hardly be characterized as an independent endeavor. It became part of the employer's usual course of business. The website simply expanded to include video in addition to text articles.

The employer has also failed to demonstrate that the claimant performed his services outside of all of the places of the employing unit's enterprise. On Mondays, the claimant attended a meeting at the employer's office. Finding of Fact # 22. On Tuesdays, Wednesdays, and Thursdays, he recorded videos at a local television studio rented by the employer or at the CEO's house. Finding of Fact ## 23 and 24. Finally, after each day of shooting during the week, he brought the videos to another "secondary" employer location, where the claimant downloaded them, and on Fridays, supervised the post-production editing. See Finding of Fact # 27.⁴ As the employer was the lessee, or perhaps the owner in the case of the CEO's house, these locations are deemed to be the employing unit's places of business. In sum, the claimant performed work at an employer's location every day of the week.

Prong (c)

Prong (c) of the ABC test "asks whether the worker is 'customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.'" Athol Daily News, 439 Mass. at 179, *quoting* G.L. c. 151A, § 2(c). As stated above, the review examiner found that the services performed by the claimant's TV production company and the services he performed for the employer were of a substantially similar nature. However, the analysis does not stop here. To determine whether the employing unit has carried its burden under prong (c), we "consider whether the services in question could be viewed as an independent trade or business because the worker is capable of performing the services [for] anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services." Coverall, 447 Mass. at 858.

Certainly, the non-exclusivity clause in the parties' contract allowed the claimant to perform his services for others. See Findings of Fact ## 6 and 7. However, we believe that the volume of the claimant's actual assigned work for the employer — to produce videotapes for 500 text-based articles — rendered him incapable of performing services for others. The review examiner

³ The parties' testimony that various company employees handled the video camera, helped the claimant build sets, and performed editing work (described by the review examiner in Finding of Fact # 27 as "post-production" work) was also part of the unchallenged evidence introduced at the hearing. See Bleich, 447 Mass. at 40; Allen of Michigan, Inc., 64 Mass. App. Ct. at 371.

⁴ Although not explicitly incorporated into the findings, the claimant presented undisputed testimony that he went to this secondary location to download the videos at the end of each workday and spent Friday afternoons at this employer-leased facility working on editing the videos with company employees.

found that the long hours spent producing and recording videos for the employer, as well as on other employer-assigned tasks, caused him to be unable to take advantage of the non-exclusivity clause. Finding of Fact # 29. It makes no difference whether the claimant approached the task willingly or enthusiastically, as suggested in the review examiner's decision. Finding of Fact # 17 indicates that the claimant merely suggested producing "some initial video material in the form of a 'demo reel'". From that suggestion, the employer decided to begin producing videos to accompany the text articles on the website. Finding of Fact # 18. As both parties testified, there were hundreds of text articles. Thus, the decision to convert hundreds of text articles into video was the employer's, and, as a result, it left the claimant with no time to offer services to other clients. In this sense, the claimant was not capable of performing services to anyone wishing to avail themselves of his services. See Board of Review Decision 0008 9539 14 (Oct. 28, 2016) (unreasonable to believe that devoting over 55 hours per week delivering packages for the employer's clients left the claimant time to build up his own business).

We, therefore, conclude as a matter of law that because the employer has failed to prove prongs (b) and (c) under G.L. c. 151A, § 2, the claimant's services constituted employment. We further conclude that, based upon this employment, the claimant was paid sufficient wages in the base period to be eligible for benefits pursuant to G.L. c. 151A, § 24(a).

The review examiner's decision is reversed. The employer is required to report wages for the claimant, and the claimant is entitled to receive benefits based upon those wages for the week beginning April 17, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 25, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh