

Public housing inspector services were shown to meet all three prongs under G.L. c. 151A, § (2).

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), which concluded that the services performed by the claimant and similarly situated individuals constituted employment under G.L. c. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On April 27, 2018, the DUA's UI Revenue Audit Unit sent the employer a determination, which stated that the services performed by the claimant constituted employment. The employer 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 in a decision rendered on October 27, 2018. We accepted the employer's application for review.

The review examiner concluded that an employment relationship existed, because the employing unit did not carry its burden under G.L. c. 151A, § 2. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the employer responded, and after receiving this response, we remanded for additional evidence to obtain further evidence about where work was performed, supervision, and any licensing requirements. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the employer failed to show that the claimant's public housing inspection services met any of the tests under G.L. c. 151A, § 2, and, therefore, they were deemed to be employment, 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 are set forth below in their entirety:

1. The business entity, a housing inspection service (hereinafter "company"), is operating as a sole proprietorship (dba) since 2011 when its organization as a Limited Liability Company was dissolved after seven years. Between 200 [sic] and 2004, the company was a sole proprietorship (dba).

2. The company performs public housing inspections for various housing authorities to be in compliance with state and federal regulations (e.g. 105 CMR 410 and HUD Housing Quality Standards (HQS)). The company is contracted to perform inspections to the more stringent regulations. Neither the state nor the federal regulations require a license to perform the inspection work or that it be performed under the supervision of a licensed individual.
3. In September of 2018, the company had a staff other than the Owner, which included one full-time Inspector, one part-time Inspector, and one part-time Administrative Assistant. Presently, the Owner has one part-time Inspector and the part-time Administrative Assistant. All staff, to include the Administrative Assistant, were issued a 1099.
4. The Owner engaged the services of the claimant as an Inspector with a full-time work load. The full-time Inspector of ten years was assigned six housing authorities, while the part-time Inspector was assigned three. The claimant was also assigned six housing authorities. The number of hours that the claimant invested per week is unknown.
5. The claimant's services were not different than the full-time Inspector or the part-time Inspector.
6. The Owner has new Inspectors ride along with the Owner or the full-time Inspector of ten years to show how the company does things and to ensure that inspections are done in a consistent manner.
7. The Owner expected the Inspectors to represent the company well.
8. The Owner does not require a written agreement regarding the terms of work while with the company.
9. The company provides in-house training as it was the Owner's "best tool." Such training enabled the Owner to gauge the competency of a new Inspector. Three-day certification training by a third-party exists, but such certification is not mandatory.
10. All Inspectors receive a list of units that require inspections at the various housing authorities, to which they are assigned by the Owner, and the individual Inspector then uses the list to schedule the times to inspect those units based on overall schedule and geographic location.
11. The employer did not supervise Inspectors in the performance of conducting inspections. The employer gauged performance by whether the phone rang with complaints from stakeholders. If a complaint was lodged about an Inspector by a tenant, the Owner attempted to mediate the situation and if

irreconcilable, the unit would be reassigned to another Inspector in order to create space between the complainant and the Inspector.

12. If the Owner felt that the Inspector represented the company well, he would keep them on.
13. The company provides notices of inspection on the company's letterhead to all Inspectors, which the Inspectors then issue to the tenants. In the past, some Inspectors "tweaked" the notice, which was not fine with the Owner.
14. The company paid workers upon settlement of bills and paid Inspectors on a flat rate per unit basis.
15. The company provided business cards with the services that the company provides, the Inspector's name and contact information.
16. The company provided ink, paper and postage.
17. The company provided a cell phone to Inspectors.
18. The company provided office keys to the Inspectors.
19. Inspectors use the office to submit weekly invoices and inspection reports required by the company due to regulatory timeframes. Inspectors picked up lists of units requiring inspection. The Owner expected the Inspectors to drop off invoices at the office on a weekly basis in order for the Administrative Assistant to keep up with billing and to meet timeliness requirements as set out by the regulatory authorities.
20. Inspectors use inspection forms issued by the company and approved by HUD. The company maintained an inventory of forms in the office for the Inspectors to retrieve when needed. Inspection forms were in triplicate, one copy left at the inspection site, the second copy sent to the housing authority by the Inspector, and the third copy retained by the Inspector/company. The Owner did not review the inspection reports prior to submission to the housing authority.
21. The company paid a travel stipend of \$400.00 per month and \$15.00 per hour for administrative duties beyond the flat rate per unit inspection.
22. Inspectors provided their own flashlight, thermometer, and circuit tester.
23. Inspectors were not required to wear a uniform while performing inspections.
24. Inspection reports and invoices were completed at the Inspector's residence on the Inspector's personally owned computer.

25. The company lost some contracts with housing authorities and the claimant's assigned work was ultimately transferred to the full-time Inspector of ten years, which resulted in the claimant's separation.
26. The company did not prohibit the claimant in any way from offering his service to others.
27. The claimant does not engage in his own inspection business, but could if the market was not closed by existing contracts. The claimant has every right to bid for a contract.

Note

Remand Questions #5a, 5b, 5c (partially), 8, 9, 10, 11, 13, 13a, and 13b were not answered due to the claimant not participating and the Owner unwilling or unable to provide such information.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact, except as follows. We decline to accept the portion of Consolidated Finding of Fact # 27, which provides that the market is closed with existing contracts and this rendered the claimant unable to engage in his own inspection business, as it is not supported by substantial evidence in the record. 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 conclusion that the claimant's services constituted employment within the meaning 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.

By its terms, this statute presumes that an employment relationship exists, unless the employer carries its burden to show “that the services at issue are performed (a) free from the control or direction of the employing enterprise; (b) outside of the usual course of business, or outside of all the places of business, of the enterprise; and (c) as part of an independently established trade, occupation, profession, or business of the worker.” Athol Daily News v. Board of Review of Division of Employment and Training, 439 Mass. 171, 175 (2003). The test is conjunctive, and it is the employer’s burden to meet all three prongs of this “ABC” test. Should the employer fail to meet any one of the prongs, the relationship will be deemed to be employment. Coverall North America, Inc. v. Comm’r of Department 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, 439 Mass. at 177, *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.

To be sure, the findings show that the employer exercised some control over the claimant’s inspection services. The claimant had to use a HUD-approved employer form to write up his inspections. *See* Consolidated Finding # 20. The claimant obtained his assignments from the employer’s inspection lists, used a notice with the employer’s letterhead to notify tenants of the inspection, and he used the employer’s business card for identification when meeting with them. *See* Consolidated Findings ## 10, 13 and 15. The employer provided some initial training and if there were complaints about the claimant’s work, it was the owner who would address them. *See* Consolidated Findings ## 9 and 11. Finally, the claimant had to turn in weekly invoices and the completed inspection reports to the employer’s office. *See* Consolidated Finding # 19.

However, in important ways, the claimant exercised considerable control over his work. He controlled his own schedule, arranging the inspections with tenants at his own convenience. *See* Consolidated Finding # 10. He performed the inspections without supervision and the employer did not review his reports. Consolidated Findings ## 11 and 20. The claimant provided his own tools and was not required to wear a uniform. Consolidated Findings ## 22 and 23. He was also free to obtain and perform similar services for others on his own. *See* Consolidated Finding # 26.

On balance, we believe the employer has met its burden under prong (a), because the claimant retained the right to control the details of performance in significant ways.¹

Prong (b)

Under prong (b), the employer may satisfy its burden by proving either that the services performed were outside the usual course of the employer's business, or that they were performed outside of all the places of business of the employer's enterprise. *See Athol Daily News*, 439 Mass. at 179. The review examiner correctly concluded that the claimant's public housing inspection services are within the usual course of the employer's business, which is providing those same inspection services. However, we disagree with his conclusion as to where the claimant's services were performed.

The inspections themselves were obviously all done at the tenants' residences. Moreover, after remand, the review examiner found that the administrative work of preparing invoices and completing inspection reports was done at the claimant's home, using his own computer. *See Consolidated Finding # 24*. It appears that the only time the claimant went to the employer's office was once a week to pick up assignments and drop off the invoices and completed inspection reports. *See Consolidated Finding # 19*. These circumstances are analogous to the newspaper delivery services in *Athol Daily News*. There, the Court held that delivering papers to peoples' homes or in bundle drops at locations in the community constituted performing services outside of all the places of the employer's business, even though the carriers picked up newspapers from the employer's distribution center each day. *Athol Daily News*, 439 Mass. at 179.

Thus, we are satisfied that the employer has met its burden under prong (b) to show that the services at issue were performed outside of all the places of business of the employer's enterprise.

Prong (c)

As to prong (c), the 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. To determine whether the employer 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.

¹ The reasoning statement accompanying the DUA's determination, Exhibit 9, refers to a recent Board of Review decision, which held that unlicensed home inspection workers were subject to the employer's direction and control as a matter of law because of state regulations requiring that they be supervised at all times. (*See Board of Review Decision Sec2-16-010* (Feb. 9, 2018), an unpublished decision available from the Board upon request.) The services in this case are public housing inspection services subject to a different set of state regulations, 105 CMR 410, which set minimum standards of fitness for human habitation, and to federal housing quality standards. None of the services here required supervision. *See Consolidated Finding # 2*.

As the review examiner found, the claimant is capable of engaging in his own inspection business. *See Consolidated Finding # 27.* He has public housing inspection experience and the employer did not prohibit him from seeking this type work elsewhere. Based solely upon the parties' testimony that the market for these services is highly competitive at the moment, the review examiner concluded that the claimant was not capable of performing the services for anyone else. We are unaware of any court decision that imposes an additional burden on the employer to address market conditions under prong (c). Even if there were, the review examiner failed to develop the record enough to support this sweeping conclusion. For example, he did not ask the claimant about any efforts to market his services, or inquire of the claimant's efforts to seek work from other employers, such as those entities who obtained the contracts that the employer lost or who are otherwise in need of these services.²

In sum, the review examiner's legal basis for concluding that the employer did not meet prong (c) is unsupported by substantial evidence or legal precedent. Because the employer has shown that the claimant is capable of performing the services for anyone wishing to avail themselves of the services, it has satisfied prong (c).

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant's services did not constitute employment under G.L. c. 151A, § 2(a), (b), and (c).

The review examiner's decision is reversed. The public housing inspection services provided by the claimant and others similarly situated do not constitute employment.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 29, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

**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:

² During the original hearing, the claimant testified that he recently worked for a state agency performing similar services. On remand, the employer identified the agency as the [Department A]. There was no discussion, however, about whether the claimant could return to similar work.

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