

**Employer home inspection services business failed to show that its licensed or unlicensed home inspectors were free of its direction and control or customarily engaged in an independent established trade or business of the same nature. Thus, it did not meet its burden to show that these workers were not employees under G.L. c. 151A, § 2(a) and (c).**

**Board of Review  
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**Issue ID: Sec 2-16-010**

## **BOARD OF REVIEW DECISION**

### Introduction and Procedural History of this Appeal

The present case originated with an unemployment claim filed by a former home inspector who had performed services for the employer. That claim caused the Department of Unemployment Assistance (DUA) Status Unit to investigate whether the claimant's services had been performed for the employer as an employee or as an independent contractor. On September 10, 2008, the DUA Status Unit determined that the services performed by the claimant, as well as by others similarly situated, were performed as an employee pursuant to G.L. c. 151A, § 2.<sup>1</sup> The employer appealed that determination to the DUA Hearings Department. Following a hearing on the merits, a review examiner affirmed the determination in a decision rendered on December 18, 2008. The employer sought review by the Board, which remanded the case for additional evidence and then affirmed the review examiner's decision pursuant to its authority under G.L. c. 151A, § 41. Subsequently, the employer appealed to the District Court pursuant to G.L. c. 151A, § 42.

On February 17, 2011, the District Court affirmed the portion of the Board's decision, which concluded that the claimant performed services as an employee, but remanded the case for a new hearing before a different review examiner to consider whether all others who performed inspectional services for the employer were employees within the meaning of G.L. c. 151A, § 2.<sup>2</sup> Following a new hearing, Review Examiner Jodi Ferullo rendered a decision on December 13, 2011, affirming the underlying determination that the services of all other home inspectors who worked for the employer constituted employment.<sup>3</sup> The employer appealed this new decision to the Board, which affirmed in a decision rendered on June 28, 2012. Again, the employer appealed to the District Court.

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<sup>1</sup> See Exhibit # 12.

<sup>2</sup> See Exhibit # 14.

<sup>3</sup> See Remand Exhibit # 1.

In a new Order, dated September 8, 2015, the District Court remanded the case for additional evidence relating specifically to G.L. c. 151A, § 2(c).<sup>4</sup> Consistent with this Order, we remanded the case to Review Examiner Ferullo to take additional evidence concerning whether these workers performed any home inspection services as part of their own independent occupation or businesses.<sup>5</sup> After several employer requests for continuances, the remand hearing was finally held on November 29, 2017. Both the employer and an attorney from the DUA participated in the hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The present issue before the Board is whether, after remand, the review examiner's original conclusion, that the services performed by the employer's licensed and unlicensed home inspectors constituted employment within the meaning of G.L. c. 151A, § 2, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the original and remand hearing before Review Examiner Ferullo, her decision, the employer's appeal, the memoranda of law filed with the District Court by the employer and the DUA, the District Court's September 8, 2015 Order, and the consolidated findings of fact, we affirm the review examiner's decision.

#### Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments, which were issued following the District Court remand, are set forth below in their entirety:

1. The employer's business, DUA id # [X], is a provider of inspectional services. The employer performs radon, septic, water and lead testing for commercial and residential properties. The employer's business has been in existence since 1991.
2. The employer's office is located at [Street Address A], [Town A], Massachusetts. The employer has office and marketing staff working at that location. The employer has approximately 10 to 12 individuals working at that location.
3. The employer has approximately thirty individuals who perform services as inspectors for the employer. There are no inspection services performed at the employer's office on [Street Address A] in [Town A], Massachusetts.
4. The inspectors are not provided with a contract of employment with the employer.
5. The inspectors complete an affidavit to be paid by Form 1099 with the employer. The employer issues the check to the inspector directly, and not under any specific business name or entity belonging to the inspector.

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<sup>4</sup> See Remand Exhibit # 6.

<sup>5</sup> See Remand Exhibit # 8.

6. The employer provides the inspectors with documentation regarding the responsibility to perform the inspections in accordance with [266 CMR] and regarding notifying the employer of their availability, along with documenting their pay level.
7. The employer's office was open from 7:30 a.m. to 10:00 p.m., Sunday through Saturday.
8. The employer performed inspections from 8:00 a.m. to 4:00 p.m., Sunday through Saturday. The employer could schedule a maximum of three inspections during that period.
9. The employer would send the inspectors a schedule, entitled "[Employer Name] Inspector Time Off Request". The schedule contained the days of the week, Monday through Sunday, along with the times of 8:30, 12:00 and 3:30. The inspectors would then complete the document to indicate what days and times they could not perform services and return the document to the employer.
10. The employer would send out a calendar, covering a six-week period, for the inspectors to indicate their own individual availability, during the specific allotted time periods indicated by the employer on the calendar. (The employer had no input into any inspectional services performed outside of those periods, for their own business(es) or for the business(es) of others.)
11. The client would contact the employer for an inspection. The employer's office personnel would then contact the inspectors based upon their availability to offer them the work. (If a client was to contact an inspector directly to schedule an inspection, the inspector was required to refer them to the employer's office.)
12. The inspectors were paid based upon a percentage of the fee charged to the client. The percentage paid to the inspectors was based upon an agreement between the employer and each individual inspector and varied from 30% to 50%.
13. The commission amount received by the inspector could be dependent upon experience. Some of the inspectors would also receive an override or additional pay per inspection based upon their experience or how long that [sic] had been available to the employer.
14. The employer provided some of the inspectors with bonuses.
15. After the inspector accepted the work, the inspector would be sent a notification from the employer of the client address and the type of inspection requested.

16. The inspector would need equipment to perform the inspection. The equipment needed is a flashlight, a ladder, a voltage indicator, a GFI tester, a clipboard and a writing utensil. The inspector provided that equipment.
17. The inspector would perform all of the services at the client location. The inspector would provide their own transportation to the client location. The employer did not reimburse the inspectors for transportation costs.
18. Once accepting work, the inspectors could decide not to perform the inspection based upon safety or other reasons. There were no ramifications from the employer if the inspector did not perform the inspection.
19. The client signs documentation with the inspector to perform the inspection, the inspector places his license number on the form. The employer's letterhead is on the form.
20. Upon completion of the inspection, the inspector would be required to complete a report. The report was provided to the inspector by the employer and contained the employer's name on the report. After completing the report, the inspector would provide a copy to the client, and then would provide a copy to the employer to be maintained for a period of three years as required by regulation. (The employer would also review those reports to notify the inspector if they were not meeting the requirements of the CMR in the performance of the inspections.)
21. The inspector would collect cash, check or credit card from the client, which would be submitted to the employer. When paying by check, the checks would be made payable to the employer.
22. The inspectors would be paid weekly by the employer, by check signed by an employer officer. The inspectors would be expected to communication with the employer if they were unable to attend an inspection after having accepted the work.
23. The employer purchased Worker's Compensation insurance for the inspectors. The inspectors were required to reimburse the employer for that expense.
24. The employer offers an avenue for inspectors to purchase health insurance, but the employer does not pay for it.
25. In May 2003, there was a State regulation implemented requiring that all inspectors be licensed through the Commonwealth of Massachusetts. The standard the inspectors had to adhere to was [266 CMR]. (Inspectors are required to perform continuing education to maintain their license.)

26. The inspectors paid for their own licensing fee. (The employer paid for one inspector licensing fee based upon an agreement with that individual.)
27. The employer provided the inspectors with the Code of Massachusetts Regulations governing their position.
28. The employer conducts quarterly meetings for updates on the CMR and for continuing education training. The inspectors are not required to attend those meetings. The employer's continuing education is offered to other inspectors working within the State who do not perform services for the employer. The individuals have to pay the employer to attend the continuing education classes.
29. The inspectors are provided with business cards from the employer, with the employer's telephone number and information, if requested by the inspector.
30. The inspector is provided with a uniform containing the employer's logo.
31. The employer has a website for the business. As part of the website, the employer has profiles of each of the inspectors. Each inspector is wearing a uniform shirt containing the employer logo. The telephone number on each inspector's page is the employer's number. The website also indicated that the employer had "satellite offices" for the inspectors. There is a supervisor of inspectors listed on the employer's website.
32. The employer provided some of the inspectors with a "best performing inspector award".
33. The employer would be required to provide supervision to the inspectors after having applied for a license, but not having yet obtained it. The employer would need to ensure that the inspections were done in accordance with the CMR.
34. The employer had two associate home inspectors who began performing services for the employer last year. (An associate home inspector does not hold a license to perform inspections.) Those two individuals were required by CMR to be supervised by managers, who were licensed inspectors. The associate inspectors would be required to perform 25 supervised inspections and an additional 100 home inspections under direct or indirect licensed home inspector in order to obtain their license [sic].
35. The employer has two managers that perform services for the employer, who are also inspectors. Those individuals handle the customer complaints. If there is a complaint regarding an inspector, they would send out a form for the inspector to complete regarding the incident. (If the inspector makes an error in the performance of an inspection, they would be required to contribute to the cost of repairs.)

36. The licensed home inspectors were permitted by the employer to perform inspection services for their own business(es) and/or other businesses and the employer did not prohibit the inspectors from advertising their services as inspectors. The employer has no information on how and if any services were advertised by the licensed inspectors, who were performing services for the employer.
37. Under the CMR, associate inspectors or trainees could not perform inspections on their own, as they did not have the required license. The employer was unaware of any unlicensed inspectors advertising their services or performing services on their own or for other businesses.
38. Sometime after December 13, 2011, the President received non-specific information regarding five of the inspectors performing inspectional services on their own or for others. The President was not provided with any specific information on when or where those services were performed or whether the inspectors had their own established inspectional services business.
39. Under the Massachusetts regulations, the employer was required to carry mandatory Errors and Omission Insurance in the amount of \$250,000 per occurrence. The employer pays for the insurance for all of the inspectors. That insurance covers the inspectors and the employer. The insurance would not cover the inspectors when performing work on their own or for another business.

#### CREDIBILITY ASSESSMENT:

At the initial hearing in 2011, the employer testified that they were unaware of individuals performing inspections on their own or for any other business(es). The employer provided affidavits at the initial hearing regarding what, if any, work the inspectors were performing, outside of the inspectional services performed for the employer. None of those affidavits indicated that the inspectors were performing inspectional services for their own business(es) or any other business(es).

The President testified that after the initial hearing(s) in 2011, he obtained information which led him to believe that some of the licensed inspectors performed inspections on their own, for their own business(es) or the business(es) of others. (Associate inspectors or trainees were unlicensed and by regulation could not perform inspections on their own.) He testified that his knowledge of such was derived from being verbally notified by the inspectors. When questioned further, the President provided the name of five inspectors, who had allegedly notified him that they performed inspections for others. However, the President did not produce any affidavits from those individuals to support his testimony, although affidavits to the contrary were produced in 2011. Additionally, the President was unable to testify as to when they performed those

services, how frequently they performed those services, who they performed those services for, whether they had an established business having their own Errors and Omissions Insurance, and/or whether they advertised their services.

### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to 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 and credibility assessment except as follows. Consolidated Finding # 34 refers to the employer retaining two associate home inspectors "last year." Because this is the same finding that appeared in the review examiner's 2011 decision, we believe it is more accurate to state that the employer began to use associate inspectors in 2010. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we believe the new consolidated findings of fact support the review examiner's legal conclusion that these home inspection services constituted employment under G.L. c. 151A, § 2.

This case is decided under 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). Although the District Court Order remanded the case for additional evidence specific to prong (c), we render our decision under all three prongs, as is our practice following a court remand, in order to address anything new in the consolidated findings that may affect our original analysis of the case.

### *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. The employer must prove, “. . . the absence of control and direction over the worker ‘both under his contract for the performance of service and in fact.’” Boston Bicycle Couriers, Inc. v. Deputy Dir. of Department of Employment and Training, 56 Mass. App. Ct. 473, 484 (2002).

Since the employer does not provide its home inspectors with an employment contract, we consider only the direction and control over its inspectors’ performance of services in practice. We consider first those consolidated findings indicative of less direction and control. The inspectors could decide when and how often they were available for assignments, and they could turn down an assignment for safety or other reasons. Consolidated Findings ## 9, 10, and 18. They paid for their own transportation to work sites and provided the tools necessary to perform the work. Consolidated Findings ## 16 and 17. Licensed home inspectors paid the employer for continuing education training, and, for the most part, paid their own licensing fees. See Consolidated Findings ## 26 and 28.

On the other hand, the consolidated findings show that the employer exercised considerable direction and control in other ways. Prospective customers had to go through the employer’s office in order to retain any inspector’s services, and, if an inspector was contacted directly, he was required to refer the client to the employer’s office. Consolidated Finding # 11. The customer contracts for the inspections were on employer forms with employer letterhead. Consolidated Finding #19. Payments for services were collected by the inspectors, but they had to be submitted to the employer’s office, and any customer checks had to be made payable to the employer. Consolidated Finding # 21. Inspectors were issued uniforms with the company logo and the employer posted photographs of each inspector on its website wearing the uniform. Consolidated Findings ## 30 and 31.

As for the work itself, all unlicensed associate and trainee inspectors were supervised by managers, as required by law. Consolidated Finding # 34. Following every inspection, all of the workers had to complete a written report on the employer’s letterhead and submit a copy of the report to the employer for review. Consolidated Finding # 20. The employer reviewed the reports and determined whether the workers’ performance satisfied the state regulatory requirements. Consolidated Finding # 20. At its discretion, the employer gave some inspectors bonuses or a “best performing inspector award.” Consolidated Findings ## 14 and 32. An employer manager fielded all customer complaints, had inspectors to fill out an incident report, and then required them to contribute to the cost of any repairs caused during the inspections. Consolidated Findings ## 35.

In order to perform home inspections in Massachusetts, the state requires every home inspector to carry at least \$250,000 in errors and omissions insurance coverage. 266 CMR 3.04. The



employer obtained and paid for a policy that covered the inspection work that these workers performed for the employer. Consolidated Finding # 39.

In light of the mandatory supervision imposed by the regulations, the employer cannot demonstrate that the associate and trainee inspectors are free of its direction and control as a matter of law. For the licensed inspectors, we find it significant that the employer held these inspectors out to the public as members of its own staff on its forms and website<sup>6</sup> and it closely monitored their work. By directing that all clients who reached out to the inspectors had to be referred to the employer's office, it prevented them from performing independent services for its clients. Moreover, the employer provided the errors and omissions insurance coverage necessary for them to do their jobs. On balance, we agree with our original assessment that the employer has also not sustained its burden to prove that the licensed inspectors were free from the employer's direction and control.

*Prong (b)*

In order to prove prong (b), the employer must establish that the home inspectors' services were performed either outside its usual course of business or outside of all of the places of business of the enterprise for which the services were performed. Since the employer's business is providing home inspection services, there is no question that the home inspectors' services were performed in the employer's usual course of business. Consolidated Findings ## 2 and 3 provide that none of the actual home inspection services were performed at the employer's office in [Town A]. Therefore, it has met its burden under prong (b) to show that the services at issue were performed outside of all of the places of business.

In his Order, District Court Judge Coven invites the parties to brief the meaning of "outside of all the places of business." The Order seems to ask that inasmuch as the employer generates no income apart from the inspection services performed at client locations, is the client location one of the employer's "places of business?" See Remand Exhibit # 6. In Comm'r of Division of Unemployment Assistance v. Town Taxi of Cape Cod, the employing unit was a taxi cab service. 68 Mass. App. Ct. 426 (2007). Presumably, it made its money only from the fares paid to its taxi drivers when they transported customers. In that case, the Appeals Court agreed with the Board of Review that the employer had met its burden under prong (b) to show that the services were outside of all of the places of business. Id. at 430–431. "Although the taxicabs were stored and the dispatch system was operated at the business premises of Town Taxi, the drivers did not transport customers on those premises." Id. at 431. Because the facts in the present case are analogous, we reach the same conclusion.<sup>7</sup>

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<sup>6</sup> Exhibit # 25, page 4, a page from the employer's 2011 website, refers to "Our staff of company trained inspector's [sic]..." Although not explicitly incorporated into the review examiner's findings, the exhibit is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. 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).

<sup>7</sup> See also Board of Review Decision BR-120513-XA (Apr. 13, 2012), *affirmed by the District Court* (employer satisfied prong (b) because the actual work of courier service drivers, delivering packages, was outside of all the places of employing unit's business); Board of Review Decision BR-110419-X (Feb. 25, 2010) (because claimant's services, installing paving stone at residential homes for employer home improvement contractor, were performed outside of employer's place of business, employer met prong (b)).

*Prong (c)*

In our June 28, 2012 decision, we referred to the Athol Daily News case as the standard for evaluating prong (c). We stated that in order to assess whether a service could be viewed as an independent trade or business, we must consider whether “the worker is capable of performing the service to 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 . . .” Athol Daily News, 439 Mass. at 181. Our decision properly concluded that the employer did not meet prong (c) as to the unlicensed associate or trainee inspectors. Because they were prohibited from performing home inspection services on their own under 266 CMR 4.07(8), they were incapable of engaging in an independent enterprise as a matter of law. However, as to the licensed home inspectors, we considered only the fact that the employer permitted them to perform services for others in deciding that the employer met prong (c), without also considering whether the nature of the employer’s business compelled them to rely upon the employer for continued work. With a more fully developed record after remand, we have an opportunity to revisit our analysis.

In the Coverall case, the claimant provided janitorial services under an agreement that permitted her to expand her “franchise” by hiring employees and directly soliciting new customers. 447 Mass. at 853-854, 858. In fact, however, the claimant lacked a clientele apart from the employer’s clients, cleaned only at the locations assigned by the employer, and any new customers had to sign a contract with the employer. Id. The Supreme Judicial Court concluded that, although technically capable of being an entrepreneur and expanding her own business, in fact, the claimant was compelled to rely heavily upon the employer. Id. at 859. Therefore, it held that the employer did not prove prong (c). Id.

In the present case, we have a finding that the employer permitted its home inspectors to advertise and perform home inspection services for others independently. Consolidated Finding # 36. However, we are unconvinced that any of them did so. Weekly paychecks were issued to the individual inspectors and not to any independent business names or entities. Consolidated Finding # 5. The employer’s errors and omissions insurance policy only covered the licensed home inspectors’ work for the employer. It did not cover inspections performed on their own or for another business and there was no evidence that any of the employer’s inspectors carried their own policies. *See* Consolidated Finding # 39. There was also no evidence that they advertised their services. Moreover, the employer required that any a client who contacted an inspector directly be referred to the employer’s business office. Consolidated Finding # 11.

As noted in the credibility assessment, the affidavits that the employer presented at the original hearing from several of its inspectors failed to show that they were performing any independent inspectional services. At the remand hearing in 2017, the employer did not provide any new or updated affidavits. In his testimony, the owner named five people that he heard were doing this work on their own. Despite having two years to prepare for a remand hearing specific to providing additional evidence that the workers at issue were customarily engaged in an independent established trade or business of the same nature, the employer did not provide any business names, nor state when, where, for whom, or how often such inspections were performed. *See* Consolidated Finding # 38. As a result, the record lacks substantial evidence to demonstrate that any of its home inspectors performed this work independently.

In sum, the facts show that the employer's inspectors, like the janitor in Coverall, were compelled to rely heavily on the employer's business to perform home inspection services. For this reason, it has not met its burden under prong (c).

We, therefore, conclude as a matter of law that, because the employer has not met its burden of proof under prongs (a) and (c), it has failed to establish that the services performed by its licensed, associate, or trainee home inspectors were not employment within the meaning of G.L. c. 151A, § 2.

The review examiner's decision is affirmed. The employer unit must make contributions to the unemployment compensation fund for its licensed, associate, and trainee home inspectors.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - February 9, 2018**



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](http://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.

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