Couriers who were required by contract to submit to the direction and control of the employing unit's clients were employees, pursuant to G.L. c. 151A, § 2.

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Issue ID: Sec2-17-037

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employing unit appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), which concluded that services performed by drivers/couriers for the employing unit constituted employment pursuant to G.L. c. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On April 12, 2017, the DUA's Revenue Audit Division, issued a determination finding that the services performed by the couriers constituted employment. The employing unit appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the employing unit and a representative from the Revenue Audit Division, the review examiner affirmed the agency's determination in a decision rendered on August 7, 2018.

The review examiner concluded that the employing unit had not carried its burden with respect to G.L. c. 151A, § 2(a), (b), or (c), and, thus, the services performed by the couriers constituted employment. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employing unit's appeal, we accepted the employing unit's application for review. 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 employing unit did not carry its burden under G.L. c. 151A, § 2, to show that the services performed by the couriers did not constitute employment, is supported by substantial and credible evidence and free from error of law.

Findings of Fact

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

1. On 4/12/17, the Department of Unemployment Assistance (DUA) Revenue Audit Department generated an Employee/Employer Relationship Determination to the instant employer finding that the services performed by the couriers, and others similarly employed, constitutes "employment" within the meaning of Section 2 of the Massachusetts Unemployment Insurance Law.

2. On 4/19/17, the employer appealed the Section 2 determination.

3. The business provides delivery and logistic services to its clients for messenger and delivery needs.

4. The instant employer contracts with a third-party administrator (CMS) who is liable to send out 1099's to the drivers and their checks are paid out by the third-party administrator. The contract between the instant employer and the third-party administrator identifies the instant employer as CC and the independent contractors as IC, and states in part: CC agrees not to represent that any IC or other person or entity associated with CC is either an employee or an independent contractor of CMS.

5. The employer's Independent Contractor Owner/Operator Agreement contract which is signed by each courier states in part:

   • Owner/Operator agrees to prominently carry, display and/or wear any identification card, badge or apparel reasonably required by the Customer for security or similar purposes.

   • This Contract constitutes the entire agreement between the parties and supersedes all previous agreement between the parties. Any additions or changes shall be in writing signed by an authorized representative of both the Broker and the Owner/Operator. Broker shall have the right to assign its rights and delegate its duties under this Contract. Owner/Operator shall not have the right to assign its rights and to delegate its duties under this contract, as its services are personal.

6. In current web based job advertisements, the instant employer posted the following:

   Delivery Driver Needed, $16.50/hr. plus benefits driving company vehicles

   We have a full-time opening for a Delivery Driver Needed, $16.50/hr. plus benefits driving company vehicles.

   Must be able to work various shifts per week.

   • Must have 1 or more years' experience
   • Must have a high school diploma or equivalent
   • Be authorized to work in the United States
   • Must have reliable transportation.
   • Background check required.

   Wage: $16.50 per hour

Driving
Valid Driver's License

Minimum Age 21+ years old

Additional

(Company name) is a leading New England provider of delivery and logistics based solutions. (Company name) is currently seeking qualified, highly motivated individuals with world-class driving and customer service skills to join our Delivery Associates' team for a unique career opportunity helping us to support a work renowned client. To Apply, Please forward a resume of your past experience along with contact information and references Overview Delivery Associates provide courteous and efficient small/medium package deliveries in a fast-paced, high-volume, customer-focused, team environment. Weekend work is required but will not be every weekend. Qualifications *Must possess a valid and current MA driver's license; minimum 25 years of age *Must have 3 years verifiable experience with no DUIs nor suspensions nor accidents with six+ months experience in a cargo van type vehicle within the last three years*Must meet and maintain (company name) Motor Vehicle Requirements *Must attain satisfactory completion of specialized training regarding transportation of goods with special handling requirements *Pass drug and background verification screening*Pass an extended road test verifying critical skill areas for specific driving position*Seeing those with world-class customer service skills*Must be tech-savvy, experienced with GPS and other smartphone related applications*Must be reliable, flexible and exhibit a sense of urgency while on the job Essential Functions*Ability to move and lift 50 pounds and maneuver packages of any weight above 50 pounds with appropriate equipment and/or assistance from another person*Ability to work varying shifts of up to 10 hours per day with paid over-time*Ability to transport goods with special handling requirements*Ability to communicate effectively with customers, vendors, and other team members*Ability to perform work activities requiring cooperation and instruction*Ability to function in a fast-paced environment and meet deadlines*Ability to work with minimal supervision What we offer*Utilization of company vehicle for delivery routes, $16.50 hour plus incentive benefits, Medical coverage, Paid Holidays, Paid Vacation…(company name) is an Equal Opportunity Employer(EOE), Qualified applicants are considered for employment without regard to age, race, color, religion, sex national origin, sexual orientation, disability or veteran status. If you need assistance or an accommodation during the application process because of a disability, it is available upon request. The company is pleased to provide such assistance, and o application will be penalized as a result of such a request.

7. According to the employer's Facebook page, the instant employer plans routes for its drivers, they customize delivery solutions to fit the needs of their

customer; and will provide their customers with a truck and uniformed driver if needed.

8. According to the employer's Facebook page, after a complaint was lodged with the company about a driver parking in a bike lane the employer reprimanded and coached the driver.

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 original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that the employing unit has not met its burden under prongs (a) or (c) of the ABC test. Therefore, the services at issue were employment, as defined in 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—
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> (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
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> (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 employing unit 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 Dept. of Employment and Training, 439 Mass. 171, 175 (2003). The test is conjunctive, and it is the employing unit's burden to meet all three prongs of this "ABC" test. Should the employing unit 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). The review examiner in this case concluded that the employing unit had not carried its burden with respect to any part of the ABC test.

Prong (a) is analyzed 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.

At the outset of our legal analysis, we note that this same employing unit has been before the Board before in similar circumstances. Indeed, during the hearing, a decision by the Board was entered into evidence. *See* Exhibit # 9. In that decision, Board of Review Decision BR-120513-XA (April 13, 2012) (the Board's 2012 decision), which related to a courier working for the employing unit's clients, the Board concluded that the employing unit had met its burden with respect to prongs (a) and (b), but not (c).[1] The employing unit argued during the hearing, and now argues on appeal, that the prior decision should be final as to the analysis for prongs (a) and (b). In the Board's 2012 decision, the employing unit raised the same argument, except at that time, it related to prong (c). As to whether the Board should follow a prior decision of the agency, we concluded the following:

> The Supreme Judicial Court recognizes that collateral estoppel may be invoked in certain circumstances, even where the parties in two adjudications are not identical. Commissioner of Department of Employment and Training v. Dugan, 428 Mass. 138, 141–142 (1998). The circumstances include: (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom estoppel is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication is identical to the issue in the current adjudication and that issue was essential to the earlier judgment. Id. at 142.
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> Since we have no record of an appeal of the 2003 determination, we shall assume that it became the final decision of the DUA in that case. The employer urges us to apply the 2003 determination to the claimant here, asserting that nothing has changed with respect to the employer's business operations or with respect to the ABC test, under G.L. c. 151A, § 2, in the last six years. Even if we assume that all of the facts surrounding the employment relationship in the 2003 determination are the same as those which led to the determination in this case, the legal analysis under the ABC test has changed in the last six years. The legal issue is not the same.

[1] According to testimony from the hearing, this case is a direct result of the Board's decision. Following the Board's issuance of its 2012 decision, the agency found the employing unit liable for contributions for all of its similarly situated couriers. However, no appeal rights were given with regard to the subsequent couriers, as the Board had already rendered its 2012 decision. Nevertheless, the employing unit contested the subjectivity of the other couriers. The April 12, 2017, determination giving rise to this matter was the means used for the employing unit to contest the subsequent actions of the DUA with respect to the other couriers. As a result, the DUA's April 12, 2017, determination was based, in large part, on the audit and information collected prior to the Board's 2012 decision.

> Prior to the SJC's decision in Athol Daily News, the legal test under prong (c) was different. To satisfy prong (c), the employer had to prove that a worker was customarily engaged in an independent business, that the business operated wholly independently, and that it was up and running. Boston Bicycle Couriers, Inc. v. Deputy Dir. of Department of Employment and Training, 56 Mass. App. Ct. 473, 479 (2002). As set forth above, the SJC has rejected that test as too rigid. Now, the proper legal inquiry under prong (c) is 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 for the continuation of the services." Athol Daily News, 439 Mass. at 181, 182 n.14.
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> Since Athol Daily News, the courts have provided additional guidance under prong (c). The SJC relied upon its new prong (c) test in rendering the 2006 Coverall decision, 447 Mass. 852, as did the Massachusetts Appeals Court in rendering its 2007 Town Taxi decision, 68 Mass. App. Ct. 426. On the record before us, we can not say why the DUA found that the employing unit had satisfied prong (c) in its 2003 determination, or whether the agency had considered the then-new capability test set forth under Athol Daily News, decided only a few weeks earlier. Nonetheless, we are satisfied that, in the last six years, the analysis with respect to prong (c) has changed. Therefore, we decline to apply the doctrine of collateral estoppel. As the law stands now under the facts before us, the employer has not satisfied its burden under prong (c).

Thus, the Board noted that a change in the law necessitated a new analysis under prong (c), and the prior determination by the agency did not preclude a different result.

Similarly, the legal landscape with respect to prong (a) has evolved since we rendered our 2012 decision. In 2014, the Appeals Court issued Subcontracting Concepts, Inc. v. Comm'r of Division of Unemployment Assistance, 86 Mass. App. Ct. 644 (2014). The facts of Subcontracting are similar to the facts of the case before the Board now. Subcontracting concerned the services of one delivery driver, Flynn, who was engaged by the employing unit (SCI) to make deliveries for SCI's client, Ace. SCI had a payroll service, which paid Flynn. There was no contract between Flynn and Ace, only between Flynn and SCI. Flynn could not negotiate his own fees with Ace, he was required to follow a delivery schedule set by Ace, he was required to wear a shirt with an Ace logo, and he was obligated to refrain from having "non-essential" personnel in his vehicle when he made deliveries for Ace. Id. at 645–646.

To resolve the case, the Appeals Court first noted that "Flynn, in fact, provided services for SCI by delivering goods for SCI's clients, such as Ace, which hired SCI to supply it with delivery drivers." Thus, simply because Flynn delivered for Ace does not mean that he was not working, or performing services, for SCI. Similarly, here, the couriers are performing services for [Employer A],[2] even if the couriers make deliveries for [Employer A]'s clients. As to prong (a), the Appeals Court in Subcontracting, 86 Mass. App. Ct. at 648, concluded:

[2] During the hearing, the employing unit's witness made clear that "Package Express" and "ABC Package Express" are the same entity. The only distinction noted during the hearing was between "Package Express"/"ABC Package Express" and "ABC Express Delivery, Inc."

> Under the contract at issue, SCI required Flynn to submit to the control or direction of Ace, SCI's client. Flynn had a contractual obligation to SCI to perform his work through whatever means or methods Ace required. SCI required that Flynn check with Ace prior to working for any other carrier, follow Ace's delivery routes and wear a t-shirt bearing the Ace logo, and ensure that anyone working with Flynn met SCI's requirements. SCI controlled how Flynn maintained the vehicle he used for deliveries and who he allowed in his vehicle while servicing SCI's customers. While Flynn had some choice as to the manner in which he performed his deliveries, SCI had authority to exercise a substantial degree of control over the numerous details of the performance.

The clear import of the reasoning used by the Appeals Court is that, even though direction and control may originate from the client, if the employing unit requires the courier to comply with the client's wishes and requirements, the direction and control may be attributed to the employing unit directly. In Subcontracting, the direction and control over Flynn was actual. For example, he had to wear a t-shirt and he was directly given routes by Ace. The record in the case before us does not have such detail. However, G.L. c. 151A, § 2(a), provides that a worker must be free from direction and control "both under his contract for the performance of service and in fact." Thus, if the contractual provisions in this case are akin or similar to the kind of actual control which was asserted by SCI/Ace over Flynn in Subcontracting, then the employer will not have met its burden under prong (a). The point, as noted by the Appeals Court, is that the employing unit would have the "authority to exercise a substantial degree of control" over the couriers.

It is undisputed that all of the couriers at issue in this matter signed Independent Contractor Owner/Operator Agreements (Agreement).[3] *See* Exhibits 8 and 16. The Agreement bound the couriers to several obligations which are reminiscent of the obligations undertaken by Flynn for Ace in Subcontracting. Paragraph 2(e) requires the couriers "to perform all pick-ups and deliveries in a manner that comports with the specific conditions set forth by the Customer. . . . Owner/Operator may designate a subcontractor or hire its own employees to execute delivery or pick-up, provided said person or entity (i) meets the same standards, criteria, and qualifications required of Owner/Operator, and (ii) is covered by either their own insurance or that provided by Owner/Operator." The conditions set forth by a customer/client presumably could include a specific route, a certain uniform, or other means of performing the work. *See also* Paragraph 2(g) of the Agreement (requiring couriers to "prominently carry, display, and/or wear any identification card, badge, or apparel reasonably required by" the customer/client). The provision also requires any employees or subcontractors of the courier to meet [Employer A]'s hiring requirements. Both of these factors were cited in Subcontracting as indicating direction and control under prong (a).

Paragraph 2(k) requires that the couriers "not permit passengers in its vehicle(s) while performing pick-up and/or delivery services if doing so might jeopardize the safety, security, or

[3] Although the review examiner made findings about only two provisions of the Agreement, *see* Finding of Fact # 5, the Agreement 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).

confidentiality of" the customer's information or goods. This is similar to the "non-essential" personnel provision from Subcontracting. Paragraph 2(n) requires the couriers to "comply with all Customer pick-up and delivery instructions communicated to it, including the obtaining of signatures and instructions not to leave unattended packages." This provision contemplates a whole range of potentially controlling behaviors which could be exercised by the client over the courier. Paragraph 2(o) requires that, if a customer requires it, the courier "will promptly call in all pick-ups and deliveries" to [Employer A]. Finally, Paragraph 8 states that [Employer A] sets the prices and charges, which is akin to the fees noted in Subcontracting, which could not be negotiated by Flynn.

At this point, we note that the review examiner relied on the "web based information provided by the auditor" to conclude that the employing unit had not met its burden. As we have shown, the web-based information need not be considered under prong (a), as the direction and control over the couriers flow directly from the Agreement. However, we note that the review examiner was not required to believe the employing unit's representations during the hearing that the advertisement noted in Finding of Fact # 6 and the Facebook postings referred not to the employing unit here, [Employer A] (or [ ] [Employer A]), but to a sister company, formed in May of 2016, called [Employer B]. As we have noted several times, the burden was on the employing unit in this case. The review examiner was not required to believe that the evidence in the record related to a separate entity, especially where the employing unit's name, [ ] [Employer A], is displayed prominently across all of the documentation, media, and paperwork. Indeed, "[Employer B]." is nowhere to be found in any of the records of this case. There is not substantial and credible evidence in the record to support the assertion that the review examiner's findings relate to a totally separate entity or company.

Our discussion leads toward the conclusion that the employing unit has not carried its burden under prong (a) of the ABC test. The holding of Subcontracting dictates such a result, even though the Board has previously held that the employing unit carried its burden under prong (a).

Under prong (b), the review examiner concluded that the employer did not meet its burden, because the couriers' services were not outside the usual course of the employing unit's delivery and logistics services. However, in order to meet its burden under prong (b), the employing unit may alternatively show that the workers performed their services outside of all its places of business. Since most of the couriers' services were performed on the road, we are satisfied that the employing unit meets the latter test under prong (b). *See* Athol Daily News, 439 Mass. at 179.

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 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.

The review examiner made few findings as to this part of the ABC test. The only relevant one relates to a part of the Agreement, Paragraph 14, which prohibits the couriers from assigning its rights or duties under the Agreement, as "its services are personal." What this means was not specifically discussed during the hearing. However, we note generally that the review examiner failed to make various findings of fact based on the representations of the employer's witness, the CEO/treasurer. Implicit in this is the review examiner's suggestion that she was not convinced that the evidence provided by the employing unit to show that the couriers had their own businesses was credible or substantial. For example, the employing unit presented copies of allegedly authentic business cards for couriers who performed services for the employing unit. *See* Exhibit #15, pp. 1–2. The cards were entered into the record as evidence of separate businesses. Later, however, the DUA's auditor noted that one phone number was registered to the CEO/treasurer himself. *See* Exhibit # 15, p. 3. This certainly undercut the argument that the business cards were authentic. The auditor also testified that she could not find records for any of the other businesses noted on the cards. A cursory review of the business cards shows that a majority of them have a similar form (font, content, information) and that two of the cards do not even include a phone number. This is not substantial and credible evidence of the existence of other businesses.

We also note that it is not clear that the couriers at issue actually signed a contract which did not contain the language from the Board's 2012 decision; language, which the Board concluded meant that the employing unit had not carried its burden under prong (c). The employing unit presented a contract which does not contain the provision. *See* Exhibit # 8. However, that was a blank Agreement. The employing unit then submitted just the final signature pages for the Agreement for the couriers allegedly at issue here. *See* Exhibit # 16. The employing unit would have the Board conclude that the signature pages related to the copy of the Agreement which is Exhibit # 8. Indeed, in its appeal to the Board, the employing unit argued that "**none** of the workers implicated by the audit at issue in this case signed agreements containing" the Board's 2012 decision language. It also noted that "[t]he Company reasonably relied on the analysis contained in [the 2012 case]" to set up its business. We are unpersuaded. The Board issued its 2012 decision on April 13, 2012. Several of the signature pages contained within Exhibit # 16 are from prior to that date. Thus, it is highly unlikely that they are from new Agreements that do not contain the *old* language. This calls into question the authenticity and veracity of the employing unit's representations that all couriers signed Agreements without the language before the Board in 2012.

Moreover, in the present case, the employing unit did not present evidence of schedules or earnings of its couriers. This information is highly relevant, as it was for the Appeals Court in Subcontracting. 86 Mass. App. Ct. at 649–650. It was not the auditor's role to present such information; it was the employing unit's burden. The review examiner does not appear to have found the testimony offered by the CEO/treasurer to be reliable or credible, and there is a lack of substantial evidence about the activities of the couriers at issue. Of course, we note that the alleged new Agreement allows the couriers to work for other entities. *See* Paragraph 7(c). However, the employing unit here did not address what Paragraph 14 of the contract actually means, and whether the couriers actually went out and were able to work for other companies in a capacity similar to how they performed services for the employer. *Compare* Athol Daily News, 439 Mass. at 181–182 (carriers free to deliver newspapers for multiple publishers and

record shows that some carriers exercised that option). Therefore, we conclude that the employing unit simply has not carried its burden under prong (c) of the ABC test.

We, therefore, conclude as a matter of law that the review examiner's ultimate conclusion that the services at issue constituted employment is free from error of law, because the review examiner's findings of fact, in conjunction with the full record of testimony and documentary evidence, show that the employing unit has not met its burden with respect to of G.L. c. 151A, §§ 2(a) and 2(c).

The review examiner's decision is affirmed.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 19, 2018

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:
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.

SF/rh