Personal trainers and group exercise class instructors were held to be employees of the employer fitness club. Employer failed to sustain its burden under G.L. c. 151A, § 2(b) to show that these services were outside the usual course of the business for which the services are performed.

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

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: SEC2-18-002

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 personal trainers and exercise class instructors constituted employment under G.L. c. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On January 3, 2018, the DUA's UI Revenue Audit Unit sent the employer a determination which stated that the services performed by personal trainers and exercise class instructors 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 3, 2018. We accepted the employer's application for review.

The review examiner concluded that an employment relationship existed, because the employer did not carry its burden under G.L. c. 151A, § 2(b), to show that the services performed by these personal trainers and instructors were outside the usual course of the business for which the service is performed or are outside of all the places of business of the enterprise for which the services are performed. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that both personal training and exercise class instruction were part of the employer athletic club's usual course of business within the meaning of G.L. c. 151A, § 2(b), is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The appellant operates a gym (hereafter, the appellant will be referred to as "the gym"). The gym owns dozens of fitness machines as well as free weights; it contains changing rooms, sauna, a childcare area and space for classes.

2. There are 12–15 individuals who provide services to the gym who the gym considers employees. They are managers, sales people, and front desk workers.

3. There are dozens of other individuals who either lead occasional exercise classes or provide individual fitness training (personal trainers) on the gym's premises. The gym considers these individuals to be independent contractors.

4. There is a fitness facility which is part of a large chain, [Gym A], located a few miles away from the gym. [Gym A] charges a low monthly fee and has long hours but does not offer any extras such as classes or personal training. The gym views offering classes and personal training as a way to distinguish itself from [Gym A].

5. Members pay a monthly fee ($29–$39) to have access to the gym's facility. As part of the membership fee, a member is entitled to a complimentary fitness consultation with a personal trainer. The member is also entitled to attend certain exercise classes free of charge.

6. On its website, the gym states that classes and personal training are available. One of the gym's marketing materials states:

   "Would you like some extra guidance and customized support to help you get and stay fit? Personal Training program at [the gym] may be a great option for you. Our Personal Training program offers a complete training system that encompasses fitness education, motivation, support, and accountability. We integrate the principles of exercise physiology with sound nutrition to help you improve your physique, stamina, and energy in the fastest and safest way possible."

7. The gym sets the rate members will pay for personal training. There is an hourly rate; or a rate for a "package" of a certain number of sessions. The gym collects the fees and pays the personal trainer a set amount per session.

8. The gym requires the personal trainer to be certified and to carry liability insurance.

9. Personal trainers are responsible for arranging the schedule of training with the member and for informing the member if the personal trainer is unable to work as scheduled.

10. The personal trainer is wholly responsible for determining what exercises are performed or what is discussed during the training session. For example, whether personal training includes advice on healthy eating, relaxation or other topics is up to the personal trainer.

11. If asked, the gym manager will provide advice to personal trainers regarding how certain medical conditions or injuries affect a client's ability to safely exercise. The personal trainer need not accept the advice given.

12. General aerobic exercise classes are open to members as part of their membership fee. Instructors of these free classes (Instructors Group A) must be certified to show they are qualified to lead a group. The instructors are responsible for obtaining the certification. The cost of obtaining that certification is low.

13. The gym does not advertise for Instructors Group A. The gym is regularly solicited by individuals asking to conduct a class. If the gym has an opening in its schedule and it seems like the type of class its members might enjoy, the gym will allow the Instructor Group A to hold a class.

14. The gym pays Instructors Group A by the session. The gym sets the price for each session.

15. The gym provides the Instructor Group A with the space for the class and a sound system to play music. Any mobile equipment already in the gym, such as free weights, are available to members to use during the class. If the Instructor Group A needs additional materials, the instructor provides the material at his/her expense.

16. If the Instructor Group A is unable to lead a scheduled class, the instructor is responsible for finding a replacement or cancelling the class. To cancel the class, the instructor would call the gym and a gym employee would post signs.

17. There are three types of classes for which an instructor certification can be quite costly – Spin, Yoga and Pilates. Instructors of these classes (Instructors Group B) are paid differently than Instructors Group A.

18. Members pay an additional fee for the spin, yoga or Pilates classes. The gym negotiates with the Instructor Group B on the class fee and the percentage of that fee which will go to the Instructor.

19. Instructors Group B frequently hold classes at several different venues, including other gyms. They also tend to advertise themselves on social media in an effort to develop a loyal following. Better known Instructors Group B who have established a following are able to negotiate a higher percentage of the fees collected.

20. The gym collects the fees for the classes and pays Instructors Group B the agreed upon percentage.

21. In addition to the space and a sound system, the gym provides bikes for the spin class and some equipment for the Pilates class.

22. If an Instructor Group B is unable to lead a scheduled class, the instructor is responsible for finding a replacement or contacting class members directly to say the class has been cancelled.

23. The gym does not advertise for Instructors Group B. The gym is regularly solicited by individuals asking to conduct a class. If the gym has an opening in its schedule, and there is reason to believe a sufficient number of individuals will enroll in the class, the gym will allow the Instructor Group B to hold a class.

24. All instructors, both Group A and B, are wholly responsible for determining what exercises to use and how to conduct the class. Any complaints about a class are referred to that instructor.

25. Instructors and personal trainers wear whatever they choose. They are not required to wear t-shirts or other apparel identifying them as belonging to the gym.

26. The gym does not preclude instructors or personal trainers from performing services at other gyms or any other venue. The gym has never required a non-competition agreement.

27. Many personal trainers or Group B instructors perform these services as their primary work.

28. The gym does not provide any benefits to instructors or personal trainers, other than free admittance to the gym.

29. The gym has approximately 2,400 members, of which 15% participate in classes or personal training.

30. As a result of a random audit conducted by the Department of Unemployment Assistance (DUA), an auditor reviewed the gym's operations and, on January 3, 2018, issued a determination that the services of 56 instructors and personal trainers who, between 2014 and 2016, held classes or performed training at the gym constituted employment under Section 2 of the unemployment insurance law. The determination also covered others similarly employed.

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 also believe the review examiner correctly concluded that the services at issue constitute 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 Department 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 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, 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.

The findings break the services at issue into three different groups, including personal trainers and two types of exercise class instructors. The employer places no restrictions upon the ability of any of these individuals to perform their services at other venues. Finding of Fact # 26. We consider whether there are other restrictions imposed upon each group separately which, on balance, show that the employer controls the means and methods of their performance.

Personal trainers work with gym members at the employer's facility on a one-on-one basis providing custom fitness education, motivation, and support to achieve the member's personal fitness goals. *See* Finding of Fact # 6. The employer provides one complimentary personal training consultation with the membership fee, then charges and collects a fee for each personal training session thereafter, paying the trainer a set amount per session. Findings of Fact ## 5 and 7. Although the employer requires that the personal trainer be certified, the trainers obtain this certification on their own.[1] The personal trainers are free to conduct each member's training session as they see fit, determining the exercises and guidance which the trainer deems appropriate. *See* Findings of Fact ## 8 and 10. Scheduling and cancelling sessions are also the personal trainer's responsibility. Finding of Fact # 9. We also note that they are not required to wear uniforms. Finding of Fact # 25.

The second and third groups are individuals who teach various exercise classes at the gym's facilities. Those whom the hearing officer referred to as instructors in Group A teach the group exercise classes that are included with the gym's membership. *See* Finding of Fact # 12. Factors showing control include that the employer requires that these instructors be certified to teach their particular class. Finding of Fact # 12. The employer determines the fee that it pays these instructors for the class. Finding of Fact # 14. The employer sets the class schedule, and it provides the space, sound system, and any free weights or other mobile equipment which the instructor may use to teach the class. *See* Finding of Facts ## 13 and 15. The employer also requires that the instructor find a replacement or notify the employer if the instructor cannot teach a scheduled class. Finding of Fact # 16. However, it is apparent that these instructors can freely decline to teach their class in the offered schedule time slot without consequence. *See* Finding of Fact # 13. Each instructor is also responsible for obtaining on their own the necessary training and certification to teach the class, and they are wholly responsible for what they do in the class. Findings of Fact ## 12 and 24. Like personal trainers, there is no required uniform. Finding of Fact # 25.

Although the instructors in Group B teach more specialized group classes, Pilates, yoga, and spin, the extent of the employer's direction and control is very similar to those in Group A and to the personal trainers. Implicit in Finding of Fact # 17 is that the instructor must be certified to teach these classes. The employer provides the space, sound system, bikes, and certain Pilates equipment for the classes. Finding of Fact # 21. It collects the class fee and then pays the instructor the agreed upon fee. Finding of Fact # 20. Similarly, the instructor may only teach a class that fits into the employer's existing schedule, and once scheduled, the instructor must find

[1] The employer's owner testified that the personal trainers obtain their own certifications. While not explicitly incorporated into the review examiner's findings, this testimony 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).

a replacement or cancel the class if he or she must be absent. *See* Findings of Fact ## 22 and 23. However, like the instructors in Group A, these Group B instructors run their classes as they see fit without supervision. Finding of Fact # 24. The findings indicate that they obtain and pay for their own more specialized teaching certifications, and that they can also decline to offer a class at the employer's facility without consequence. *See* Findings of Fact # 17 and 23. Again, there is no uniform which they must wear while performing their services. Finding of Fact # 25.

The record shows that the personal trainers and group instructors are not entirely free of the employer's direction and control. However, we agree with the review examiner that, on balance, the employer has met its burden under prong (a). Because the employer does not provide any training or supervise the personal trainers or any of the instructors in the performance of their duties, and the individuals are free to decline work and perform their services elsewhere, we believe these workers retain the right to control the details of the performance in significant ways.

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 the places of business of the employer's enterprise. *See* Athol Daily News, 439 Mass. at 179. Obviously, since all of the personal training and exercise class instruction services at issue take place at the employer's gym facility, these services are not performed outside of all the places of the employer's enterprise. The question we must decide is whether such services are performed "outside of the usual course of business for which the service is performed . . . ." G.L. c. 151A, § 2(b). We believe the review examiner correctly concluded that they were not.

We are unaware of any Massachusetts appellate court decision that has decided whether a worker was an employee or independent contractor based upon whether the employer met the portion of prong (b) at issue. In its appeal, the employer argues that the critical factor is whether the service is necessary or merely incidental to the employing unit's business, *citing, inter alia*, Sebago v. Boston Cab Dispatch, Inc., 471 Mass. 321, 333 (2015) and a 2008 Attorney General Advisory. During the hearing and on appeal, the employer has asserted that its business is a gym that provides weights, cardio equipment, steam and sauna room, basketball courts, childcare, and merely the space for personal training and exercise classes. These personal training and group exercise classes, it argues, are not necessary to running a gym. Moreover, because only 15% of the employer's members participate in classes or personal training, it urges the Board to conclude that these services were merely incidental to its business.

It is important to point out that Sebago, the Attorney General's Advisory, and the other cases cited in the employer's appeal address whether services constituted employment under G.L. c. 149, § 148B, the Massachusetts Independent Contractor statute, not under G.L. c. 151A, § 2, the Massachusetts Unemployment statute. The statutory provisions are similar but not the same.[2]

[2] Apparently, G.L. c. 149, § 248B(2) and G.L. c. 151A, § 2(b) used to be identical until 2004, when the Legislature amended the former. Compare the current provisions under G.L. c. 149, § 248B(2), which requires an employer to prove that "the service is performed outside the usual course of the business of the employer;…" with G.L. c. 151A, § (2)(b), which requires the employer to prove that "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 the business of the enterprise

The employer's appeal incorrectly suggests that the Athol decision supports the Sebago "necessary" versus "incidental" test. In Sebago, the SJC merely pointed to Athol for the proposition that "a purported employer's own definition of its business is indicative of the usual course of business." Sebago, 471 Mass. at 333. In the present case, we are mindful of how the employer defines its own business. However, we believe that in stating that its gym merely provides space for personal training and exercise classes, the employer has too narrowly characterized its business for the sake of this appeal. *See* Da Costa v. Vanguard Cleaning Systems, Inc., 2017 WL 4817349, *6 (Mass. Super. 2017).

The record shows that the employer did more than provide space to the individuals at issue. It scheduled the exercise classes for the instructors. It provided the weights and other equipment for the personal trainers, a sound system used in many of the exercise classes, the bikes for spin, and special equipment for Pilates. Its website advertised the classes and the personal training services to bring in business and portrayed many of trainers and instructors as members of its staff. *See* Exhibit 15 and 19.[3] In short, the employer's actions more reliably portray the nature of its business. Personal training and exercise class instruction were part of its product.

Returning to Athol, we note that the SJC did not define what the entire phrase "usual course of the business for which the service is performed" means under G.L. c. 151A, § 2(b). But, it did refer to unemployment decisions from other jurisdictions, including Mattatuck Museum-Mattatuck Historical Society v. Admin., Unemployment Compensation Act, 679 A.2d 347 (Conn. 1996); and Bigfoot's Inc. v. Board of Review of the Indus. Comm'n of Utah, 710 P.2d 180 (Utah 1985).[4] Athol Daily News, 439 Mass. at 179. In these jurisdictions, the courts struggled with the exact same prong (b) language as we have under G.L. c. 151A, § 2, and ultimately settled upon a definition.

In Mattatuck Museum, the question was whether art course instructors were performing their services within the usual course of the museum's business. There are similarities between this case and the present appeal. In Mattatuck, the employer urged the court to view its business as a museum, which the dictionary defined as an institution devoted to the procurement, care, and display of objects. 679 A.2d at 351. The Connecticut Supreme Court refused to abide by the dictionary definition because that ignored the plain language of prong (b), which required inquiry into "*the* business for which the service is performed." Id. (Emphasis in original.) The court observed that the statutory language does not refer to the type of business, but to the specific business activities engaged in by the enterprise. Id. These art courses were part of its specific business activities. Id. at 352.

---

for which the service is performed;…" *See* Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, § 248B, 2008/1.

[3] Exhibits 15 and 19 are copies of pages from the employer's website, which the DUA's UI Revenue Audit Unit witness presented during the hearing. These exhibits are also part of the unchallenged evidence introduced at the hearing and placed in the record.

[4] It appears that the Illinois Supreme Court has declined to follow the Illinois Appeals Court decision in the third case cited in Athol, Yurs Funderal Home v. Dir. of Labor, 235 N.E.2d 871 (Ill.App.Ct. 1968). *See* Carpetland U.S.A, Inc. v. Illinois Dept. of Employment Security, 776 N.E.2d 166, 186 (Ill. 2001) (adopting guidance from its Administrative Code to define services that are not necessary to the employing unit's business as outside the usual course of business).

In Mattatuck, the court also rejected the employer's argument that the offered art courses were outside the museum's usual course of business merely because, in relation to the revenue or resources devoted to its other activities, these services were *de minimus*. Id. at 351. Prong (b), it stated, does not compel an inquiry into the extent of a particular business activity in relation to others. Id. Thus, the court defined "usual course of business" to mean that "the employer performs the activity on a regular or continuous basis without regard to the substantiality of the activity in relation to the enterprise's other business activities." Id. In deciding that the services were performed within the museum's usual course of business, the court relied upon findings that the instructor's art courses were offered on a regular and continuing basis, the museum had employed instructors to teach art for several years, the museum held itself out to the public as offering art courses with brochures listing the hours, location, and including the claimant as a member of its faculty, and it discounted art courses for members to bolster its membership. Id. at 352. *See also*, Bigfoot's Inc., 710 P.2d at 181–182 (band musician and entertainers hired over 15-month period to attract customers and increase business were usual and customary part of beer bar's business).

Here, it is evident that the services at issue were also offered on a regular and continuing basis. The employer's owner testified that its personal training and exercise class services are utilized year-round. Payroll records support this.[5]

We find support for applying the Mattatuck Museum analysis in a more recent case. The New Hampshire Supreme Court embraced this regular and continuous basis definition of "usual course of business" in deciding whether a live musical entertainer's services constituted employment under its unemployment statute. Appeal of Niadni, 93 A.3d 728 (N.H. 2014). The N.H. provision is also identical to our prong (b). Id. at 731. Because the services were regularly and continuously provided at the employer resort, it held they were within its usual course of business. Id. at 732. The court rejected the notion that the employer merely scheduled independent musician performances, as the employer maintained the amenities to facilitate those services, *e.g.*, a stage and public address system, and it advertised the performances to attract patrons to the resort. Id. The court also decided that, even though live entertainment was not essential to the employer's business, that did not negate the regular and continuous presence of live entertainment, as the employer offered live entertainment on 60–70% of the nights it was open. Id. Because the services were used to attract new business to the resort, it determined that the musician's services were not incidental to, but rather an integral part of the resort's business. Id. at 733.

In the present appeal, the employer urges the Board to reach the same outcome as it did in a recent Board decision, where we concluded that the services of class instructors, including Zumba, yoga, and fitness, were outside the usual course of business of the employing unit, a community center. Board of Review Decision Sec2-16-033 (July 27, 2018).[6] It argues that the facts in this case are analogous. To the extent we used such terms as "needed" and "pivotal" in analyzing the usual course of business phrase in this decision, we take this opportunity to clarify.

[5] *See* Exhibit 14, which is a breakdown of compensation paid to personal trainers and exercise class instructors on a quarterly basis. This exhibit and the employer's testimony are also part of the unchallenged evidence in the record.
[6] Board of Review Decision Sec2-16-033 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

The business activities of the employer in the present case and in Board of Review Decision Sec2-16-033 are not the same. In the latter case, the employing unit was found to be a community center "providing educational, recreational and cultural programs at their facility," and the instructors provided a wide variety of classes, among them Zumba, Kripalu, CPR First Aid, Gardening, Drama, Tai Chi, Dog Training, Babysitter Training, Yoga, Knitting/Crocheting, Food Preparation, Piano Lessons, Fitness Classes, Improvisation, Geneology, Belly Dancing and Reiki.[7] "The business for which the service is performed" in that case is far more broad than in the present appeal. In the former, we stated that belly dancing was not needed to run the employer's business, that specific instruction such as Zumba, dog training, or genealogy classes were not integral to running a community center. Id. at p. 6. Here, the employer gym's business is fitness. Personal training and group exercise classes are fitness options which the employer presents to its members and to the public as part of its product. These services are as necessary and integral to the character of the employer's business as playing basketball.

Thus, the employer has not met its burden under prong (b) to show that the services at issue are outside the usual course of the employer's business, or that they are 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 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. As the review examiner found, the individuals providing personal training and exercise classes in both Groups A and B were free to take their services to other gyms or other venues. The employer also produced substantial evidence demonstrating that the vast majority of them were marketing their services on social media and most were performing at other venues. *See* Exhibits 21–23 and 25–67. In light of this evidence, we agree that the employer has met prong (c).

We, therefore, conclude as a matter of law that because the employer has not shown that the services of its personal trainers or group exercise instructors were performed either outside the usual course of the business for which the services are performed or outside of all the places of business of the enterprise for which the services are performed within the meaning of prong (b), it has not met its burden to show that these individuals are independent contractors under G.L. c. 151A, § 2.

[7] *See* Board of Review Decision Sec2-16-033, Findings of Fact ## 2 and 3.

The review examiner's decision is affirmed. The services provided by the employer's instructors and personal trainers constitute employment.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 7, 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:
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