

Work performed by a salesperson did not constitute employment, where the subject-individual was free to make sales as he wished, performed the work outside of the employing unit's business location at customers' homes, and could have worked elsewhere without restriction and did so in the past.

**Board of Review
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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 a [Worker A]¹ 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 reverse.

On May 14, 2019, the DUA's Revenue Audit Division issued a determination finding that the services performed by the subject-individual 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 September 27, 2019.

The review examiner concluded that the employing unit had failed to carry its burden pursuant to G.L. c. 151A, § 2, to show that the services at issue were not 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 and remanded the case to the review examiner to take additional evidence as to whether the services provided by the subject-individual were employment. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. 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 subject-individual did not constitute employment, is supported by substantial and credible evidence and free from error of law.

Findings of Fact

¹ [Worker A] is referred to variously in the documentary record as the salesman, worker, and subject-individual. Because the review examiner uses "subject-individual" in his consolidated findings of fact, we will also use that term in our decision.

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

1. The business entity, an exterior home improvement contractor, is a sole proprietor doing business as "[Business A]."
2. The company performs exterior home improvement services (i.e. roofing, siding, windows, doors, decks, etc.) for the general public.
3. The business entity obtains work through advertisement using various media.
4. The business entity receives an initial inquiry from the public about its services. Only the sole proprietor responds to the initial inquiry to set up a time to perform a survey and estimate of the potential job.
5. The sole proprietor then goes to the homeowner's residence to perform a survey of the work to be performed. The sole proprietor then draws up an estimate/proposal for the work to be performed per the homeowner's specifications.
6. The sole proprietor, or the "Salesman" (as characterized in the initial determination) (hereinafter "subject-individual"), then returns to the homeowner's residence to secure a contract for the work to be performed.
7. The subject-individual was engaged to perform such duties when the sole proprietor is too busy to perform the duty himself.
8. The subject-individual never declined a job and if he did, he would not have been be subject to any discipline.
9. The subject-individual made arrangements with customers for appointments to meet in their residences.
10. The subject-individual was not instructed on how to secure a contract and was not told what tactics to use.
11. The subject-individual did not receive training from the sole proprietor. The subject-individual knew what to do when he went to a residence due to his many years of experience.
12. The subject-individual had fifty years of sales experience and experience in the roofing industry as he worked for his son-in-law, who is also a roofer and friend of the sole proprietor.
13. The subject-individual was authorized to modify [an] estimate/proposal based on the customer's preference or desire, which may have changed since the initial estimate/proposal was drafted.

14. The subject-individual did not need to seek approval from the sole proprietor for any modifications to include corresponding pricing.
15. The estimate/proposal was provided by the sole proprietor with the business entity's information on the form.
16. The sole proprietor provided business cards of the sole proprietor to the subject-individual to give to customers.
17. The subject-individual did not wear any identifying information to tie it to the business.
18. The subject-individual may have provided his personal cell phone number to customers. The cell phone was not provided to the subject-individual by the sole proprietor.
19. Once the contract is secured, the sole proprietor orders the necessary material for the contracted job and oftentimes engages other contracting businesses to perform the work.
20. Upon completion, either the sole proprietor or the subject-individual returned to the customer's home to secure payment for the work performed.
21. The sole proprietor maintains a home office where the majority of the work is not performed.
22. The subject-individual did not visit the sole proprietor's home office as all communications were conducted by telephone and U.S. Mail.
23. The fee for service by the subject-individual was an arbitrary commission (not a set percentage) verbally agreed to as determined by the scope of the job.
24. The subject-individual was paid on a 1099.
25. The subject-individual occasionally performed services on behalf of the sole proprietor and did not perform services for other entities during the subject time period.
26. The subject-individual performed services for another roofing company in the early 2000's, when the subject-individual began performing services for the sole proprietor.
27. The sole proprietor did not prevent the subject-individual from performing services for other entities.

28. The sole proprietor did not keep track of the subject-individual's weekly hours due to the nature of the work and the subject-individual not being paid on a hourly basis.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we conclude that the employing unit has carried its burden to show that the services performed by the subject-individual did not constitute employment.

Employment, for purposes of the Massachusetts Unemployment Compensation statute, 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 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 Div. 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 Div. of Unemployment Assistance, 447 Mass. 852, 857 (2006).

The review examiner concluded that the employing unit had not carried its burden as to any prong of the ABC test. We disagree and conclude that each prong has been met.

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.

The subject-individual in this case performed services as a salesman. He would go to a customer’s residence and attempt to secure a contract for the employing unit. Consolidated Finding of Fact # 6. He arranged his own meetings with the customers. Consolidated Finding of Fact # 9. He was not told how to get a customer to sign a contract. Consolidated Finding of Fact # 10. He received no training, primarily because he had extensive experience in the roofing industry and knew the business quite well. Consolidated Findings of Fact ## 11 and 12. When he was negotiating with the customers, he could modify an estimate or proposal without consulting with the sole proprietor. Consolidated Findings of Fact ## 13 and 14. All of these factors show a significant amount of freedom in how the subject-individual performed his work.

In his decision, the review examiner concluded that the employer exerted direction and control over the services performed, because the sole proprietor “set the rates and provided the assigned work” and “provided the estimate/customer agreement.” The review examiner also noted that the subject-individual did the same work that the sole proprietor would do. We do not believe that these factors show that the employing unit was controlling how the specific services were to be done or performed. In Athol Daily News, the Supreme Judicial Court noted that the focus of prong (a) is not on the relationship between the parties so much as it is on the “indices of control over the details of . . . performance.” 439 Mass. at 177. Thus, providing the assigned work, even if done on the employing unit’s forms, does not show control over the details of what the subject-individual was doing when he went to the customers’ homes. Moreover, it is not clear what the review examiner is referring to when he notes that the sole proprietor “set the rates.” If this is a reference to the estimate/proposal, which is created by the sole proprietor, the review examiner found that the subject-individual could change the estimate/proposal to meet the wishes of the customer. Far from showing direction and control, this shows that the subject-individual was working substantially independently.

From the record, it appears that, once the subject-individual was given the customer information and the estimate/proposal, he was given considerable freedom in how he closed the sale. In short, the means and manner of how the subject-individual did the services was up to him. Therefore, the employing unit has carried its burden with respect to prong (a).

Under prong (b), the employing unit may satisfy its burden by proving either that the services performed are outside the usual course of the employing unit’s business or that they are performed outside all places of the employing unit’s enterprise. *See Id.* at 179. The employing unit need only establish one of the alternate components of prong (b) to carry its burden.

There is no question that the services performed by the subject-individual were not outside the usual course of the employing unit’s business. The claimant was performing roofing or home

improvement sales work for the employing unit's roofing/home improvement company. In addition, as the review examiner noted in his conclusion, the subject-individual did some of the same work as the sole proprietor. Consolidated Finding of Fact # 7.

As to whether the services were performed "outside all places of the employing unit's enterprise," the review examiner concluded that "the contractual relationship established the customers' homes, where the service was being performed, as the 'business location' of the business entity." Therefore, the employing unit did not meet this part of the prong (b) test. We disagree. We decline to adopt the view that a contractual relationship between the employing unit and a customer means that the customer's premises turn into a "place of enterprise" of the employing unit. In Athol Daily News, 439 Mass. at 179, the SJC found prong (b) to be met, because the carriers made "deliveries outside of premises owned by the News or which could fairly be deemed its 'places of business.'" We interpret this to mean that this part of the prong (b) test is concerned with what places are owned, controlled, or maintained by the employing unit for the continuous operation of its business. A customer's home, where the work is performed, is not one of those places.

Here, the substantive work performed by the subject-individual was done at the customers' residences. Although the sole proprietor maintained a home office, the subject-individual never went there. Consolidated Findings of Fact ## 21 and 22. Thus, there was even less contact with the employing unit's main place of business (the home office) than the carriers had in Athol Daily News. There, the Court held that delivering papers to homes or in bundle drops at locations in the community constituted performing services outside of all the places of the employing unit's business, even though the carriers picked up newspapers from the employing unit's distribution center each day. Athol Daily News, 439 Mass. at 179. In Athol Daily News, the carriers had some contact with the company's distribution center. In this case, there was none.

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

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.'" Id. 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 analysis in this case is relatively straightforward. The employing unit did not restrict the subject-individual from performing services for any business or entity. Consolidated Finding of Fact # 27. Consequently, the subject individual could have worked for other employing units if he desired. Nothing in the consolidated findings of fact indicates that the subject-individual had so much work with this employing unit that he was unable to work elsewhere. He could have rejected work if he wanted, although this never occurred. Consolidated Finding of Fact # 8. Because the subject-individual worked for this employing unit, as well as another entity in the 2000's, the subject-individual did not depend on the employing unit to continue his services. Where the subject-individual had a breadth of experience and knowledge in the roofing industry,

time to perform work for others, and the choice of accepting or rejecting work from the employing unit, it has been established that his work could be viewed as an independent trade or business. The employing unit carried its burden with respect to prong (c).

We, therefore, conclude as a matter of law that the review examiner's decision, which concluded that the services performed by the subject-individual constituted employment, is not free from error of law, because the record before us in its entirety shows that the employing unit has met its burden with respect to each prong of G.L. c. 151A, § 2.

The review examiner's decision is reversed. The services performed by the subject-individual were not employment, and the employing unit is not required to make contributions based on those services.



BOSTON, MASSACHUSETTS

Paul T. Fitzgerald, Esq.
Chairman

DATE OF DECISION - July 16, 2020



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
(See Section 42, Chapter 151A, General Laws Enclosed)**

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