



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

Charles F. Hurley Building • 19 Staniford Street • Boston, MA 02114
Tel. (617) 626-6400 • Office Hours: 8:45 a.m. to 5:00 p.m.

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LT. GOVERNOR

SUZANNE M. BUMP
SECRETARY, LABOR AND
WORKFORCE DEVELOPMENT

**BOARD OF REVIEW
DECISION**

JOHN A. KING, ESQ.
CHAIRMAN

DONNA A. FRENI
MEMBER

SANDOR J. ZAPOLIN
MEMBER

BR-105183-XA et seq. (Aug. 15, 2008) -- Skilled performers, designers, music librarians, technical directors, props workers, carpenters, set painters, set construction crew, and stage hands, who worked on discrete productions for local opera company were independent contractors.

**BR-105183-XA
BR-105184-XA
BR-105185-XA
BR-105186-XA
BR-105187-XA**

Introduction and Procedural History of this Appeal

The company appeals five decisions by a review examiner of the Division of Unemployment Assistance (DUA), who concluded that the services performed for the company by principal singers, chorus members, dancers, actors, musicians, chorus librarians, orchestra librarians, lighting designers, makeup designers, technical directors, set designers, props workers, set construction workers, carpenters, truck drivers, set painters, stage hands, Academy stage hands, and sound designers constituted employment within the meaning of G.L. c. 151A, § 2. We review pursuant to our authority under G.L. c. 151A, § 41, and affirm in part and reverse in part.

A random audit by the DUA Status Unit resulted in a determination on August 5, 2005, that the services performed by these personnel constituted employment. The company appealed that determination to the DUA hearings department, which rendered a decision affirming the Status Unit on January 11, 2006. The company appealed that decision to the Board of Review, and we first remanded the case for additional evidence, and ultimately remanded it again for a hearing *de novo*.

The matter was reheard by a new review examiner in the DUA hearings department. Both the company and representatives from the DUA Status Unit attended these hearings. Following these *de novo* hearings, the review examiner rendered five separate decisions on October 2, 2007, which together include all of the listed job categories. These five decisions are the subject of the present appeal.

We have consolidated the five cases into this single written opinion. BR-105183-XA incorporates the job categories of principal singers, chorus members, dancers, and actors. BR-105184-XA includes the musicians. BR-105185-XA covers the company's chorus librarians, orchestra librarians, lighting designers, makeup designers, technical directors, set designers, and props workers. Included in BR-105186-XA are the job titles for set construction workers, carpenters, truck drivers, and set painters. BR-105187-XA includes the appeal for the employer's stage hands, Academy stage hands, and the sound designer.

In each case, the issue on appeal is the same. That is, whether the company has met its burden to prove that the services performed by persons in the listed job categories were not employment within the meaning of G.L. c. 151A, § 2. Our decision is based upon our review of the recorded testimony and exhibits from the *de novo* hearings, the subsequent DUA hearings decisions, and the company's appeal.

Findings of Fact

The DUA review examiner's findings of fact and credibility assessments for each of his five decisions are set forth below in their entirety. Findings numbered one through six are the same for all of the decisions below, and they are as follows:

1. On 8/5/05, [Employer], [address] was notified that the services performed by "performers"¹ and others similarly employed constituted employment within the meaning of Section 2 of MGL Chapter 151A.
2. On 8/13/05, [Employer] appealed this determination.
3. This business is a 501-3C non-profit corporation in existence since 1976 which provides/produces opera concerts and musical theatre performances to the local region (approximately 5 per year). The corporation offices are located at the [] address and a warehouse used to store sets, props, and other items is located in [Town] Ma. The opera company has no performance venues of its own. Local colleges, high schools, church organizations, and music academy theatres are used for the performances. The opera company also sponsors educational programs to involve students in the arts.
4. The opera company has a 26 member volunteer board of directors and an executive committee which governs/sets policy for the opera company. The company employs an Executive Director and an Office Manager on a full time basis to run the daily operation, as well as an Artistic Director to produce the shows.

¹ We restate finding #1 for each Board docket number to reflect the respective job titles in each case.

5. Funding for the productions comes from donations (60% of revenue) from patrons, businesses in the area, advertisements, merchandising, and ticket sales (40% of revenue).
6. When the Board decides which productions will be performed during the year, the Artistic Director is then engaged to begin the process of putting together the production staff, support staff, musicians, and performers for the individual shows. The Artistic Director puts together a budget and submits it for approval by the Board. A venue for the performance is also obtained. Sometimes the opera company uses the staff from the particular venue being used for the production of the shows. However, at times the opera company uses its own crew who are paid “honoraria” or fees and this is the group this hearing is dealing with.

The findings specific to the principal singers, chorus members, dancers, and actors, now assigned number BR-105183-XA are as follows:

1. On 8/5/05, [Employer], [address] was notified that the services performed by “performers” and others similarly employed constituted employment within the meaning of Section 2 of MGL Chapter 151A.
7. The performers (principal singers, chorus, dancers, and actors) apply for various parts in each production advertised in various publications, by contacting the company offices and providing resumes, pictures, and audition tapes. The best qualified are chosen by the Artistic Director, often through scheduled auditions. The auditions can be held at the venues or space donated by local colleges.
8. The performers chosen are then sent a “Letter of Agreement” for the role which states the date, time, and place for the performances, as well as the number of performances. The agreement also states the amount of the honorarium agreed to by both (no set method of determining this amount). The agreement must be signed and the signatory agrees to communicate with the Artistic Director and the Stage Director in a timely manner as needed to meet the needs of the production.
9. The agreement does not limit the performers from working for other companies as available. They can have their own business as they prefer, and do in some cases (not necessarily related to this field). Most are employed in regular occupations (including college professors) and some are professional performers.

10. The opera company also sets the rehearsal schedule for the production (in writing) which can be adjusted as needed. (This can be weekly for a few hours for several weeks and more intense as the performance date approaches). The performers also do their own rehearsal work prior to the company rehearsal schedule as needed to learn the part, and sometimes hire their own “coach” for this purpose.
11. The opera company can provide scripts or music but at times the performers may provide their own. The performers are expected to take direction from the Artistic and Stage directors but are also expected to provide their own unique abilities, experience, and interpretation to their parts. The Opera Company does not specifically provide “training” in this field. Costumes (rented) are usually provided by the opera company.
12. No taxes are taken out of the honoraria and no benefits of any kind are provided to the performers. A form 1099 is issued for tax purposes (if paid over \$600.00 in a year).
13. The opera company has liability insurance covering the performers and other participants of the production. No Workmen’s Compensation coverage is provided, and no health insurance is provided (except to the actual employees).
14. The relationship with the performers ends when the performances end, but they can be considered for future roles as well.

The review examiner’s findings that are specific to the employer’s musicians, assigned appeal number BR-105184-XA, are as follows:

1. On 8/5/05, [Employer], [address] was notified that the services performed by “musicians” and others similarly employed constituted employment within the meaning of Section 2 of MGL Chapter 151A.
7. After the Artistic Director chooses an Orchestra Manager, he reviews what number and type of musicians are needed for the production in process. He then uses a list available at the office to contact local musicians he is familiar with or who have the needed experience for the show to see if they are available.
8. The musicians play various musical instruments in support of the performers (singers, chorus, dancers, actors). The best qualified are chosen by the Artistic Director. They usually don’t need auditions as they are experienced musicians working for local orchestra/choral groups. The opera company does not provide training to the musicians.

9. The musicians are usually provided the music for the performances and they are expected to learn this mainly on their own. There is a rehearsal scheduled prior to the performance, however, which the opera company sets. This is usually at the venue. The musicians have no need to report to the opera company offices for any specific reason.
10. There is usually no written contract with the musicians. They are usually paid an “honorarium” for their performances (no specific method used to determine the amount), but some actually volunteer their services (these individuals were not targeted by the DUA investigation, however). They do agree to the performance dates, times, and venues, as well as the number of performances needed. They also take direction from the Orchestra Manager or Conductor during the performances.
11. The musicians provide their own musical instruments. The opera company provides the music stands and chairs are provided by the venues.
12. The musicians can work for other companies as available. They can have their own business as they prefer, and do in some cases (not necessarily related to this field). Most are employed in regular occupations (including working for other orchestras) and some are professional performers.
13. No taxes are taken out of the honoraria and no benefits of any kind are provided to the musicians. A form 1099 is issued for tax purposes (if paid over \$600.00 in a year).
14. The opera company has liability insurance covering the musicians and other participants of the production. No Workmen’s Compensation coverage is provided, and no health insurance is provided (except to the actual employees).
15. The relationship with the musicians ends when the performances end, but they can be considered for future roles as well.

The following factual findings were made concerning the employer’s chorus librarians, orchestra librarians, lighting designers, makeup designers, technical directors, set designers, and props workers, BR-105185-XA:

1. On 8/5/05, [Employer], [address] was notified that the services performed by “chorus librarians, orchestra librarians, lighting designers, makeup designers, technical directors, set designers, and props workers” and others similarly employed constituted employment within the meaning of Section 2 of MGL Chapter 151A.

7. The Artistic Director chooses all of these positions for the production from a list of available people who may or may not have provided such services to the opera company in the past, but who have experience in the needed services. The opera company does not provide training for these services.
8. The production staff chosen are then sent a “Letter of Agreement” for the service which states the date, time, and place for the performances, as well as the number of performances. The agreement also states the amount of the honorarium agreed to by both (no set method of determining this amount-individual depending on the extent of the services and the estimates submitted by the various services). The agreement must be signed and the signatory agrees to communicate with the Artistic Director and the Stage Director in a timely manner as needed to meet the needs of the production.
9. The agreement does not limit the production staff from working for other companies as available. They can have their own business as they prefer, and do in some cases (not necessarily related to this field). Most are employed in regular occupations.
10. The opera company also sets any rehearsal schedule for the production (in writing) which can be adjusted as needed.
11. The production staff may provide their own tools. The production staff is expected to take direction from the Artistic and Stage Directors, but is also expected to provide their own unique abilities, experience, and interpretation to their services.
12. The chorus and orchestra librarians are usually singers and musicians already engaged for those services and who are then paid an additional amount to obtain/rent the needed written music and choral scripts for the orchestra and the chorus. These documents are then passed out to the singers/musicians for the performances, and then collected after the performances by the librarians to return to the publisher. The opera company pays the costs of the rentals.
13. The set designer is a skilled worker (no training) who meets with the Artistic Director to determine what the stage sets are to look like based on the production and either use(s)
14. [Existing] sets owned by the opera company or design(s) new sets as needed. The set designer may help construct the sets elsewhere but then deliver(s) them to the venue for the performances, and dismantles them afterward.

15. The lighting designer (skilled worker) may use the existing lighting at the venue or bring in other equipment to set up. The opera company pays for the cost of rental equipment. This designer will also meet with the Artistic Director to find out what is needed for the production. He sets up computer programs to control the lighting needed for various scenes or acts in the production, and will monitor and adjust the lighting during the productions as needed.
16. The makeup designer (skilled worker) also meets with the Artistic Director to determine what makeup is needed for the performers during the production, based on lighting needs, story line and direction. The makeup artist will be present for the performances and make adjustments as needed. Helpers for these skilled positions may be hired by them, and they cover the cost (usually part of any estimate made to the opera company, as well as the make-up costs).
17. The technical director will be at the performances controlling the lighting changes as needed based on scene movement. They also monitor the lighting and dialogue at the rehearsals and the performances. They are also considered skilled workers and get no training, but they also meet with the Artistic Director to learn the needs of the production and the methods of proceeding with same.
18. The props person will meet with the Artistic Director to find out what the production props needs are (list given to him) and to prepare and obtain the needed set props for each scene. The props can be purchased new or obtained from the opera company's warehouse collection. The props person will attend the rehearsal and be present during productions for adjustments as needed. No training is provided by the opera company. The props person also gets a budget based on his estimate of what is needed for the production.
19. No taxes are taken out of the honoraria and no benefits of any kind are provided to the production staff. A form 1099 is issued for tax purposes (if paid over \$600.00 in a year).
20. The opera company has liability insurance covering the production staff and other participants of the production. No Workmen's Compensation coverage is provided, and no health insurance is provided (except to the actual employees).
21. The relationship with the production staff ends when the performances end, but they can be considered for future roles as well.

The review examiner issued the following specific findings regarding the services of the employer's set construction workers, carpenters, truck drivers, and set painters, which have been assigned appeal number BR-105186-XA:

1. On 8/5/05, [Employer], [address] was notified that the services performed by "set construction workers, carpenters, truck drivers, and set painters" and others similarly employed constituted employment within the meaning of Section 2 of MGL Chapter 151A.
7. The Artistic Director chooses the production staff positions for the production from a list of available people who may or may not have provided such services to the opera company in the past, but who have experience in the needed services. The opera company does not provide training for these services. .
8. The production staff listed above does not have to sign a "Letter of Agreement" for their service (only the skilled production staff does that).
9. The truck driver is a relative of the founder of the company and performs labor work as needed (direction given from the Artistic Director or Stage Director). He is paid an "honorarium" also (no set method of determining the amount). The opera company will rent a truck to transport the sets from the carpenter's work location or the warehouse to the venues, and the truck driver will also be available for any odd jobs or supporting the set assembly. He submits an invoice for payments.
10. The carpenter is engaged to physically build the set (often at his own workplace), work with the Artistic Director and set designer to get needed specifications and designs, and then assemble it at the venue for the performances. He can use construction workers if needed, but the opera company also pays construction workers directly if needed to assist at the performance venue. They are paid by invoice submitted to the opera company.
11. The carpenters [use] their own tools and are not provided with any training.
12. The set painter position is rarely paid. This is often a volunteer position, although at least two of these positions [were] listed as receiving an honorarium on the company records. The set painters paint various parts of the performance sets on stage. They may do this on stage at the venue or elsewhere where the sets are being prepared. The opera company purchases the paint and brushes for this work. They are not given training, but are engaged for the duration of the needed preparation for the sets.

13. This production staff can work for other companies as available. They can have their own business as they prefer, and do in some cases (not necessarily related to this field). The carpenter has his own business. Most are employed in regular occupations.
14. No taxes are taken out of the honoraria and no benefits of any kind are provided to the production staff. A form 1099 is issued for tax purposes (if paid over \$600.00 in a year).
15. The opera company has liability insurance covering the production staff and other participants of the production. No Workmen's Compensation coverage is provided, and no health insurance is provided (except to the actual employees).
16. The relationship with the production staff ends when the performances end, but they can be considered for future roles as well.

Finally, the review examiner's findings specific to the employer's stage hands, Academy stage hands, and sound designer, now incorporated into BR-105187-XA, are as follows:

1. On 8/5/05, [Employer], [address] was notified that the services performed by "stage hands, Academy stage hands, and the sound designer" and others similarly employed constituted employment within the meaning of Section 2 of MGL Chapter 151A.
7. The Artistic Director chooses the production staff positions for the production from a list of available people who may or may not have provided such services to the opera company in the past, but who have experience in the needed services. The opera company does not provide training for these services.
8. The sound designer chosen is then sent a "Letter of Agreement" for the service which states the date, time, and place for the performances, as well as the number of performances. The agreement also states the amount of the honorarium agreed to by both (no set method of determining this amount-individual depending on the extent of the services and the estimates submitted by the various services). The agreement must be signed and the signatory agrees to communicate with the Artistic Director and the Stage Director in a timely manner as needed to meet the needs of the production.
9. The agreement does not limit the production staff from working for other companies as available. They can have their own business as they prefer, and do in some cases (not necessarily related to this field). The sound designer has his own business. Most are employed in regular occupations.

10. The remaining production staff listed above does not have to sign a “Letter of Agreement” for their service.
11. The sound designer sets up and designs the sound/amplification for the production, as directed by the Artistic and Stage Directors, placing microphones as needed and setting up speakers. This sound designer uses his own equipment (has his own business) but works around the budget agreed upon between him and the opera company. The sound designer can set up the equipment at his own time, but this must be completed within the time constraints of the production and the rehearsal schedules. The sound designer is used for the duration of the production.
12. The Academy stage hands and the stage hands are used to help the other production people get their work done, as well as assist in the back stage needs of the performances.
13. They are present at the venue before, during, and after the performances.
14. The Academy stage hands are from the local Academy of Music and when they are used, their earnings are governed by union rates. Regular stage hands can be volunteers or students, and can be paid less, using an invoice.
15. This production staff can work for other companies as available also. They can have their own business as they prefer, and do in some cases (not necessarily related to this field). Most are employed in regular occupations.
16. No taxes are taken out of the honoraria and no benefits of any kind are provided to the production staff. A form 1099 is issued for tax purposes (if paid over \$600.00 in a year).
17. The opera company has liability insurance covering the production staff and other participants of the production. No Workmen’s Compensation coverage is provided, and no health insurance is provided (except to the actual employees).
18. The relationship with the production staff ends when the performances end, but they can be considered for future roles as well.

Ruling of the Board

The Board adopts the DUA review examiner’s findings of fact, with the exception of a portion of finding #10 under BR-105186-XA, which we take exception to for reasons which are set forth below (see page 13). In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

Employment is defined 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.

This is the so-called “abc test.” The three prongs of this test are conjunctive. Therefore, if the employer fails to prove 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).

Section (a)—*free from direction and control*

The DUA review examiner made a legal conclusion that all of the jobs listed in this appeal were subject to the opera company’s direction and control. We disagree, because the evidence shows otherwise.

The principal singers, chorus members, dancers, and actors (“skilled performers”) were all required to sign a Letter of Agreement. They agreed to perform a role in the production of one opera or musical, which included a number of performances at designated dates, times, and a venue. In return, the company paid them a fee. They were further required to communicate with, and take direction from, the Artistic and Stage Directors as needed to meet the needs of the production and to abide by the rehearsal schedule. More significantly, they had to learn their parts on their own time prior to the company rehearsals and, if necessary, to retain their own coach for this purpose. Additionally, the company expected these skilled performers to bring their own unique talent and experience to their parts. Beyond these expectations, they were free to work for other companies or for their own businesses.

Although the musicians did not sign Letters of Agreement, the terms of their engagements were similar. In exchange for a fee, the musicians had to play at designated performance dates, times, and venues, as well as the scheduled rehearsals. They were expected to learn their musical parts on their own in advance and to take direction from the Orchestra Manager or Conductor during the performances. Like the other performers, the musicians were not prohibited from engaging in other work for themselves or for other companies.

We analyze prong (a), under common law principles of a 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 the Division of Employment and Training, 439 Mass. 171, 177 (2003), *quoting* Griswold v. Dir. of Division of Employment Security, 315 Mass. 371, 372-373 (1944). “[T]he test is not so narrow as to require that a worker be entirely free from direction and control from outside forces.” Athol, 439 Mass. at 178.

Although Massachusetts courts have not recently applied the test to skilled professionals, federal courts have done so in order to distinguish an employee from an independent contractor under Title VII of the federal Civil Rights Act of 1964 and under the Americans with Disabilities Act. In Alberty-Velez v. Corporacion de Puerto Rico, a television actress was held to be an independent contractor, even though the employer directed her during filming, dictated the location of the filming sites, and controlled her hours during filming days. 361 F.3d 1, 9 (1st Cir. 2004). The Court of Appeals emphasized that “control” must be examined in light of the nature of the work and industry at issue. Id.

The court used Lerohl v. Friends of Minnesota Sinfonia, 322 F.3d 486 (8th Cir. 2003), *cert. denied* 540 U.S. 983 (2003), to illustrate its point. In Lerohl, the court rejected the argument that because the conductor selected the music, scheduled rehearsals and concerts, and determined how the music was to be played, two orchestra musicians were subject to control.

‘[W]ork by independent contractors is often performed to the exacting specifications of the hiring party.’ Musicians participating in an orchestra are, by necessity, subject to the control and scheduling of the conductor because such control allows the symphony to perform as a single unit. . . . [T]he relevant control issue was not whether the conductor could instruct the musicians ‘where to sit and when to play’ but whether the musicians retained the discretion to decline to participate in Sinfonia concerts to play elsewhere.

Alberty-Velez, 361 F.3d at 9, *quoting* Lerohl, 322 F.3d at 491. *See also* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 752-53 (1989)(sculptor was an independent contractor even though the organization that hired him specified most of the details of the sculpture.)

These federal cases found significant to the issue of control that the individuals were skilled, used their own tools, were hired for short periods of time, were paid to complete a specific job, that the company had no right to assign additional work during or after that time period, and that the workers were free to set their own hours to do the lions share of their work, at home or in their own studio, making daily supervision impossible. As in the present appeal, the skilled performers and musicians were also highly skilled professionals who needed no on-the-job training other than rehearsals to perform in a variety of settings. Alberty-Velez, 361 F.3d at 7; Lerohl, 322 F.3d at 491.

In the unemployment insurance context in other jurisdictions, an opera performer has been held to be an independent contractor, Spackman v. D.C. Dept. of Employment Services, 590 A.2d 515 (D.C., 1991), and orchestra musicians were held to be independent contractors and not subject to unemployment taxes, Florida Gulf Coast Symphony v. Dept. of Labor and Employment Security, 386 So.2d 259 (Fla. Dist. Ct. App. 1980.)

Seeing no distinction between the professionals in these cases and the professionals incorporated into BR-105183-XA and BR-105184-XA, we conclude that they were sufficiently free of the opera company's control to satisfy prong (a).

We also conclude on similar grounds that the lighting, makeup, and set designers, ("designers,") chorus and orchestra librarians, ("librarians,") technical directors, and props workers in BR-105185-XA were free of the company's control.

The designers signed the same Letters of Agreement as the skilled performers, which set forth expectations only as to the result, i.e., create a basic set design and final plans within the required deadlines. Like the skilled performers and musicians, these workers took direction from the Artistic and Stage Directors, and applied their own unique abilities, experience, and interpretation to their services. The opera company paid each a lump sum to perform the necessary work over a short period of time without regard to the number of hours they worked at the venue or in their own studios. The company provided no training, imposed no limits on their ability to perform work for others, and retained no right to impose additional work during or after the time period. The designers, technical directors, and props workers all used their own tools; the librarians did not need any.

In sum, there is nothing in the record to suggest that the opera company exercised any more control over these individuals than the skilled performers or musicians. Therefore, as to them, prong (a) is satisfied.

BR-105186-XA includes set construction workers, carpenters, truck drivers, and set painters. The record fails to show that the opera company in fact paid any set constructions workers. Any set construction workers that were required were retained directly by the carpenter. Therefore, there is insufficient support for the review examiner's finding #10, which took the position that the company paid any set construction workers who were needed. The company thus has no obligation to pay unemployment taxes for set construction workers.

The carpenter was a skilled craftsman. The company did not supervise the carpenter's work; it cared only about the final product. He was expected to produce sets in accordance with the set designer's rendering in time for the performance and to assemble them at the venue. Like the skilled performers and musicians, the carpenter set his own hours, used his own tools, worked from his own shop, received no training, was hired for a short period, and had his own separate carpentry business. These facts do not support the review examiner's conclusion that the opera company directed and controlled the carpenter's services.

The "truck driver" was related to the company's founder. He performed odd jobs, as needed, including delivering sets to and from the warehouse. He did not receive training, but there is no indication that his services required training. Exhibits 7 and 13 show that he worked for the company for four months, earning only \$320 (the balance was reimbursement for mileage and materials.) Without more evidence, we are unable to determine whether he was free of the company's direction and control. Unless an employer can prove prong (a) under G.L. c. 151A, § 2, services are deemed to be employment. As there is insufficient evidence to prove prong (a), we conclude that this truck driver's services constitute employment.

According to the findings, the set painters were usually volunteers, but some received honorariums. They were given paint, brushes, and an artist's rendering of the set, then painted the set at home or at the venue without supervision. They received no training, worked on their own time and only for as long as it took to complete the set for a performance. The company relied upon them only for the final product, then their work commitment ended. Under these circumstances, we conclude that the set painters paid with honorariums were sufficiently free of the company's direction and control to satisfy prong (a). The company is under no obligation to pay unemployment taxes for persons who volunteer their services.

Sound designers, stage hands, and Academy stage hands are included in BR-105187-XA. The findings concerning the nature of services these individuals performed for each production are irrelevant, inasmuch as there is no evidence that the DUA Status Unit found any payments to sound designers, stage hands, or Academy stage hands during their audit. The determination that they were employees is therefore incorrect as a matter of law, and the company is under no obligation to pay unemployment taxes for their services.

Section (b)—engaged in an independent trade or business

The DUA review examiner concluded that the work performed by all of the individuals listed above was performed at the opera company's places of business. We disagree. The opera company had an office and a warehouse. The musicals and operas were performed at a number of different venues, including local colleges, high schools, churches, and music academy theatres, but in no instance were they performed at the company's office. These performance venues were not owned or controlled by the company. Rather, they were the place of business of the local colleges, school departments, churches, and music academy, respectively. Since all of the listed services in this appeal were either performed in shops, studios, or at the theater venues and not at the employer's office or warehouse, we conclude that the services were performed outside of the enterprise's places of business. The company has met its burden of proof under section (b).

Section (c)—engaged in an independent trade or business

The DUA review examiner concluded that the employer failed to sustain its burden to prove prong (c) because the workers who operated their own business might or might not have been in the same field as the opera company. We disagree.

The SJC requires the following approach to evaluating part (c). 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, 439 Mass. at 181.

The Athol test does not require a worker to be actually conducting work for others in the field. He must merely be *capable* of doing so. In the present appeal, these workers were free both in contract and in fact to perform their services to anyone wishing to avail themselves of the services.

It is undisputed that the listed personnel were retained to perform services for one production at a time, with no guarantee that they would be retained for the next one. Nothing in the Letters of Agreement or the company's practices restricted these workers from performing their musical, theatrical, or production services for other companies. In fact, many did so.

The workers in the present appeal were much like the taxi drivers in Comm'r. of Division of Unemployment Assistance v. Town Taxi of Cape Cod, 68 Mass.App.Ct. 426 (2007), who were free to open their own taxi service or drive for other companies without restriction. Compare them to the janitor in Coverall, 447 Mass. 852, who could not expand her own business without the employer taking the new customer. The Supreme Judicial Court held the taxi drivers to be independent contractors. The janitor was not, however, because she was compelled to depend entirely upon the employer.

Conclusion

Inasmuch as the DUA Status Unit failed to present evidence that the company paid wages for the services listed in BR 105187-XA, we conclude as a matter of law that these services were not employment within in the meaning of G.L. c. 151A, § 2.

As the company has satisfied all three prongs of the abc test for the services listed in BR-105183-XA, BR-105184-XA, and BR-105185-XA, we also conclude that these were independent contractor services for which the company is not required to pay unemployment taxes.

Under BR-105186-XA, the company sustained its burden of proof that the carpenter and set painters were independent contractors for whom the employer has no tax liability. However, because the company failed to prove that the services listed as truck driver were free of its direction and control, the company must pay unemployment taxes on the truck driver's services.

The DUA review examiner's decision is affirmed in part and reversed in part.

BOSTON, MASSACHUSETTS
DATE OF MAILING - August 15, 2008



John A. King, Esq.
Chairman



Sandor J. Zapolin
Member

Member Donna A. Freni did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT

(See Section 12, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT- September 15, 2008