



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-110419-X (Feb. 25, 2010) -- Installer of paving stone for employer's home improvement projects was an independent contractor. The employer did not supervise his work, all services were performed at residential homes, and the claimant performed similar projects for his own construction business.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner in the Division of Unemployment Assistance (DUA), which concluded that the claimant's services did not constitute 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 a status determination issued on January 15, 2009, the agency determined that the services that the claimant performed were those of an employee, and not those of an independent contractor. The employing unit appealed the determination to the DUA hearings department. Following a hearing on the merits, in which only the employing unit participated, the review examiner overturned the agency's initial determination in a decision rendered on June 10, 2009.

The review examiner concluded that the claimant was free from the employing unit's direction and control and was not restricted from working for any other employer or business. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case back to the review examiner to take additional evidence. Both parties participated in the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record, including the consolidated findings.

The issue on appeal is whether the employing unit demonstrated that their relationship with the claimant was not that of employment within the meaning of G.L. c. 151A, § 2.

Findings of Fact

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

1. The alleged employer (the "employer") is engaged in the sales and marketing business.
2. The employer develops leads for home improvement projects, i.e. basement finishing, replacement windows and paving stone, through direct mailings, canvassing, and advertising.
3. The employer contracts out the installation for the projects.
4. The employer was referred by a sub-contractor to the claimant's business, [business X].
5. The claimant managed the installations of paving stone at customers' homes.
6. When the employer needed a specific project completed the employer hired the claimant to manage the project.
7. The claimant managed projects for the employer from May 5, 2008 through [November 14], 2008, when the employer no longer had any projects for the claimant.
8. The claimant had no specific schedule, but was given a timeframe for completion of each project.
9. The claimant provided his own work tools and vehicle.
10. The employer provided the supplies and products for the projects.
11. On July 1, 2008 the claimant purchased a slide, a skimmer, and PVC piping from two different [pool] stores through his business [business X].
12. The employer reimbursed the claimant for any supplies he purchased for projects through his own business.
13. The claimant was expected to follow the manufacturers' installation instructions.

14. The claimant was not required to inform the employer if he wanted to take time off from working on a project.
15. The employer did not provide the claimant with benefits.
16. The employer paid the claimant based on the square feet of each job.
17. The claimant was reimbursed for mileage to certain jobs.
18. The claimant was paid upon completion of each project.
19. The employer did not deduct social security taxes or any other taxes from the claimant's payment.
20. The employer reported the claimant's payment on a 1099 Form.
21. The claimant was not restricted from working for any other employer or business.
22. The claimant worked on similar projects for his own business while he managed the employer's projects.
23. On November 28, 2008, the claimant filed an unemployment claim. The effective date of the claim is November 23, 2008.

Credibility Assessment:

The claimant contends that his business [business X] was not in existence at the time he worked for the employer. However, documents in the record show that on July 1, 2008 the claimant purchased a slide, a skimmer, and PVC piping from two different [pool] stores through his business [business X].

The claimant offered that he purchased the items through the 'defunct' business because he had accounts at the [pool] stores.

However, the claimant's testimony is in question and as such the employer's testimony regarding the agreement between the employer and the claimant is deemed more credible.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact. 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.

The review examiner evaluated the claimant's eligibility 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.

It is the employer's burden to meet all three prongs of the "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).

With respect to prong (a), we consider whether services performed by an individual are 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." Griswold v. Dir. of Division of Employment Security, 315 Mass. 371, 372 (1944). However, the inquiry under prong (a) is "not so narrow as to require that a worker be entirely free from direction and control from outside sources." Athol Daily News v. Board of Review of the Division of Employment and Training, 439 Mass. 171, 178 (2003).

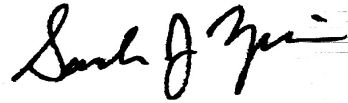
Here, the claimant was free from the employing unit's control. Specifically, the review examiner found that the employing unit did not provide the claimant with a specific schedule by which projects had to be conducted. Further, the review examiner found that the claimant followed the manufacturer's guidelines, not the employing unit's, when installing paving stone on projects. Finally, the claimant used his own tools and vehicle, not those of the employing unit's, when working on a project. Given the employing unit's lack of supervision over the work performed by the claimant, we conclude that the employing unit has demonstrated that the claimant was free from their direction and control.

The claimant installed paving stone at residential homes which were not owned by the employing unit. As such, the services provided by the claimant were performed outside of the employing unit's places of business. The employing unit has met their burden of proof under prong (b).

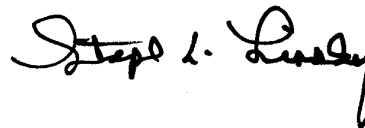
As for prong (c), the key question is whether “the worker is capable of performing the service to anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer...” Athol, 439 Mass. at 181. Not only was the claimant capable of performing similar services for others but, as the review examiner found, he worked on similar projects for his own construction business while overseeing the paving stone installations scheduled by the employing unit. Thus, the employing unit has shown that the claimant was customarily engaged in an independently established trade and was not compelled to depend on a single employer.

As the employing unit has satisfied all three prongs of the “ABC” test, the services performed by the claimant do not constitute employment pursuant to G.L. c. 151A, § 2. As such, the employing unit is not required to pay unemployment taxes on the claimant’s earnings or others similarly employed. The DUA review examiner’s decision is affirmed.

MAILING DATE: February 25, 2010



Sandor J. Zapolin
Member



Stephen M. Linsky, Esq.
Member

Chairman John A. King, Esq. 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- March 29, 2010

NPV/lw