



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
BOARD OF REVIEW

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## BOARD OF REVIEW DECISION

BR-116119-XA (Sept. 28, 2011) – Under G.L. c. 151A, § 2, the employer proved that its newspaper carriers were independent contractors. Under prong (a), the relationship more closely resembled the degree of direction and control over newspaper carriers in the Supreme Judicial Court's Athol Daily News decision, rather than over the carriers in the Mass. Appeals Court's Driscoll decision.

### Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) that certain services performed by the claimant constituted employment within the meaning of G.L. c. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On November 24, 2009, the agency issued a status determination, which found that the services performed by the claimant and others similarly situated constituted employment within the meaning of G.L. c. 151A, § 2. The employing unit appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties as well as a representative from the DUA's Status Unit, the review examiner affirmed the agency's initial determination in a decision rendered on October 19, 2010.

The review examiner concluded that the services performed by the claimant constituted employment, because, although the claimant performed all work outside all of the employer's places of business and was capable of engaging in an independently established business of the same nature as the employing unit, the claimant was not free from the direction and control of the employing unit and, thus, was in employment under G.L. c. 151A, §§ 2 and 1(k). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employing unit's appeal, we provided the parties with an opportunity to submit written reasons for agreeing or disagreeing with the review examiner's decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue on appeal is whether the services performed by the claimant as a newspaper delivery person constituted employment.

Findings of Fact

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

1. The alleged employer (the "Employer") is in the business of publishing and distributing newspapers and advertising included with newspapers.
2. From October 2005 until sometime in about February 2009, the claimant performed services as a delivery person, delivering the Employer's newspaper to customers of the Employer.
3. The claimant entered into a Wholesale Agreement (the "Agreement") with the Employer.
4. The Agreement was written on the letterhead of the Employer and drafted by the Employer.
5. The Employer customarily has its new delivery person drive with a member of management to learn their route (see below). The Employer suggests an order for delivering papers on routes. The carriers are not required to follow that suggested order for delivering papers.
6. The claimant purchased newspapers from the Employer at a wholesale rate set by the Employer. The claimant charged customers of the Employer a suggested retail rate established by the Employer. The difference in those amounts was the amount the claimant was paid by the Employer.
7. On a weekly basis, the Employer produced a bill for the claimant which she was required to pay no later than the following Monday after she received the bill.
8. The Employer reported the claimant's pay on a 1099 Form.
9. Under the Agreement, the Employer agreed to compensate the claimant at an amount set forth in the Agreement for new qualified subscriptions obtained by the claimant.
10. Under the Agreement, the Employer agreed to provide the claimant with a reasonable number of free copies of the newspapers for her to provide as samples to prospective customers.

11. The Employer set and reorganized the geographic territories where the claimant worked. Customers who signed up to receive the Employer's newspaper within the territory were the customers to whom the claimant delivers a newspaper.
12. The Employer required its newspaper delivery persons like the claimant to deliver newspapers by a deadline time- 5 PM Mondays through Fridays, and an earlier established time on Saturdays. The Employer communicated the delivery deadline to its customers.
13. The Agreement called for the Employer to impose a charge to the claimant if she failed to make a delivery or missed a delivery.
14. The Employer required its newspaper delivery persons to deliver the paper to customers in a dry, readable condition.
15. The Employer provided plastic bags for the claimant to bag the newspapers in the case of inclement weather. The Employer advised the claimant to "double bag" newspapers in the event of inclement weather. The claimant did not have to pay for the bags.
16. The Employer provided elastic bands for the claimant to band the newspapers. The claimant did not have to pay for the elastics. The Employer did not require the claimant to use elastic bands to band newspapers.
17. The Employer did not inspect the claimant's work.
18. The Employer provided billing envelopes for the claimant to use to bill customers who paid cash for their newspapers. The envelopes included the name of the customer and the due date for their bill. The claimant did not have to pay for the billing envelopes.
19. The claimant was permitted to deliver the newspapers by foot, car or other means. The claimant was not required to inform the employer about which method she used for deliveries.
20. If the claimant used a car to deliver newspapers, the car was not required to have any Employer identification on it.
21. The claimant was required to pay for her own gasoline and own car insurance.
22. At the time the claimant was hired, she was required to show the Employer her driver's license and proof of car insurance.
23. The Employer did not provide worker's compensation to the claimant.

24. If a customer wanted to stop/start delivery of the newspaper, the customer called the Employer.
25. If the customers to whom the claimant delivered the newspapers had a complaint, they customarily contacted the Employer at its "800" number which was published in the Employer's newspaper.
26. If the Employer received a complaint or complaints from a customer on a carrier's route, the Employer would discipline the carrier or terminate the carrier's services.
27. The Employer's newspapers were printed, and then dropped off at the Employer's distribution center.
28. The claimant picked up newspapers at the Employer's distribution center. The distribution center had established hours and the claimant and other carriers were only allowed to pick up papers only during those hours.
29. The claimant picked up the number of newspapers for the number of customer deliveries in her territory. Those numbers were retained in the Employer's computer system and conveyed to the claimant.
30. At the distribution center, the Employer provided the claimant with a daily route list. The route list included information, including the names and addresses of customers to whom the newspaper was to be delivered, the customers' account numbers, whether the customer had prepaid his/her bill and instructions about specifically where at the customers' delivery address to deliver the newspapers.
31. The Employer sometimes instructed the claimant to affix stickers to newspapers and to deliver advertisements with the papers.
32. The Employer prohibited the claimant from inserting any foreign material into the newspapers.
33. The claimant was required to collect payments from customers who paid cash for the newspapers.
34. The claimant was allowed to work whatever hours she liked as long as the newspapers were delivered by the time set forth by the Employer. The claimant was allowed to take as many breaks and to do as much personal business on the days she was delivering newspapers as long as the newspapers were delivered by the time set forth by the Employer.
35. The claimant did not have to deliver the newspapers in any particular order.

36. The Employer did not provide the claimant with any benefits such as vacation pay or retirement benefits.
37. The Employer gave its newspaper carriers like the claimant the option to obtain health insurance through a bonding company associated with the Employer.
38. The claimant was allowed to use other persons to help her deliver newspapers.
39. The claimant was responsible for paying helpers who assisted her with delivering newspapers.
40. It was customary for delivery people to call their Manager if they were unable to do their route due to sickness or any other reason.
41. The Employer expected the claimant to find a replacement worker if she was unable to deliver her newspapers.
42. If the claimant was unable to find a replacement, management of the Employer would sometimes fill in to cover the claimant's route. On an occasion when the claimant was out of work for one week, the Manager covered her route.
43. The Employer offered carrier recognition programs to its newspaper carriers. The programs had prizes such as gas cards or other gifts. The programs were publicized to carriers through flyers posted at the distribution center.
44. The Employer did not restrict the claimant from delivering newspapers for any other entities or from engaging in other work or employment with other entities.
45. While she worked for the Employer, the claimant was not delivering newspapers for any other entities.
46. From March 2008 until December 2008, the claimant also performed services for the Employer as a recovery driver, where her duties were to deliver newspapers to customers whose deliveries were missed during the day. At that position, the claimant usually worked Monday through Friday, from 5 PM to 8 PM and Saturday, from 8 AM to 12 PM.
47. In about February 2009, the Employer terminated the claimant's services as a newspaper carrier. The Employer terminated the claimant's services because they determined she owed them money.

48. On September 23, 2009, the claimant filed an unemployment claim. The effective date of the claim is September 20, 2009.

### Ruling of the Board

The Board adopts the review examiner's 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.

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.

In other words, the employing unit must 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 Division 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 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).

The review examiner concluded that the employing unit had carried its burden with respect to prongs (b) and (c), but not (a). Most significantly, the review examiner concluded that the employing unit had not satisfied prong (a), because the employing unit would receive complaints about carriers and could discipline carriers accordingly and the employing unit offered incentive and carrier recognition programs.

*Prong (a): Direction and Control*

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 (internal citations and quotations omitted).

The review examiner found that the employing unit required the claimant to deliver newspapers in a dry, readable condition. The claimant picked up the newspapers from the employing unit’s distribution center, which had established hours for pick-ups. She purchased newspapers from the employing unit at prices established by the employing unit, but sold the newspapers to customers only at a suggested price and could charge more if customers were willing to pay it. She could perform the deliveries in any manner she chose, including by foot, car, or other means. Although she was initially given a suggested route to follow, the claimant could deliver the newspapers in any order she wanted. She was not supervised on a regular basis while she delivered the newspapers, and she could make her own schedule and stop her deliveries to take breaks when she wanted, as long as the papers were delivered in readable condition by a certain time each day. The employing unit provided plastic bags for carriers to use in the event of inclement weather or if required to do so by a customer of the employing unit, but, per the contract between the claimant and employing unit, use of plastic bags or elastic bands was not required.<sup>1</sup> Carriers could use other people to deliver their newspapers, and the carriers were responsible for compensating those persons. The employing unit also expected the carriers to find a replacement if a carrier was unable to perform a route on a particular day, although, in practice, the claimant’s manager could step in and perform a route if a replacement could not be found.

At the hearing, the representative from the DUA’s Status Unit relied heavily on Driscoll v. Worcester Telegram & Gazette, 72 Mass. App. Ct. 709 (2008), an Appeals Court case in which the Court found that adult carriers of newspapers were employees of a newspaper. In Driscoll, the Court noted that the employer “controlled virtually all aspects of the services provided by” the carriers. Id. at 714. The Court carefully reviewed the details of the employment relationship. For example, the carriers were required to submit a delivery list to the employer, and the carriers were obligated to follow the delivery order on that list in the future. Id. A district manager also had the authority to go out with a carrier, on a daily basis, to supervise him to see if the carrier was performing his work to the company’s and the customers’ satisfaction. Id. The Driscoll

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<sup>1</sup> The review examiner found that the employing unit provided plastic bags for carriers to use. See Finding of Fact # 15. The written contract between the parties leaves up to the carrier the option of inserting newspapers into plastic bags, if not otherwise required to do so by a customer of the employing unit. Although the review examiner did not note this contractual provision in her findings, we properly refer to it here, as it was part of the unchallenged record introduced at the hearing. 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).

carriers did not purchase newspapers from the newspaper company and could not charge a price higher than the rate set by the employer. Id. at 715. In addition, the employer required carriers to use a motor vehicle. Finally, the employer required written notification if a carrier delegated any delivery authority to another individual, and the employer retained the right to refuse to allow such an individual to deliver its newspapers. Id. at 715-716.

In its appeal, the employing unit argues that this case is more analogous to Athol Daily News v. Board of Review of Division of Employment and Training, 439 Mass. 171 (2003). In Athol Daily News, the SJC noted that the employing unit only required carriers to deliver newspapers in good condition before a certain time each day. Id. at 178. Delivery could be completed in any manner, and carriers could be assisted by anyone to deliver the newspapers on time. Id. The Court concluded that other factors, including that subscribers may complain to the employing unit directly with problems about delivery, that the circulation manager is responsible for carriers, and that the employing unit could terminate the carrier agreement at any time, did not affect the prong (a) analysis. Id. It held that it was enough for the employing unit to show that the “mode, manner and means of delivery are up to the carrier” for the employing unit to satisfy its burden. Id.

We agree with the employing unit that Athol Daily News controls the outcome here. The facts show that the mode, manner, and means of delivery were up to the claimant. She could deliver the newspapers using any method she wanted, including by car or by foot. The major requirement for the claimant, as in Athol Daily News, was that she had to deliver the company’s newspapers on time, in readable condition. The exact order of the route was up to her, and she could decide how each newspaper was to be delivered to a customer. The claimant paid the employer the wholesale cost of the papers she wanted to deliver, and was free to charge whatever mark-up over that cost she could obtain. The review examiner’s reliance on evidence that customers could complain to the employing unit if they had delivery problems was misplaced, as the plain language of Athol Daily News indicates. Finally, unlike Driscoll, the claimant was not supervised on a daily basis, and did not have to formally notify the employing unit if she hired someone else to take care of her deliveries. As long as the papers were delivered in good condition, the employing unit was satisfied.

Based on these facts, the employing unit has met its burden to show that the claimant was not subject to the direction and control of the employing unit. Thus, prong (a) of the “ABC” test is satisfied.

*Prong (b): Outside All Places of Business of the Employing Unit*

Under prong (b), the employer 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. Here, we agree with the review examiner that the employing unit satisfied the second part of the test. There was no dispute that the claimant performed all of her services at the various delivery locations, not at any employer-operated site. Therefore, the employer has met its burden under prong (b).



*Prong (c): Engaged in an Independent Trade or Business*

Finally, the third prong of 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. We approach the question by considering “whether the service in question could be viewed as an independent trade or business because the worker is *capable* of performing the service to anyone wishing to avail themselves of the services, or, conversely, whether the *nature of the business compels* the worker to depend on a single employer for the continuation of services.” Id. (emphasis supplied).

In Athol Daily News, 439 at 181-182, the SJC observed that, “[b]y its very nature, the business of delivering newspapers is not limited to a single employer.” As in that case, the claimant used her own means of transportation to deliver the newspapers and was not restricted by the employing unit to only delivering newspapers for it. Nothing in the written contract with the employing unit prevented the claimant from performing other tasks for customers, as long as the newspapers were delivered on time, in good condition. Therefore, we believe that the employer has shown that the claimant was not compelled to rely on the employing unit for work, and the employing unit has satisfied prong (c).

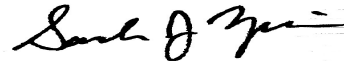
We, therefore, conclude as a matter of law that the services performed by the claimant for the employing unit did not constitute employment for purposes of G.L. c. 151A, §§ 2 and 1(k), because the claimant was an independent contractor.

The review examiner’s decision is reversed. The claimant is an independent contractor. The employing unit is not required to make contributions based on the services performed by the claimant.

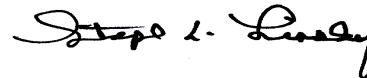
**BOSTON, MASSACHUSETTS**  
**DATE OF MAILING – September 28, 2011**



John A. King, Esq.  
 Chairman



Sandor J. Zapolin  
 Member



Stephen M. Linsky, Esq.  
 Member

**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- October 28, 2011**