THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-117473-XA (Jan. 24, 2012) – Pedicab drivers who were contractually prohibited from using the pedicabs for other business purposes and from operating or managing a similar business within the employer's area of operation both while working for the employer and for 12 months following the end of their lease were employees. They were not sufficiently free of the employer's direction and control under prong (a) or able to engage in an independently established business of a similar nature under prong (c) of G.L. c. 151A, § 2.

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 services performed by pedicab drivers, as well as those of others similarly situated, constituted employment within the meaning of G.L. 151A, § 2. We review pursuant to our authority under G.L. c. 151A, § 41, reverse in part, and affirm in part.

In a status determination issued on December 15, 2009, the DUA determined that the services performed by the pedicab drivers, and others similarly situated, were those of an employee, not an independent contractor within the meaning of G.L. 151A, § 2. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner affirmed the agency's initial determination in a decision rendered on January 5, 2011.

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 on appeal is whether the employer has met its burden to prove that the services performed by pedicab drivers, as governed by the terms of 2009 and 2010 pedicab lease agreements, were not employment within the meaning of G.L. c. 151A, § 2.

Findings of Fact

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

1. In 2010, an individual who previously performed services as a driver for the employer filed an unemployment claim with the Division [sic] of Unemployment Assistance.

2. The employer started their business approximately 4 years prior. The business is called [Employer].

3. The employer donates generated funds to a charity, specifically the Dana Farber Cancer Institute.

4. The employer's business is the owning and maintaining pedicab vehicles for lease and use by the drivers.

5. Drivers must enter into a lease agreement with the employer.

6. In the lease agreement, drivers are restricted to operating the employer's vehicles in any route of their choice within [Town A] and [Town B].

7. The drivers operate the employer's vehicles to pick up and drop off passengers that they obtain and select.

8. The driver's earn gratuities from the passengers.

9. The rental rate of the vehicle is 25% of the income generated which is assessed on a daily, weekly or event basis.

10. If the driver does not earn tips totaling $50 or more, then the driver is not responsible for any payments to the employer.

11. Pedicab drivers did not charge customers a fee for their services. Tips were the only source of income from the drivers.

12. Pedicab drivers were required [to] pay $25 a shift as a lease rate. The employer's shifts are as follows, 12:00pm to 10:00pm Monday through Thursday, 12:00pm to 6:00pm Friday through Sunday and 6:00pm to 12:00am Friday through Sunday.

13. Drivers chose their own shifts and schedules.

14. The employer does not dispatch drivers.

15. Drivers are required to maintain good hygiene, professional appearance and civil conduct given they are considered unofficial representatives of the employer.

16. Drivers are not to use the vehicle for cargo purposes.

17. Drivers are not allowed to operate or manage a similar business in the employer's area of operation.

18. Although the employer has drivers enter a lease agreement indicating the above-mentioned requirements, the company president does not enforce such requirements.

19. The employer only enforces certain aspects of the contracts with drivers.

20. When drivers enter into the lease agreement, the employer does not explain which aspects of the contracts that they do and do not enforce.

21. In April 2010, the employer introduced a new lease agreement to drivers for the 2010 season which starts in April. All drivers were required to enter into this new lease agreement.

22. Under the new lease agreement, [Employer] drivers still do not charge customers a fee for their services. Customer tips are the only source of income for the drivers.

23. The employer's lease rates under the new agreement remained uncharged at $25 a shift as a lease rate. The employer's shifts are as follows, 12:00pm to 10:00pm Monday through Thursday, 12:00pm to 6:00pm Friday through Sunday and 6:00pm to 12:00am Friday through Sunday.

24. The employer requires the driver to pay the set lease rate regardless of the amount they earn from customers during the rental period. This is enforced by the employer under the new 2010 lease agreement.

25. Under the new lease agreement, [Employer] drivers are not restricted from operating solely within [Town A] and [Town B]. Drivers are not required to refrain from operating a Pedicab or a similar business in [County A] or [County B] Counties for a period of time following termination of the lease. Drivers are not required to refrain from using the pedicabs for other business purposes other than to provide services for the employer.

26. Such restrictions were removed in April 2010 when drivers were required to enter into a new lease agreement.

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 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).

Prong (a) - Direction and Control

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). The employing unit must prove, however, "…the absence of control and direction over the worker 'both under his contract for the performance of service and in fact.'" Boston Bicycle Couriers, Inc. v. Deputy Dir. of Department of Employment and Training, 56 Mass. App. Ct. 473, 484 (2002).

In Comm'r. of Division of Unemployment Assistance v. Town Taxi of Cape Cod, Inc., taxi drivers were free to use their leased taxis to drive for other services, were not obligated to respond to calls from dispatch and were free to perform other work and personal business during shifts while using the taxi. 68 Mass. App. Ct. 426, 430 (2007). These factors were key to the court's determination that the taxi drivers were sufficiently free from the employer's direction and control.

We believe that the employing unit has met its burden for those pedicab drivers who signed the 2010 pedicab lease agreement ("2010 lease"). As in Town Taxi, those drivers who signed the 2010 lease were allowed to use the pedicabs for other business purposes. Id. The review examiner also found that drivers were free to choose their own shifts and schedules and that the employing unit does not dispatch drivers. The lessees under the 2010 lease were therefore sufficiently free, both in contract and in fact, from the employing unit's direction and control in performance of services.

However, we conclude that the employing unit has not met its burden for those pedicab drivers who were subject to the 2009 lease agreements ("2009 lease"). The review examiner found that the drivers who signed the 2009 lease were: (1) restricted to operating the employer's vehicles within a certain geographic area, (2) prohibited from using the vehicle for cargo purposes, and (3) prohibited from operating or managing a similar business in the employer's area of operation. Although the review examiner found that the employing unit does not enforce such requirements, the statute, on its face, requires the worker to be free from the employing unit's direction and control both in practice and in contract. Therefore, by virtue of the terms in the 2009 lease, those drivers who signed the 2009 lease are not free from the employing unit's direction and control.

Prong (b) – Outside the course or place of the employer's business

The employing unit has met its burden for prong (b) for all pedicab drivers. The pedicab drivers operate the employer's pedicab vehicles by picking up and dropping off passengers on public streets. By nature of the services rendered, all of the pedicab drivers' services were performed outside of the employing unit's premises.

Prong (c) – Capable of carrying on an independent business of the same type

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, only that he be capable of doing work for others.

In Town Taxi, the court determined that the employing unit had proven that the taxi drivers were: (a) capable of performing services to anyone wishing to avail themselves of the services, (b) able to open their own taxi service or drive for another service, (c) free to find and reject customers referred from dispatch, and (d) free to engage in other employment or generate their own businesses while using the leased taxi. 68 Mass. App. Ct. 426, 432 (2007).

Similarly, in this case, after the employing unit changed its lease in April 2010, those pedicab drivers who signed the new lease were: (a) no longer restricted to operating solely within certain geographic areas under the lease, (b) no longer restricted from operating a pedicab or a similar business in certain counties for a period of time following termination of the lease, and (c) not restricted from using the pedicabs for purposes other than providing services for the employing unit. The findings also establish that the pedicab drivers were not dispatched by the employing unit and were free to engage in an entrepreneurial spirit by finding and rejecting potential customers. The employing unit has, therefore, met its burden for prong (c) for those pedicab drivers who were subject to the 2010 lease.

However, for those pedicab drivers who were subject to the 2009 lease agreements, the employing unit has not met its burden to prove prong (c). Although, these pedicab drivers were also not dispatched by the employing unit and therefore free to find and reject potential customers under the terms of the 2009 pedicab lease, they were contractually prohibited from operating or managing a similar business within the employing unit's area of operation for 12 months following termination of the lease and from using the pedicabs for other business purposes.

Conclusion

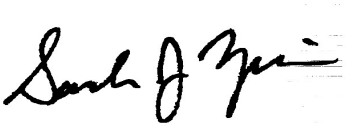
The employing unit has satisfied all three prongs of the "ABC test" for the services provided by those pedicab drivers who were subject to the 2010 lease. We, therefore, conclude as a matter of law that the services provided by the pedicab drivers who signed the 2010 lease and the services of others similarly situated, did not constitute employment within the meaning of G.L. c. 151A, § 2, for which the employing unit is not required to pay unemployment taxes.

The employing unit has not proven that those drivers who were subject to the 2009 lease were sufficiently free from the employing unit's direction and control or that those drivers were able to engage in an independently established business of a similar nature as the services performed for the employing unit. We, therefore, conclude as a matter of law that the services provided by those drivers who signed the 2009 lease, and the services of others similarly situated, constituted employment within the meaning of G.L. c. 151A, § 2, for which the employing unit must pay unemployment taxes.

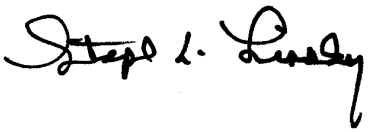
The review examiner's decision is affirmed in part and reversed in part.

BOSTON, MASSACHUSETTS
DATE OF MAILING - January 24, 2012

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 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT- February 23, 2012

SBA/mt