THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-120513-XA (Apr. 13, 2012) -- Board held that the claimant was an employee of a delivery service because the employer failed to sustain its burden under G.L. c. 151A, § 2(c). A contractual non-compete clause covering the period during which the claimant worked for the employer and extending for 3 years after he left the company rendered the claimant incapable of conducting his own independent business without the employer's permission. *[Note: The District Court affirmed the Board of Review's 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 the claimant's services for the employing unit constituted employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant filed a claim for unemployment benefits with the DUA on July 14, 2009. On August 31, 2009, the agency determined that the services performed by the claimant constituted employment. The employing unit appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination in a decision rendered on August 17, 2011.

The review examiner concluded that an employment relationship existed under G.L. c. 151A, § 2, after she found that the claimant was not free from the direction and control of the employing unit, the work performed was within the employing unit's usual course of business, and the claimant was not customarily engaged in an independently established business of the same nature as that of the employing unit. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we accepted the employing unit's application for review on October 7, 2011. Our decision is based upon our review of the entire record.

The issue on appeal is whether the delivery services performed by the claimant for the employing unit's courier business constituted employment, where the claimant was required to sign a non-competition agreement, and notwithstanding a 2003 DUA determination that delivery services performed by a different claimant for the same employer were performed as an independent contractor.

Findings of Fact

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

1. On 8-31-09, the Status Department determined that there was an employer-employee relationship established between the instant employer and the claimant (SS# xxx-xx-xxxx) and others who are similarly employed and providing similar services for the instant employer, i.e. [Employer Name].

2. The employer is a courier service and brokerage business engaged in the pick up and delivery of mail and parcels.

3. The employer's office and warehouse are located at [Address].

4. The employer uses individuals considered to be independent contractors to make deliveries for the employer's customers. The employer finds independent contractors through advertising and word of mouth. The employer gets customers through the sales efforts of its employees.

5. The claimant and other individuals providing delivery services was/are required to sign Independent Contractor Agreements in order to provide services for the employer. Said agreement includes the requirement that contractors have insurance, and sets forth the minimum amount of insurance required. It further includes a detailed confidentiality section.

6. The agreement has a Relationship of the Parties section that states in part as follows: "It is understood that the Company does not agree to use Contractor exclusively and that Contractor is free to accept other work at any time from any other Company or business.

   Contractor agrees to make any accepted deliveries within a reasonable time frame, in accordance with the terms of the contract with the customer, and in a professional and businesslike manner." Under the Non-Solicitation section of the agreement, it states in part as follows: "During the period of this agreement, Contractor will devote his best efforts to Company and will not directly or indirectly, alone or as a consultant to or as a partner, consultant, employee, officer, director or stockholder, or in any other capacity for any other

organization, entity, or business, be engaged in any commercial activity that competes with the Company without prior written approval and consent of the president of the company." It further states in part as follows: "During the two (2) year period following termination of this agreement, Contractor will not engage in any business or activity, either alone or as a consultant to, or as a partner, Consultant, employee, officer, director or stockholder, or in any other capacity for any other organization, entity or business in competition with the Company, and shall not directly or indirectly, or in any capacity, on his own behalf or on behalf of any other firm undertake or assist in the solicitation of any customer or account of the Company existing during the course of this contract."

7. The independent contractors give the employer their availability and the employer calls when work is available. The contractors are free to accept or decline work that is offered. The contractors pick up the mail/packages to be delivered at the employer's warehouse and make the deliveries. The signed agreement has a Place of Work section that states as follows: "Company has no control over the manner and means in which the work is performed. The manner of driving, method of transportation, use of routes, and any other means used by the Contractor are exclusively within his/her discretion and control. Contractor agrees to make any accepted deliveries with reasonable dispatch, in accordance with the terms of the contract with any customer, and in a professional and businesslike manner."

8. The independent contractors are paid a commission based on the work that is billed. The employer sets the commission rates. Contractors are required to submit invoices and completed Driver Recap forms. The employer generates a printout and reconciles it against the Driver Recap form and then pays the contractor.

9. The claimant was paid a company check made out in his name. The only deduction from his pay was for Workers Compensation. The claimant was responsible for his own taxes, and the employer issued him Form 1099's for tax purposes. The claimant received no benefits from the company.

10. The independent contractors are free to hire helpers to perform the delivery services. If helpers are hired, the contractors are responsible for them and pay them directly.

11. The contractors provide their own vehicles, equipment, and tools. The employer does have larger vehicles that are available for lease. The contractors pay for all of the expenses incurred in the performance of the deliveries. The employer does reimburse for tolls and parking only, i.e. for reimbursement, the contractors must submit the receipts, and the employer then reimburses and bills its customers.

12. The claimant does not have his own independently established delivery company. He has provided similar services for other companies in the past.

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 order to overcome the determination of an employment relationship, the employing unit has the 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 & 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 Div. of Unemployment Assistance, 447 Mass. 852, 857 (2006).

The review examiner concluded that the employing unit had not met its burden as to any prong of the test. We disagree as to prongs (a) and (b). However, as we share the review examiner's view that the employing unit has not met its burden with regard to prong (c), we, therefore, conclude that the claimant was an employee.

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. "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." Id. at 177-178.

In this case, the claimant was substantially free from the employing unit's direction and control. The review examiner found that the claimant gave the employing unit his own schedule of availability. He was free to accept or decline work that was offered to him. The claimant provided his own vehicle, equipment, and tools needed to perform the functions of his job. He also paid for all expenses incurred in the performance of the deliveries, but could have requested reimbursement for tolls and parking only. Finally, the claimant was able to hire helpers to perform the delivery services which he accepted from the employing unit. Any helpers reported to the claimant, not to the employing unit.

The claimant's freedom with respect to how he performed his work and when he performed it is also reflected in the signed agreement between the claimant and the employing unit. The review examiner found that the agreement provided that the employing unit has no control over how the claimant performed his work. The manner and means of his performance were up to the claimant, including his method of transportation and any route or delivery order he may have adopted. The employing unit did require deliveries to be made timely and in a professional manner. But these requirements, which speak primarily to the end result of the claimant's work, not the means by which he achieved it, are not sufficient indicia of direction and control for us to conclude that the employing unit failed to meet prong (a). *See* Athol Daily News, 439 Mass. at 178 (employing unit satisfied prong (a) where agreement "require[d] only that the newspapers be delivered in good condition before a certain time each day").

For these reasons, we conclude that the employing unit has satisfied its burden under prong (a) of the ABC test.

Prong (b): Outside the Usual Course of the Employing Unit's Business or 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 were outside the usual course of the employing unit's business *or* that they were performed outside all places of the employing unit's enterprise. Here, the review examiner found that the claimant's job duties included delivering mail and parcels. He traveled outside of the employing unit's premises to deliver the packages. Thus, even though the review examiner found that the claimant picks up mail and packages at the employing unit's warehouse, the actual work performed by the claimant—that of delivering packages—was performed outside all of the places of business of the employing unit's business. *See* Athol Daily News, 439 Mass. at 179 (employer satisfied prong (b) where carriers picked up newspapers at employer's distribution center and delivered them on a public route). Thus, we conclude that the employing unit has met its burden under prong (b).

Prong (c): Customarily Engaged in an Independently Established Trade, Occupation, Profession or Business of the Same Nature as that Involved in the Service Performed

The third prong of the ABC 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." G.L. c. 151A, § 2(c). The review examiner concluded that the written agreement restricted the claimant from working for a competitor of the employer for two years after the termination of the agreement. She also found that the claimant did not, in fact, have an independently established trade, occupation, profession, or business of the same nature as the employing unit. Thus, in her view, the employing unit had failed to meet its burden under prong (c).

We agree that the employing unit has not satisfied this part of the statutory test. As an initial matter, however, we note that whether or not the claimant actually had his own independent business is not dispositive, and we disagree, therefore, with the review examiner's reliance on this in her analysis of prong (c). The Supreme Judicial Court has explicitly rejected this type of inquiry when applying prong (c). In Athol Daily News, the DUA had argued that, in order to satisfy prong (c), the employing unit must show that "a carrier's delivery services constitute *in fact* an independently established enterprise capable of operating without the benefit of its relationship with" the employing unit. 439 Mass. at 179-180 (emphasis supplied). However, the Court found this formulation "far too stringent." Id. at 180. Instead, Athol instructs us to approach this prong 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. at 181 (emphasis added). Against this standard, we believe the employer's independent contractor argument fails.

Although the employer's witness testified during the hearing that couriers could freely work for other employing units while also performing services for it, the written agreement between the parties provides otherwise. The agreement stated that the claimant could not "directly or indirectly, alone or as a consultant to or as a partner, consultant, employee, officer, director or stockholder, or in any other capacity for any other organization, entity, business, be engaged in any commercial activity that competes with the [employing unit] without prior written approval and consent of the president of the [employing unit]." It further provided that for two years following the termination of the agreement, the claimant could not "engage in any business or activity . . . in competition with the [employing unit], . . . " Even if the claimant had his own package delivery business, the agreement prohibited him from performing services for his own business without prior consent of this employing unit. In this way, the contractual provisions forced the claimant to rely on this employing unit for work. *See* Coverall North America, Inc. v. Comm'r of Div. of Unemployment Assistance, 447 Mass. 852, 853-854, 859 (2006) (employer failed to meet prong (c) where, even though claimant had permission to grow her own franchise, she was compelled to rely heavily on employer's business, because each new customer had to negotiate a contract with the employer). *Compare* Comm'r of Div. of Unemployment Assistance v. Town Taxi of Cape Cod, Inc., 68 Mass. App. Ct. 426, 432 (2007) (taxi drivers were independent contractors where they were permitted to engage in other employment or generate their own business without interference from employing unit). For this reason, we conclude that the employer has failed to satisfy prong (c).

Collateral Estoppel

In its appeal to the Board, the employing unit argues that a prior determination by the DUA's Status Unit precludes the agency and the Board from finding that the claimant is an employee. The employer refers to a status determination issued on June 4, 2003, ("the 2003 determination") wherein the DUA[1] found a previous claimant "and others similarly situated" to be independent contractors.

The Supreme Judicial Court recognizes that collateral estoppel may be invoked in certain circumstances, even where the parties in two adjudications are not identical. Commissioner of Department of Employment and Training v. Dugan, 428 Mass. 138, 141-142 (1998). The circumstances include: (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom estoppel is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication is identical to the issue in the current adjudication and that issue was essential to the earlier judgment. Id. at 142.

Since we have no record of an appeal of the 2003 determination, we shall assume that it became the final decision of the DUA in that case. The employer urges us to apply the 2003 determination to the claimant here, asserting that nothing has changed with respect to the employer's business operations or with respect to the ABC test, under G.L. c. 151A, § 2, in the last six years. Even if we assume that all of the facts surrounding the employment relationship in the 2003 determination are the same as those which led to the determination in this case, the legal analysis under the ABC test has changed in the last six years. The legal issue is not the same.

Prior to the SJC's decision in Athol Daily News, the legal test under prong (c) was different. To satisfy prong (c), the employer had to prove that a worker was customarily engaged in an independent business, that the business operated wholly independently, and that it was up and running. Boston Bicycle Couriers, Inc. v. Deputy Dir. of Div. of Employment & Training, 56 Mass. App. Ct. 473, 479 (2002). As set forth above, the SJC has rejected that test as too rigid. Now, the proper legal inquiry under prong (c) 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 for the continuation of the services." Athol Daily News, 439 Mass. at 181, 182 n.14.

Since Athol Daily News, the courts have provided additional guidance under prong (c). The SJC relied upon its new prong (c) test in rendering the 2006 Coverall decision, 447 Mass. 852, as did the Massachusetts Appeals Court in rendering its 2007 Town Taxi decision, 68 Mass. App. Ct. 426. On the record before us, we can not say why the DUA found that the employing unit had satisfied prong (c) in its 2003 determination or whether the agency had considered the then-new capability test set forth under Athol Daily News, decided only a few weeks earlier. Nonetheless, we are satisfied that in the last six years, the analysis with respect to prong (c) has changed. Therefore, we decline to apply the doctrine of collateral estoppel. As the law stands now under the facts before us, the employer has not satisfied its burden under prong (c).

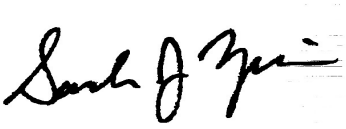
[1] At that time, the DUA was known as the Division of Employment and Training.

We, therefore, conclude as a matter of law that the services performed by the claimant did constitute employment, for purposes of G.L. c. 151A, § 2.

The review examiner's decision is affirmed. The claimant is an employee and the employer is required to make contributions based on the services performed by the claimant and others similarly situated.

BOSTON, MASSACHUSETTS
DATE OF MAILING - April 13, 2012

John A. King, Esq.
Chairman



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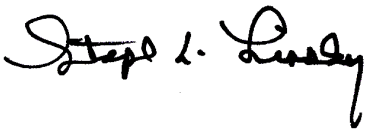
Member



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- May 14, 2012

Ab/SFjv