



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-123334-A-CTRM (Jan. 8, 2013) – Employer court reporting referral service did not control the work performed by its court reporters. Client attorneys, not the employer, directed the place and time for recording testimony. The reporters provided their own equipment, could refuse employer assignments, could negotiate higher rates with clients, and set their own schedule and place for completing transcripts without supervision.

Introduction and Procedural History of this Appeal

The employing unit appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) that services performed by court reporters for it constituted employment pursuant to G.L. c. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

After an audit conducted by the agency, the DUA's Revenue Department sent the employing unit a determination on May 25, 2010, informing the employing unit that services performed by court reporters constituted employment within the meaning of G.L. c. 151A, § 2. The employing unit appealed to the Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on August 5, 2011. The employing unit sought review by the Board, which denied the appeal, and the employing unit appealed to the District Court pursuant to G.L. c. 151A, § 42.

On June 1, 2012, a justice of the Springfield District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning: (1) the exact nature and function of the employing unit's business, (2) the extent to which the court reporters that it contracted with were subject to the direction and control of the employing unit, if at all, and (3) whether any court reporters worked for the employing unit or performed services at the employing unit's places of business. The employing unit, as well as a representative from the DUA's Status Department, attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The issue on appeal is whether services performed by court reporters for the employing unit constituted employment within the meaning of G.L. c. 151A, § 2.

After reviewing the entire record, including the testimony offered by the parties at both the initial and the remand hearings, the documents included in the record, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision, because we conclude that the services performed for the employing unit did not constitute employment.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments, which were issued following the District Court remand, are set forth below in their entirety:

1. On 5/25/10 the employer was mailed a status determination finding that the services provided by the individuals in the job title of court reporter constitutes "employment" within the meaning of Section 2 of the Massachusetts Unemployment Insurance Law.
2. The court reporters that provide services for the instant employer are generally informed of the instant employer by their instructors while they are in training for the work of the court reporter and generally call the instant employer to get their name on the employer's list of available court reporters.
3. On an Employer Status Report completed by the employer the principal commodity product was listed as steno typing.
4. On a questionnaire from the status unit completed by the employer the organization's business is listed as court reporting.
5. In addition to the court reporting/steno services offered by the instant employer the employer provides office space and conferencing equipment for a number of clients including attorneys, employers, mediators, any entity that is in need of a room for conference or interview purposes.
6. There are no court reporters whose primary function is to provide court reporting services on the payroll of the instant employer. (2)
7. The court reporters are issued jobs upon the request of a lawyer. The lawyer contacts the instant employer when a deposition has been scheduled. The employer will go to their list and call a court reporter. (3)
8. The court reporters often times work for other agencies or themselves and for that reason may not be available. The court reporters can state [they're] not available for any reason and the employer will continue on to another person on the list. (3)

9. Once a court reporter has accepted the job he/she will be informed where the lawyer will be doing the deposition by the lawyer. The place and time of the deposition is determined by the attorney and this information is given to the court reporter by the attorney. [The majority of the time the deposition will be taken at the office of the lawyer]. (3)(4)
10. The only time that the court reporting activity is performed at the physical premises of the instant employer is if the lawyer requests that it take place there. (4)
11. The court reporters are responsible for all of the tools, equipment and supplies they will need for the job such as stenotype machine, computer, software, resource materials. The reports are taped. The tape is completely for the convenience of the reporter. The tape is property of the reporter. (3)
12. The court reporters are responsible for paying for their expenses, worker's compensation, and health insurance. (3)
13. The court reporters are paid by the instant employer according to the industry standards which is per typed line with a minimum set amount. (3)
14. The court reporter is issued an invoice by the instant employer and the court reporter must complete this form in order to be paid. The invoice indicates the name or names of the witnesses involved in the deposition, the number of pages. The invoice indicates if a witness is requesting a copy of the deposition; a disk; an e-mail attachment, etc. If a witness is requesting a copy of anything the instant employer is responsible for sending the witness the requested item and for billing the witness. (3)
15. The invoice states in part:

As an independent contractor I hereby certify that this billing is true and correct as per our agreed pricing. I shall not hold (company) of [sic] its officers responsible for payment to me if the client does not pay [sic] I understand that I will reimburse (company) for uncollectible invoices paid to me.
16. The instant employer is paid by the attorney for whom the services were provided and the instant employer in turn issues a company check to the court reporter. A portion of the amount received by the instant employer is payment to the instant employer. (3)
17. The court reporter has the ability to negotiate a higher rate with the attorney if the deposition is extraordinarily technical such as with medical terminology. A higher rate can be requested if the deposition must be completed immediately or is extremely difficult. (3)

18. At times a deposition must be continued to another date and time and if the court reporter is not able to make that appointment the instant employer will be notified and the instant employer will send another court reporter. (3)
19. The court reporter takes all of the information during the deposition, but completes the finished product at the place of their choosing at home, at their office. (3)
20. The court reporter must adhere to 98.5% accuracy on their work which is a professional standard. (3)
21. If an attorney is not satisfied with a deposition the instant employer would be notified and most likely would not use this court reporter again, however to date this has never happened. (3)
22. The normal turn around time for the finished deposition is ten days, this is an industry standard and this is what the instant employer would normally expect. (3)
23. The court reporter must agree that the information that they obtain in this work must remain confidential. (3)
24. Each court reporter must sign an Agreement for Providing Court Reporting Services issued by the employer on the employer's letter head, which states: (3)

In consideration of providing court reporting services for (company) I the undersigned promise and agree as follows

* I am an independent contractor responsible for paying my own income and self employment taxes, paying for my business expenses, paying for workers compensation and other insurances as required, paying for any person or staff that I may have assisting me under this agreement, and I hold harmless (company) for my actions or decisions associated with my business.

* I am an independent contractor able to set my own agreed hours for providing services [sic] able to provide services for other companies, able to provide services at my place of choosing and able to terminate or quit this agreement at any time of my choosing.

* I am an independent contractor representing that I have made a substantial personal investment in equipment, software, resource materials, etc. at a great risk of loss and shall maintain the proper tools and materials I need to provide services as agreed.

* I am an independent contractor representing that I am qualified and trained to perform the court reporting service requirements as to the final outcome of the finished product [sic] I have the sole right to manage, operate and direct my duties under this agreement.

* I am an independent contractor responsible for truthfully and accurately completing all billings for my services to (company). In the event I fail to bill promptly or properly I shall permit (company) to send correct bills for me.

* I am an independent contractor and will not hold (company), its officers, agents, or employees responsible for payment to me if the client does not pay.

* This document contains the entire agreement between the parties. No one has made any representations, promises or warranties other than those contained in this agreement.

25. The instant employer is engaged in the placement of court reporters to those clients that need such services. (1)

The instant employer is engaged in the placement of court reporters to those clients that need such services rather than being in the business of court reporting. Although the employer is not in the business of court reporting they are in the business of the placement of court reporters to their clients and for this reason it has not been established that the work of the court reporters is outside the employer's usual course of business.

Ruling of the Board

The Board adopts the DUA 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.

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.

To avoid an employment relationship, 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 & 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 employing unit fail to meet any one of the prongs, the relationship will be deemed to be employment. Coverall North America, Inc. v. Commissioner of Division of Unemployment Assistance, 447 Mass. 852, 857 (2006).

The review examiner concluded in her original decision that the employing unit had not met its burden as to prongs (a) and (b) of the test. We disagree.

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. Director 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.

The review examiner found that the employing unit is in the business of providing court reporters to attorneys, mainly for use during depositions. When contacted by an attorney, the employing unit calls court reporters from its own list of qualified court reporters. Once the employing unit matches the court reporter with the lawyer, the lawyer then dictates where and how the court reporter will provide her services. The place and time of a deposition is determined by the lawyer, not by the employing unit. Other details of the job are given to the court reporter by the attorney requesting her services. The court reporters could refuse work offered by the employing unit if they were not available to take a particular job.

The court reporters are also responsible for the equipment, tools, and supplies needed to perform their job. Specifically, any stenotype machine, software, materials, and computer that the court

reporter may need to do or finish the job of taking a deposition and then transcribing it are their own. They are not the property of the employing unit. Even the tapes that the court reporters use to record the depositions, which they may later use to check their own work, become their property, not the property of the employing unit. Aside from the equipment needed to perform their job, the court reporters are also responsible for expenses which may arise.

After the deposition is taken, the employing unit exerts little control over how the court reporters complete their work and are paid. After a deposition, the court reporters can complete their work at any place of their own choosing; it does not have to be done under the supervision of the employing unit or at the employing unit's places of business. The review examiner found that both the accuracy rate and the payment rate are professional standards in the court reporters' business. We interpret this to mean that the employing unit does not affirmatively set or impose any rate which the court reporter must accept. Rather, there is a mutual agreement as to how much a court reporter is paid. When there is an amount to be negotiated, however, the review examiner found that the court reporters themselves, without input from the employing unit, may negotiate prices with the attorney that is requesting the services. The court reporters are paid after they fill out an invoice and return it to the employing unit.

The findings of fact, as summarized above, indicate that the court reporters had a considerable amount of freedom as to how they performed their services. They brought their own expertise to the jobs they finished. They owned and were responsible for their own equipment. They were not monitored or supervised in how they performed their services. Most of the contact that the court reporters had was with the attorneys they served, not necessarily with the employing unit. The employing unit was involved mainly in matching up the court reporters with potential clients and with ultimate payment to the court reporters at the end of the job. In short, the "mode, manner, and means" of doing the services were up to the court reporters themselves. Any control over the court reporters by the employing unit was only incidental or indicative of their relationship to the employing unit, "not indices of control over the details of the [court reporters'] performance as contemplated by [G.L. c. 151A,] § 2(a)." Athol Daily News, 439 Mass. at 178. Therefore, we conclude that the employing has met its burden to show that the court reporters were free from the employing unit's direction and control.

Prong (b): Outside All Places of Business of the Employing Unit or Outside the Usual Course of the Employing Unit's Business

The review examiner concluded that the employing unit had not met its burden under this prong, because the services performed by the court reporters were not outside the usual course of the employing unit's business of placing court reporters with clients. This analysis is legally incomplete, because, 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. Thus, even if the review examiner was correct — which we believe she was — that the services performed are within the employing unit's usual course of business, the employing unit may still carry its burden by showing that the services were performed outside all of the places of the employing unit's business. Athol Daily News, 439 Mass. at 178-179.

The review examiner found that the court reporters are told by attorneys, not the employing unit, where to perform their services. Most of the time, the location will be at the office of an attorney. However, on some occasions, the services may be performed at the employing unit's offices. The review examiner found that, in addition to its court reporting services, the employing unit also is in the business of renting out office space or conferencing equipment to attorneys. Therefore, in order to use the employing unit's office space, the attorney must rent it or pay for it. During that time, the office space is not being controlled by the employing unit, but rather by the attorney who has paid for it. When performing their services during the time they are at the employing unit's premises, the court reporters are only doing so because the attorney has paid for that space and asked for the services to be done there. The space has, effectively, turned into the attorney's space, rather than be a place of business of the employing unit. Again, we note that the only reason that court reporters would work at the employing unit's premises would be because a client has instructed them to do so.

Based on this, we conclude that the employing unit has shown that the court reporters perform services outside all of the places of the employing unit's enterprise.¹ Therefore, it 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 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." Athol Daily News, 439 Mass. at 181.

The review examiner found that court reporters who perform services for the employing unit may also perform services for other agencies or themselves without restriction from the employing unit. They may refuse work if they choose to do so. Nothing in the agreement between the court reporters and the employing unit prevents the court reporters from working for a competitor, from growing their own court reporting business, or from hiring others to help them do their own work. They are not required to give information about their own clients to the employing unit for any reason. We believe that the employing unit has shown that the court reporters were capable of performing their services for anyone who wished to use them. They also were not compelled to rely on the employing unit for work. Therefore, the employing unit has satisfied prong (c).

¹ It is entirely possible that a court reporter, if never requested to by a client, might *never* have to perform services at the employing unit's offices. It would be anomalous to hold that the employing unit carried its burden under prong (b) with respect to those court reporters, but did not carry its burden with respect to court reporters who were directed occasionally by attorneys to perform their services at the employing unit's premises. Our conclusion and interpretation of prong (b) here can be applied to *all* court reporters who have performed services for the employing unit.

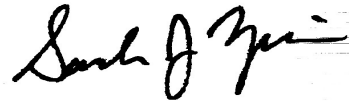
We, therefore, conclude as a matter of law that the services performed by court reporters for the employing unit did not constitute employment for purposes of G.L. c. 151A, §§ 2 and 1(k), because the court reporters are independent contractors.

The review examiner's decision is reversed. The employing unit is not required to make contributions based on the services performed by the court reporters.

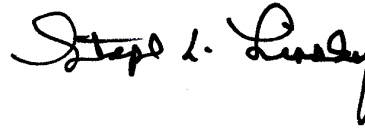


John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - January 8, 2013



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 – February 7, 2013

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval under G.L. c. 151A, § 37.