

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

**Adam Jankauskas and  
City Compost,**  
Petitioners

v.

Docket No. LB-23-0038

**Office of the Attorney General,  
Fair Labor Division,**  
Respondent

**Appearance for Petitioners:**

Adam Jankauskas  
66 Graham St. Unit 10  
Gardner, MA 01440

**Appearance for Respondent:**

Kate Watkins, Esq.  
Assistant Attorney General  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

**Administrative Magistrate:**

Kenneth J. Forton

**RULING ON MOTION FOR SUMMARY DECISION**

Petitioner Adam Jankauskas timely appeals four citations issued by the Fair Labor Division (FLD) of the Massachusetts Attorney General's Office (AGO).<sup>1</sup> The first

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<sup>1</sup> Mr. Jankauskas originally appealed five citations. During the course of the appeal, he has decided not to challenge the citation for failure to furnish true and accurate payroll records to the Division.

citation Mr. Jankauskas appeals is failure to keep true and accurate payroll records from January 1, 2020 to April 25, 2022, a violation of G.L. c. 151, §§ 15, 19(3). A second citation was issued for violation of G.L. c. 151, § 19(4), for misclassification of employees for the purpose of evading G.L. chapter 151 requirements. The third citation was for a violation of G.L. c. 149, § 149C(b), for failure to permit employees to earn and use sick time as required from January 1, 2020 to April 25, 2022. The final citation was for violating G.L. c. 149, § 148, for failure to make timely payment of wages due and owing from June 25, 2021 to July 11, 2021.

On January 19, 2023, DALA acknowledged receipt of Petitioners' appeal and ordered Mr. Jankauskas to pay the requisite appeal filing fees or file a fee waiver request. On March 31, 2023, I dismissed the appeal for failure to pay the filing fees or request a fee waiver. After several continuances, Mr. Jankauskas finally filed his fee waiver application on July 28, 2023. On August 7, 2023, I vacated my Order of Dismissal.

I held a pre-hearing conference on September 8, 2023, and a second status conference on November 9, 2023. An additional conference was held on January 12, 2024, at which I ordered Mr. Jankauskas to provide to the FLD any documents that he wanted them to review in mitigation of the citations. On January 26, 2024, the FLD notified DALA that it would be moving for summary decision on all citations. On February 28, 2024, the FLD filed its motion for summary decision, along with 14 exhibits, an affidavit of FLD Investigator Daniel Guerino, and two affidavits of Mr. Jankauskas's past employees, John Peri and Hodrin Kamnang. Mr. Jankauskas did not submit any exhibits and opposed the motion only by referencing a previous argument he had submitted. He did not submit his own affidavit. Because he has not submitted any

evidence to contradict Mr. Peri's and Mr. Kamnang's sworn affidavits and has decided not to cross-examine these witnesses, I accept the facts therein as true.

The FLD conducted an investigation of Mr. Jankauskas' sole proprietorship, City Compost, after receiving complaints from two of his former drivers alleging Mr. Jankauskas owed them wages. In response, Mr. Jankauskas claimed that he did not have any employees, arguing that everyone who worked for him was an independent contractor. He described City Compost's business as "coordinating compost collection." Most of the alleged independent contractors were drivers, like Mr. Peri and Mr. Kamnang, who were responsible for traveling to customers' homes, picking up buckets filled with compostable material, leaving empty buckets, returning the material to City Compost's premises, and then cleaning the buckets. Mr. Jankauskas also had "contractors" perform administrative services, such as answering customers' emails and phone calls.

Investigator Daniel Guerino issued a demand to Mr. Jankauskas for records of employees' wages and hours, and information to prove that those persons who worked for him were independent contractors. Mr. Jankauskas produced a list of 188 contractors, invoices for one driver, two invoices for customer service representatives, an invoice for trucking services, and independent contractor agreements with two drivers. Mr. Jankauskas claimed that a majority of his agreements with his workers were verbal only. He did not furnish evidence of payment.

The FLD issued five citations to Mr. Jankauskas for violations of G.L. c. 151, §§ 15, 19(3), 19(4) and G.L. c. 149, §§ 148, 149C(b). Investigator Guerino concluded that Mr. Jankauskas owed Mr. Kamnang and Mr. Peri a combined \$3,766.53. The five

citations carry a total of \$23,750 in civil penalties, in addition to paying Mr. Kamnang and Mr. Peri restitution for the wages owed.

## I

Summary decision in administrative proceedings is the functional equivalent of summary judgment in civil proceedings. *Compare* 801 CMR 1.01(7)(h) with Mass. R. Civ. P. 56. *See Catlin v. Bd. of Registration of Architects*, 414 Mass. 1, 7 (1992) (citing Mass. R. Civ. P. 56 for summary decision in administrative case). Summary decision is appropriate when there are no genuine issues of material fact, and the case may be decided as a matter of law. *Catlin*, 414 Mass. at 7. *See* 801 CMR 1.01(7)(h); Mass. R. Civ. P. 56. The moving party must demonstrate the absence of any genuine issues of material fact. 801 CMR 1.01(7)(h); *see also* Mass. R. Civ. P. 56; *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 808 (1991). When parties have moved for summary decision and there is no real dispute as to the salient facts, or if only questions of law are involved, a court will allow the motion of the party entitled to judgment as a matter of law. *Cassesso v. Comm'r of Correction*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976).

Mr. Jankauskas bears the burden of proving by a preponderance of the evidence that the citations were “erroneously issued.” G.L. c. 149, § 27C(b)(4). If he does so, DALA may vacate or modify the citation order. *Id.* Otherwise, DALA must affirm the citation. If the citation is not vacated, the petitioner must comply with DALA’s decision within 30 days. *Id.* § 27C(b)(5).

## II

The Attorney General’s Fair Labor Division enforces the Commonwealth’s Wage and Hour Laws. *See* G.L. c. 149, § 2. These laws protecting wages and access to earned

sick time apply only to employees. G.L. c. 149, §§ 148B, 148C. At issue here is whether the people who work for Mr. Jankauskas are employees or, as he argues, independent contractors. The petitioner has the burden of rebutting the presumption that individuals who perform services for another person or entity are employees by proving three elements. Failure to satisfy any single element will result in the individual's classification as an employee. *Id.* at 327. Proof of all three elements is demanding because of the statute's purpose to protect employees, and the classification of employees as independent contractors allows business owners to evade statutory requirements that provide critical benefits. *Monnell v. Boston Pads, LLC*, 471 Mass. 566, 575 (2015); *Hogan v. InStore Group, LLC*, 512 F. Supp. 3d 157, 176 (D. Mass. 2021).

First, the petitioner must prove that the worker is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact. G.L. c. 149, § 148B. He must demonstrate that the contractors were free from control and direction, meaning there was minimal instruction given for the workers to accomplish their assigned task. *Hogan*, 512 F. Supp. 3d at 176.

Second, he must prove that the service is performed outside the usual course of the business of the employer. G.L. c. 149, § 148B. This demands a showing that the employer's actual business operations are distinctly different from the services performed by the worker. *Id.* at 180; *Sebago v. Boston Cab Dispatch, Inc.*, 471 Mass. 321, 335 (2015). "The usual course of business" does not include services that are merely incidental to the business. *Sebago*, 471 Mass. 321, 333.

Finally, petitioner must prove that 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. 149, § 148B.

*A*

Mr. Jankauskas asserts his workers are free from control for the following reasons: they use their own vehicles, cameras, phones, and GPS systems; have discretion on directions from location to location; can deviate from work orders for other business or personal matters; can define their own days off; and are required to complete work orders on an agreed upon day, but can define their own working hours. The analysis centers on whether the worker has the “right to control the details of the performance,” including “freedom from supervisions not only as to the result to be accomplished but also as to the means and methods that are utilized in the performance of the work.”

*Hogan*, 512 F. Supp. 3d at 176. Mr. Jankauskas’s former driver, Mr. Kamnang, stated that the “order in which [he] did pickups” was determined by Mr. Jankauskas and he would be “reprimanded” if he did not complete all the pickups in one day. Additionally, both Mr. Kamnang and Mr. Peri reported that they returned to the City Compost shop at the end of their delivery routes to empty the customers’ buckets, wash them, and put them away. Because the drivers were required to adhere to a strict schedule and take other orders from him, Mr. Jankauskas, he has not proven that they were free from his control and direction.

*B*

The second prong of the independent contractor test is really the focus of this appeal. Mr. Jankauskas argues that the contractors’ services were outside the usual course of the business because his role at City Compost was considerably different than his workers’ responsibilities. He claims he acted as the “conduit of information between the customer and the service provider,” and his job is primarily communicating with customers, scheduling tasks, billing, and assignment of work orders. Even if Mr.

Jankauskas's job is different from the jobs of the workers that he hires, that does not then mean that his job responsibilities alone define the usual course of the business as a whole. *See Hogan*, 512 F. Supp. 3d at 182.

Mr. Jankauskas argues that City Compost's business is limited to coordinating compostable material collection services. It is clear from the uncontradicted evidence that City Compost's actual business is coordinating *and* performing the removal of compostable materials from its customers. Although a business owner's definition of what the business is can inform the court's analysis, it is not dispositive. *Hogan*, 512 F. Supp. 3d at 181-82. City Compost is clearly responsible for collecting compostables from its customers. It advertises itself as a "compost collection service," implying that its job is not complete until after the compostables are actually collected, and not, as Mr. Jankauskas asserts, when he assigns a driver to pick up the materials. Mr. Jankauskas cannot create "a false dichotomy between the administrative and operational aspects of [his] business." *Sebago*, 471 Mass. 321, 330.

Mr. Jankauskas presents no countervailing facts to establish that the coordination of services is a distinct operation from the delivery and collection of compostable materials. City Compost's ultimate responsibility is to collect the compostable materials; this responsibility then defines the entity's usual course of business. That means that the drivers who collect on behalf of City Compost are performing their duties within its usual course of business. *Hogan*, 512 F. Supp. 3d at 182.

For the alleged contractors who performed administrative and customer services, there is no evidence that indicates their services were not performed in City Compost's usual course of business. Mr. Jankauskas states that one of his primary job duties was to communicate with customers. This same job duty is listed on the administrative workers'

invoices. As a matter of law, if workers engaged in the “exact business the employer engaged in,” they are providing services in the company’s usual course of business. *Id.* at 185-86.

To sum up, without the work of the drivers and administrators that Mr. Jankauskas treated as independent contractors there would be no business; City Compost would not be able to provide the services that it advertised. The work the drivers perform is necessary to the operation of the business, not merely incidental. *Sebago*, 471 Mass. 321, 333. For these reasons, Mr. Jankauskas has not satisfied element two of the independent contractor test.

### C

Mr. Jankauskas argues that the third element, that the worker be customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed, is satisfied because the colloquial definition of “customarily” implies that it is not a requirement for individuals to be actually engaged in an independent trade. *See* G.L. c. 149, § 148B. While Massachusetts does not provide a definition of the phrase “customarily and regularly,” the Code of Federal Regulations defines it as “a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed ‘customarily and regularly’ includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.” 29 C.F.R. § 541.701; *Mark Rogers and Rogers Logistics Group, Ltd. v. Office of the Attorney General – Fair Labor Division*, LB-10-133, at \*10-11 (DALA Jan. 10, 2011). Mr. Kamnang and Mr. Peri stated that they were not working elsewhere while employed by City Compost. Mr. Peri additionally stated that he did not perform “any other transportation or delivery work” or have his own



business. Given these statements and the lack of countervailing facts or evidence, Mr. Jankauskas has failed to meet his burden of proving prong three.

*III*

Mr. Jankauskas has submitted no evidence or argument that the penalties assessed by the Fair Labor Division were “erroneous” or otherwise not justified. Therefore, they will remain as assessed.

**ORDER**

For the foregoing reasons, the Fair Labor Division’s motion for summary decision is allowed. The citations are therefore affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

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Kenneth J. Forton  
Administrative Magistrate

Dated: **MAR 27 2024**