



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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Tel. (617) 626-6400 • Office Hours: 8:45 a.m. to 5:00 p.m.

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BOARD OF REVIEW DECISION

BR-110709-XA (Jan. 13, 2011) -- Since the claimant, a carpenter performing services on customers' homes for the employer's remodeling company, was not a registered home improvement contractor under G.L. c. 152, § 14, he was incapable of performing services as an independent contractor as a matter of law under G.L. c. 151A, § 2(c).

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), which concluded that the claimant's services, 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; we affirm as to the result, but do so under a different rationale.

In a status determination issued on April 1, 2009, the DUA determined that the services performed by the claimant were not those of an employee, but an independent contractor, within the meaning of G.L. 151A, § 2. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, the review examiner overturned the agency's initial determination in a decision rendered on July 10, 2009. The review examiner found the claimant to be an employee rather than an independent contractor because he found that the employer exercised a high degree of control over his activities, and because he concluded that the claimant worked in the same line of business as the employer and in the same place of business.

The employer appealed to the Board. 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 claimant, a carpenter who worked for a registered home improvement contractor, was capable of engaging in an independent trade or business in the same line of work under Massachusetts law regulating home improvement contractors.

Findings of Fact

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

1. The claimant filed his claim for benefits on 2/5/09 (eff. date Sunday 2/1/09).
2. The base period of the claim was determined to be the 52 weeks from 1/1/08 through 12/31/08.
3. The claimant reported wages from one employer during the base period. The employer in question here is [Employer]. The claimant worked for this company as a carpenter from 1/1/08 through 8/31/08 when he became separated from the job.
4. Wages were reported as follows;

Quarter ending.	
3/31/08	\$4767.00
6/30/08	\$5676.00
9/30/08	\$4655.13
12/31/0	\$00.00
Total	\$15,098.13

5. The claimant, however, was notified that he was not able to use these earnings to establish his benefit rate and credit as the employing unit reported that the claimant was an independent contractor (self-employed) and was not considered an employee covered by the unemployment system within the meaning of Section 2 of the Law.
6. The claimant was therefore determined to be ineligible for benefits since he had no other base period wages.
7. The claimant appealed his monetary determination in a timely manner.
8. The claimant was engaged to work as a carpenter for the instant company, a full service remodeling and renovation company, which has been in business for 24 years.

9. The company works out of the owner's home. The claimant visited there at times, but performed his services at the construction sites for each customer contract.
10. The claimant had previously worked for himself under the name [X] Builders. He was not actively running this business (never incorporated or officially registered with the state) at the time he started with the employer. The claimant believed he was going to work as a regular employee originally (he provided his Social Security number and # of dependents to claim), but he was paid through checks from the employer made out to [X] Builders and the checks were deposited into a [X] Builders account still in use by the claimant.
11. No written contract was signed at time of hire but the employer considered the claimant an independent contractor and no taxes were deducted from his pay. The claimant had no benefits such as paid vacations, holidays, sick days, or insurance from this employer. (The claimant's job status was later discussed and disputed by the claimant).
12. The claimant was paid by the job, but an hourly rate was established (\$27.00 per hour locally; \$30.00 per hour for a [Location] Job). The claimant submitted a time report each week. The claimant usually worked alone but had a helper on a few jobs as needed. The helper was paid through additional monies from the employer.
13. The claimant had flexibility in his daily work hours but had to conform to the employer's time constraints of the contracts. He usually worked 8AM-4:30PM daily. He had to notify the employer if he could not work his shifts or complete the work, and he had to provide a two week notice if he was going to take any unpaid vacation time.
14. The employer provided the supplies for the construction work. The claimant had his own truck and tools but any large or expensive tools needed would be provided by the employer (through rentals if necessary). No documents or office space was needed.
15. The claimant did not need training in his work, but the employer instructed the claimant where to report when jobs ended or changed, generally supervised the jobs, and provided direction as needed.
16. The claimant worked under the employer's contracting license.
17. The employer thought the claimant had his own liability insurance. He did not. No Workmen's Compensation coverage existed as a result.

18. The claimant was issued a form 1099 for his yearly tax reports. The employer issued 1099's to all his subcontractors (up to 10 as needed).
19. The claimant did not work for anyone else during this period.
20. The relationship ended when the employer sent the claimant a letter explaining his dissatisfaction with the quality of some of the claimant's work and his behavior such as constantly being on his cell phone, not following instructions, taking time off without notifying the employer, and coming in late. The letter also suggested some changes in their continuing relationship, including the employer no longer covering the cost of error corrections, getting paid by the job, not hourly, not leaving the job site for personal issues before completing the work, providing his own liability insurance, individual job contracts, time lines to meet, possibly supplying the materials for some jobs, and a production based payment schedule. The claimant disagreed with the criticisms. He also decided this was an intention to make him an independent contractor and would not accept it. He did not return after that.

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) - Supervision, 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 Div. 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. Bd. of Review of Div. of Employment and Training, 439 Mass. 171, 178 (2003).

In this case, whether the employer exercised sufficient control over the claimant to meet the exemption of prong (a) is a close call. The employer provided the claimant with his assignments, the building materials and at least one large or expensive tool necessary to perform the assignments, paid the claimant by the hour, and expected to be notified when the claimant took time off. Testimony at the hearing revealed that the employer also spent some amount of time providing direction at each job.¹ The claimant, however, worked most of the time without supervision and on one occasion hired his own employee to perform part of the work. We need not decide whether the employer has proved prong (a), however, because the employer failed to prove prong (c).

Prong (b) - Outside the Course or Place of the Employer's Business

We do not agree with the review examiner's conclusion on prong (b). All of the claimant's services were performed at customers' homes, which were outside the employer's place of business. Therefore, in our view, the employing unit has met its burden on this prong.

Prong (c) - Capable of Engaging in an Independent Trade or Business

The Supreme Judicial Court 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.

As a matter of law in Massachusetts, the claimant is not permitted to perform home improvement contracting services directly for customers without registering with the Massachusetts Board of Building Regulations and Standards, an agency within the Executive Office of Public Safety. The act regulating home improvement contractors, G.L. c. 142A, § 9, provides, in relevant part, as follows:

- (a) No contractor or subcontractor shall undertake, offer to undertake, or agree to perform residential contracting services unless registered therefore with the approval of the bureau of building regulations and standards.

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006).

This claimant was not a registered home improvement contractor. Under G.L. c. 142A, § 14, he was not required to be in order to perform carpentry services for the employer's residential customers, because he worked under the employers' registration. However, without a home improvement contractor registration number of his own, the claimant was incapable of performing services as an independent contractor as a matter of law. For this reason, the employer cannot meet its burden of proof under prong (c).

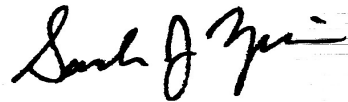
We, therefore, conclude as a matter of law that both the claimant's services and the services of others similarly situated were employment within the meaning of G.L. c. 151A, § 2.

The review examiner's decision is affirmed. The services performed by the claimant constituted employment, and, therefore, the employer is required to report the compensation for these services to the DUA and to make unemployment contributions on them. The DUA shall use the sums earned by the claimant in his service to the employer in computing the monetary basis for his claim.

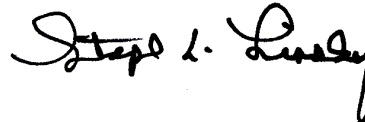


John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - January 13, 2011



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 14, 2011