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DECISION

DOCKET NUMBER: 443486

I. STATUTORY PROVISION(S) AND ISSUE(S) OF LAW:

MGL Chapter 151A, §§24(a) & 1(a) & 430 CMR 4.81-4.86 - Whether the claimant has credible substantiation that the benefit credit would be increased by 10% or more using the alternate base period.

MGL Chapter 151A, §§ 2 & 1(k) - Whether the claimant performed services as an employee and such services constitute employment.

II. FINDINGS OF FACT:

1. The Division disqualified the claimant from eligibility for benefits, because it had found him "...monetarily ineligible for benefits because you were not paid the minimum amount of wages required by law.
2. The claimant originally applied for benefits on February 17, 2006.
3. The claimant's filing on February 17, 2006 established a base period consisting of the last four completed calendar quarters, January 1, 2005 through December 31, 2005.
4. Beginning in June 2001, the claimant drove a delivery van for a nationwide delivery service. The claimant found the position through a newspaper advertisement. The service required the claimant to have a white extended van. The claimant obtained a white extended van to comply with this requirement.
5. The service also required the claimant to possess a valid driver's license.
6. The service required him to undergo a Department of Transportation physical. The service designated the doctor to perform the physical.

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7. The service required the claimant to sign a contract. The claimant had no ability to alter the terms of the contract. The contract contained all of the terms and conditions upon which the claimant would perform the deliveries.
8. The service provided uniforms that it required the claimant to wear while delivering for the Service. The Service charged the claimant for the uniforms.
9. The Service required the claimant to have his van washed every Thursday.
10. The Service required the claimant to have his vehicle insured. The claimant had no choice in obtaining the insurance. The service provided the insurer.
11. While delivering for the Service, it required the claimant to have signs posted on the van that indicated the Service's name. If used for any other purpose, the claimant had to remove or cover over the signs. The Service allowed the claimant to use the van for personal reasons and other purposes with this condition.
12. While making deliveries for it, the Service prohibited the claimant from using the van for any other purpose. Specifically, paragraph, 1.4 of the contract states in part, "While the equipment is in the service of [Service's Initials], it shall be used by Contractor exclusively for the carriage of goods of [Service's Initials], and for no other purpose."
13. The claimant needed to begin his work day by a reasonable time, generally considered as 8:30 a.m. The claimant began his work day from the Service's facility in Northborough, MA.
14. The Service designated the claimant's delivery area as the communities of Ayer, Shirley, Groton, Pepperell, Lunenburg, Harvard and Bolton, MA. The exact communities in the claimant's delivery area changed over time. The Service determined the communities in the claimant's delivery area.
15. Routes would change from day to day depending upon the number of deliveries. The Service set out the claimant's delivery route.
16. The claimant also needed a scanner. The claimant used the scanner as part of the Service's tracking system. The Service provided the scanner to the claimant. The claimant had to pay a leasing fee.
17. In the event that the claimant could not work, he needed to inform the terminal. During a period of prolonged absence or leave, the claimant had to pay for a substitute driver, van and associated costs.

18. In the event that the delivery van needed maintenance or repair that did not allow its use,
19. the claimant needed to provide another van to ensure deliveries occurred.
20. The Service had standards of service that it required the claimant to follow. The Service had persons ride with the claimant and also used unknown spotters to track his deliveries in order to ensure that the claimant met such standards of service.
21. The Service also established a Code of Corporate Conduct that it required the claimant to follow. The Code of Corporate Conduct covered policies establishing expected compliance by the claimant with Ethical and Legal Compliance Policies, Legal and Ethical Standards, Conflicts of Interest and Environmental Health and Safety Policies.
22. The service had a required safety meeting for drivers. This occurred once a month.
23. The Service set the rates at which it compensated the claimant for making deliveries.
24. Over the last year of his work, the Service began to deduct an amount to "pay" the claimant for a week of vacation every six months.
25. In 2005, the claimant had a period of about two months, when he could not work. The Service continued to pay the claimant. The Service also required the claimant to pay for a covering driver, lease of a vehicle and operating expenses. The claimant had no choice as to who covered his route area.
26. In 2005, the claimant had year to date earnings of \$65,186.61.
27. The claimant's work represented a critical component of the Service's business.
28. The claimant had no other business.

III. CONCLUSIONS & REASONING:

The claimant appeared at the hearing with his counsel. The Service did not attend.

Section 2 of M.G.L. c. 151A reads, "Service performed by an individual, except in such cases as the context of this chapter otherwise requires, shall be deemed to be employment subject to this chapter irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the commissioner that--

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“(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.”

The claimant did not provide services free from the direction and control of the appellant. The claimant worked under an immense amount of direction and control in every aspect of providing the Service’s business. This included the type of vehicle required for deliveries, the insuring of the vehicle, the requirement to identify the Service on the vehicle while making deliveries but not at other times or uses, the requirement to wear a company identifying uniform while making the deliveries, the requirement to lease scanning equipment to track deliveries, required attendance at meetings, the direction of areas of service and service delivery routes. The Service exercised so much discretion and control over the claimant’s delivery of services that no question exists over this aspect of the statute. The claimant’s services were not free from direction and control under s. 1.

The Service’s core business is the delivery of items throughout the nation. The claimant’s area in north central Massachusetts represented only a small picture of the Service’s total scope. Since delivery represents the core business of the Service, it does not meet the requirements of s. 2.

The Service allowed the claimant to use the van for other purposes, but only when not delivering items for the Service. The contract explicitly prohibited the claimant’s ability to conduct any other service while delivering. Since the claimant had no other trade or business of the same nature, s. 3 does not apply. The contract eliminated any possibility that the claimant could have conducted any other service while delivering for the Service. Had he done so, he would have violated the contract.

S. 2 allows exemption from its provisions providing that all three subsections apply. Because all three exceptions do not apply, the claimant’s services fall within the scope of the statute. The hearing produced substantial evidence and testimony to conclude that the claimant’s services represent employment within the meaning of s.2 of M.G.L. c. 151A.

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Since the claimant actually represented an employee of the Service, the next question becomes how to determine his benefit amount. The provisions of s. 24(a) & 1(r) control this aspect of the case.

The claimant had year to date earnings of \$65,186.61. The employer paid the claimant even during a period of illness to arrive at this total. Accordingly, the decision adopts the position that the claimant earned a virtually equal amount over all four quarters, \$16,296.52. This results in the claimant's eligibility of the maximum benefit amount of \$551.00 per week for a period of 30 weeks.

IV. DECISION:

The determination is overturned.

The claimant is monetarily eligible for a benefit amount of \$551.00 per week for a period of 30 weeks providing that he is otherwise eligible.

HEARINGS DEPARTMENT

**BY: M. K. Block/rmp
REVIEW EXAMINER**

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