

JOHN R SHINNICK

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APPEAL RESULTS

Docket: 458290 Mail Date: March 13, 2007  
 Appellant: CLAIMANT Local Office: 11-0



Claimant JOHN R SHINNICK  SSN:	Date of Determination: 01/02/07 Hearing Request Filed: 01/11/07 Hearing Date: 03/01/07 Location of Hearing: LEOMINSTER
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Employer: FEDERAL EXPRESS CORP. C/O UC EXPRESS P.O. BOX 283 ST. LOUIS, MO 63166-0000  EMP#:	Original Determination: AFFIRMED: [ ] OVERTURNED: [X] OTHER: [ ]
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Appearance:  
 Claimant: [X] Employer: [ ]  
 Claimant's Rep/Attorney: [ ] Employer's Rep/Attorney: [ ] Interpreter: [ ]

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Commonwealth of Massachusetts

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~~Timothy P. Murray Lt. Governor~~

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## DECISION

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

MGL Chapter 151A, §§24(a) & 1(a) & 1(s) - Whether the claimant was paid sufficient wages in the base period to be eligible for benefits.

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 claimant performed services under an Operating Agreement that he signed with FedEx Home delivery between 2001 and 2006. The contract purported to make the claimant an independent contractor in the performance of these services.
2. The claimant ceased performing these services in December of 2006 and filed a new claim for benefits on 12/8/06.
3. The claimant's base period was thereby established as the period 1-1-06 through 12-2-06. The claimant had earned \$52,576.38 for services rendered to FedEx during this period.
4. On 1-2-07 the Division made a monetary determination and concluded that the claimant was not eligible for benefits. The claimant had had no wages during his base period from any other source and the Division determined that the sums paid to him by FedEx were not wages within the meaning of Chapter 151A.
5. The claimant appealed the monetary determination.
6. The claimant performed all of his services to Fed Ex within Massachusetts.
7. FedEx has operating facilities and regular employees within Massachusetts.
8. The primary activity of FedEx is the pick up and delivery of parcels and envelopes to businesses and residences.

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9. To that end FedEx employs drivers/delivery persons on a routine basis to carry out its business.
10. The claimant was engaged by FedEx to perform the same functions as those employees who were on its payroll; his duties required him to pick up packages at a FedEx facility each morning and to deliver all of the packages to the designated destinations prior to the end of the business day. FedEx determined the number and type of packages that were designated for delivery on a given day.
11. Although FedEx permitted the claimant to decide on his route and the timing of the delivery of most packages, in order to do his work efficiently he had to rely on a system of package numbering and loading that FedEx had worked out. The packages were already numbered and ordered for loading on his truck when he arrived each morning; he routinely followed the FedEx system in order to complete his deliveries within the time allocated for that purpose.
12. FedEx provided the claimant with an optical scanner that he used to scan/read bar codes on the various packages; this system confirmed delivery and tracked the time of delivery. The claimant was not required to use this system; he had the option to maintain such records manually, but he found it was impossible to do his job with the allotted time unless he utilized the scanning system.
13. FedEx did not require the claimant to appear at its facility at a particular time each morning. However, it did require him to have his truck fully loaded and to depart from its facility by 9 AM each day. This effectively determined the claimant's start time each day.
14. FedEx paid the claimant flat fees for the delivery of each package depending on the type of package. The claimant was not paid an hourly rate for his services. He earned the per package fee regardless of the time he spent in making deliveries. The claimant was not required to track and report his time spent in performing his duties except to the extent that the package code scanning system revealed that information.
15. Other than the scanning reports which track time and place of delivery the claimant was not required to submit any additional reports to FedEx.
16. The claimant was required under the Operating Agreement to invest in the purchase of delivery truck. He was not reimbursed directly for that cost, or for operating and maintenance expenses. FedEx did however require that the truck be of a certain type and manufacture and installed FedEx logos and paint on the exterior of the vehicle, and FedEx provided standards for maintenance that the claimant was required to observe.

17. The claimant was required to wear a uniform bearing FedEx logos while performing his services.
18. The Operating agreement required the claimant to pay the cost of insurance on his vehicle and workers compensation insurance; however, the carriers for these coverages were dictated by FedEx.
19. The Operating agreement was for a set term. The claimant was not free to terminate the agreement at will prior to the expiration of the term. During the life of the Operating agreement the claimant was not free to perform similar package delivery services for others.
20. The claimant received a one week mandatory training prior to being permitted to begin performing services. FedEx instructed him on how to conduct himself in his dealings with customers and instructed him on what to say when making deliveries.
21. FedEx determined the prices the claimant could charge a customer for delivery of a package and FedEx specified the time certain packages had to be delivered.
22. The claimant at one time had had a business and had reported his income as a sole proprietor holding himself out as providing delivery of food items for a fee.

### III. CONCLUSIONS & REASONING:

Only the claimant attended the hearing. Therefore, the above findings of fact are based exclusively on the claimant's direct testimony.

Whether the sums of money paid to the claimant by FedEx during the base period of his claim constitute "wages" within the meaning of Chapter 151A and therefore can be used to establish monetary eligibility for a claim under the provisions of Section 24(a) & 1(a) of the Law hinges on whether or not that compensation was paid for services rendered within an employer-employee relationship as defined by Section 2 of the Law.

Section 2 provides as follows:

*Section 2. 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—*

*(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 failure to withhold federal or state income taxes or to pay workers compensation premiums with respect to an individual's wages shall not be used for the purposes of making a determination under this section. An individual's exercise of the option to purchase insurance as permitted by subsection (4) of section 1 of chapter 152 shall not be used for purposes of making a determination under this section.*

*Whoever fails to treat an individual as an employee according to this chapter shall be punished as provided in section 47. Nothing in this section shall limit the availability of other remedies at law or in equity.*

The burden of proof under Section 2 rests with the party seeking to negate an employer-employee relationship. Section 2 essentially presupposes that services are performed within an employer-employee relationship unless the three tests contained in Subsections (a), (b) and (c) are all shown to be true.

In this case, based on the above findings of fact, only subsection (c) was shown to be true. The claimant had a prior history of operating an independent trade or business involving the distribution of packages of food stuffs; such a profession was "of the same nature" as the services he performed under this arrangement.

Subsection (b) will be proven true if the services the claimant performed were performed either "outside the usual course of the business" of FedEx or "outside all places of business" of FedEx. The services performed by the claimant for FedEx - package deliveries - were clearly within the usual course of business of FedEx. They were also not performed "outside all places of business of" FedEx; the claimant was required to go to a FedEx facility each morning to pick up his day's allotment of packages.

Finally, Subsection (a) was not proven to be true. The claimant was not free of direction and control in the performance of his services. He was required to use a truck decorated with the FedEx colors and logo and to wear a FedEx uniform. The employer trained him to act in a

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certain way in dealing with customers and instructed him on what he could and could not say. FedEx determined what packages were to be delivered each day and for all practical purposes determined the order and timing of delivery. The claimant was not free to perform similar services for others. Although there was some flexibility in the timing of his departure in the morning, FedEx required him to begin by 9 AM and expected him to complete the delivery of all packages by the end of the work day. For practical purposes he was required to use a scanner to read bar codes; that system tracked his activities and reported them to FedEx minute by minute. The employer reserved the right to demand that certain packages be delivered at fixed times designated by FedEx. The claimant was not free of "control and direction".

The services performed by the claimant for FedEx were performed within an employer-employee relationship within the meaning of Section 2. The \$52,576.38 in compensation paid to the claimant by FedEx for services rendered during 2006 therefore were wages within the meaning of Section 24(a) and 1(a).

Those wages can be used as the basis for the claimant's monetary eligibility on his claim filed on 12/8/06.

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**IV. DECISION:**

The determination is reversed.

The compensation the claimant received for services that the claimant performed for FedEx during the base period of his claim constitutes wages paid in an employer-employee relationship.

The claimant is monetarily eligible for benefits based on wages paid to him during the base period of his claim.

**\*\*N.B.\*\*** Enter the compensation paid to the claimant for his services for FedEx during 2006 into the automated system as wages. Redetermine his monetary eligibility relying on those wages.

**HEARINGS DEPARTMENT**

**BY: Richard Gauthier/amm  
REVIEW EXAMINER**

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