

- DECISION

EMPLOYER:

WATTS STAFFING SOLUTIONS LLC.

DATE: April 25, 2014

DECISION NO 21-BH-14

DETERMINATION NO 1358007

EMPLOYER ACCT NO.

ISSUE: Whether payments to certain individuals constitute covered employment or represent payments to independent contractors and are thereby excluded from unemployment insurance covered wages.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200*.

The period for filing an appeal expires: May 25, 2014

- APPEARANCES -

FOR THE APPELLANT:
Barbara Watts

FOR THE SECRETARY:
Kimberly Hale Carney, Assist. Attorney General

EVALUATION OF THE EVIDENCE

The Board of Appeals (the "Board") pursuant to statute, functions as an independent unit within the Maryland Department of Labor, Licensing and Regulation (hereinafter, the "Agency") for the purpose of reviewing determinations made by the Agency. *Md. Code Ann., Lab. & Empl. art., Sections 8-5A-07, 8-602(c), 8-617(g) and 8-629(f)*. The Agency is a party before the Board, *Section 8-602(c)(3)*, and the Board is not bound by any Agency decision or determination.

The hearing before the Board was *de novo*. *COMAR 09.32.06.03(H)(1)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*. As a result of its consideration of the evidence in the record, the Board may change the Agency's prior decision. The prior Agency decision may be affirmed, modified, reversed, or remanded.

The Agency's November 27, 2012 determination (with attachments) and the Board's hearing notice sufficiently apprised the employer of the legal and factual issues in this case. The Board mailed the hearing notice for the March 18, 2014 hearing on February 12, 2014. The employer had a sufficient opportunity to retain legal counsel and representation.

The Board is not persuaded that the employer met its burden to rebut the presumption of employment of the fifteen individuals identified in the Agency's 2011 audit. The Board finds the weight of the credible evidence does not support a finding that these fifteen individuals were independent contractors who were not performing services in covered employment within the meaning of *Section 8-205*.

I.

Barbara Watts, Watts Staffing Solutions, LLC's sole member, conceded at the hearing that Timothy Watts, her brother and the employer's office manager, was an employee and not an independent contractor. The Board finds sufficient evidence to support this concession. Timothy Watts only performed services for Watts Staffing Solutions, LLC, performed his services under the direction and control of Barbara Watts, and did not have an independent business of his own.

II.

The Board is not persuaded that the employer rebutted the presumption of employment for Jennifer Perman or that the weight of the credible evidence supports a finding that she was an independent contractor. The employer relied upon this specific language in Ms. Perman's employment agreement when making her assertion that Ms. Perman was an independent contractor: "Jenna is an Independent Contractor with no employee benefits." The employer's reliance upon this one statement was misplaced. The Board is not bound by labels placed on the relationships by the parties. The Board must consider the employment relationship as a whole and the course of performance of the relationship between Ms. Perman and the employer when carrying out the agreement.

There is insufficient evidence that Ms. Perman was free from direction and control. Notwithstanding Ms. Watts' asseverations that Ms. Perman was free to perform marketing services at her discretion, Ms. Perman was required to meet with Ms. Watts on a weekly basis (every Tuesday). The evidence does not establish that these meetings were for the sole purpose of merely monitoring Ms. Perman's performance of a customer's defined contractual requirements. These meetings were to establish and promote a marketing strategy for the employer.

The Board understands that under certain statutes and regulations, confidential patient medical information cannot be disseminated or disclosed. As a marketing manager, that was not the case with Ms. Perman. The evidence does not establish that Ms. Perman was privy to client medical information governed by confidentiality laws. Notwithstanding, Ms. Perman was contractually prohibited, "at any time or in any manner, either directly or indirectly, divulge, disclose, or communicate in any manner any Information to any third party without prior written consent of [the employer]". See *Employer's Exhibit 3, numbered paragraph 5*. The confidentiality limitation was "material" to the Employment Agreement.

The Board finds that "Information" as defined in the Employment Agreement's confidentiality clause was vague and overbroad and operated to substantially curtail the claimant's ability to independently and reasonably pursue business activities outside the scope of her work with this particular employer. This contractual provision is indicia of control.

There was insufficient evidence that Ms. Perman was engaged in an independent business or occupation of the same nature that was involved with the work of this employer. There was insufficient evidence that Ms. Perman maintained a business listing in the telephone directory; had her own place of business; had a financial investment in a related business; could incur a loss in the performance of the service (she was reimbursed for authorized expenses); employed others to perform the service; carried her own liability or workers' compensation insurance; performed the service for more than one unrelated employer at the same time; or was paid by the job.

At all times relevant to this case, the evidence supports a finding that Ms. Perman only held herself out as the marketing manager for this particular employer. Ms. Perman's business card clearly identified her as "Marketing Manager" for "Angel Heart Home Health". See *Agency Exhibit 2, page 33*. Her office telephone and facsimile number listed on the business card were the same as Watts Staffing Solutions, LLC's numbers. This was not indicia of an independently established business; rather, it was persuasive evidence of an employment relationship.

The Board finds that the weight of the credible evidence supports a finding that Jennifer Perman performed services in covered employment within the meaning of *Section 8-201*. The employer did not rebut the presumption of Ms. Perman's employment by a preponderance of the evidence within the meaning of *Section 8-205*.

III.

The Board is not persuaded that the employer rebutted the presumption of employment of any of the thirteen identified home care providers or that the weight of the credible evidence supports a finding that any of the home care providers was an independent contractor.

The employer proffered that each of the home care providers executed an independent contractor's agreement prepared by its lawyer. See *Agency Exhibit 4*. The employer provided no documentary evidence that any of the thirteen home care providers executed this contract and insufficient evidence that any of the home care providers acted in strict conformance with its provisions. Furthermore, it would not be dispositive of the independent contractor issue that a lawyer prepared the document or that the workers signed it. The concept of an independent contractor is one of function, not form. A worker is not an independent contractor because he, or the business enterprise for which he performs services, attaches such a label.

The Board finds insufficient evidence that any of the thirteen home care providers were engaged in an independent business or occupation of the same nature as the work. The employer presented insufficient evidence that any of the home care providers had an independent business listing, had a financial investment in a related business, could incur a loss in the performance of the service, employed others to perform the service, or that any of the home care providers performed services for more than one unrelated employer at

the same time. By the employer's admission, the home care providers were paid by the hour after submitting timesheets for the time they worked performing services for the employer's clients. None of the home care providers were paid by the job.

The evidence does not support a finding that the home care providers' work was performed outside the employer's place of business. The client's homes were an extension of the employer's workplace because that is where its services were performed. The preponderance of the evidence established that the home care providers' work was squarely within the employer's usual course of business.

The Board finds that the weight of the credible evidence supports a finding that the thirteen home care providers each performed services in covered employment within the meaning of *Section 8-201*. The employer did not rebut the presumption of their employment by a preponderance of the evidence within the meaning of *Section 8-205*.

FINDINGS OF FACT

Watts Staffing Solutions, LLC, is a Maryland limited liability company whose sole member is Barbara Watts. Ms. Watts is a registered nurse. The employer operates a "Private Duty Nursing Agency" doing business as "Angel Heart Home Health...[a] division of Watts Staffing Solutions, LLC" based from its business address at 6999 Reisterstown Road, Baltimore, Maryland. *See Agency Exhibit 3* and *Agency Exhibit 5*. Angel Heart Home Health is not a separate legal entity and is wholly within the Watts Staffing Solutions, LLC umbrella.

Because employer contribution issues arose relating to an unemployment benefits claim filed by Jennifer Perman (after her separation from employment with Watts Staffing Solutions, LLC), the Agency conducted an investigation and audit. For the period of January 1, 2011 through December 31, 2011, the Agency found Watts Staffing Solutions, LLC, had total wages of \$117,289.00 with taxable wages of \$75,828.00. *See Agency Exhibit 2*. The Agency found Watts Staffing Solutions, LLC underreported its UI taxable wages to the Agency by \$19,141.00. *Id.* As of December 31, 2011, the Agency found total outstanding UI contributions due and owing by Watts Staffing Solutions, LLC, to the Agency were \$2,584.00. *Id.*

The employer had three different types of positions: (1) an office manager position; (2) a marketing manager position; and (3) thirteen "home care" provider positions. The home care providers are certified nursing assistants and nurse-trained "sitters and companions". *See Agency Exhibit 3*. All staff members were "monitored and evaluated" by Barbara Watts. *See Agency Exhibit 3*. The home care providers rendered their services at the employer's clients' homes. Ms. Watts also provided home care services for the business' clients. As the result of an investigation and audit, on November 27, 2012, the Agency determined that all these individuals were employees who performed services in covered employment during calendar year 2011¹.

The office manager, Timothy Watts, is Barbara Watts' brother. Mr. Watts performed administrative duties

¹ The employer did not request an Agency review of the audit findings; therefore, the November 27, 2012 audit determination became final thirty days after its issuance.

in the employer's office as an employee.²

Jennifer Perman was the employer's marketing manager. Ms. Perman only worked for Watts Staffing Solutions, LLC, (d/b/a Angel Heart Home Health) until her separation from employment and at no time did she operate her own independent business. Her business telephone number (410-764-2787) and facsimile number (410-764-2789) listed on her business card was Watts Staffing Solution, LLC's, telephone and facsimile numbers. *See Agency Exhibit 2* and *Agency Exhibit 5*. Ms. Perman did not hold herself out as an independent marketing manager for any other company or business.

Ms. Perman executed an "Employment Agreement" with Angel Heart Home Health wherein she had "...no employee benefits...[however], Jenna shall be entitled to Unemployment Insurance Compensation based on State guidelines." *See Employer's Exhibit 3*. Ms. Perman's duties were described in the first numbered paragraph entitled "EMPLOYMENT" [emphasis in original]. *Id.* In addition to the duties described in the Employment Agreement, Ms. Perman was required to meet with Ms. Watts in person every Tuesday. *See Agency Exhibit 1*. The Employment Agreement only authorized "Jenna" to perform sales and marketing consulting services for the employer and bound "Jenna" to a duty of confidentiality regarding the employer's "Information". *See Employer's Exhibit 3*. The Employment Agreement was solely between Ms. Perman (an individual) and Angel Heart Home Health and did not provide a provision whereby Ms. Perman could sub-contract or assign the contracted services to others. At no time did Ms. Perman hire others to perform the services, or assist in performing the services, for which she was employed.

Ms. Perman was paid a wage of \$22.50 per hour, a "monthly commission equaling 3% of all sales for each new account for the first 90 days of accounts establishment [sic]" and a mileage reimbursement for travel. *See Employer's Exhibit 3*. Under the Employment Agreement's terms, Ms. Perman was to be reimbursed for her pre-authorized expenses incurred in the course of her duties. The employer issued Ms. Perman an IRS form 1099 as evidence of her paid wages.

The thirteen home care providers performed services on behalf of the employer at the employer's clients' homes.³ There were no written employment or independent contractor agreements executed by the home care providers. Each home care provider submitted timesheets (not invoices) to the employer when reporting the hours worked. The employer paid the home care providers by the hour and not by the job.

None of the home care providers were engaged in an independent business or independent occupation. The home care providers performed services only for Watts Staffing Solutions, LLC / Angel Heart Home Health in calendar year 2011. The home care providers did not have independent business listings, their own places of business, and did not employ others to perform the services for which they were responsible. The home care providers' services were performed within the usual course of the employer's home caregiver service business in calendar year 2011. Watts Staffing Solutions, LLC, issued all home care providers an IRS form 1099 as evidence of their paid wages.

² Barbara Watts conceded that Mr. Watts was an employee and not an independent contractor. The Board shall not further address this factual issue.

³ The thirteen home care providers are individually identified in *Agency Exhibit 2, page 9* as: Audrina Gray; Brittany Green; Charity Knight; Delores Lee; Elaine Barrow; Gerald Wims; Janice Watkins; Joann Blue; Latea Gray; Neshell Riddick; Sheila Canty; Tanylle Young; and Vivian Haynes.

CONCLUSIONS OF LAW

Md. Code Ann., Lab. & Empl. art., Section 8-201 establishes a presumption that a person performing services is in covered employment. *Section 8-201* provides, in pertinent part,

- (a) Presumption. -- Employment is presumed to be covered employment if:
- (1) regardless of whether the employment is based on the common law relation of master and servant, the employment is performed:
 - (i) for wages;
 - (ii) under a contract of hire that is written or oral or express or implied; and
 - (2) the employment is performed in accordance with § 8-202 of this subtitle.
- (b) Overcoming presumption. -- To overcome the presumption of employment, an employing unit shall establish that the person performing services is an independent contractor in accordance with § 8-205 of this subtitle or is specifically exempted under this subtitle.

Md. Code Ann., Lab. & Empl. art., Section 8-205 provides, in pertinent part,

- (a) In general. -- Work that an individual performs under any contract of hire is not covered employment if the Secretary is satisfied that:
- (1) the individual who performs the work is free from control and direction over its performance both in fact and under the contract;
 - (2) the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and
 - (3) the work is:
 - (i) outside of the usual course of business of the person for whom the work is performed; or
 - (ii) performed outside of any place of business of the person for whom the work is performed.
- (b) Regulations. -- The Secretary shall adopt regulations to provide:

- (1) general guidance about the application of subsection (a) of this section; and
- (2) specific examples of how subsection (a) of this section is applied to certain industries, including the construction industry, the landscaping industry, and the home care services industry.

The employer has the burden of proof and may rebut the presumption of employment by showing, by a preponderance of the evidence, that it meets each element of the *Section 8-205* three-prong test. *COMAR 09.32.01.18B(1) and B(2); Herald Mail Co., 02990-BH-97.*

The employer's burden notwithstanding, the Agency has a responsibility to put on a case which clearly establishes the reasons for its findings based on a logical foundation of facts and law. *Susan Gage Caterers, Inc., 00740-BR-97.*

The mailing of the Agency's audit review determination manifests the Agency's satisfaction that it has had a full and fair opportunity to build a record and support its findings and that the determination will "stand on its own merits". *Herald Mail Co., 02990-BH-97.* An audit review determination give the employer notice of potential facts and issues of dispute. Due process requires that the audit not be a "moving target". An audit is closed when the Agency issues its review determination. Hearings before the Board are not a continuation of the Agency's audits; they are a separate independent proceeding to consider the evidence that the Agency used to make its determinations and to allow the parties to put on their case before the Board.

The Agency's case is essentially limited to the audit. *Herald Mail Co., 02990-BH-97.* To allow the Agency to substitute new evidence (not considered in the audit) or unsuitable evidence is a violation of the employer's due process. *Id.* The employer must have notice of the legal and factual issues of the case.

In *Shaw v. Valdez, 819 F.2d 965 (10th Cir. 1987)*, the U. S. Supreme Court held: "[i]t goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them." *FTC v. National Lead Co., 352 U.S. 419, 427, (1957)*; see also *Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970)*.

The Court has additionally stated: "We think Shaw was entitled, as a matter of right, to know in advance all of the factual and legal issues that would be presented at the hearing." The *Shaw* Court further held:

Lastly, we are not persuaded by the consideration that the volume of appeals in such cases required expeditious proceedings, without a more specific notice. The State could afford a fair hearing premised on fair notice by a brief statement of particular factual and legal points to be raised at the hearing... with a warning to the parties that there would be no "issue switching" at the hearing.

And we note further that while the burden on the administrative process of a particular procedural safeguard should be considered, *Mathews v. Eldridge, 424 U.S. 319, 335, (1976)* administrative "speed and efficiency" cannot justify a failure to observe basic fairness in procedure. See *Stanley v. Illinois, 405 U.S. 645, 656, (1972)*.

In an unemployment tax contribution hearing, both parties are entitled to notice of the factual and legal issues to be adjudicated at the hearing. This requires more than a broad unspecified statement or a statement that is so vague and potentially inclusive as to be meaningless. Additionally, the issue stated on the Notice of Hearing should be materially consistent with the issue shown on the review determination from which a party has appealed.

As to the first prong of the *Section 8-205* test, in order to be an independent contractor, an individual who performs work must be free from control and direction over the performance of the work, both in fact and under the contract. *Section 8-205(1)*. An employer can control the end but not the means; the worker must be answerable only as to the results, not as to the performance of the work. *Herald Mail Co., 02990-BH-97*.

COMAR 09.32.01.18(A)(3)(a) lists five factors which can be evidence of freedom from control; this list is not exhaustive and there is no requirement that any or all be proven:

- (a) The person has been and will continue to be free from the employing unit's control or direction:
 - (i) The employing unit does not require the person to comply with detailed instructions about when, where, and how the person is to work,
 - (ii) The employing unit does not train the person to perform the service in a particular manner or using a particular method determined by the employing unit,
 - (iii) The employing unit does not establish set hours of work for the person performing the services,
 - (iv) The employing unit does not establish a schedule or routine for the person performing the service,
 - (v) The employing unit may not discharge the person for failure to obey the employing unit's specific instructions on how the service is to be performed;

The standards of performance established by the end-user (the employer's customer or client) to outline the responsibilities and structure of the work are not the employer's controls. *Pharmakinetics, 156-EA-94; Great Southern Printing Co., 00899-BH-97* (a contractual acknowledgement of the reasonable requirements of the end-user are not "controls" of the employer).

Requirements or actions to ensure compliance with the law and/or government regulations (e.g., FDA, OSHA) do not constitute control over the performance of the work. *Pharmakinetics, 156-EA-94*.

A worker's right to refuse to accept an assignment is not equivalent to setting his hours of employment. *DLLR v. Fox, 346 Md. 484 (1997)*.

Where the employer's function is merely to monitor the integrity of the work to ensure conformity with the standards set by the end-user, the employer does not "control the performance of the work. *Great Southern Printing Co., 00899-BH-97.*

Finding "control" as opposed to "mere monitoring", the Court of Appeals in *DLLR v. Fox, 346 Md. 484 (1997)* looked closely at the role of the end-user vis-à-vis the employer and the worker in weighing various elements of control:

- (a) Fox, not the end-user, paid the worker;
- (b) Fox unilaterally set fixed compensation rates;
- (c) Fox, not the end-user, decided whom to offer assignments;
- (d) Under the contract, Fox prohibited workers from taking a permanent offer until after the end-user paid a placement fee;
- (e) In the event of cancellation of service by the end-user, Fox charged a cancellation fee which was not passed on to the worker;
- (f) Fox, not the worker, bore the risk of nonpayment by the end-user.

As to the second prong of the *Section 8-205* test, in order to be an independent contractor, the individual must be customarily engaged in an independent business or occupation of the same nature as that involved in the work. *Section 8-205(2)* is a "co-equally important consideration of the three-prong test" but is in reality a corollary of the control test prescribed in *Section 8-205(1)*, which is the principal consideration in determining the relationship of the employment: "If one is engaged in his own independently established business, he is not subject to the control of another. If an individual is subject to another's control or direction over the performance of the work, he is pursuing another's business and not an independent business or occupation of his own." *James Youngbar, 1452-BR-97.*

COMAR 09.32.01.18B(3)(c) lists ten factors which can be evidence of an independently established business; this list is not exhaustive and there is no requirement that any or all be proven. Each case must be decided on its own merits. *America's Energy Savers Home Improvement, Inc., 03579-BH-96.*

- (1) Maintains a business listing in the telephone directory;
- (2) Has his or her own place of business;
- (3) Has a financial investment in a related business and can incur a loss in the performance of the service;
- (4) Has his or her own equipment needed to perform the service;

- (5) Determines the price of the service to be performed;
- (6) Employs others to perform the service;
- (7) Carries his or her own liability or workers' compensation insurance, or both;
- (8) Performs the service for more than one unrelated employer at the same time;
- (9) Sets his or her own hours;
- (10) Is paid by the job.

The length of time the worker is engaged in such an independent business or occupation may be irrelevant. *Pharmakinetics, 156-EA-94.*

There is no requirement that the individual must be engaged in another independently established business. *America's Energy Savers Home Improvement, Inc., 03579-BH-96.* Section 8-205(2) does not depend on whether the worker is serving one person or many, but whether in pursuit of his occupation he is acting upon his own behalf or as the servant of another. *Herald Mail Co., 029901-BH-97.* The Section 8-205 test's second prong may be satisfied by showing the individual's involvement in an independent occupation. *James Youngbar, 1452-BR-97.*

The employer's requirement that a worker supply his own liability or worker's compensation insurance is more probative of "independence" under Section 8-205(2) than of "control" under Section 8-205(1). *Great Southern Printing, 00899-BH-97.*

A worker's freedom to simultaneously compete with the employer or work for an employer's competitor is persuasive evidence of an independently established business. *Id.*

As to the third prong of the Section 8-205 test, in order to be an independent contractor, the employer must demonstrate that an individual's work is (i) outside of the usual course of business of the person for whom the work is being performed; or (ii) performed outside of any place of business of the person for whom the work is performed.

Being an integral part of the process (i.e., needed in the course of the employer's business) does not necessarily render a service to be "within the usual course of business", *Pharmakinetics, 156-EA-94*; one must look to the function of the worker in question. *Id.* (employer's usual course of business is the analysis of data, and the worker's function is to ingest drugs and providing bodily fluids for the employer's analysis).

The fact that a worker goes to the employer's workplace to conduct transactions "merely incidental to the main purpose [of the service he has been hired to perform]" (such as purchasing supplies) does not automatically prevent the employer from meeting its burden under Section 8-205(3)(ii). *Herald Mail Co., 029901-BH-97*; *Cf. America's Energy Savers Home Improvement, Inc., 03579-BH-96* (the Board was not persuaded with the argument that the homes of potential customers constituted a "place of business" of the employer on the facts of that case).

The Board finds that the employer did not meet its burden of rebutting the presumption of employment by a preponderance of the evidence for any of the fifteen individuals identified in the Agency's 2011 audit within the meaning of *Section 8-205*. The Board finds the weight of the evidence supports a finding that the fifteen individuals identified in the Agency's 2011 audit were not independent contractors but were employees who performed services in covered employment.

The Agency's November 27, 2012 audit determination shall be affirmed for the reasons herein.

DECISION

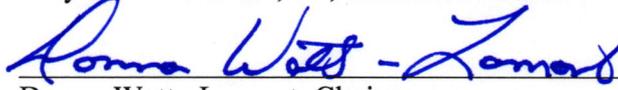
THE BOARD HOLDS that the employer failed to rebut the presumption of employment for Jennifer Perman (the marketing manager); Timothy Watts (the office manager); and Audrina Gray; Brittany Green; Charity Knight; Delores Lee; Elaine Barrow; Gerald Wims; Janice Watkins; Joann Blue; Latea Gray; Neshell Riddick; Sheila Canty; Tanylle Young; and Vivian Haynes (the thirteen home care providers) within the meaning of *Md. Code Ann., Lab. & Empl. art., Section 8-205*.

THE BOARD HOLDS that the following individuals performed services in covered employment within the meaning of *Md. Code Ann., Lab. & Empl. art., Section 8-201*: Jennifer Perman (the marketing manager); Timothy Watts (the office manager); and Audrina Gray; Brittany Green; Charity Knight; Delores Lee; Elaine Barrow; Gerald Wims; Janice Watkins; Joann Blue; Latea Gray; Neshell Riddick; Sheila Canty; Tanylle Young; and Vivian Haynes (the thirteen home care providers).

The Agency's November 27, 2012 audit determination is affirmed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

YJ

Copies mailed on April 07, 2014 to:

MARK A. SORRENTINO

WATTS STAFFING SOLUTIONS LLC.

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