

DLLR

STATE OF MARYLAND

DEPARTMENT OF LABOR, LICENSING AND REGULATION

PARRIS N. GLENDENING, Governor
JOHN P. O'CONNOR, Acting Secretary

Board of Appeals
Hazel A. Warnick, Chairperson

- CORRECTED DECISION -

EMPLOYER:

PERSONAL CARE, INC

DATE: January 26, 1999

DECISION #00021-BH-99

DETERMINATION #9550113

EMPLOYER ACCT.

Issue: The issue in this case is 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: February 25, 1999

- APPEARANCES -

FOR THE APPELLANT:

Sidney L. Bloom, Vice-President
Sue McConnell, President
Craig F. Ballew, Attorney

FOR THE SECRETARY:

Jessica Carter, Attorney Generals Office

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.



This case was set before the Board of Appeals for legal argument only. The Board has considered the extensive legal arguments presented by both parties.

There is a presumption under Maryland law that personal services are performed in an employment relationship regardless of whether or not there is a common law relationship of master and servant between the employer and employees unless it is specifically exempted under Maryland Unemployment Insurance Law. The employer has the burden of proving, by a preponderance of the evidence, that the services of the individuals in question are exempted. See Warren v. Board of Appeals, 226 Md.1 (1961). See also America's Energy Savers Home Improvement, Inc., 03579-BH-96.

LE, Section 8-205 sets forth a three prong test for determining whether an individual is an independent contractor or an employee. In order for an individual to be considered an independent contractor within the meaning of the unemployment insurance law, the employer must show (1) that the individual is free from control over the performance and direction of his work; (2) that the individual is customarily engaged in an independent business or occupation of the same nature as that involved in the work; and (3) that the work is either (a) outside the usual course of business of the employer or (b) the work is performed outside any place of business of the employer. Section 8-205 requires that the employer prove all three prongs of this conjunctive test, in order to meet the exemptions.

FINDINGS OF FACT

Personal Care Incorporated (PCI) provides home health care aides to clients for an hourly fee. In 1995, the Department of Labor, Licensing and Regulation (DLLR) initiated an audit of PCI, for calendar years 1993 and 1994. DLLR concluded from that audit that PCI had not reported wages for 99 individuals identified as home care aides in 1993 and for 75 home care aides in 1994. PCI appealed, asserting that its home care aides are independent contractors and therefore exempt from unemployment insurance coverage.

PCI maintains a registry of aides. The aides are not registered nurses but may be certified nursing assistants (CNAs) and geriatric nursing assistants who are certified by the State of Maryland. Each potential aide must fill out an application and provide references. The application requests information concerning the applicant's background, education, special skills, employment history, physical and mental disabilities, lifting restrictions and felony convictions. It also asks for the applicant's availability and shift preference. The application includes an authorization to PCI to verify all statements and secure information from previous employers and references. By signing the application form, the applicant agrees to release PCI from any liability in connection with the release of the information.

PCI also requires applicants to complete a detailed check list of their abilities and experience and a separate information authorization sheet, authorizing former employers and educational references to furnish PCI with information concerning the applicant. The applicant must submit a copy of her certificate of training. PCI then checks the references, verifies the training and interviews the applicant.

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PCI also requires applicants to complete a detailed check list of their abilities and experience and a separate information authorization sheet, authorizing former employers and educational references to furnish PCI with information concerning the applicant. The applicant must submit a copy of her certificate of training. PCI then checks the references, verifies the training and interviews the applicant.

Once an applicant has proven that she has the proper certification and her references are acceptable, PCI will offer her a contract called a Memorandum of Understanding. There is no fee requested from the applicant by PCI to be included in its registry, but the applicant must sign the Memorandum of Understanding. That Memorandum includes the following provisions:

1. The aide requests to be added to PCI's registry and agrees that PCI's services consist of securing aides for its clients and maintaining and coordinating the scheduling of service care to its clients by the aides.
2. The aide agrees to perform the duties prescribed by the client's physician or agreed upon directly with the client.
3. The aide agrees not to follow the client's orders if to do so would not be in the client's best interests.
4. The aide agrees to contact the client's physician if the aide and the client disagree with respect to care and service.
5. The aide acknowledges that she is usually part of a team and agrees to cooperate with the other team members who are providing care to the client.
6. The aide agrees that if communication or other problems develop, the aide will be bound by whatever PCI or the client decide is best for the client in order to maintain staffing continuity.
7. The aide establishes an hourly rate for service and authorizes PCI to request this rate on the aide's behalf. The rate is generally \$6 to \$7 per hour.
8. The aide acknowledges that she is a self-employed individual, responsible for her own taxes.
9. The aide acknowledges that PCI does not cover her for unemployment insurance compensation, workers' compensation, health insurance or any other benefits.
10. The aide agrees to purchase liability insurance to protect the client from any damage due to the aide's negligence or mistake or through an accident.
11. The aide agrees not to accept a position with any client to whom PCI has referred the aide, or a family member of said client within 180 days after the aide's employment relationship has been terminated by either the client or PCI.
12. The aide agrees not to "take" PCI's clients with the aide if she decides in the future to become affiliated with another registry or an employer.

13. If the aide violates this agreement, the aide agrees to be responsible for any monetary loss sustained by PCI (i.e. weekly fee paid to PCI by the client for its services) as well as any legal fees incurred to recover this monetary loss. This does not apply to non-PCI referral clients that the aide secures directly.

14. The aide acknowledges that PCI does not guarantee payment by the client. However, if the aide is not paid by the client, PCI agrees to use its best efforts to collect the aide's payment at no cost to the aide, as part of PCI's efforts to collect its own payment. This includes recovery of attorney's fees and court costs from the client.

Once the aide signs the Memorandum, PCI adds her name to its registry.

PCI is responsible for obtaining clients and does so through referrals through hospitals and social workers. It is also listed in the Yellow Pages under "Nursing Services" and distributes a brochure.

When a client contacts PCI, PCI meets with the client to assess the client's needs. The employer fills out a client assessment sheet that includes information about the client's mental status, mobility, medical history, hobbies and interests and special needs. The assessment also includes medications and the names and addresses of attending physicians and contact persons. PCI also discusses with the client the cost of its services, the hourly rate the client is to pay the aide and the number of hours of service required by the client.

Once the client decides to use PCI's services, PCI provides the client with a prepared contract called an Agreement for Personal Care Referral Services. This contract, once signed, authorizes PCI to use its best efforts to: "secure and coordinate the staffing of personal care aides" to assist the client. The contract also contains the following provisions:

1. The type of assistance required by the client.
2. The hours the assistance of an aide is required.
3. The hourly rate paid to the aide and a statement that the aide is to be paid weekly.
4. The hourly rate paid to PCI by the client for each hour the aide is on duty. This varies from \$.75 to \$1.50 per hour. There is also a statement that this fee will be paid weekly unless other arrangements are agreed upon.
5. A requirement to pay the aide time and a half for certain specified holidays.

6. A statement that if the client terminates the aide and re-employs the aide within 180 days from the termination, the client will continue to owe PCI its hourly rate for as long as the client employs the aide.
7. A provision that if the client needs the services of an additional aide to transport the client or to assist the aide on duty, the client must pay PCI for the additional aide with a two hour minimum for each such visit.
8. A statement that the client understands that PCI is not providing services directly or indirectly and the aide is an independent contractor and a third party beneficiary of this contract for purposes of payment.
9. An agreement to allow PCI to use its best efforts to resolve problems between the aides and the clients if the client is unsuccessful in resolving it directly with the aide. PCI agrees to use its best efforts to resolve the problem and maintain staffing continuity.
10. An agreement by the client to pay 1.5% interest per month on any amount due to PCI or the aide for more than 30 days and to pay reasonable attorney's fees to PCI or the aide for collection services, if necessary.
11. A statement that the client is personally responsible for the payment due to PCI and the aide.

This contract is signed by PCI and the client; the aide does not enter into or sign this contract.

Once the contract is signed, PCI selects an aide from its registry and contacts that aide and offers her the assignment. If the aide accepts, she is sent to the client.

The client and the aide work out the aide's schedule. The client is required to have filled out a two part time sheet on PCI letterhead and turn in one of the two sheets to PCI each week. The time sheet must contain the name of the client, the name of the aide or aides (if more than one), the week ending date, the hours worked each day and the amount paid.

The client pays the aide directly and pays PCI its fee separately. PCI does permit an aide to bring in a non-PCI aide to assist her in serving a client. That non-PCI aide's name, hours and amount paid by the client is listed on PCI's time sheet, but PCI receives no hourly fee based on this aide's service.

PCI does not require aides to keep written records of their service (other than the previously described time sheet) and does not perform any quality control monitoring of the aide's service.

A client can terminate the services of an aide by requesting that PCI dismiss the aide from the client's case. PCI has the option of either re-assigning the aide when needed, or terminating the aide permanently by removing her from its registry. PCI can terminate an aide for any reason. An aide can also voluntarily remove herself from PCI's registry for any reason.

PCI does not restrict an aide from working for another nursing service or other employer while the aide is also working for PCI. If an aide must be absent, she may secure a replacement herself or through PCI.

PCI does not provide a handbook, equipment or training to its aides.

Among the 99 individuals listed on the 1993 audit list, 32 also were employed by other nursing registries. Among the 74 listed for 1994, 27 also performed services for others.

CONCLUSIONS OF LAW

Section 8-205 states 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.

The employer has the burden of proving that he meets all three prongs of this test, in order for this exemption to apply. The Board concludes that the employer has failed to prove this exemption.

The Board is persuaded that PCI has not met its burden of proof with regard to Section 8-205(1).

PCI interviews the aides, has them complete a detailed questionnaire, a check list and an information authorization form. The aide is required to submit references, evidence of training and must consent to have references checked.

PCI requires each aide to sign a contract that PCI has prepared. The aide agrees that PCI secures aides for clients and maintains and coordinates the scheduling of service by aides to clients. In the contract the aide also agrees to be bound by PCI's decision if a dispute arises between the client and the aide. The aide also agrees to purchase liability insurance.

Most importantly: (1) the aide agrees not to work for any client or a family member of a client referred by PCI within one hundred eighty days after the aides's employment with the client has ended; (2) the aide agrees not to take PCI clients with her if she is employed at another agency; and (3) PCI can terminate the aide at any time for any reason.

These are all strong indicia of direction and control, within the meaning of the statute. PCI argues that it is merely a placement agency or a broker between the client and the aide, and not an employer. It cites the facts that the aides can set rates, change their vacations and hire helpers as indicia of freedom from control. However, the Board finds that the factors in favor of control are much more persuasive.

The Board of Appeals has looked at this question carefully in several recent decisions. It is true that control must be something more than mere monitoring and that where the worker is answerable to the Employer only as to the results of the work, but not as to the performance of the work, there is indicia of freedom from control. See Pharmakinetics, 156-EA-94 and Herald Mail Company, 02990-BH-97.

However, there is more here than the mere monitoring of results. The Court of Appeals, in its recent decision DLLR v. Fox, 346 Md. 484, 697 A.2d. 478 (1997), affirmed the Board's decision that Fox, a sole proprietor who trades as "Dental Placements," (furnishing temporary help to dentists' offices, primarily hygienists and dental assistants) was "not a mere referral or brokering service which matches the needs for staffing of dentists' offices with the availability of independent contractors." Fox, supra. The Court concluded, as had the Board, that the temporary workers were covered employees of Fox, within the meaning of the statute.

Many, although not all, of the same factors that the Court considered in Fox apply to PCI:

1. There is an express contract between Fox and the client (dentist) and a separate express contract between Fox and the worker.

2. There is no "contract of hire" directly between the dentist and the worker.¹
3. Fox maintains a registry of qualified persons.
4. Fox requires applicants interested in working at a dental office through Fox to complete a questionnaire describing their skills, licensing, education, references and availability.
5. Fox verifies the information furnished by the applicant.
6. The applicant is required to obtain malpractice insurance.
7. The applicant is required to accept any placement in the capacity of an Independent Contractor.²
8. There is a limitation placed on the applicant's ability to privately contract with the dentist. In Fox, the dentist must pay Fox a fee; PCI has imposed a strict time period during which the aide cannot work privately for the client.

Some of the factors that PCI cites as evidence of freedom from control were present in Fox; nevertheless, the Court did not find them sufficient to meet Fox's burden:

1. Fox furnishes no tools to the workers.
2. Fox holds no license in the dental services field and does not hold herself out as qualified to perform any services in that field for which no license is required.
3. To the extent that the workers are directed how to perform their services while on a temporary job, the direction is given by persons at the particular dentist's office.

¹In Fox, unlike this case, the "client" (the dentist) did not pay wages to the worker, but instead paid Fox. However, that factor alone is not sufficient to prove that PCI meets the control test of 8-205(1). In addition, where Fox received a single fee for its services, PCI receives from the clients weekly payments for the services of its aides, further evidence of continuing control over the employment relationship.

²As with PCI's contract with its aides, the mere stating that the worker is an independent contractor, is not evidence that in fact, she is an independent contractor for the purposes of the Maryland Unemployment Insurance Law.

4. The worker may refuse an assignment.³

There are, of course, some differences between the employment arrangement here and in the Fox case. But these cut both ways. On the one hand, Fox sets the wages to be paid and pays them directly to the workers. PCI specifies that the client is to pay the aide and, in theory, at least, the aide sets her own rate and "authorizes" PCI to request that rate from the client.

On the other hand, where Fox receives a one time fee from the dentist at the conclusion of the service, PCI receives a weekly payment from the client. Further, in Fox, the Court found that if a dental office was dissatisfied with a temporary worker, it is the dentist, and not Fox, who has authority to remove the individual from the temporary position. PCI specifically retains the right to terminate the services of its aides at any time. The right to terminate the contract at its discretion has previously been held by the Board to be "inconsistent with an independent contractor arrangement." Nurses Unlimited, Inc., 37-EA-89.

For all these reasons, the Board concludes that PCI has not met its burden of proving that the aides are free from PCI's direction and control, within the meaning of LE, Section 8-205(1) of the statute.

The Board is persuaded that PCI has not met its burden of proof, with regard to LE, Section 8-205(2).

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 8-205(1), which is the principle consideration in determining the relationship of 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 his work, he is pursuing another's business and not engaged in an independent business or occupation of his own." James Youngbar, 1452-BR-97.

COMAR 09.02.01.18b(3)(c) sets forth ten criteria which may be used as indicia of whether a person is engaged in an independent business. In determining whether an employer-employee or an independent contractor relationship exists, no single factor alone is conclusive and there is no set amount of factors that must be met in order to meet this second prong of 8-205. Each case must be decided on its own peculiar facts. America's Energy Savers Home Improvement, Inc., 03579-BH-96. These factors are:

1. maintains a business listing in the telephone directory;
2. has his or her own place of business;

³The Court of Appeals in Fox specifically held that this is not equal to the ability to set one's own hours.

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. set his or her own hours;
10. is paid by the job.

The Hearing Examiner found that, aside from one example of an aide who became incorporated, the employer provided no evidence that its aides are employed in an independent business or occupation of the same nature as involved in PCI's work. There was no evidence offered that the aides have their own business cards, submit invoices for their services or list themselves in the business telephone directory. The Board agrees. While there is evidence that under the contract, the aide may hire others to perform the service and the aide may work for another unrelated employer, this is not sufficient to meet PCI's burden.

As the Agency argues, PCI's actual evidence offered on this part of the test is weak. The generic advertisements for home health care were not placed by persons working for PCI. Although such evidence is admissible, it is barely probative or competent. See America's Energy Savers Home Improvement, Inc., supra, (an example of a case where the alleged employer did provide competent, probative evidence on this issue).

The Board also agrees with the Agency's argument that PCI failed to prove that its aides were customarily engaged in an independent occupation. PCI's aides are not professionals. They are paid just over the minimum wage and often must work two jobs to make ends meet. Unlike nurses and physicians, these aides are not working in a licensed occupation in the State of Maryland. See licensing provisions for nurses and physicians at Md. Code Ann., Health Occup. Title 8 (Nurses) and Title 14 (Physicians). They are not subject to extensive educational requirements like nurses and physicians and to not have the same statutory constraints and obligations as nurses and physicians.

There is no requirement that home care like that provided by PCI must be provided by nursing assistants who are certified by the Department of Health & Mental Hygiene nor even that the care be provided by a nursing home. See also Nurses Unlimited, supra, where the Board held that certification as a nursing assistant does not establish that nursing assistant is an independent occupation.

The Board is persuaded that PCI has not met its burden of proof with regard to Section 8-205(3).

Under this third prong, PCI must prove that the work performed by the aides is either (i) performed outside the usual course of business of PCI or (ii) that it is performed outside of any place of business of PCI.

The Board concludes, as did the Hearing Examiner, that the work done is not outside the usual course of business of PCI. The work performed by the aides is integral to PCI's business, which is providing health care aides to clients. PCI's income is totally dependent on the work of its aides and without it, would not be in business.

The Board has held that being an integral part of the process does not, in and of itself, necessarily render a service "within the usual course of business." One must look to the function of the worker in question. See Pharmakinetics (where the Board held that the test subjects' function was to provide bodily fluids for analysis after ingesting and absorbing various drugs; the employer's business was the analysis of data, including data derived from the test subjects' bodily fluid).

However, here, PCI's total function is to "secure and coordinate the staffing of personal care aides" to assist clients with their home health care needs and PCI's income and therefore its existence is totally dependent on the work of these aides.

The last part of this prong, 8-205(3)(ii), concerns whether the services performed by the aides is performed outside of any place of business of PCI. The Hearing Examiner concluded that PCI did not meet its burden here either, by finding that the homes of the clients where the aides provided services are PCI's places of business. The Examiner cited the Board decision in Trahan Films, Inc., 32-EA-92.

However, the Board's determination on this issue in Nurses Unlimited, Inc., supra, appears to be more on point, given the similar nature of that business to PCI. In that case, the Board held that since no work was performed by the nursing assistants at the actual business location of Nurses Unlimited, the employer had met its burden of proving the "out of the usual places of business" portion of the test. By implication, the Board rejected in that case, the notion that the homes of the clients were the places of business of the employer. See also America's Energy Savers Home

Improvement, Inc., supra, where the Board rejected the argument that the homes of potential customers is the place of business of the employer. While not specifically overturning the conclusion in Trahan Films, Inc., supra, since each case must be decided on its own facts, the Board rejects the reasoning of that case here and concludes that PCI did prove that it met the requirements of LE, Section 8-205(3)(ii). However, since it has failed to prove the first two portions of the three prong test, this one conclusion does not alter the outcome of this case.

In its arguments, PCI raised several other arguments for non-coverage, all of which the Board will briefly address, but all of which the Board rejects.

The Board rejects PCI's argument that the individual clients, and not PCI are the employers of the aides.

PCI's argument here is based largely on the fact that the aides are paid directly by the clients and not by PCI. The Board disagrees with this argument.

First, this financial arrangement exists at the insistence of PCI, who requires both the client and the aide to sign contracts agreeing to this arrangement. This could easily be construed as a deliberate attempt by PCI to foist an employer-employee relationship on the client, thereby transferring its tax liability to the client. Public policy would seem to dictate against making employers out of potentially tens of thousands of individuals who have no reason to know that they are incurring the responsibility for unemployment insurance tax payments. Such parties cannot reasonably be found to be intended employers contemplated by the Legislature within the meaning of the Maryland unemployment insurance law.

A second way to analyze these facts is to consider them in light of the "borrowed servant doctrine."⁴ This doctrine is predominately used to determine liability in tort and workers' compensation cases, but could have some applicability to unemployment insurance law.

The basic premise of this doctrine is that if:

... one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general services...one may prefer to enter into an agreement with another that the other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them.

⁴This analysis is excerpted, in large part, from a paper entitled "Temporary, Leased, and Borrowed Servants: Solutions To Special Problems In the Maryland Unemployment Insurance Law" by Clayton A. Mitchell, Sr., Associate Member, DLLR Board of Appeals

...he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because though it is done for the ultimate benefit of the other, it is still, in its doing, his own work. Standard Oil v. Anderson, 212 U.S. 215 (1909).

Thus control is the key determining factor under this doctrine as well. In determining whether a master-servant relationship exists, the Maryland Court of Appeals set forth five criteria that should be considered.⁵ These include:

- 1) the selection and engagement of the servant;
- 2) the payment of wages;
- 3) the power to discharge;
- 4) the power to control the servant's conduct; and
- 5) whether the work is part of the regular business of the employer.

These factors are similar to those discussed with regard to the test under LE, Section 8-205, with the Court of Appeals citing control as the most important factor. As we discussed in that portion of this decision, the right to terminate is strong indicia of control. "Standing alone, none of these indicia, excepting (4), seems controlling. The decisive test is whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done."⁶ Thus, examining the above five criteria in light of the prior discussion, the Board finds that all but the second criteria are present in this case and further support the conclusion that PCI, and not the clients, is the employer of the aides.

As part of its argument that the client is the real employer, PCI also argues that the Domestic Employment Exemption, LE, Section 8-211 applies here. Again, the Board disagrees and adopts the arguments of the Agency. LE, Section 8-211 applies to employer arrangements between the client and the domestic worker. Here, there is no such employment arrangement.

PCI makes and controls all the arrangements. PCI has in fact set up a purely artificial separation of control and direction, while ensuring that PCI maintains a continuous income stream from the labor of its aides. For all the reasons discussed above, the Board finds that PCI is not covered by this exemption.

The Board rejects PCI's argument that the Federal Sitter Exemption is applicable in this case.

⁵Keitz v. National Paving and Contracting Co., 134 A2d. 296 (Md. 1957).

⁶ Id.

PCI argues that the Agency is required, pursuant to LE, Section 8-103, to apply 26 U.S.C. Section 3506 to this case. Section 3506 is the "sitter exemption" of the federal employment tax, which states, in pertinent part, that persons who place "sitters" in touch with individuals who wish to employ them, are not employers for the purposes of the federal employment tax if certain conditions are met. 26 U.S.C. Section 3506(a). "Sitters" are "individuals who furnish personal attendance, companionship, or household care services to children or to individuals who are elderly or disabled." 26 U.S.C. 3506(b).

There is nothing in the Maryland Unemployment Law that includes such an exemption, nor is there any requirement for Maryland law to do so. Maryland law must conform to certain minimum requirements of federal law, but is not required to mimic federal law. See Equitable Life Insur. Co. v. Iowa Empl. Sec. Comm'n., 231 Iowa 889, 2 N.W. 2d 262 (1942). LE, Section 8-103 only requires that Maryland law be construed consistent with relevant provisions of the applicable federal statutes.

The Board agrees with and adopts the arguments of the Agency on this issue. Section 3506 applies to the federal employment tax; it does not apply to the State unemployment insurance law and it is not one of those minimum standards that the state is required to adopt.

The Board rejects PCI's argument that the Agency's treatment of PCI's home care aides as employees of PCI is incongruent with federal and state income tax law.

The provisions cited by PCI, including Section 10-107 of the Tax General Article and federal income tax provisions are simply not relevant here. The tax in question here is unemployment insurance tax, not income tax. The Board agrees with the Agency's position that there is no requirement that Maryland conform with state and federal income tax provisions.

In conclusion, the Board finds that the aides are employees of PCI, and that the services performed by these aides are in covered employment within the meaning of the Maryland Unemployment Insurance law and their earnings must be reported to the Agency.

DECISION

Services performed by individuals in the performance of their duties as home health care aides for Personal Care, Inc. are held to be within covered employment within the meaning of Md. Code,

Labor & Empl. Article, Title 8, Section 201 and are not exempted under Md. Code, Labor & Emp. Article, Title 8, Section 205. Therefore, wages earned by these individuals must be reported to the Department of Labor, Licensing and Regulation in accordance with the statutory requirements.

The decision of the Hearing Examiner is affirmed.



Hazel A. Warnick, Chairperson



Donna Watts-Lamont, Associate Member



Clayton A. Mitchell, Sr., Associate Member

KJK

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FILE

DLLR

STATE OF MARYLAND

DEPARTMENT OF LABOR, LICENSING AND REGULATION

PARRIS N. GLENDENING, Governor
JOHN P. O'CONNOR, Acting Secretary

Appeals Division
Louis Wm. Steinwedel, Chief Hearing Examiner

- DECISION -

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The period for filing an appeal expires: February 11, 1999

- APPEARANCES -

FOR THE APPELLANT:

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Jessica Carter, Attorney Generals Office

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.



This case was set before the Board of Appeals for legal argument only. The Board has considered the extensive legal arguments presented by both parties.

There is a presumption under Maryland law that personal services are performed in an employment relationship regardless of whether or not there is a common law relationship of master and servant between the employer and employees unless it is specifically exempted under Maryland Unemployment Insurance Law. The employer has the burden of proving, by a preponderance of the evidence, that the services of the individuals in question are exempted. See Warren v. Board of Appeals, 226 Md.1 (1961). See also America's Energy Savers Home Improvement, Inc., 03579-BH-96.

LE, Section 8-205 sets forth a three prong test for determining whether an individual is an independent contractor or an employee. In order for an individual to be considered an independent contractor within the meaning of the unemployment insurance law, the employer must show (1) that the individual is free from control over the performance and direction of his work; (2) that the individual is customarily engaged in an independent business or occupation of the same nature as that involved in the work; and (3) that the work is either (a) outside the usual course of business of the employer or (b) the work is performed outside any place of business of the employer. Section 8-205 requires that the employer prove all three prongs of this conjunctive test, in order to meet the exemptions.

FINDINGS OF FACT

Personal Care Incorporated (PCI) provides home health care aides to clients for an hourly fee. In 1995, the Department of Labor, Licensing and Regulation (DLLR) initiated an audit of PCI, for calendar years 1993 and 1994. DLLR concluded from that audit that PCI had not reported wages for 99 individuals identified as home care aides in 1993 and for 75 home care aides in 1994. PCI appealed, asserting that its home care aides are independent contractors and therefore exempt from unemployment insurance coverage.

PCI maintains a registry of aides. The aides are not registered nurses but may be certified nursing assistants (CNAs) and geriatric nursing assistants who are certified by the State of Maryland. Each potential aide must fill out an application and provide references. The application requests information concerning the applicant's background, education, special skills, employment history, physical and mental disabilities, lifting restrictions and felony convictions. It also asks for the applicant's availability and shift preference. The application includes an authorization to PCI to verify all statements and secure information from previous employers and references. By signing the application form, the applicant agrees to release PCI from any liability in connection with the release of the information.

PCI also requires applicants to complete a detailed check list of their abilities and experience and a separate information authorization sheet, authorizing former employers and educational references to furnish PCI with information concerning the applicant. The applicant must submit a copy of her certificate of training. PCI then checks the references, verifies the training and interviews the applicant.

Once an applicant has proven that she has the proper certification and her references are acceptable, PCI will offer her a contract called a Memorandum of Understanding. There is no fee requested from the applicant by PCI to be included in its registry, but the applicant must sign the Memorandum of Understanding. That Memorandum includes the following provisions:

1. The aide requests to be added to PCI's registry and agrees that PCI's services consist of securing aides for its clients and maintaining and coordinating the scheduling of service care to its clients by the aides.
2. The aide agrees to perform the duties prescribed by the client's physician or agreed upon directly with the client.
3. The aide agrees not to follow the client's orders if to do so would not be in the client's best interests.
4. The aide agrees to contact the client's physician if the aide and the client disagree with respect to care and service.
5. The aide acknowledges that she is usually part of a team and agrees to cooperate with the other team members who are providing care to the client.
6. The aide agrees that if communication or other problems develop, the aide will be bound by whatever PCI or the client decide is best for the client in order to maintain staffing continuity.
7. The aide establishes an hourly rate for service and authorizes PCI to request this rate on the aide's behalf. The rate is generally \$6 to \$7 per hour.
8. The aide acknowledges that she is a self-employed individual, responsible for her own taxes.
9. The aide acknowledges that PCI does not cover her for unemployment insurance compensation, workers' compensation, health insurance or any other benefits.
10. The aide agrees to purchase liability insurance to protect the client from any damage due to the aide's negligence or mistake or through an accident.
11. The aide agrees not to accept a position with any client to whom PCI has referred the aide, or a family member of said client within 180 days after the aide's employment relationship has been terminated by either the client or PCI.
12. The aide agrees not to "take" PCI's clients with the aide if she decides in the future to become affiliated with another registry or an employer.

13. If the aide violates this agreement, the aide agrees to be responsible for any monetary loss sustained by PCI (i.e. weekly fee paid to PCI by the client for its services) as well as any legal fees incurred to recover this monetary loss. This does not apply to non-PCI referral clients that the aide secures directly.

14. The aide acknowledges that PCI does not guarantee payment by the client. However, if the aide is not paid by the client, PCI agrees to use its best efforts to collect the aide's payment at no cost to the aide, as part of PCI's efforts to collect its own payment. This includes recovery of attorney's fees and court costs from the client.

Once the aide signs the Memorandum, PCI adds her name to its registry.

PCI is responsible for obtaining clients and does so through referrals through hospitals and social workers. It is also listed in the Yellow Pages under "Nursing Services" and distributes a brochure.

When a client contacts PCI, PCI meets with the client to assess the client's needs. The employer fills out a client assessment sheet that includes information about the client's mental status, mobility, medical history, hobbies and interests and special needs. The assessment also includes medications and the names and addresses of attending physicians and contact persons. PCI also discusses with the client the cost of its services, the hourly rate the client is to pay the aide and the number of hours of service required by the client.

Once the client decides to use PCI's services, PCI provides the client with a prepared contract called an Agreement for Personal Care Referral Services. This contract, once signed, authorizes PCI to use its best efforts to: "secure and coordinate the staffing of personal care aides" to assist the client. The contract also contains the following provisions:

1. The type of assistance required by the client.
2. The hours the assistance of an aide is required.
3. The hourly rate paid to the aide and a statement that the aide is to be paid weekly.
4. The hourly rate paid to PCI by the client for each hour the aide is on duty. This varies from \$.75 to \$1.50 per hour. There is also a statement that this fee will be paid weekly unless other arrangements are agreed upon.
5. A requirement to pay the aide time and a half for certain specified holidays.

6. A statement that if the client terminates the aide and re-employs the aide within 180 days from the termination, the client will continue to owe PCI its hourly rate for as long as the client employs the aide.
7. A provision that if the client needs the services of an additional aide to transport the client or to assist the aide on duty, the client must pay PCI for the additional aide with a two hour minimum for each such visit.
8. A statement that the client understands that PCI is not providing services directly or indirectly and the aide is an independent contractor and a third party beneficiary of this contract for purposes of payment.
9. An agreement to allow PCI to use its best efforts to resolve problems between the aides and the clients if the client is unsuccessful in resolving it directly with the aide. PCI agrees to use its best efforts to resolve the problem and maintain staffing continuity.
10. An agreement by the client to pay 1.5% interest per month on any amount due to PCI or the aide for more than 30 days and to pay reasonable attorney's fees to PCI or the aide for collection services, if necessary.
11. A statement that the client is personally responsible for the payment due to PCI and the aide.

This contract is signed by PCI and the client; the aide does not enter into or sign this contract.

Once the contract is signed, PCI selects an aide from its registry and contacts that aide and offers her the assignment. If the aide accepts, she is sent to the client.

The client and the aide work out the aide's schedule. The client is required to have filled out a two part time sheet on PCI letterhead and turn in one of the two sheets to PCI each week. The time sheet must contain the name of the client, the name of the aide or aides (if more than one), the week ending date, the hours worked each day and the amount paid.

The client pays the aide directly and pays PCI its fee separately. PCI does permit an aide to bring in a non-PCI aide to assist her in serving a client. That non-PCI aide's name, hours and amount paid by the client is listed on PCI's time sheet, but PCI receives no hourly fee based on this aide's service.

PCI does not require aides to keep written records of their service (other than the previously described time sheet) and does not perform any quality control monitoring of the aide's service.

A client can terminate the services of an aide by requesting that PCI dismiss the aide from the client's case. PCI has the option of either re-assigning the aide when needed, or terminating the aide permanently by removing her from its registry. PCI can terminate an aide for any reason. An aide can also voluntarily remove herself from PCI's registry for any reason.

PCI does not restrict an aide from working for another nursing service or other employer while the aide is also working for PCI. If an aide must be absent, she may secure a replacement herself or through PCI.

PCI does not provide a handbook, equipment or training to its aides.

Among the 99 individuals listed on the 1993 audit list, 32 also were employed by other nursing registries. Among the 74 listed for 1994, 27 also performed services for others.

CONCLUSIONS OF LAW

Section 8-205 states 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.

The employer has the burden of proving that he meets all three prongs of this test, in order for this exemption to apply. The Board concludes that the employer has failed to prove this exemption.

The Board is persuaded that PCI has not met its burden of proof with regard to Section 8-205(1).

PCI interviews the aides, has them complete a detailed questionnaire, a check list and an information authorization form. The aide is required to submit references, evidence of training and must consent to have references checked.

PCI requires each aide to sign a contract that PCI has prepared. The aide agrees that PCI secures aides for clients and maintains and coordinates the scheduling of service by aides to clients. In the contract the aide also agrees to be bound by PCI's decision if a dispute arises between the client and the aide. The aide also agrees to purchase liability insurance.

Most importantly: (1) the aide agrees not to work for any client or a family member of a client referred by PCI within one hundred eighty days after the aides's employment with the client has ended; (2) the aide agrees not to take PCI clients with her if she is employed at another agency; and (3) PCI can terminate the aide at any time for any reason.

These are all strong indicia of direction and control, within the meaning of the statute. PCI argues that it is merely a placement agency or a broker between the client and the aide, and not an employer. It cites the facts that the aides can set rates, change their vacations and hire helpers as indicia of freedom from control. However, the Board finds that the factors in favor of control are much more persuasive.

The Board of Appeals has looked at this question carefully in several recent decisions. It is true that control must be something more than mere monitoring and that where the worker is answerable to the Employer only as to the results of the work, but not as to the performance of the work, there is indicia of freedom from control. See Pharmakinetics, 156-EA-94 and Herald Mail Company, 02990-BH-97.

However, there is more here than the mere monitoring of results. The Court of Appeals, in its recent decision DLLR v. Fox, 346 Md. 484, 697 A.2d. 478 (1997), affirmed the Board's decision that Fox, a sole proprietor who trades as "Dental Placements," (furnishing temporary help to dentists' offices, primarily hygienists and dental assistants) was "not a mere referral or brokering service which matches the needs for staffing of dentists' offices with the availability of independent contractors." Fox, supra. The Court concluded, as had the Board, that the temporary workers were covered employees of Fox, within the meaning of the statute.

Many, although not all, of the same factors that the Court considered in Fox apply to PCI:

1. There is an express contract between Fox and the client (dentist) and a separate express contract between Fox and the worker.

2. There is no "contract of hire" directly between the dentist and the worker.¹
3. Fox maintains a registry of qualified persons.
4. Fox requires applicants interested in working at a dental office through Fox to complete a questionnaire describing their skills, licensing, education, references and availability.
5. Fox verifies the information furnished by the applicant.
6. The applicant is required to obtain malpractice insurance.
7. The applicant is required to accept any placement in the capacity of an Independent Contractor.²
8. There is a limitation placed on the applicant's ability to privately contract with the dentist. In Fox, the dentist must pay Fox a fee; PCI has imposed a strict time period during which the aide cannot work privately for the client.

Some of the factors that PCI cites as evidence of freedom from control were present in Fox; nevertheless, the Court did not find them sufficient to meet Fox's burden:

1. Fox furnishes no tools to the workers.
2. Fox holds no license in the dental services field and does not hold herself out as qualified to perform any services in that field for which no license is required.
3. To the extent that the workers are directed how to perform their services while on a temporary job, the direction is given by persons at the particular dentist's office.

¹In Fox, unlike this case, the "client" (the dentist) did not pay wages to the worker, but instead paid Fox. However, that factor alone is not sufficient to prove that PCI meets the control test of 8-205(1). In addition, where Fox received a single fee for its services, PCI receives from the clients weekly payments for the services of its aides, further evidence of continuing control over the employment relationship.

²As with PCI's contract with its aides, the mere stating that the worker is an independent contractor, is not evidence that in fact, she is an independent contractor for the purposes of the Maryland Unemployment Insurance Law.

4. The worker may refuse an assignment.³

There are, of course, some differences between the employment arrangement here and in the Fox case. But these cut both ways. On the one hand, Fox sets the wages to be paid and pays them directly to the workers. PCI specifies that the client is to pay the aide and, in theory, at least, the aide sets her own rate and "authorizes" PCI to request that rate from the client.

On the other hand, where Fox receives a one time fee from the dentist at the conclusion of the service, PCI receives a weekly payment from the client. Further, in Fox, the Court found that if a dental office was dissatisfied with a temporary worker, it is the dentist, and not Fox, who has authority to remove the individual from the temporary position. PCI specifically retains the right to terminate the services of its aides at any time. The right to terminate the contract at its discretion has previously been held by the Board to be "inconsistent with an independent contractor arrangement." Nurses Unlimited, Inc., 37-EA-89.

For all these reasons, the Board concludes that PCI has not met its burden of proving that the aides are free from PCI's direction and control, within the meaning of LE, Section 8-205(1) of the statute.

The Board is persuaded that PCI has not met its burden of proof, with regard to LE, Section 8-205(2).

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 8-205(1), which is the principle consideration in determining the relationship of 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 his work, he is pursuing another's business and not engaged in an independent business or occupation of his own." James Youngbar, 1452-BR-97.

COMAR 09.02.01.18b(3)(c) sets forth ten criteria which may be used as indicia of whether a person is engaged in an independent business. In determining whether an employer-employee or an independent contractor relationship exists, no single factor alone is conclusive and there is no set amount of factors that must be met in order to meet this second prong of 8-205. Each case must be decided on its own peculiar facts. America's Energy Savers Home Improvement, Inc., 03579-BH-96. These factors are:

1. maintains a business listing in the telephone directory;
2. has his or her own place of business;

³The Court of Appeals in Fox specifically held that this is not equal to the ability to set one's own hours.

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. set his or her own hours;
10. is paid by the job.

The Hearing Examiner found that, aside from one example of an aide who became incorporated, the employer provided no evidence that its aides are employed in an independent business or occupation of the same nature as involved in PCI's work. There was no evidence offered that the aides have their own business cards, submit invoices for their services or list themselves in the business telephone directory. The Board agrees. While there is evidence that under the contract, the aide may hire others to perform the service and the aide may work for another unrelated employer, this is not sufficient to meet PCI's burden.

As the Agency argues, PCI's actual evidence offered on this part of the test is weak. The generic advertisements for home health care were not placed by persons working for PCI. Although such evidence is admissible, it is barely probative or competent. See America's Energy Savers Home Improvement, Inc., supra, (an example of a case where the alleged employer did provide competent, probative evidence on this issue).

The Board also agrees with the Agency's argument that PCI failed to prove that its aides were customarily engaged in an independent occupation. PCI's aides are not professionals. They are paid just over the minimum wage and often must work two jobs to make ends meet. Unlike nurses and physicians, these aides are not working in a licensed occupation in the State of Maryland. See licensing provisions for nurses and physicians at Md. Code Ann., Health Occup. Title 8 (Nurses) and Title 14 (Physicians). They are not subject to extensive educational requirements like nurses and physicians and to not have the same statutory constraints and obligations as nurses and physicians.

There is no requirement that home care like that provided by PCI must be provided by nursing assistants who are certified by the Department of Health & Mental Hygiene nor even that the care be provided by a nursing home. See also Nurses Unlimited, supra, where the Board held that certification as a nursing assistant does not establish that nursing assistant is an independent occupation.

The Board is persuaded that PCI has not met its burden of proof with regard to Section 8-205(3).

Under this third prong, PCI must prove that the work performed by the aides is either (i) performed outside the usual course of business of PCI or (ii) that it is performed outside of any place of business of PCI.

The Board concludes, as did the Hearing Examiner, that the work done is not outside the usual course of business of PCI. The work performed by the aides is integral to PCI's business, which is providing health care aides to clients. PCI's income is totally dependent on the work of its aides and without it, would not be in business.

The Board has held that being an integral part of the process does not, in and of itself, necessarily render a service "within the usual course of business." One must look to the function of the worker in question. See Pharmakinetics (where the Board held that the test subjects' function was to provide bodily fluids for analysis after ingesting and absorbing various drugs; the employer's business was the analysis of data, including data derived from the test subjects' bodily fluid).

However, here, PCI's total function is to "secure and coordinate the staffing of personal care aides" to assist clients with their home health care needs and PCI's income and therefore its existence is totally dependent on the work of these aides.

The last part of this prong, 8-205(3)(ii), concerns whether the services performed by the aides is performed outside of any place of business of PCI. The Hearing Examiner concluded that PCI did not meet its burden here either, by finding that the homes of the clients where the aides provided services are PCI's places of business. The Examiner cited the Board decision in Trahan Films, Inc., 32-EA-92.

However, the Board's determination on this issue in Nurses Unlimited, Inc., supra, appears to be more on point, given the similar nature of that business to PCI. In that case, the Board held that since no work was performed by the nursing assistants at the actual business location of Nurses Unlimited, the employer had met its burden of proving the "out of the usual places of business" portion of the test. By implication, the Board rejected in that case, the notion that the homes of the clients were the places of business of the employer. See also America's Energy Savers Home

Improvement, Inc., supra, where the Board rejected the argument that the homes of potential customers is the place of business of the employer. While not specifically overturning the conclusion in Trahan Films, Inc., supra, since each case must be decided on its own facts, the Board rejects the reasoning of that case here and concludes that PCI did prove that it met the requirements of LE, Section 8-205(3)(ii). However, since it has failed to prove the first two portions of the three prong test, this one conclusion does not alter the outcome of this case.

In its arguments, PCI raised several other arguments for non-coverage, all of which the Board will briefly address, but all of which the Board rejects.

The Board rejects PCI's argument that the individual clients, and not PCI are the employers of the aides.

PCI's argument here is based largely on the fact that the aides are paid directly by the clients and not by PCI. The Board disagrees with this argument.

First, this financial arrangement exists at the insistence of PCI, who requires both the client and the aide to sign contracts agreeing to this arrangement. This could easily be construed as a deliberate attempt by PCI to foist an employer-employee relationship on the client, thereby transferring its tax liability to the client. Public policy would seem to dictate against making employers out of potentially tens of thousands of individuals who have no reason to know that they are incurring the responsibility for unemployment insurance tax payments. Such parties cannot reasonably be found to be intended employers contemplated by the Legislature within the meaning of the Maryland unemployment insurance law.

A second way to analyze these facts is to consider them in light of the "borrowed servant doctrine."⁴ This doctrine is predominately used to determine liability in tort and workers' compensation cases, but could have some applicability to unemployment insurance law.

The basic premise of this doctrine is that if:

... one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general services...one may prefer to enter into an agreement with another that the other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them.

⁴This analysis is excerpted, in large part, from a paper entitled "Temporary, Leased, and Borrowed Servants: Solutions To Special Problems In the Maryland Unemployment Insurance Law" by Clayton A. Mitchell, Sr., Associate Member, DLLR Board of Appeals

...he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because though it is done for the ultimate benefit of the other, it is still, in its doing, his own work. Standard Oil v. Anderson, 212 U.S. 215 (1909).

Thus control is the key determining factor under this doctrine as well. In determining whether a master-servant relationship exists, the Maryland Court of Appeals set forth five criteria that should be considered.⁵ These include:

- 1) the selection and engagement of the servant;
- 2) the payment of wages;
- 3) the power to discharge;
- 4) the power to control the servant's conduct; and
- 5) whether the work is part of the regular business of the employer.

These factors are similar to those discussed with regard to the test under LE, Section 8-205, with the Court of Appeals citing control as the most important factor. As we discussed in that portion of this decision, the right to terminate is strong indicia of control. "Standing alone, none of these indicia, excepting (4), seems controlling. The decisive test is whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done."⁶ Thus, examining the above five criteria in light of the prior discussion, the Board finds that all but the second criteria are present in this case and further support the conclusion that PCI, and not the clients, is the employer of the aides.

As part of its argument that the client is the real employer, PCI also argues that the Domestic Employment Exemption, LE, Section 8-211 applies here. Again, the Board disagrees and adopts the arguments of the Agency. LE, Section 8-211 applies to employer arrangements between the client and the domestic worker. Here, there is no such employment arrangement.

PCI makes and controls all the arrangements. PCI has in fact set up a purely artificial separation of control and direction, while ensuring that PCI maintains a continuous income stream from the labor of its aides. For all the reasons discussed above, the Board finds that PCI is not covered by this exemption.

The Board rejects PCI's argument that the Federal Sitter Exemption is applicable in this case.

⁵Keitz v. National Paving and Contracting Co., 134 A2d. 296 (Md. 1957).

⁶ Id.

PCI argues that the Agency is required, pursuant to LE, Section 8-103, to apply 26 U.S.C. Section 3506 to this case. Section 3506 is the "sitter exemption" of the federal employment tax, which states, in pertinent part, that persons who place "sitters" in touch with individuals who wish to employ them, are not employers for the purposes of the federal employment tax if certain conditions are met. 26 U.S.C. Section 3506(a). "Sitters" are "individuals who furnish personal attendance, companionship, or household care services to children or to individuals who are elderly or disabled." 26 U.S.C. 3506(b).

There is nothing in the Maryland Unemployment Law that includes such an exemption, nor is there any requirement for Maryland law to do so. Maryland law must conform to certain minimum requirements of federal law, but is not required to mimic federal law. See Equitable Life Insur. Co. v. Iowa Empl. Sec. Comm'n., 231 Iowa 889, 2 N.W. 2d 262 (1942). LE, Section 8-103 only requires that Maryland law be construed consistent with relevant provisions of the applicable federal statutes.

The Board agrees with and adopts the arguments of the Agency on this issue. Section 3506 applies to the federal employment tax; it does not apply to the State unemployment insurance law and it is not one of those minimum standards that the state is required to adopt.

The Board rejects PCI's argument that the Agency's treatment of PCI's home care aides as employees of PCI is incongruent with federal and state income tax law.

The provisions cited by PCI, including Section 10-107 of the Tax General Article and federal income tax provisions are simply not relevant here. The tax in question here is unemployment insurance tax, not income tax. The Board agrees with the Agency's position that there is no requirement that Maryland conform with state and federal income tax provisions.

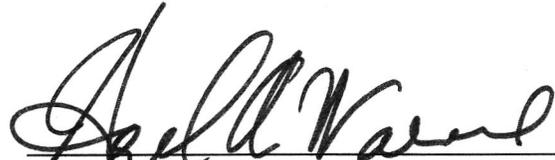
In conclusion, the Board finds that the aides are employees of PCI, and that the services performed by these aides are in covered employment within the meaning of the Maryland Unemployment Insurance law and their earnings must be reported to the Agency.

DECISION

Services performed by individuals in the performance of their duties as home health care aides for Personal Care, Inc. are held to be within covered employment within the meaning of Md. Code,

Labor & Empl. Article, Title 8, Section 201 and are not exempted under Md. Code, Labor & Emp. Article, Title 8, Section 205. Therefore, wages earned by these individuals must be reported to the Department of Labor, Licensing and Regulation in accordance with the statutory requirements.

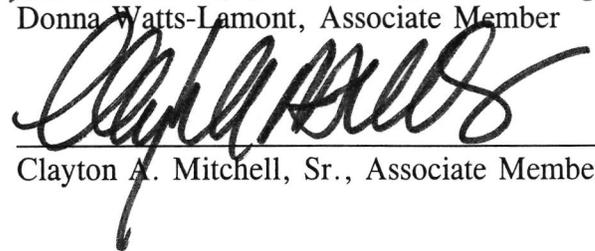
The decision of the Hearing Examiner is affirmed.



Hazel A. Warnick, Chairperson



Donna Watts-Lamont, Associate Member



Clayton A. Mitchell, Sr., Associate Member

KJK

Copies mailed on January 12, 1999 to:

PERSONAL CARE, INC

Jerry Placek, Room 407

FILE

**UNEMPLOYMENT INSURANCE--APPEALS DIVISION
EMPLOYER APPEAL
DECISION**

IN THE MATTER OF THE APPEAL OF:

PERSONAL CARE, INC

EMPLOYER ACCOUNT NUMBER

DETERMINATION NUMBER 9550113

BEFORE THE:

Department of Labor,
Licensing and Regulation
Appeals Division
1100 North Eutaw Street
Room 511
Baltimore, MD 21201
(410) 767-2421

October 16, 1996

FOR THE APPELLANT: SIDNEY BLOOM, CHRISTOPHER COSTELLO, SUE McCONNELL,
CRAIG BALLEW

FOR THE SECRETARY: JERRY PLACEK

ISSUE(S)

The issue in this case is whether payments to certain individuals constitute covered employment or represent payments to independent contractors and are thereby excluded from unemployment insurance covered wages.

FINDINGS OF FACT

The employer, Personal Care, Inc., (PCI), is in the business of referring home health care aides to clients for a fee. It created a registry of individuals for referral.

The employer recruits workers through word-of-mouth and by newspaper advertising. Potential workers are also referred to the employer by home care aide instructors at the junior college. The employer does not recruit registered nurses, but does recruit certified nursing assistants and geriatric nursing assistants who have been certified by the State of Maryland.

The employer requires each applicant to complete its registry questionnaire. This consists of questions about the applicant's background including his or her education, special skills, employment history, physical and mental disabilities, lifting restrictions and felony convictions. It also has questions about the applicant's availability and shift preferences. The applicant also provides references.

The applicant signs the questionnaire which authorizes the employer to verify all statements and secure information from previous employers and references. By signing the application, the applicant

agrees to release the employer, former employer and references from any liability in connection with the release of information.

The employer also requires applicants to complete a detailed check list of their abilities and experience and a separate information authorization sheet authorizing former employers and educational references to furnish the employer with information concerning the applicant. The applicant submits a copy of his or her certificate of training. After the applicant completes these forms, the employer interviews him or her and the employer checks the applicant's references and verifies his or her training level.

If an applicant has passed the State of Maryland training and the references are otherwise acceptable, the employer offers the applicant a contract called a Memorandum of Understanding. This contract has been prepared by the employer. The employer does not charge applicants a fee to have their names added to its registry.

The memorandum includes the following provisions:

1. The aide requests to be added to the employer's registry and agrees that the employer's services consist of securing aides for its clients and maintaining and coordinating the scheduling of service care to its clients by the aides.
2. The aide agrees to perform the duties prescribed by the client's physician or agreed upon directly with the client.
3. The aide agrees not to follow the client's orders if to do so would not be in the client's best interests.
4. The aide agrees to contact the client's physician if the aide and the client disagree with respect to care and service.
5. The aide acknowledges that he or she is usually part of a team and agrees to cooperate with the other team members who are providing care to the client.
6. The aide agrees that if communication or other problems develop, the aide will be bound by whatever the employer or the client decides is best for the client in order to maintain staffing continuity.
7. The aide establishes an hourly rate for service and authorizes the employer to request this rate on the aide's behalf. The rate is generally \$6 to \$7 per hour.
8. The aide acknowledges that he or she is a self-employed individual, responsible for his or her own taxes.

9. The aide acknowledges that PCI does not cover him or her for unemployment insurance compensation, workers' compensation, health insurance or any other benefits.

10. The aide agrees to purchase liability insurance to protect the client from any damage due to the aide's negligence or mistake or through an accident.

11. The aide agrees not to accept a position with any client to whom PCI has referred the aide, or a family member of said client within one hundred eighty days after the aide's employment relationship has been terminated by either the client or PCI.

12. The aide agrees not to "take" PCI's clients with the aide if he or she decides in the future to become affiliated with another registry or an employer.

13. If the aide violates this agreement, the aide agrees to be responsible for any monetary loss sustained by PCI (i.e. the weekly fee paid to PCI by the client for its services) as well as any legal fees incurred to recover this monetary loss. This does not apply to non-PCI referral clients that the aide secures directly.

14. The aide acknowledges that PCI does not guarantee payment by the client. However, if the aide is not paid by the client, PCI agrees to use its best efforts to collect the aide's payment at no cost to the aide as part of PCI's efforts to collect its own payment. This includes recovery of attorney's fees and court costs from the client.

If the applicant signs this contract, the employer adds his or her name to its registry.

The employer gets clients through referrals by hospitals and social workers and by listing itself in the Yellow Pages under "Nursing Services." The employer also distributed a brochure about its services.

When a client contacts the employer, the employer meets with the client to assess the client's needs. The employer fills out a client assessment sheet which includes information about the client's mental status, mobility, medical history, hobbies and interests and special needs. The assessment also lists medications and the names and addresses of attending physicians and contact persons. The employer also discusses with the client the cost of its services, the hourly rate the client wishes to pay the aide and the number of hours of service required by the client.

If the client decides to use PCI's services, PCI provides the client with a prepared contract called an Agreement for Personal Care Referral Services. By signing this contract, the client or his representative authorizes PCI to use its best efforts to "secure and coordinate the staffing of personal care aides" to assist the client.

The contract between PCI and the client includes the following provisions:

1. The type of assistance required by the client.
2. The hours the assistance of the aide is required.

3. The hourly rate paid to the aide and a statement that the aide is paid weekly.
4. The hourly rate paid to PCI for each hour the aide is on duty. This varies from \$.75 to \$1.50 per hour. There is also a statement that this fee will be paid weekly unless other arrangements are agreed upon.
5. A requirement to pay the aide time-and-a-half for certain specified holidays.
6. A statement that if the client terminates the aide and re-employs the aide within one hundred eighty days from the termination, the client will continue to owe PCI its hourly rate for as long as the client employs the aide.
7. A provision that if the client needs the services of an additional aide to transport the client or to assist the aide on duty, the client must pay PCI for the additional aide with a two-hour minimum for each such visit.
8. A statement that the client understands that PCI is not providing services directly or indirectly and the aide is an independent contractor and a third party beneficiary of this contract for purposes of payment.
9. An agreement to allow PCI to use its best efforts to resolve problems between the aides and the clients if the client is unsuccessful in resolving it directly with the aide. PCI agrees to use its best efforts to resolve the problem and maintain staffing continuity.
10. An agreement by the client to pay 1.5 percent interest per month on any amount due to PCI or the aide for more than thirty days and to pay reasonable attorney's fees to PCI or the aide for collection services if necessary.
11. A statement that the client is personally responsible for the payments due to PCI and the aide.

Both PCI and the client or his or her representative sign this contract. PCI is not aware of any of its aides contracting directly with clients.

After obtaining a contract from a client, PCI will then go to its registry and select an appropriate aide or aides to send to the client. PCI then contacts the aide or aides selected and offers them the job. If the aide is interested in the job, PCI will send the aide to the client requiring service. If more than one aide is selected, the client can choose which aide or aides it wants.

Once an aide is assigned to a client, the client and the aide work out the aide's schedule. PCI provides the client with a two-part time sheet with its letterhead imprinted on the top. One copy of the time sheet is turned in to PCI each week and the other copy is kept by the client.

On the time sheet, each aide working for a particular client records his or her name, the week ending date, the hours worked each day and the amount paid. The client or patient's name is recorded at the top. Several different aides can be recorded on the same time sheet.

The client pays the aide directly. The client pays PCI its fees separately. PCI does not handle payment to aides except on rare occasions when a client sends PCI one check which includes both the aide's salary and PCI's fee. In that case, PCI will cash the check, deduct its fee and forward the balance to the aide.

PCI allows aides to bring in non-PCI aides to serve clients. In that case, the non-PCI aide's name, hours and amount paid by the client is listed on PCI's time sheet, but PCI receives no hourly fee based on this aide's service.

PCI does not require aides to keep written records of their service and does not do quality control monitoring of the aides' service to clients.

If a client is unhappy with an aide, the client can terminate the aide or request that PCI dismiss the aide from the case. PCI will then provide another aide to the client. If an aide is dismissed from a particular client, PCI will not necessarily remove the aide's name from its registry. It will simply reassign the aide elsewhere when needed. PCI can remove an aide from its registry and will do so if, for example, an aide steals from a client or writes a bad check against a client's account. An aide can also decide to leave a client or remove himself or herself from PCI's registry.

PCI does not restrict aides from working for other registries or employers while the aide is on its registry or working for its clients.

PCI does not provide a handbook for aides nor does it provide any equipment to aides. Aides provide their own training.

If an aide must be absent from his or her assignment, the aide can secure a replacement or if the aide so requests, PCI will send a replacement.

PCI provided a notarized list of its aides with the outside work of some of them noted. The list was compiled by Dianna Rivera, who worked for PCI first as an aide and now as a full-time secretary. The lists cover 1993 and 1994.

Out of ninety-nine names on the 1993 list, Ms. Rivera noted outside work at other registries or other places of employment for approximately thirty-two names. For example, three of the aides also worked for Tender Loving Home Care, Inc., another registry in the area.

Out of seventy-four names on the 1994 list, twenty-seven were noted as having outside work, including four who also worked for Tender Loving Home Care, Inc.

PCI also produced evidence that one of its aides became incorporated as Loving Assisted Care, Inc. and contracted to perform service for PCI under the corporate name.

Additionally, PCI produced copies of newspaper ads where unidentified certified nursing assistants advertised their services to the general public. There was no evidence that these ads were placed by aides working for PCI.

CONCLUSIONS OF LAW

Md. Code, Labor & Emp. Article, Title 8, Section 201 states that except as otherwise provided in this subtitle, employment is 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; or (ii) under a contract of hire that is written or oral or expressed or implied; and (2) the employment is performed in accordance with Section 8-202 of this subtitle.

The Code of Maryland Regulations (COMAR) at Section 09.32.01.18A states that a person performing services is presumed to be an employee, regardless of whether a common law master and servant relationship exists, unless specifically exempted under the unemployment insurance law or these regulations.

COMAR 09.32.01.18B states that to overcome the employee presumption, an employing unit shall establish that the person performing services is an independent contractor.

Md. Code, Labor & Emp. Article, Title 8, Section 205 deals with independent contractors. It states that 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.

The statute does not limit the right of an employer to contract with an employee. However, the statute does authorize those who are charged with its enforcement to look through the "tag" placed on the employment relationship and determine, as a matter of fact, whether the relationship, regardless of what it may be called, comes within the purview of the statute. Warren vs. Board of Appeals, 226 Md. 1,172A.2d 124 (1961).

EVALUATION OF EVIDENCE

With respect to Section 8-205 (1), the individual aides in this case are not free from PCI's control and direction over their performance. PCI interviews the aides, has them complete a detailed questionnaire, a check list and an information authorization form. The aide is required to submit references, evidence of training and must consent to have references checked. PCI then requires the aide to sign a contract that it has prepared. The aide agrees that PCI secures aides for clients and maintains and coordinates the scheduling of service by aides to clients. In the contract, the aide agrees to be bound by PCI's decision if a dispute arises between the client and the aide. The aide agrees to purchase liability insurance. The aide agrees not to work for any client or a family member of a client referred by PCI within one hundred eighty days after the aide's employment relationship with that client has been terminated. The aide agrees not to take PCI clients with the aide if the aide is employed at another registry. PCI can terminate the aide from its registry for any reason.

With respect to Section 8-205 (2), aside from one example of an aide who became incorporated, the employer provided no evidence that its aides are employed in an independent business or occupation of the same nature as involved in PCI's work. For example, there was no evidence that the aides have their own business cards, submit invoices for their services, list themselves in the business telephone directory or carry their own workers' compensation insurance. The aides rely on PCI to provide them with work.

With respect to Section 8-205 (3)(i), the work done by the aide is not outside the usual course of business of PCI. PCI provides health care aides to clients. The work performed by the aides is integral to PCI's business. Without the labors of the aides, PCI would not receive any income and it would not be in business.

With respect to Section 8-205 (3)(ii), the work performed by the aides is not performed outside of any place of business of PCI. Since PCI is in the business of sending health care aides to clients, the locations where the aides provide this service are PCI's places of business. Trahan Films, Inc., 32-EA-92.

The employer urges that the decision in the case of Pharmakinetics Laboratories, 156-EA-94, be applied to this case. That case dealt with the issue of whether people who volunteered as test subjects for a drug company were independent contractors. The Board held that they were independent contractors.

However, the type of situation in this case more closely resembles the situation in the case of Nurses Unlimited, Inc., 37-EA-89, where the Board decided that certified nursing assistants who were given assignments by Nurses Unlimited, Inc., performed services in covered employment and were not independent contractors.

The Board found Nurses Unlimited, Inc. to be similar to other temporary employment agencies. Although Nurses Unlimited, Inc. exercised more control over its employees than PCI does, the Board noted that, "Many of these entities exercise much less control over their employees than Nurses Unlimited, Inc. does over the nursing assistants in this case, but there has been no serious contention that workers assigned by these temporary services are not employees of the temporary service."

Since the appellant in this case, PCI, has not satisfied all three requirements of Md. Code, Labor & Emp. Article, Title 8, Section 205, the agency's Review Determination Number 9550113 will be affirmed.

DECISION

Services performed by individuals in the performance of their duties as home health care aides for Personal Care, Inc. are held to be within covered employment within the meaning of Md. Code, Labor & Emp. Article, Title 8, Section 201 and are not exempted under Md. Code, Labor & Emp. Article, Title 8, Section 205. Therefore, wages earned by these individuals must be reported to the Department of Labor, Licensing and Regulation in accordance with the statutory requirements.

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Agency Review Determination Number 9550113 is affirmed.



Regina Tabackman, Esq.
Hearing Examiner

Notice of Right of Further Appeal

Any party may request a further appeal either in person or by mail which may be filed in any local office of the Department of Labor, Licensing and Regulation, or with the Board of Appeals, Room 515, 1100 North Eutaw Street, Baltimore, MD 21201. Your appeal must be filed by October 31, 1996.

Note: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Copies mailed on October 16, 1996 to:

PERSONAL CARE, INC
Jerry Placek, Room 407
John McGucken, Room 508
FILE

PERSONAL CARE, INC.

Petitioner,

v.

BOARD OF APPEALS,
DEPARTMENT OF LABOR,
LICENSING AND REGULATION,

Respondent.

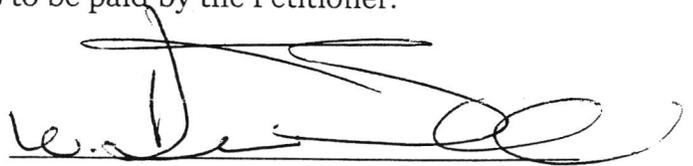
* IN THE
* CIRCUIT COURT
* FOR
* WASHINGTON COUNTY
* Civil #21-C-02-014414 AA
*
* * * * *

ORDER OF COURT

No cause to the contrary having been shown, it is this 6th day of January, 200~~2~~³, by the Circuit Court for Washington County

ORDERED:

1. That the foregoing Motion to Dismiss be, and the same is hereby granted, with prejudice, for failure to file a Memorandum on appeal as required by Rule 7-207; and
2. That costs for the appeal is to be paid by the Petitioner.



JUDGE

Copies To:

✓ Matthew W. Boyle, Esquire
Assistant Attorney General

Craig F. Ballew, Esquire

01550113

JAN 07 2003

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

PERSONAL CARE, INC.
Petitioner

vs.

BOARD OF APPEALS,
DEPARTMENT OF LABOR,
LICENSING AND REGULATION
Respondent

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CASE NOS. 21-C-99-6313-AA
& 21-C-02-14414-AA

ORDER

Having considered Petitioner's Motion for Partial Consolidation or Alternative Relief, and Respondent's Response and Renewal of Motion to Dismiss, it is this 7th day of January, 2003, by the Circuit Court for Washington County, Maryland, hereby **ORDERED**:

1. That Petitioner's Motion for Partial Consolidation or Alternative Relief in the above two cases is Denied; and

2. That Respondent's Motion to Dismiss in Case No. 21-C-02-14414-AA is Granted; and

3. That the Petition for Judicial Review in Case No. 21-C-02-14414-AA is hereby Dismissed with prejudice for failure to file a written memorandum as required by *Rule 7-207*.

The hearing scheduled for Jan 24, 2003 at 9:30 AM in 21-C-02-14414 is cancelled.

U. [Signature]

JUDGE

Copies To:

Matthew W. Boyle, Esquire
Assistant Attorney General

Craig F. Ballew, Esquire

JAN 07 2003

Assignment Card

DLLR

STATE OF MARYLAND

DEPARTMENT OF LABOR, LICENSING AND REGULATION

PARRIS N. GLENDENING, Governor
KATHLEEN KENNEDY TOWNSEND, Lt. Governor
JOHN P. O'CONNOR, Secretary

Board of Appeals
Hazel A. Warnick, Chairperson

DATE: October 11, 2000

EMPLOYER: Personal Care, Inc.

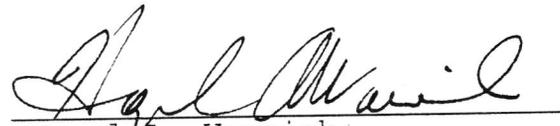
REVIEW DET. NO.: 9550113

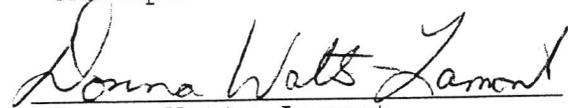
EMP. ACCT. NO.:

REMAND ORDER

Pursuant to the Order of the Circuit Court for Washington County, this case is remanded by consent of the parties to the Agency to conduct an audit level review and develop facts relevant to the following areas:

- 1) Whether each Personal Care, Inc. (PCI) aide was engaged in the duties of domestic employment within the meaning of Section 8-211 of the Act and applicable decisional law; and
- 2) Which PCI aides were paid cash wages of at least One Thousand (\$1,000.00) Dollars during any calendar quarter in any calendar year relevant to the Agency's audit of PCI for calendar years 1993 and 1994; and it is further, Ordered that the Agency shall not engage in any revision of existing factual findings in the course of this remand.


Hazel A. Warnick
Chairperson


Donna Watts-Lamont
Associate Member

COPIES MAILED TO:

EMPLOYER

Craig F. Ballew, Esq.

Michael Taylor - Legal Counsel, OUI, Room 501

Jerry Placek - Room 407



DLLR

STATE OF MARYLAND

DEPARTMENT OF LABOR, LICENSING AND REGULATION

PARRIS N. GLENDENING, Governor
KATHLEEN KENNEDY TOWNSEND, Lt. Governor
JOHN P. O'CONNOR, Secretary

Board of Appeals
Hazel A. Warnick, Chairperson

DATE: August 7, 2000

EMPLOYER: Personal Care, Inc.

REVIEW DET. NO.: 9550113

EMP. ACCT. NO.:

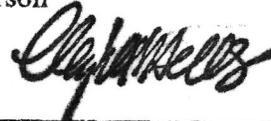
ORDER

The Board of Appeals reopens the above-captioned case for the purpose of implementing the Stipulated Order of Remand for Additional Factual Determinations, entered on May 26, 2000 by the Circuit Court for Washington County.

You will be notified of the Board's further action in the near future.



Hazel A. Warnick
Chairperson



Clayton A. Mitchell, Sr.
Associate Member

kbm

COPIES MAILED TO:

EMPLOYER

Craig F. Ballew, Esq.
Jerry Placek, Room 407
Susan Bass - Room 501



IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

PERSONAL CARE, INC.
Petitioner

vs.

CASE NO. 21-C-99-6313-AA

BOARD OF APPEALS
DEPARTMENT OF LABOR,
LICENSING & REGULATION
Respondent

STIPULATED ORDER OF REMAND
FOR ADDITIONAL FACTUAL DETERMINATIONS

Having reviewed the record in this matter and heard oral argument with respect to Petitioner Personal Care, Inc.'s appeal, this Court then reviewed potential deficiencies in the existing record with counsel, and counsel agreed pursuant to a conference call on May 12, 2000 with the Court to remand this matter for additional factual findings. Accordingly, it is, this 26th day of May, 2000 by the Circuit Court for Washington County, Maryland,

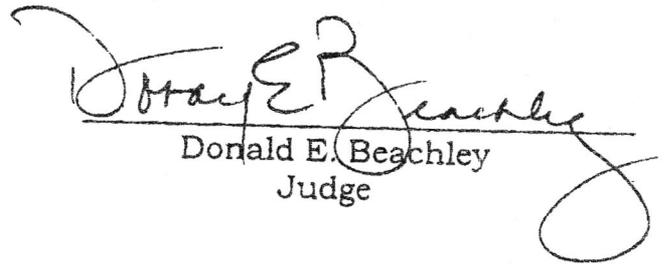
ORDERED, that this case is remanded by consent of the parties to the Department of Labor, Licensing & Regulation with instructions to conduct an audit level review and develop facts relevant to the following areas:

1. Whether each PCI aide was engaged in the duties of domestic employment within the meaning of Section 8-211 of the Act and applicable decisional law, and

2. Which PCI aides were paid cash wages of at least One

Thousand (\$1,000.00) Dollars during any calendar quarter in any calendar year relevant to the Agency's audit of PCI for calendar years 1993 and 1994; and it is further,

ORDERED, that the Agency shall not engage in any revision of existing factual findings in the course of this remand.


Donald E. Beachley
Judge

cc Arthur Schneider, Esquire
Matthew W. Boyle, Esquire
Craig F. Ballew, Esquire

True Copy:

Test: 
Clerk

BOARD OF APPEALS

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DLLR

STATE OF MARYLAND

DEPARTMENT OF LABOR, LICENSING AND REGULATION

PARRIS N. GLENDENING, Governor
JOHN P. O'CONNOR, Acting Secretary

Board of Appeals
Hazel A. Warnick, Chairperson

DATE: January 26, 1999

EMPLOYER: Personal Care, Inc.

EMP. ACCT. NO.:

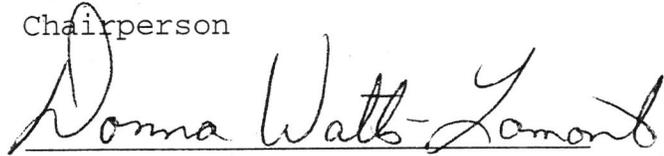
REV. DET. NO.: 9550113

ORDER

The Board of Appeals reopens the above-captioned case, to issue a corrected decision. Due to a clerical error, the employer's attorney was not sent a copy of the Board's decision of January 12, 1999. A copy of the corrected decision is enclosed with this Order.



Hazel A. Warnick
Chairperson



Donna Watts-Lamont
Associate Member



Clayton A. Mitchell, Sr.
Associate Member

COPIES MAILED TO:

EMPLOYER

Jerry Placek, Room 407

John T. McGucken, Agency Counsel, DLLR

Craig F. Ballew, Esq.

