WORKERS' COMPENSATION BOARD
ABUSE INVESTIGATION UNIT
(Appellee)

v.

DONALD J. PRICE, JR. d/b/a BLIND FAITH TATTOOS
(Appellant)

Argued: January 29, 2014
Decided: July 14, 2014

PANEL MEMBERS: Hearing Officers Collier, Elwin, and Pelletier
BY: Hearing Officer Pelletier

[¶1] Donald J. Price, Jr., d/b/a Blind Faith Tattoos, appeals from a decision of a Workers' Compensation Board Hearing Officer (*Dunn, HO*) imposing a civil penalty of $400 for failure to secure workers' compensation coverage for his employees. *See* 39-A M.R.S.A. § 324(3)(B) (Supp. 2013); 39-A M.R.S.A. § 401 (Supp. 2012).[1] Mr. Price argues that the hearing officer erred by concluding that the tattoo artists and the body piercer who rent space in Mr. Price's studio (collectively, "the artists") are employees within the meaning of the Workers' Compensation Act. Because the facts as found by the hearing officer are insufficient to support the conclusion that the artists were in an employee-employer relationship with Mr. Price, we vacate the hearing officer's decision.

[1] Title 39-A M.R.S.A. § 401 has since been amended. *See* P.L. 2011, ch. 643 § 118 (effective Dec. 31, 2012). The parties stipulated that the relevant time period in this case is from 2009 through 2012. The amendments do not apply in this case.

I. BACKGROUND

[¶2] Donald J. Price, Jr. is a tattoo artist duly licensed by the State of Maine. He has operated an unincorporated business under the name Blind Faith Tattoos for about eight years. He rents a building in Bangor which houses his studio, and rents additional booth space in the studio to other tattoo artists and a body piercer pursuant to a rental agreement. Mr. Price's studio is a State-approved operating location for the practice of tattooing. The State issues licenses to individual practitioners for a specific approved location, and tattoo artists can have more than one license simultaneously. There is no dispute that some of the artists licensed at Blind Faith Tattoos also were licensed to perform tattooing at other approved locations.

[¶3] Beginning December 1, 2012, Mr. Price implemented a written rental agreement that memorialized his previous oral agreement with the artists. The rental agreement required the artists to pay 30% of their gross daily proceeds from tattoos or piercings to Mr. Price as rent. The artists retain the remaining 70% of their daily gross proceeds from their customers as payment for their work.

[¶4] Within the time frame at issue, the following persons rented space from Mr. Price within Blind Faith Tattoos' studio for the performance of their craft: Orrin Nilsson, Autumn Tierney, Ronald Anderson, Brian McLaughlin and Thomas

Rockwell. Orrin Nilsson is a piercer; the others are tattoo artists. Mr. Price did not carry workers' compensation insurance coverage.

[¶5] The Board's Abuse Investigation Unit (AIU) filed a complaint for penalties alleging that Mr. Price failed to secure the payment of workers' compensation for his employees between January 1, 2009, and December 31, 2012, in violation of 39-A M.R.S.A. § 401. In this proceeding, the AIU bore the burden of proof by a preponderance of evidence that the artists were Mr. Price's employees within the meaning of the Act. The hearing officer considered the factors listed in the statutory definition of independent contractor in 39-A M.R.S.A. § 102(13) (Supp. 2012)[2] and concluded that although tattooing is

[2] Title 39-A M.R.S.A. § 102(13) has since been repealed and replaced. *See* P.L. 2011, ch. 643 §§ 7, 8 (effective Dec. 31, 2012). The amendments do not apply in this case. The applicable statute provides, in relevant part::

> In determining whether [an independent contractor] relationship exists, the board shall consider the following factors:
>
> > **A.** Whether or not a contract exists for the person to perform a certain piece or kind of work at a fixed price;
> >
> > **B.** Whether or not the person employs assistants with the right to supervise their activities;
> >
> > **C.** Whether or not the person has an obligation to furnish any necessary tools, supplies and materials;
> >
> > **D.** Whether or not the person has the right to control the progress of the work, except as to final results;
> >
> > **E.** Whether or not the work is part of the regular business of the employer;
> >
> > **F.** Whether or not the person's business or occupation is typically of an independent nature;
> >
> > **G.** The amount of time for which the person is employed; and

"typically independent in nature," the artists here were Mr. Price's employees. Thus, the hearing officer imposed a penalty.

[¶6] Mr. Price filed a Motion for Additional Findings of Fact and Conclusions of Law, which the hearing officer denied. This appeal followed.

II. DISCUSSION

[¶7] Mr. Price contends that the hearing officer erred as a matter of law when concluding that the artists who rent space from him are his employees.

[¶8] The role of the Appellate Division is "limited to ensuring that the [hearing officer's] factual findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts [is] neither arbitrary nor without rational foundation." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983). Because Mr. Price filed a motion for findings of fact and conclusions of law and proposed findings and conclusions, the Appellate Division does not assume that the hearing officer made all necessary findings to support his judgment. "Instead, we review the original findings and any additional findings made in response to a motion for

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H. The method of payment, whether by time or by job.

In applying these factors, the board may not give any particular factor a greater weight than any other factor, nor may the existence or absence of any one factor be decisive. The board shall consider the totality of the relationship in determining whether an employer exercises essential control or superintendence of the person.

findings to determine if they are sufficient, as a matter of law, to support the result and if they are supported by evidence in the record." *See Maietta v. Town of Scarborough*, 2004 ME 97, ¶ 17, 854 A.2d 223.

[¶9] The hearing officer analyzed the case in terms of whether the artists who rent from Mr. Price were either his "employees" or "independent contractors." However, the question whether an individual is or is not an employee is not always an "either/or" proposition. There is a third possibility—that they are neither employees nor independent contractors. Based on the facts as found by the hearing officer, we conclude that neither such relationship exists in this case.

[¶10] The Act defines the term "employee" as "every person in the service of another under *any contract of hire*, express or implied, oral or written, except…(7) an independent contractor." 39-A M.R.S.A. § 102(11)(A)(7) (Supp. 2012) (emphasis added). "Independent contractor" means "*a person who performs services for another under contract*, but who is not under the essential control or superintendence of the other person while performing those services." *Id.* § 102(13) (emphasis added). Pursuant to these provisions, before a hearing officer conducts the analysis to differentiate between the two, the hearing officer should address the threshold issue whether a contract of hire or a contract for services exists. *See Malpass v. Philip J. Gibbons,* Me. W.C.B. No. 14-19, ¶¶ 19, 22 & n.2 (App. Div. 2014) (determining in the context of alleged lent employment, that no

contract of hire or for services existed between purported general or special employers and claimant).

[¶11] The hearing officer considered the section 102(13) factors and concluded that there was an employer-employee relationship because: there is no contract for services between the parties for the breach of which a cause of action would arise; the work performed by the artists was part of Mr. Price's regular business; the agreement prohibited subletting the space; Mr. Price retained control over the artists' work through the requirements of the rental agreement; Mr. Price furnished an autoclave, "the critical tool in tattooing," as well as the phone, heat, electricity, and common areas; and the artists' tattooing licenses are tied to Mr. Price's location, which has been approved by the State.[3]

[¶12] However, the hearing officer also made the following findings of fact that support the conclusion that there was no contract of hire between the artists and Mr. Price: the artists have rental agreements with Mr. Price which require them to pay Mr. Price 30% of their daily gross proceeds; the artists retain the remainder of the fees paid by their customers[4]; the artists are free to employ and supervise the activities of assistants; the artists supply all tools and materials necessary to their

[3] With respect to Orrin Nilsson, there is insufficient evidence in the record to support some of these findings. His work involved piercing only, which is not part of Mr. Price's regular business; and there was no evidence that any license Mr. Nilsson had to perform piercing was tied to the approved premises.

[4] "*A fortiori*, payment in the form of a percentage of gross revenue is a strong indication of contractorship." 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 61.06[2], n.30 (2013) (citing *Heilner v. Workmen's Comp. Appeal Bd.*, 393 A.2d 1085 (Pa. Commw. Ct. 1978).

profession (except the autoclave) including needles, pigment, tattoo machines, power supply, and all consumables; and the artists, to a great degree, operated independently.[5] There is no evidence in the record that Mr. Price in any way actually controlled (or had the right to control) the progress of the artists' work or even the final results, except to the extent that the rental agreement required the artists to comply with State law regarding records—which they are required to do regardless of where they operate—and to keep their rented booth in a clean and professional condition. The rental agreement also prohibited subletting the booth space. These provisions, aside from record-keeping, address the lessor-lessee relationship of the parties rather than an employment relationship.

[¶13] We conclude that the facts found by the hearing officer do not establish that an employer-employee relationship exists. The facts demonstrate only that the artists rent booth space from Mr. Price in exchange for a fixed percentage of their gross daily earnings. *See Creative Designs Tattooing Ass., Inc. v. The Estate of Earle Lindsey Parrish III*, 693 S.E.2d 303, 311 (Va. App. 2010) (holding that tattoo artist who rented space from Creative Designs, Inc., for 45% of proceeds, and supplied all of his own tools and supplies except for a "sharps

[5] The undisputed evidence in the record that supports the hearing officer's finding that the artists operated independently "to a great degree" includes: the artists were paid exclusively by their own customers; the artists set their own prices without input or control from Mr. Price; the artists scheduled appointments independently of Mr. Price; and they performed their craft without any input from Mr. Price. Although the artists each had their individual licenses to perform tattooing tied to Mr. Price's studio, the artists could, and some did, hold multiple licenses simultaneously tied to different locations.

container" for disposal of needles, was not an employee under Virginia common law). The relationship between Mr. Price and the artists is akin to the common office-sharing arrangement in which professionals (medical professionals, for example), operating independently, rent space in a licensed facility that contains some shared equipment.

[¶14] We recognize that in some circumstances, certain rental agreements could constitute veiled arrangements for paying wages for services. For example, in *W.C.B. Abuse Investigation Unit v. Morrissette*, Me. W.C.B. No. 14-18, ¶ 12 (App. Div. 2014), an Appellate Division panel recently held that an employer-employee relationship existed between a taxi cab company and its drivers. The company rented vehicles to drivers for a per hour fee and allowed the drivers to keep the remainder of the fares they earned. *Id*. ¶ 2.

[¶15] However, *Morrissette* is distinguishable from this case in several respects. The cab company exerted significant control over the drivers' work by providing dispatch services and cell phones. *Id.* ¶ 3. The cab company also provided to the drivers the means for performing the work—the vehicles—which the company owned, maintained, registered, inspected, and insured. *Id.* Vehicles are a very valuable tool to a taxi cab service. *See West v. C.A.M. Logging*, 670 A.2d 934, 937-38 (Me. 1996) ("Because the C.A.M. truck was sufficiently valuable to provide an incentive for control and for efficient employment of

capital, this factor weighs heavily in favor of employment status" (quotation marks omitted)).

[¶16] No such level of control was established in this case. The record does not support the hearing officer's finding that the autoclave, the only tool provided by Mr. Price, is necessarily "the critical tool" for performance of the artists' craft (in comparison, for example, to the tattoo machines, or the taxicabs in *Morrissette*). Further, undisputedly the artists were not required to use Mr. Price's autoclave, and the autoclave is not such a valuable asset that it would provide an incentive for Mr. Price to exert control over its use or the conduct of the artists in performing their work.

III. CONCLUSION

[¶17] The hearing officer's findings do not support the conclusion that the individual artists who rented booth space from Mr. Price d/b/a Blind Faith Tattoos were in Mr. Price's service under a contract of hire. Because Mr. Price was not obligated to secure the payment of workers' compensation for the artists under the Act, no penalty should be imposed.

The entry is:

> The hearing officer's decision is vacated and the Abuse Investigation Unit's complaint is denied.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2013).

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