INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 6048-2011
TAX LIABILITY

IN THE MATTER OF THE CLAIM OF

SKI TOWN DISTRIBUTIONS, LLC,

Putative Employer,

v.

DIVISION OF EMPLOYMENT AND TRAINING,

Employer.

FINAL ORDER

The putative employer, Ski Town Distributions, LLC (Ski Town) appeals the hearing officer's determination that a class of individuals providing services as newspaper distributors were in covered employment pursuant to § 8-70-115(1)(b), C.R.S., for unemployment compensation tax liability purposes. We reverse.

Section 8-70-115(1)(b) provides that service performed by an individual for another is deemed to be employment for purposes of the Colorado Employment Security Act (CESA) unless it is shown that the individual is free from control and direction in the performance of the service and that he or she is customarily engaged in an independent trade, occupation, profession, or business related to the service. Generally, the putative employer has the burden of proving both conditions exist in order to rebut the presumption of an employment relationship under the statute. *See Carpet Exchange of Denver Inc. v. Industrial Claim Appeals Office*, 859 P.2d 278 (Colo. App. 1993). An independent contractor is not free from all control, and the "control and direction" provided for by § 8-70-115(1)(b) is control and direction over the means and methods of performing the work. *See Carpet Exchange, supra.*

Under § 8-70-115(1)(c), C.R.S. a putative employer may provide evidence that the requirements of § 8-70-115(1)(b) are met by producing a written document, signed by both parties, that satisfies the specific listed factors demonstrating those conditions. Section 8-70-115(2) further provides that a rebuttable presumption of an independent contractor relationship may be established by such a written document, if it contains certain disclosures. *See Home Health Care Professionals v. Colorado Dept. Of Labor & Employment,* 937 P.2d 851 (Colo. App. 1996). The hearing officer was not persuaded

that the contract carrier agreements used by Ski Town contained sufficient factors to raise the rebuttable presumption of independent contractor relationships.

The hearing officer considered whether workers who delivered newspapers were employees. The hearing officer found that Ski Town distributed various newspapers and had a contract with the Denver Newspaper Agency to deliver papers throughout Colorado. Individuals delivered papers on specific routes. The hearing officer found little in the way of control and direction by Ski Town over how the individual carriers did their jobs. The hearing officer was not persuaded, however, that all but one of the carriers, Mr. Rath, were customarily engaged in an independent trade, occupation, profession, or business related to the service they provided to Ski Town.

In addition, the hearing officer rejected Ski Town's assertion that the services provided were exempt from employment pursuant to § 8-70-136, which excludes from employment "an individual engaged in the trade or business of the delivering or distribution of newspapers." The hearing officer observed that the statute required all remuneration of such individuals to be "directly related to sales." Section 8-70-136*(1)(a)*, C.R.S. The hearing officer found the remuneration paid to the class of workers under consideration was not tied to sales or performance. Instead, the workers received a flat, weekly rate that did not consider the hours worked or the number of papers delivered.

The hearing officer determined that the class of workers provided their services to Ski Town in covered employment, except for Mr. Rath.

Ski Town argues that the carriers are excluded from employment pursuant to § 8-70-136, C.R.S. We agree. Section 8-70-136(1), C.R.S. excludes from employment "an individual engaged in the trade or business of the delivering or distribution of newspapers," but only under the following conditions:

> (a) All the remuneration ... for the performance of such services is directly related to sales or other output, including the performance of services, instead of the number of hours worked; and
>
> (b) The services are performed pursuant to a written contract ... and if such contract provides that the person shall not be treated as an employee with respect to such services for federal tax purposes.

We are satisfied that the individuals at issue are exempt from employment.

We have reviewed the contracts between the individuals and Ski Town. Interpretation of a contract is an issue of law. Consequently, we may determine whether the agreement complies with the statute. See *Fiberglas Fabricators, Inc. v. Klyberg*, 799 P.2d 371 (Colo. 1990). The contract between the individuals at issue and Ski Town provide that the individual carrier "is not hired or employed" by Ski Town, will receive "an IRS 1099" and that "[i]t is the carrier's sole responsibility to pay appropriate federal and state taxes." Exhibit 6. We therefore conclude that the contracts conform with subsection (1)(b) of § 8-70-136.

We are also satisfied that the carriers are compensated according to § 8-70-136(1)(a). The hearing officer found that Ski Town pays each carrier a negotiated weekly flat rate that does not depend on the carrier delivering a certain number of newspapers and that is paid regardless of the number of hours the carriers spend delivering newspapers. The carriers also keep all tips. Thus, the carriers' compensation is not dependent on the "number of hours worked." Instead of being paid based on the number of hours worked, the carriers' compensation consists of a flat rate (plus tips) for delivering papers. We conclude that the phrase "related to sales or other output, including the performance of services" used in the statute is sufficiently broad to encompass the services performed in this case.

IT IS THEREFORE ORDERED that the hearing officer's decision mailed June 23, 2011, is reversed.

INDUSTRIAL CLAIM APPEALS PANEL

John D. Baird

Robert M. Socolofsky

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS.** To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty (20) calendar days of the mailing date of this order, as shown below.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide five (5) copies of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

- You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Division of Employment & Training, the Attorney General's Office and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

- In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

- An appeal to the Colorado Court of Appeals is based on the existing record before the hearing officer and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

- Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.colorado.gov/cdle/CTAPPFORM or in person, or from the Industrial Claim Appeals Office.

- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals.

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CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

12/8/2011 by KG.

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