DEPARTMENT OF EMPLOYMENT AND TRAINING

BOARD OF APPEALS
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

(301) 383-5032

STATE OF MARYLAND
HARRY HUGHES
Governor

BOARD OF APPEALS
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MARK R. WOLF
Chief Hearing Examiner

— DECISION —

IN THE MATTER OF THE APPEAL OF:

Pennsylvania Manufacturers Assoc.
Insurance Company

Decision No.: 3-EA-86

Date: March 24, 1986

Exec. Determ. No.: 4603

Emp. Account No.:

ISSUE: Whether the compensation paid to Nancy I. Lee (S. S. No. and Ann D. Hopper (S. S. No. are chargeable to the petitioner's account.

— NOTICE OF RIGHT OF FURTHER APPEAL —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE, OR WITH THE APPEALS DIVISION, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A FURTHER APPEAL EXPIRES AT MIDNIGHT ON April 23, 1986

— APPEARANCES —

For the Appellant:

George Davis - Attorney

For the Secretary:

John Roberts -
Legal Counsel

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered the evidence presented before the Special Examiner in this case. Before the Board itself, legal argument was heard from the petitioner and alleged employer, Pennsylvania Manufacturers Association Insurance Company, and by the Department of Employment and Training.

FINDINGS OF FACT

The Board of Appeals adopts the findings of fact of the Special Examiner.

CONCLUSIONS OF LAW

The agency argues in its appeal that the Special Examiner used common law doctrines of master-servant relationship in order to determine an issue which is properly determined by the statutory provisions of the unemployment insurance law. More specifically, the agency argues that, irrespective of whether the common law relationship of master-servant exists, the provisions of Section 20(g)(6)(i), (ii) and (iii) are applicable to this case. Under those sections, a person performing services, whether an independent contractor or not, is nevertheless a covered employee within the meaning of the unemployment insurance law unless the specific tests of the statute are met. The agency argues that the nurses employed in the home of the injured worker do not meet the requirements of Section 20(g)(6) of the law and are therefore employees of PMA for the purposes of the unemployment insurance statute.

This argument misses the point. It is not necessary to decide whether the nurses are either independent contractors under the common law or whether they meet the standards of Section 20(g)(6) of the law. The nurses aides simply do not work for PMA at all. Under Section 20(g)(1) of the law employment is defined as "service, including service in interstate commerce, performed for remuneration or any contract of hire, written or oral, express or implied." Obviously, there is no contract of hire, written or oral, express or implied between PMA and the nursing aides. PMA has no right to hire, supervise or fire the nurses aides. PMA would have no obligation to pay the nurses aides if a contract dispute or disputed wage claim was brought by one of them. PMA's only obligation is to reimburse the family for the necessary medical expenses. The fact that PMA pays the expenses directly to the nurses aides in order to avoid financial hardship for the family is simply not that significant a factor, considering that the nurses aides are not responsible to PMA and PMA is not directly responsible for the nurses aides' wages.

The other part of that section speaks of service "performed for remuneration." Of course, the service in this case was performed for remuneration. The question is, <u>for</u> <u>whom</u> was the service performed. The comments of the Special Examiner with respect to the privity of contract argument are appropriate. The nurses aides have no privity of contract with PMA and are not performing services <u>for</u> PMA for remuneration.

The Board notes that there is insufficient evidence to make a final determination as to whether these nurses aides in fact meet the definition in Section 20(g)(6). If they do, their wages are not taxable wages under the unemployment insurance law, and they may not form a basis for the receipt of unemployment insurance benefits. It does appear that the nurses do meet the requirements of Section 20(g)(6) at least with respect to PMA. A final decision on whether the nurses aides meet the requirement of Section 20(g)(6) cannot and should not be made, however, without all the parties having been given a chance to appear and present evidence. Although, as stated above, the nurses aides appear to meet the standards of Section 20(g)(6) with respect to PMA, it may be that they don't meet those standards with respect to the Matthews family. But it is unnecessary to decide in this case whether the nurses aides meet the requirements of Section 20(g)(6) since it it abundantly clear that, whatever their status with respect to that section, they do not perform services for remuneration for PMA nor do they work for PMA under any contract of hire, written or oral, express or implied within the meaning of Section 20(g)(1) of the law.

DECISION

Nancy I. Lee (S. S. No. 218-30-7555) and Ann D. Hopper (S. S. No. 214-36-1263) were not employees of Pennsylvania Manufacturers Insurance Company within the meaning of Section 20(g)(1) of the law. Employer account number 00 491345 09 is not chargeable with benefits paid to these claimants.

The decision of the Special Examiner is affirmed.

Thomas W. Keech
Chairman

Maurice E. Dill

Harold A. Marks
Associate Member

Associate Member

K:W:D
kmb
DATE OF HEARING: November 26, 1985
COPIES MAILED TO:
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DEPARTMENT OF EMPLOYMENT AND TRAINING

BOARD OF APPEALS
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STATE OF MARYLAND
HARRY HUGHES
Governor

— DECISION —

IN THE MATTER OF THE APPEAL OF:

Pennsylvania Manufacturers Asso
Insurance Co.

Decision No.: 30-EA-84

Date: September 17, 1984

Exec. Determ. No.: 4603

Emp. Account No.:

ISSUE:

Whether charges for unemployment insurance benefits paid to Nancy I. Lee and Ann D. Hopper may be assessed to Account No.

— NOTICE OF RIGHT OF FURTHER APPEAL —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE, OR WITH THE APPEALS DIVISION, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A FURTHER APPEAL EXPIRES AT MIDNIGHT ON October 2, 1984

— APPEARANCES —

For the Appellant:

Mary Louise D. MacMullan,
Attorney;
Carol Rusnak, Witness;
Joseph Hornig,
Rehabilitation Mgr.

For the Secretary:

John Kleylein,
Super., Field
Investigation
and Audit

FINDINGS OF FACT

The employer in this case was the carrier of Workmen's Compensation Insurance for its client, Floyd Culler, an employer in the Frederick, Maryland area. An employee of Floyd Culler, Robert Matthews, had a severe work-connected injury and became a third-party beneficiary of the workmen's compensation policy issued by Pennsylvania Manufacturers Association Insurance Company (hereinafter called PMA).

Robert Matthews was rendered a paraplegic by the accident and required 24-hour home care for an indefinite time which was expected to extend for the remainder of his life. Under the terms of the policy, PMA was responsible for the costs of this care. The patient's wife obtained the services of an attendant, Charles Jackson, who initiated the home care system and ostensibly served as a defacto administrator. Because of the 24-hour care requirement other nursing assistants were needed and to secure such services Mrs. Matthews placed an advertisement in a local newspaper and obtained the services of Ann D. Hopper and Nancy I. Lee, among others. Prior to beginning work, all persons providing home care did so under an agreement that they were in a self-employment status and were specifically provided with IRS instructions for self-employed persons.

The cost of these services ran to $1,200-1,500 weekly and it was beyond the financial capacity of the patient to advance such funds and seek later reimbursement by the insurer. Accordingly, PMA made direct payment to the nurses aides without "filtering" the funds through the patient, Charles Matthews. Subsequently, the two nurses aides above named filed for and received unemployment insurance benefits upon their cessation of services for unspecified reasons. Charges for these benefits were made against the account of PMA and excepted to by the employer in a protest filed July 12, 1983. A review determination was prepared on March 2, 1984 which provided that PMA "chose to become the employer by directly dispersing checks to the nurses aides in lieu of paying a lump sum claim to Robert Matthews or engaging a private medical service to provide the care . . ."

From this review determination, PMA appeals. It is noted that the last day for filing an appeal is stated in Agency Exhibit No. 1 to be March 23, 1984 and the request for appeal is dated April 4, 1984. However, evidence produced by the agency at the hearing shows that the original notification was undated and did not constitute adequate notice of the time for filing an appeal. The agency does not raise the issue of time on this and proceeds on the merits of the case.

CONCLUSIONS OF LAW

In view of the apparent irregularity in notification of appeal date, it will be held that the employer filed a technically late appeal, but with good cause. (See, Premick v. Roper Eastern, 141-BR-83.)

The issue on appeal is whether charges for unemployment insurance benefits paid to Nancy I. Lee and Ann D. Hopper may be assessed to the account number 00 491345 09 of PMA, under the provisions of Articla 95A, §8(g) Annotated Code of Maryland. Clearly, the greater, and determining, issue is whether PMA was the employer of Lee and Hopper.

It is basic that the relationship of employer and employee arises from a contract (see, East Coast Freight Lines v. Maryland City Council of Baltimore, 58 A.2d 290), and obviously the first step is to look for the existance of a contractual relationship between PMA and the two nursing aides. Two of the several basic elements of contract are mutuality and privity. It is hard to assert mutuality or meeting of the minds between the nursing aides who may not immediately have been aware of the existance of PMA. They dealt exclusively with Mr. Jackson and Mrs. Matthews and entered into no employment contract with PMA, thus precluding any privity of contract between them. If, for example, they had been refused payment for services rendered, would they have had a cause of action against PMA for breech of an employment contract? Possibly construed as third-party beneficiaries they may have, but that circumstance in itself is insufficient to establish an employment contract between the aides and PMA. It seems highly unlikely on these facts that any contract between the aides and PMA can be construed.

Further, the meeting of the minds according to evidence in the record is that the nursing aides were to be self-employed. Thus, it seems clear that there was no employment agreement, expressed or implied, between PMA and the nursing aides.

Did the aides hold the status of independent contactors? It is generally accepted that an independent contractor is one who undertakes to do a particular piece of work by his own means and methods without being subject to control by the contractee, except with regards to the result of the work performed. (See, Greer Lines Company v. Roberts, 139 A.2d 235 and the cases cited therein). That is, if the party is not under close supervision or control he is generally an independent contractor. Another test of an independent contractor is whether the work performed is part of the regular business activities of the employer (see, Keitz v. National Paving, 134 A.2d 296). Under these facts, nursing services are not part of the regular business of an insurance company. The most conclusive test is that an employer is not only concerned with what is done but how it is done through continuing control and supervision (see, Globe Indemnity Co. v. Victill Corp., 119 A.2d 423).

It is noted that the agency's contention that PMA pay a lump sum settlement to Mr. Matthews would amount to a violation of Maryland Workmen's Compensation law in view of PMA's continuing indefinite obligation.

A consideration of the evidence in this case supports conclusions that: (1) there was no intention of an employment contract between the nursing aides and PMA; and (2) that the intention of the parties was clear that the aides were to be engaged as self-employed independent contractors.

DECISION

It is held that Nancy I. Lee (S. S. No.) and Ann D. Hopper (S. S. No. were not employees of Pennsylvania Manufacturers Insurance Company and the employer account number not chargeable with benefits paid to these claimants.

Louis Wm. Steinwedel
Special Examiner

LWS:kbm
Date of Hearing: August 13, 1984

COPIES MAILED TO:

EMPLOYER

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Joel Lee - Assistant Secretary

M. C. Ashley - U. I. Director

John Roberts - Legal Counsel

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