

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0427

Reversed
Independent Contractor

PROCEDURAL HISTORY: On December 17, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding “the employer”, Weber Packaging Solutions, Inc. (Weber) discharged claimant, but not for misconduct (decision # 103238). Weber filed a timely request for hearing. On February 18, 2020, ALJ Snyder conducted a hearing, and on February 20, 2020, issued Order No. 20-UI-144851, affirming the Department’s decision. On March 9, 2020, Weber filed an application for review with the Employment Appeals Board (EAB).

On April 15, 2020, EAB issued EAB Decision No. 2020-EAB-0207, reversing Order No. 20-UI-144851 and remanding the case to the Office of Administrative Hearings. On May 4, 2020, ALJ Snyder conducted the remand hearing, and on May 12, 2020 issued Order No. 20-UI-149638 affirming the Department’s December 17, 2019 decision (decision # 103238). On May 27, 2020, the employer filed an application for review of Order No. 20-UI-149638 with EAB.

EAB considered the employer’s written argument when reaching this decision.

FINDINGS OF FACT: (1) Weber, a label manufacturing and distribution business, originally employed claimant from 1969 until his retirement in 2004, in various sales capacities, culminating with the position as Director of Sales.

(2) In approximately 2006, and with the intent of supplementing his social security income, claimant filed paperwork with the California Secretary of State forming ABSWAN Company, LLC (ABSWAN). Claimant listed himself on the paperwork as a manager of ABSWAN and ABSWAN’s business type as “Label Sales Broker.” Exhibit 3 at 000022. Claimant “formed this company as an independent company for working with customers and prospects and doing work with them outside of Weber’s line of

supplies.” Transcript at 35. From April 2006 until December 2017, Weber and claimant had no relationship.

(3) In 2016, claimant relocated to from California to Oregon. Prior to his departure, claimant closed ABSWAN and, at all relevant times considered ABSWAN to be an inactive company.

(4) On December 8, 2017, Weber and claimant entered into an “Independent Contractor Agreement” (Agreement). The Agreement referred to claimant as an “independent contractor” or a “contractor” and expressly stated, “[n]othing in this Agreement shall be deemed to constitute Contractor as a ... employee... or anything other than an independent contractor.” Exhibit 3 at 000011. Pursuant to the Agreement, claimant began selling Weber Products in Oregon and Washington and he was required to submit a monthly invoice to receive a \$1,633 fixed-rate payment for his monthly general expenses and “5% commission on the net value of label orders made to customers located in Pacific NW territory...” Exhibit 3 at 000016.

(5) The Agreement allowed claimant to provide his sales services to not only Weber but also any other person, or the general public, and it reflected an intent between the parties that claimant would “handle his own books of account, file his own income tax returns, and pay his own withholding and social security taxes.” Exhibit 3 at 000012. Weber was not responsible for providing claimant health insurance benefits under the Agreement, nor did Weber provide claimant a 401(k) plan. In performing his sales services, the Agreement provided claimant autonomy to employ his “own personal skills and methods... and [his] own professional judgment and shall not be subjected to the control or direction of any other person; provided, however, that [claimant] shall abide by all reasonable guidelines of Weber.” Exhibit 3 at 000012.

(6) Claimant fulfilled his obligations under the Agreement by working on existing accounts from his Oregon home and by travelling to pursue sales leads throughout several states in the Pacific Northwest. While Weber issued claimant a computer and a company phone to enable him to meet his obligations under the Agreement, claimant ultimately “bought a computer terminal so I could see, instead of using the Weber small computer...” Transcript at 36. Claimant was not required to wear a Weber uniform, nor was he required to report how he went about making his sales; he was only required to make weekly reports about the results of his sales efforts. Claimant could hire anyone he wished to assist him with conducting sales and he had sole discretion to fire any such individual. If claimant hired an employee, Weber would take no supervisory role over that employee and would not pay wages or benefits to any of claimant’s employees. Claimant also had the authority to choose how many hours he was going to work during the day or week. Claimant was required to carry his own insurance, and Weber did not cover claimant with liability insurance, performance bonds, or errors and omission insurance. In addition, if claimant had required a license to perform his sales work, claimant would have been required to obtain the license or face the risks for failing to do so.

(7) At all relevant times, claimant submitted his monthly invoices under the name “ABSWANCOMPANY Contractor Packaging Systems”. Exhibit 3 at 000002. Pursuant to the Agreement, Weber remitted payment to claimant for his expenses and commission via direct deposit to a Wells Fargo business bank account set up by claimant in the name of ABSWAN. Despite the fact that claimant considered ABSWAN to be “defunct” during the time he operated under the Agreement, claimant continued to use his ABSWAN business account for billing purposes.

(8) In 2018 and 2019, Weber issued claimant an IRS Form 1099-MISC. Claimant filed personal income taxes in 2017 and 2018, but did not have to pay any taxes because his pay did not outweigh his expenses. ABSWAN did not file tax returns for calendar year 2017 or 2018.

(9) Claimant made investments to facilitate his ability to perform contracted service for Weber including installing a dedicated telephone line in his home and making modifications to his spare bedroom. Claimant also purchased vehicles on two separate occasions, both times for work-related purposes. Initially, claimant purchased “a smaller profile car” but he “had to upgrade to a higher profile [car] because of driving on interstate highways in Washington, Oregon, and Idaho....” Transcript at 36.

(10) Between December 8, 2017 and October 31, 2019, Weber and claimant renewed the agreement on more than one occasion. The last version of the agreement, entered into by the parties in December 2018, recognized among other things, that claimant was to submit to Weber a fixed-rate “monthly invoice in the amount of \$1933” which was “to cover general expenses associated with performing the duties of a contractor” and included a “5% commission on commissionable products located in Pacific NW territory.” Exhibit 3 at 000004. The December 2018 renewal agreement also agreed to compensate claimant for hotel, gas, airfare, and per diem “related to trips over 250 miles,” but otherwise reflected that claimant was “solely responsible for the cost of all of [his] expenses.” Exhibit 3 at 000004-000005. The renewal agreement expressly recognized that claimant “shall control the means and methods of providing sales services” and that Weber “does not control or have any direction over the where (sic) the [claimant] works, the number of hours worked or any production quota for [claimant].” Exhibit 3 at 000006. At all relevant times, Weber complied with these express limitations on their ability to control the means and method with which claimant provided services to Weber. The renewal agreement also stated that claimant “is engaged in an independent business and desires to provide services as a Contractor...” and that “neither [claimant] nor any of [claimant’s] ... employees... is entitled to, shall receive, and has no claim to, any benefits or other compensation currently paid by [Weber] to its employees ... including without limitation... unemployment insurance coverage....” Exhibit 3 at 000005. Weber also did not indemnify claimant or ABSWAN.

(11) On September 30, 2019, pursuant to the terms of the Agreement, Weber provided claimant 30-days’ notice that they were terminating the Agreement. Weber decided that it wanted to move its business in a different direction. The Agreement was terminated effective October 31, 2019. Claimant sold his vehicle the day after his termination and “lost \$6,000.00 on that car”. Transcript at 36. During all relevant times, claimant believed he was an employee of Weber, and not an independent contractor.

(12) As of December 5, 2019, a LinkedIn profile created by claimant reflected claimant as the “[p]resent” owner of “ABSwan Company” and that he had owned ABSwan Company since June 2004. Exhibit 3 at 000020. Claimant had attempted to cancel the profile in 2015, but was only successful in cancelling it after he learned that it still existed on or after December 5, 2019.

CONCLUSIONS AND REASONS: Claimant was an independent contractor and therefore not qualified to receive unemployment insurance benefits.

“Services performed by an individual for remuneration are deemed to be employment subject to this chapter *unless and until it is shown to the satisfaction of the Director of the Employment Department that the individual is an independent contractor* as that term is defined in ORS 670.600.” ORS

657.040(1). (Emphasis added). ORS 670.600(2) provides, in pertinent part, that the term “independent contractor” means a person who provides services for remuneration and who, in the provision of the services, is (a) free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results, and (b) is customarily engaged in an independently established business.¹ Where an individual performed services as an independent contractor, those services are not considered subject employment covered by the unemployment insurance statutes, and individuals are not eligible to receive benefits based upon work performed as an independent contractor. *See* ORS 657.040; OAR 471-030-0038(1)(a) (December 23, 2018) (“This section does not apply where no employment relationship exists because the worker is an independent contractor . . .”); *Register Guard v. Employment Dep’t*, 247 Or. App. 692, 271 P. 3d 136 (2012); *May Trucking Co. v. Employment Dep’t*, 251 Or. App. 555, 284 P.3d 553 (2012).

Independently established business. Pursuant to ORS 670.600(3), a person is customarily engaged in an independently established business if any three of the following five requirements are met: (a) the person maintains a business location that is separate from the business or work location of the person for whom the services are provided, or that is in a portion of the person’s residence and that portion is used primarily for the business; (b) the person bears the risk of loss related to the business or the provision of services as shown by factors such as, the person enters into fixed-price contracts, is required to correct defective work, warrants the services provided, or negotiates indemnification agreements or purchases liability insurance, performance bonds or errors and omissions insurance; (c) the person provides contracted services for two or more different persons within a 12-month period, or the person routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services; (d) the person makes a significant investment in the business, through means such as purchasing tools or equipment necessary to provide the services, paying for the premises or facilities where the services are provided, or paying for licenses, certificates or specialized training required to provide the services; and/or (e) the person has the authority to hire other persons to provide or to assist in providing the services and has the authority to fire those persons.

The order under review concluded that claimant did not meet any of the five criteria for establishing that he customarily engaged in an independently established business. Order No. 20-UI-149638 at 4.² Based on this conclusion alone, the order under review found that claimant was an employee of Weber and therefore qualified to receive unemployment compensation benefits. The record evidence does not support the order’s conclusion. Rather, the record evidence supports the conclusion that claimant met

¹ Both ORS 670.600(2)(c) and (2)(d) recognize that an “independent contractor” can also be defined by whether a person, in the provision of services is licensed under ORS chapter 671 and 701 (where the services provided by that person require a license under either of those chapters) and by whether a person, in the provision of services, is otherwise responsible for obtaining other licenses or certifications necessary for providing the services. Neither of these statutory provisions appear to be at issue in this case as the record evidence fails to establish that claimant’s work arrangement with Weber required him to be licensed in any manner. It is noted that to the extent any license requirement could have potentially existed, claimant was responsible under the agreement for the cost of obtaining any “professional licenses” necessary for the performance of the agreement. Exhibit 3 at 000005; *see also* Employer’s written argument at 2 of 4. (“There is no dispute over the fact that ORS § 670.600(2)(c) is inapplicable here (because no such licenses are required) and that ORS § 670.600(2)(d) is satisfied because [claimant], not [Weber], was responsible for obtaining any necessary licenses or certificates.”).

² Although the order under review stated that claimant “met one of the five criteria”, this reference appears to have been a typographical error as the order’s analysis expressly rejected the applicability of each of the five criteria to claimant’s situation. Order No. 20-UI-149638 at 4.

four of the five criteria and, thus, regardless of whether ABSWAN was defunct or not, that was nevertheless customarily engaged in an independently established business.

The record evidence establishes that claimant met the criteria reflected in ORS 670.600(3)(a) because he maintained a business location that was separate from Weber's business location. Specifically, the preponderance of the evidence demonstrates that all relevant times claimant provided sales services to Weber while either working from his home or through travelling to various locations around several states in the Pacific Northwest in an attempt to sell Weber products. Claimant never worked "at a Weber office or facility." Transcript at 23. In addition, the record evidence suggests that claimant modified and used the spare bedroom in his home primarily to perform work under his contract with Weber. As such, the preponderance of the evidence supports the conclusion that claimant maintained a business location at his home such that he met the requirements of ORS 670.600(3)(a).

The record evidence establishes that claimant met the criteria reflected in ORS 670.600(3)(b) because he bore the risk of loss related to his provision of services to Weber. Here, claimant's agreement with Weber was a fixed-price contractual arrangement and claimant was "solely responsible for the costs of all of [his] expenses." Exhibit 3 at 00005. For example, the record reflects that after the employer terminated claimant, claimant bore a \$6,000.00 loss when he sold his work vehicle the next day. The preponderance of the evidence supports the conclusion that at all times claimant bore the risk of loss with respect to his provision of services to Weber, such that he met the requirements of ORS 670.600(3)(b).

The record evidence establishes that claimant met the criteria reflected in ORS 670.600(3)(d) because he made significant investments in his business by purchasing equipment necessary to provide services to Weber and by making expenditures to modify the spare bedroom in his home from where he provided the services to Weber. Specifically, the record reflects that claimant used his own funds to purchase a computer terminal and to purchase vehicles on two separate occasions. In addition, the record reflects investments made by claimant to modify his home office workspace by installing a dedicated telephone line and by making conversions to his spare bedroom. The preponderance of the evidence supports the conclusion that claimant made significant investments in his business such that he met the requirements of ORS 670.600(3)(d).

Finally, the record evidence establishes that claimant met the criteria reflected in ORS 670.600(3)(e) because he had the authority at all times to hire other persons to provide or to assist in providing the services to Weber and because he maintained the authority to "fire" those persons. Transcript at 24-25. As such, the preponderance of the evidence supports the conclusion that at all times claimant had the sole authority to hire individual to assist him with providing services to Weber, and to fire those same individuals, such that he met the requirements of ORS 670.600(3)(e).

Because claimant met four of the five criteria codified in ORS 670.600(3), the preponderance of the evidence demonstrates that claimant was customarily engaged in an independently established business while providing services to Weber.

Direction and control. With respect to the "direction and control" test, OAR 471-031-0181(3)(a)(C) (February 1, 2007) states that "free from direction and control" means that the independent contractor is free from the right of another person to control the means or manner by which the independent

contractor provides services. “Means” are resources used or need in performing services, and “Manner” is the method by which services are performed. OAR 471-031-0181(3)(a)(A) and OAR 471-031-0181(3)(a)(B). To be free from direction and control over the “means or manner” of providing services, an independent contractor must determine which resources to use and how to use those resources in order to perform the work. OAR 471-031-0181(3)(a)(A) and OAR 471-031-0181(3)(a)(B). If the person for whom services are provided has the right to control the means or manner of providing the services, it does not matter whether that person actually exercises the right of control. OAR 471-031-0181(3)(a)(C). Specifying the final desired results of the contractor’s services does not constitute direction and control over the manner of providing those services. OAR 471-031-0181(3)(b).

The order under review did not address whether claimant met the “direction and control” test because such a determination was unnecessary once the order incorrectly concluded that claimant was not customarily engaged in an independently established business. Nevertheless, the preponderance of the evidence demonstrates that claimant maintained control over the means and manner that he used to provide services to Weber.

Here, the Agreement between claimant and Weber expressly stated that “[claimant] shall control the means and methods of providing sales services” and that Weber “does not control over the where (sic) the [claimant] works, the number of hours worked or any production quota for [claimant].” Exhibit 3 at 000006. This contractual provision was consistent with the testimony of the parties reflecting that claimant had no defined work schedule, no sales quota, and that it “was completely his call” which location, home or road, he wanted to work from. Transcript at 19. Claimant had sole authority to hire, supervise, and fire employees if and when he thought it would be beneficial to the advancement of the services he was providing to Weber. The record evidence reflects that Weber’s approach to the means and manner with which claimant provided his services was “hands off” and that, at the end of the day, Weber was only interested in the results of claimant’s sales efforts. Transcript at 22. The preponderance of the evidence therefore supports the conclusion that, at all relevant times, claimant had control over the means and manner with which he provide services to Weber, such that he was free from the direction and control of Weber.

Because the record evidence establishes that claimant was free from the direction and control over the means and manner of providing the services he provided to Weber, and was customarily engaged in an independently established business, the preponderance of the evidence supports the conclusion that claimant’s relationship with Weber was that of an “independent contractor” for purposes of ORS 670.600(2). As such, Weber did not employ claimant as an employee, and the severance of the contractual relationship between Weber and claimant was not a “work” separation, and the severance was neither a qualifying or disqualifying event for purposes of unemployment insurance benefits.

DECISION: Order No. 20-UI-149638 is set aside, as outlined above.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

DATE of Service: June 19, 2020

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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