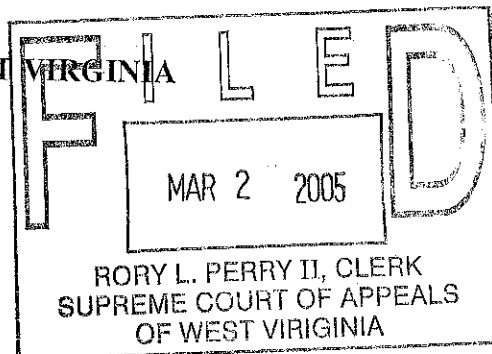


SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 32521



W and R INC., D/B/A
SHOCKERS LOUNGE,

Appellee/Respondent below,

v

Appeal from the Circuit Court of Kanawha County
Civil Action No. 03-AA-172
Hon. James C. Stucky, Judge

MARY A. WHITING,

Appellant Whiting/Claimant below;

BOARD OF REVIEW, WEST VIRGINIA BUREAU
OF EMPLOYMENT PROGRAMS; DONALD H. PARDUE,
ACTING COMMISSIONER, BUREAU OF EMPLOYMENT
PROGRAMS,

Intervenor.

BRIEF OF THE INTERVENOR

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ACTING COMMISSIONER, BUREAU OF EMPLOYMENT
PROGRAMS,

Intervenor.

BRIEF OF THE INTERVENOR

The issue presented in this appeal is whether a waitress and/or mixer at an exotic dance club, whose work is both integral to the employer's business and directed and controlled by the employer and who is not "engaged in an independently established" trade or business is as an independent contractor under West Virginia's Unemployment Compensation laws. West Virginia Code 21A-1A-16(7).

It is the position of the West Virginia Bureau of Employment Programs/Board of Review, by its Acting Commissioner, Donald H. Pardue, ("BEP"), the Intervenor herein, that under this state's Unemployment Compensation laws, an employer may not exempt itself from Unemployment Compensation premiums or exclude workers from unemployment compensation

coverage by deeming those workers "independent contractors" by requiring them to enter into independent contract agreements and by failing to withhold taxes.

I. NATURE OF PROCEEDING AND RULING BELOW

Mary A. Whiting ("Appellant Whiting") applied for unemployment compensation benefits after she was terminated from her position as a waitress at W and R Inc., d/b/a Shockers Lounge ("Shockers"), an exotic dance club. Appellant Whiting's claim was initially denied in a "Deputy's Decision" dated June 8, 2003.

On September 8, 2003, that decision was overturned by an Administrative Law Judge for the Bureau of Employment Programs ("ALJ"). In that decision, the ALJ determined that Appellant Whiting was an employee and, therefore, entitled to unemployment benefits. The ALJ made the following "Findings of Fact" in support of this decision:

1. The claimant worked for the employer, W & R Corporation, dba, Shockers Lounge, from June 1996, until February 28, 2003, working as a waitress or entertainer, receiving 50 percent of the beverage sales served to customers by the claimant, plus tips. The claimant worked from 7:00 p.m. until 3:00 a.m., usually Fridays and Saturdays.
2. The employer is Shockers Lounge.
3. The claimant was required by the employer to provide advance notice to the manager or owner if the claimant was going to be absent or tardy.
4. The claimant was instructed by the owner or manager about the amount of the charge for the drinks to the customers.
5. The employer provided bar rags, pens/pencils, or trays. The claimant did not provide any tools. The claimant provided her clothes, except the employer provided the claimant a shirt with Shockers on the back and the claimant's name on the front. The claimant did not have to wear the shirt with Shockers on the back, but the claimant would occasionally wear the shirt. The claimant received

one shirt a year. After separation, the claimant disposed of the shirts with Shockers on the back and claimant's name on the front.

6. The employer had a dress code for the waitresses or entertainers, applicable to the claimant.

7. If the claimant arrived at work an hour late, she received a reduction in the percentage of the drink sales.

8. The claimant was paid with a 1099 form, without deductions for taxes or withholdings.

9. The claimant was scheduled by the employer concerning which hours the claimant was to work.

10. The claimant and the employer entered into a written agreement on July 29, 2000, which expressed that an independent contractor-employer relationship is created.

In its "Conclusions of Law and Discussion," the ALJ concluded, in pertinent part, that:

[t]here are several indications that the claimant is an independent contractor. The July 29, 2000, agreement expresses that the parties intend an independent contractor relationship. The method of payment of the claimant as a percentage of drink sales may be an indication of an independent contractor. Also, the claimant accepted payment for her work without deductions for holdings. The employer provided the claimant with a 1099 Form, not a W-2 Form.

There are also indications that the claimant is an employee of Shockers Lounge. The manager and owner instructed the claimant about dress and the amount of charge for drinks to the customers. The claimant was provided a shirt with Shockers written on the back and the claimant's name on the front. Although the claimant did not have to wear the shirt, the claimant wore the shirt at work, and the shirt was provided by the employer. The employer also provided tools such as bar rags, pens/pencils, and trays. The employer had a dress code, applicable to the claimant. The claimant was penalized (a reduction in the percentage of the drink sales accruing to the claimant) if the claimant was tardy. The claimant had to give advance notice to the employer if the claimant was going to be late or absent. The employer assigned to the claimant the time to work, from 7:00 p.m. to 3:00 a.m.

Considering the entire record, and giving due consideration to the ability of Shockers Lounge manager and owner to supervise the claimant, it is concluded that the claimant was an employee. The manager and owner instructed the claimant about the dress code, the amount to charge customers for drinks, and the employer assigned the claimant the time to work. The claimant had to give advance notice if she was going to be absent. In balance, the claimant has more characteristics of an employee. Therefore, the claimant's wages earned at Shockers Lounge may be properly included as base period wages, and used to establish the claimant's weekly benefit amount. W & R Corporation is a covered employer.

[emphasis supplied]

The ALJ decision was affirmed by the Board of Review by decision dated October 8, 2003. In reaching its determination, the Board of Review adopted the decision of the Administrative Law Judge in its entirety.

Shockers appealed the October 8, 2003, decision to the Circuit Court of Kanawha County. By "Order Reversing the Decision of the West Virginia Bureau of Employment Programs, Board of Review" ("Order") dated May 5, 2004, the Circuit Court of Kanawha County reversed the decision of the Board of Review. The circuit court found, in pertinent part,

1. The record reveals that the Respondent, Mary Whiting, and the Petitioner, W & R, Inc., entered into a written agreement ("Agreement") on July 29, 2000 whereby Ms. Whiting was engaged as an independent contractor to provide "entertainment" to the customers of W & R, Inc. The agreement specifically states that it is the responsibility of the independent contractor to "engage the Company's customers in polite and entertaining conversation."
2. W & R, Inc. did not pay Ms. Whiting wages as an employee of Shocker's Lounge. As an independent contractor, the only compensation that Ms. Whiting received from W & R, Inc. for providing customers with the personal companionship of a young lady for a short while was enumerated discounts off of the "regular Independent Contractor's purchase price for all beverages purchased from the Company."
3. Similarly to exotic dancers in the same establishment who are also independent contractors, Ms. Whiting was entitled to keep tips given to her by customers in addition to the set portion of the purchase price paid by the customer for "special

drink” services. See *W & R Corporation d/b/a Shockers Lounge v. Palmer*, Civil Action No. 00-AA-100 (December 17, 2001) and *B B Enterprise v. Palmer*, 214 W.Va. 571, 591 S.E.2d 129 (2003).

4. According to the terms of the Agreement the Respondent’s drink discount, if applicable, on customer purchases made by credit card is not remitted to her until W & R, Inc. has been reimbursed by the credit card company.
5. Additionally, the Agreement provides that the Respondent, as an independent contractor, is “solely responsible for any clothes, outfits or other materials [she] deems necessary or desirable for the execution of [the] Agreement.”
7. The signed Agreement also provides that the Respondent is responsible for paying her own taxes and taking any other necessary deductions from her earnings including unemployment insurance.
8. The Respondent was paid with a 1099 form, without deductions for taxes or withholdings.

Conclusions of Law

1. The West Virginia Supreme Court has explained that, “findings of fact made by an administrative agency will not be disturbed on appeal unless such findings are contrary to the evidence or based on a mistake of law. In other words, the findings must be clearly wrong to warrant judicial interference.... Accordingly, absent a mistake of law, findings of fact by an administrative agency supported by substantial evidence should not be disturbed on appeal.” *Modi v. West Virginia Bd. of Medicine*, 195 W.Va. 230, 239, 465 S.E.2d 230, 239 (1995).
2. “[D]eferential standards have no application if any agency’s decision is based upon a mistaken impression of the legal principles involved. Under such circumstances, the findings and conclusions of an agency will be accorded diminished respect on appeal.” *West Virginia Health Care Cost Review Auth. v. Boone Mem’l Hosp.*, 196 W.Va. 326, at 335, 472 S.E.2d 411, at 420 (1996).
3. Ms. Whiting was not an employee of W & R, Inc. within the meaning of West Virginia Unemployment Compensation Law, *W.Va. Code* § 21A-1-1 *et seq.*, but rather an independent contractor pursuant to the signed agreement of July 29th 2000.
4. Under West Virginia Unemployment Compensation Law, Chapter 21A, Article 1A, Section 17(7) the services performed by the Respondent do not constitute employment pursuant to the said chapter that can be used to establish a weekly

benefit amount for unemployment compensation.

5. W & R, Inc. is not a covered employer in this case.

It is from the circuit court order that Appellant Whiting appealed to this Court.¹

BEP has filed with this Court a Motion to Intervene in the pending appeal. BEP now presents the instant brief in response to the circuit court's order denying unemployment compensation benefits to Appellant Whiting.

II. STATEMENT OF FACTS

As indicated above, Shockers operates an exotic dance club in Kanawha County, West Virginia. In addition to providing exotic entertainment to its patrons, Shockers sells drinks to its customers. Therefore, to perform these functions, Shockers employs bartenders, waitresses, and dancers.

Duties of Appellant Whiting

Appellant Whiting was employed for seven (7) years as a waitress by Shockers. It is undisputed that her duties were those of a typical waitress. According to Appellant Whiting, she:

waited on customers, got their drinks, brought it back ... go back and take their money, go back to the bar, give the bartender their cash then they'd give me the ... cash back and I'd take it back to the customer.

(Transcript from Hearing before Administrative Law Judge, pp. 14-15, 17, 64 [“(T, 14-15, 17, 64)”]

While waiting on customers, Appellant Whiting attempted to get the customers to buy

¹On a prior date, this Court granted the underlying “Petition for Appeal on Behalf of Petitioner Mary A. Whiting.”

drinks for dancers or to purchase private dances from the dancers. (T, 15) Shockers provided pens and boards for credit cards so that she could wait on customers. (T, 53-55)

Appellant Whiting also cleaned the tables and the room each night that she worked. (T, 16) She indicated that the equipment she used to perform her job— including towels — was supplied by Shockers.

Control by Shockers of Appellant Whiting's Work: Clothing, Schedule, Specific Direction of Performance of Job, and Payment of Wages

Shockers controlled the work performed by Appellant Whiting. Shockers drafted and posted a schedule that workers followed and established the shifts that Appellant Whiting worked.²

Appellant Whiting further indicated that she was not permitted to leave the club during a shift. She testified, "I couldn't leave. And if we wanted something to eat, then they would have the doorman to go get it." (T, 21) If Appellant Whiting was going to be late, she was required by the owners to call in. (T, 56-57) Shockers contacted her on her off days to request that she come to work. (T, 17-18, 21)

Shockers controlled Appellant Whiting's specific activities while she worked. She was directed to sell certain drinks at certain times. (T, 57-58) Appellant Whiting testified that she was told by the owners of Shockers to:

"Go wait on a customer. Hurry up and try to get them to sit down at the stage before they come into the bar."

Or, "You need to go wait and see if he'll get that girl a drink." "Try and get a VIP."³ All things like that.

²She noted that she was required to work from "7:00 to 3:00."

³Appellant Whiting indicated that a "VIP" was a private dance.

(T, 19) (Footnote added)

Shockers also controlled the pay received by Appellant Whiting. She was paid on a weekly basis in cash. Any payments received by credit card were held by Shockers until payday and then distributed. Paydays occurred on Mondays and were administered by the owners of the club. (T, 22) Importantly, Shockers provided no evidence to establish that Appellant Whiting submitted bills or invoices to Shockers or managed or monitored how much she was owed by Shockers for her work in a given week.

Appellant Whiting was subject to a dress code. She was not permitted to wear jeans at work and was provided with several t-shirts with the name "Shockers" on the back. She was also encouraged to wear dresses. (T, 53-55, 61)

The Independent Contractor Agreement: Elements of Control by Shockers

The primary piece of evidence offered by Shockers to establish that Appellant Whiting was an "Independent Contractor Agreement" ("Contract") (See Ex. 1 from Hearing before the Administrative Law Judge ["(Ex. 1)"])

According to Appellant Whiting, she was presented with the document on or about July 29, 2000. She testified that Shockers made her "hurry up and sign it." (T, 29). She further testified that she did not "understand" the Contract when it was presented to her. (T, 25) She was not permitted to take a copy of the contract home with her. (T, 85)

Although the Contract was entitled "Independent Contractor Agreement," the contents of the Contract granted Shockers a significant level of control over Appellant Whiting. In

particular, the Contract gave Shockers the right to terminate the contract at will.⁴

Furthermore, the Contract gave Shockers significant control over Appellant Whiting's terms and conditions of employment – particularly with regard to pay and the hours that she was required to work. Under paragraph 8 of the Contract, Shockers agreed that Appellant Whiting would be paid 50% of the amount received for all drinks sold. However, the Contract further permitted Shockers to reduce Appellant Whiting's pay if she was late for work or failed to work a full shift. Thus, if Appellant Whiting was late for her shift or left a shift early, her pay could be reduced under the contract.⁵

Appellant Whiting's duties: Fundamental to the operation of Shockers

The evidence indicated that Shockers was in the business of selling beer and liquor and providing exotic entertainment. The record further establishes that these activities are inextricably intertwined. Patrons consume beer and liquor at the club while they watch the performances and/or mingle with the dancers. In turn, the dancers and/or waitresses are directed to sell drinks to patrons.

⁴Under paragraph 5 of the Contract, Shockers had the authority to terminate the Contract "immediately." Although the Contract provides that grounds for termination must be "reasonable" and certain examples are given as to reasonable grounds for termination, there is no limitation that these are the only grounds for termination. (Ex. 1, Paragraph 5)

⁵Paragraph eight (8) of the Contract provided in pertinent part:

Independent Contractors will receive a 50% discount off independent contractor's purchase price for all beverage if she works an entire eight (8) hour shift; a 40% discount off the independent contractor's purchase price for all beverages purchased from Company if Independent Contractor works seven (7) hours out of an eight hour shift; and a 30% discount off the Independent contractor's purchase price for all beverages purchased if Independent Contractor works six (6) hours out of an eight hour shift. In the event that Independent Contractor elects to work less than six (6) hours, Independent Contractor will be ineligible for any form of discount for any beverages purchased from the Company.

Appellant Whiting's duties were integral to this operation. She took drink orders; delivered drinks; and completed the financial transactions. She also encouraged patrons to mingle with dancers and to buy the dancers drinks. No evidence was offered to establish that Appellant Whiting's duties were outside the usual course of business of Shockers. Nor was any evidence presented to establish that her duties were performed outside of the place of business of Shockers.

The absence of any evidence that Appellant Whiting was engaged in an independently established trade

No evidence was presented to establish that Appellant Whiting was engaged in an independently established trade or occupation. In particular, no evidence was offered to prove that: (1) that Appellant Whiting had a business license; (2) that she submitted her own invoices; (3) that she had made any personal investment in a business; (4) that she maintained payroll records; (5) that she held herself out in any manner as independent business; or (6) that she worked at any other business in the capacity of a waitress.

III. ISSUE PRESENTED

1. WHETHER THE CIRCUIT COURT WAS WRONG AS A MATTER OF LAW AND CLEARLY WRONG IN ITS FINDINGS OF FACT WHEN IT OVERTURNED THE DECISION OF THE BOARD OF REVIEW AND HELD THAT APPELLANT WHITING WAS AN INDEPENDENT CONTRACTOR AND NOT AN EMPLOYEE.
 - A. WHETHER SHOCKERS EXERCISED CONTROL OVER MS. WHITING IN THE PERFORMANCE OF HER JOB BASED UPON THE TERMS OF THE "INDEPENDENT CONTRACTOR'S AGREEMENT."
 - B. WHETHER SHOCKERS EXERCISED CONTROL OVER MS.

WHITING IN THE ACTUAL PERFORMANCE OF HER JOB.

- C. WHETHER APPELLANT WHITING'S LABORS WERE PERFORMED IN THE USUAL COURSE OF SHOCKERS' BUSINESS.
- D. WHETHER SHOCKERS FAILED TO ESTABLISH THAT APPELLANT WHITING WAS INVOLVED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION OR BUSINESS.
- E. WHETHER SHOCKERS HAS FAILED TO ESTABLISH THAT THEY HAVE MET EACH AND EVERY PRONG OF THE "ABC TEST."

IV. ARGUMENT

STANDARD OF REVIEW

The standard of review of decisions from BEP is well-settled. In Dailey v. Board of Review, et al., 214 W.Va. 419, 589 S.E.2d 797 (2003), this Court indicated:

In syllabus point three of *Adkins v. Gatson*, 192 W.Va. 561, 453 S.E.2d 395 (1994), this Court explained the following standard of review:

The findings of fact of the Board of Review of the [West Virginia Bureau of Employment Programs] are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*.

LIBERAL CONSTRUCTION OF UNEMPLOYMENT COMPENSATION STATUTES

This Court has routinely held that unemployment statutes are to be liberally construed as it relates to a worker's claim for unemployment compensation:

Our review of this matter is further governed by our consistent recognition that "[u]nemployment compensation statutes, being remedial in nature, should be

liberally construed to achieve the benign purposes intended to the full extent thereof.” Syl. Pt. 6, *Davis v. Hix*, 140 W.Va. 398, 84 S.E.2d 404 (1954); *see also* Syl. Pt. 2, *Smittle v. Gatson*, 195 W.Va. 416, 465 S.E.2d 873 (1995); Syl. Pt. 1, *Perfin v. Cole*, 174 W.Va. 417, 327 S.E.2d 396 (1985).

Id.

Accordingly, unemployment compensation statutes must be liberally construed in favor of the claimant. This Court has routinely held:

We have also asserted that “unemployment compensation statutes should be liberally construed in favor of the claimant[.]” *Davenport v. Gatson*, 192 W.Va. 117, 119, 451 S.E.2d 57, 59 (1994). Syllabus point one of *Peery v. Rutledge*, 177 W.Va. 548, 355 S.E.2d 41 (1987), also instructs that “[d]isqualifying provisions of the Unemployment Compensation Law are to be narrowly construed.”

Moreover, an employer seeking a denial of benefits must prove that the unemployed person should be disqualified from receiving unemployment compensation. This Court has held that:

The burden of persuasion is upon the former employer to demonstrate by the preponderance of the evidence that the claimant’s conduct falls within a disqualifying provision of the unemployment compensation statute.

Peery v. Rutledge, 177 W. Va. 548, 552, 355 S.E.2d 41, 45 (1987).

THE APPLICABLE STATUTORY FRAMEWORK: “THE ABC TEST”

In order to determine if a worker may receive unemployment compensation benefits, it must first be determined if the person is eligible for benefits. The Court has held that:

West Virginia’s statutory eligibility and disqualification provisions concerning the receipt of unemployment compensation benefits constitute a two-step process. The first step involves determining whether an individual is eligible to receive such benefits, and the second step is to consider whether the individual is disqualified. *Private Indus. Council v. Gatson*, 199 W. Va. 204, 207, 483 S.E.2d 550, 553 (1997) (citations omitted).

Vieweg v. Gatson, 209 W. Va. 268, 546 S.E.2d 267 (2000).

“Eligibility” for benefits is generally governed by West Virginia Code § 21A-6-1 et seq.

In order to be eligible for benefits, an person must, in part, have been:

paid wages for employment equal to not less than two thousand two hundred dollars and must have earned wages in more than one quarter of his base period.

West Virginia Code § 21A-6-1(5). (emphasis added)

“Employment” under the unemployment compensation act is defined at West Virginia Code §21A-1A-16. Consistent with the eligibility requirements in West Virginia Code § 21A-6-1(5), the definition of “employment” specifies that one who receives “wages” is covered by this act unless a person’s work is not within the statutory definition of “employment.”

One exception from the statutory definition of “employment” listed in this section is for an “independent contractor.” “Independent Contractor” under this definition status is defined by West Virginia Code §21A-1A-16(7), or the “ABC Test.” The “ABC Test” provides:

Services performed by an individual for wages are employment subject to this chapter unless and until it is shown to the satisfaction of the commissioner: **(A)** The individual has been and will continue to be free from control or direction over the performance of the services, both under his or her contract of service and in fact; and **(B)** the service is either outside the usual course of the business for which the service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and **(C)** the individual is customarily engaged in an independently established trade, occupation, profession or business[.]

[emphasis supplied] If a worker is determined to be an “independent contractor” under this definition that worker is ineligible for benefits. If, however, the worker is determined to be an employee, the worker is eligible for such benefits.

In order to be an “independent contractor,” this provision requires that each of the three prongs of the “ABC Test” be met in order for an individual to be considered an independent

contractor and, thereby, exempt an entity from premium payments for such an independent contractor. If, however, it is determined that a single prong of the “ABC Test” is not met, then the individual at issue will be an “employee” and unemployment premiums must be paid for that employee.⁶

DISCUSSION

1. THE CIRCUIT COURT WAS WRONG AS A MATTER OF LAW AND CLEARLY WRONG IN ITS FINDINGS OF FACT WHEN IT OVERTURNED THE DECISION OF BEP AND HELD THAT APPELLANT WHITING WAS AN INDEPENDENT CONTRACTOR, AND NOT AN EMPLOYEE.

A. Shockers exercised control over Ms. Whiting in the performance of her job based upon the terms of the “Independent Contractors’ Agreement.”

Prong A of the “ABC Test” requires that in order for a worker to be considered an independent contractor, it must first be shown that:

(A) The individual has been and will continue to be free from control or direction over the performance of services, both under his or her contract and in fact[.]

(emphasis supplied)

As a threshold matter, it is evident that the Legislature did not intend to permit an

⁶The inclusion of the conjunctive “and” between the three prongs requires this conclusion. Such an interpretation is supported by well-settled rules of statutory construction. The West Virginia Supreme Court of Appeals has indicated “and” is used to conjoin words and that words coming before “and” are meant to be joined with words coming after. In Expedited Transportation Systems, Inc. v. Vieweg, 207 W. Va. 90, 529 S.E.2d 110 (2000), the Court indicated:

‘and’ is used to conjoin words, clauses or sentences, expressing the relation of addition or connection, and signifying that something is to follow in addition to that which proceeds, and its use implies that the connected elements must be grammatically coordinate, as where the elements preceding and succeeding the word ‘and’ refer to the same subject matter.

employer to circumvent the payment of unemployment premiums by simply issuing a contract declaring an employee an independent contractor. This provision specifically requires that an employee be free from control under a “contract” and “in fact.” Thus, even if a contract is in place, an analysis of the actual work of the worker is required. Inherent in this provision is a recognition that one must look behind such a contract to determine if a worker is in fact an independent contractor. The circuit court in this case failed to make such an analysis.

A review of both contract and the actual work of Appellant Whiting in this case indicates that Appellant Whiting was not “free from” Shockers’ control or direction. Thus, the circuit court erred when it relied – nearly to the exclusion of all other relevant evidence – on the Contract and concluded that Appellant Whiting was an independent contractor.⁷

The Contract in this case granted significant control to Shockers. As noted, supra., the Contract gave Shockers the ability to immediately terminate the employment of Appellant Whiting. Clearly, this provided significant power and control to Shockers. Moreover, the Contract permitted Shockers to reduce Appellant Whiting’s pay if she was late for work. Again, such power is indicative of an employee-employer relationship because it limited (or eliminated) the freedom that an independent contractor would typically have to select his or her own hours.

Although this Court has not addressed the specific issue at hand, other courts have. Courts have determined that an independent contractor agreement, coupled with the requirement

⁷As noted supra., five of the seven findings of fact in the Circuit Court’s order were devoted to a discussion of the contract. The only other evidence offered to support a finding that Appellant Whiting was an independent contractor was the fact that she was paid with a “1099 form, without deductions for taxes or withholdings.” (See Order, page 3, Finding of Fact 8). Without more, the existence of the contract and the issuance of a “1099 form” is insufficient to establish that an independent contractor relationship existed as discussed infra.

that workers pay their own taxes, does not conclusively establish that the worker is an “independent contractor.” For instance, in Hoey v. Commonwealth of Pennsylvania, Department of Labor and Industry, Bureau of Employment Security, 499 A.2d 1124 (1985), an employer claimed certain workers were independent contractors because the workers had signed independent contractor agreements. The Commonwealth Court of Pennsylvania concluded that the presence of such agreements alone does not establish independent contractor status:

We have previously held, in C. A. Wright Plumbing Co. v. Unemployment Compensation Board of Review, 6 Pa.Commonwealth Ct. 45, 293 A.2d 126 (1972), that an employer cannot exempt himself from payment of unemployment compensation taxes and exclude his employees from unemployment benefits merely by having the employees sign subcontractor’s agreements and not withholding Social Security and income taxes. [citation omitted] In such cases, its is necessary to look beyond such contracts to the true facts of the employment in order to discern whether the employees were truly independent contractors or employees.

Hoey, at 1127. (emphasis supplied)

In Hoey, the court determined – despite the presence of the independent contractor agreements – that the workers were employees because the company maintained general control of the workers while leaving “only the most specific details” to the employees. See also, Richardson Brothers. v. Board of Review of the Department of Employment Security, 555 N.E.2d 1126 (Appellate Court of Illinois, Fifth District) (Simple reading of the “independent contractors agreement” demonstrates that the employer retained a great deal of control and direction over the workers in the performance of their duties).

Similarly, in C.A. Wright Plumbing Co. v. Unemployment Compensation Board of Review, 6 Pa.Commonwealth Ct. 45, 293 A.2d 126 (1972), the court concluded that to allow an employer to exempt himself from unemployment compensation taxes with such agreements

“would be a travesty of the law” when the facts show that the workers are not independent contractors. See also, AFM Messenger Service, Inc. v. Department of Employment Security, 763 N.E.2d 272 (Supreme Court of Illinois 2002) (In determining whether workers are exempt from unemployment coverage, “the terminology used by the parties in describing their employment relationship is not controlling.”)

One indication of control over a worker is the ability to terminate employment. In Jones v. Unemployment Compensation Board of Review, 60 A.2d 568 (Superior Court of Pennsylvania 1948), the Court indicated:

[T]he power of an employer to terminate the employment at any time is incompatible with the full control of the work which is usually enjoyed by an independent contractor, and hence is considered a strong circumstance tending to show the subserviency of the employee.

Similarly, in Journal Pub. Co. v. State Unemployment Compensation Commission, 155 P.2d 570 (Supreme Court of Oregon 1945), the Court stated:

The reservation in an alleged employer of the power of control, whether actually exercised or not, constitutes control; for the statute demands freedom from control ‘both under his contract of service and in fact.’ The test is the same as that applied by the courts in determining whether one is a servant or an independent contractor, that is to say, it is not ‘the fact of actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control[.]’ [citations omitted] And in ascertaining whether this right or activity exists ‘no single fact is more conclusive ... than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the work itself.

(emphasis added)

The court noted in Journal Pub. Co. that the contract at issue in that case gave the employer the authority to cancel the contract for “good and sufficient” cause. Journal Pub. Co., at 585.

It is uncontroverted that Shockers maintained significant control over Ms. Whiting

because it held the unrestricted right to end her services whenever it chose, without notice. Moreover, Shockers enjoyed significant control of Appellant Whiting's day to day activities because it could reduce her pay based upon the amount of time she worked; the time she arrived at work; and the time she departed. These two factors – present in the contract – indicate that Appellant Whiting was not free from control or direction in performing her job. Thus, despite the fact that the Contract labels Appellant Whiting an “independent contractor,” the very terms and conditions of the contract indicates that her activities were controlled by Shockers and she was, therefore, an employee is entitled to unemployment benefits.

B. Shockers, exercised control and direction over Ms. Whiting in the actual performance of her job.

The record also established that Appellant Whiting was in fact controlled and directed in her work by Shockers. Shockers directed her activities at work: they directed her to wait on and mingle with particular patrons. They drafted and maintained a schedule that she was required to follow. Moreover, she was required to work a shift that was set by Shockers. She indicated that she worked a “7:00 to 3:00” shift that was established by Shockers. If she was going to be late, she had to call in. Crucially, she was not permitted to leave the establishment during a shift. Indeed, if she wanted to eat during a shift, a doorman was sent by the owners to get her a meal.

Shockers also controlled the financial arrangement with Ms. Whiting. Shockers paid Appellant Whiting on a designated pay-day. Payment from credit transactions were administered by Shockers. Appellant Whiting would not receive her cut from a credit card transaction until pay-day and, then, Shockers would pay her by check for her portion of the sale. No evidence was

offered to establish that Appellant Whiting submitted invoices or managed her own business.

Like any employee, Appellant Whiting reported for shifts established by the employer and according to a schedule drafted and maintained by the employer. During her shift her activities were controlled by the employer; she was supervised; and her duties were specifically directed by the employer. Indeed, Shockers even controlled her attire: she could not wear jeans and was given t-shirts with the Shockers logo.

The record established Appellant Whiting was in fact controlled and directed by Shockers in the performance of her duties.

Although the West Virginia Supreme Court of Appeals has not addressed this specific issue, the Court of Appeals of Virginia in Yard Bird, Inc. v. Virginia Unemployment Commission, 28 Va. App. 215, 503 S.E.2d 246 (1998), addressed a similar set of facts. In that case, the court addressed the claim of an exotic dance club that its dancers were independent contractors because the workers had been issued independent contractor agreements. Upon review of the elements of control within the contract and in practice, the court concluded that the dancers were employees and entitled to unemployment benefits.

In Yard Bird, the employer noted that it – as in this case – issued documents entitled “independent contractor” agreements were signed by the dancers. Moreover, the club indicated that the dancers often have their own business cards and work at other clubs in the area. The owner of the club also indicated that the workers are required to secure local business licenses, but that requirement often went unenforced. As in the instant matter, the entity provided its dancers with 1099s and informed the workers that the club would not withhold taxes and that they were responsible for paying them.

Despite these factors, the Virginia Court of Appeals concluded that the dancers were employees rather than independent contractors. In addressing the issue of control, the court looked at the efforts of the club to enforce its rules. For example, the court noted that the dancers had to conform with the business' schedule, although they could choose their work times. The court also noted that the workers were required to follow state liquor laws and that the entity could terminate employees at will under the contract. The court concluded that the entity exercised -- "in several significant aspects" -- actual or potential control over the dancers and they were, therefore, employees who were entitled to unemployment benefits.⁸

The analysis of the Virginia Court of Appeals is fitting herein. Like the dancers in that case, Appellant Whiting was in fact subject to significant control. Again, Shockers failed to establish Prong A of the "ABC Test" and Appellant Whiting was an employee entitled to unemployment benefits.

C. Appellant Whiting's labors were performed in the usual course of Shockers' business.

Prong B of the "ABC Test" provides that in order for a worker to be an independent contractor, the worker must perform services "either outside the usual course of the business for which the service is performed or that such service is performed outside of all the places of business of the enterprise for which the service is performed." West Virginia Code § 21A-1A-

⁸Similarly, in Journal Pub. Co. supra., the court took into account the fact that workers were required to attend meetings at which instructions relating to work were given; that the manager directed the workers to be on time for work and to perform their work promptly; and that a worker was discharged from his position with the employer. Based, in part upon these factors, the workers were found to be employees covered by Unemployment Compensation.

16(7)(B). It is abundantly clear that Shockers did not establish prong “B” of the “ABC Test.”

It is uncontroverted that Appellant Whiting performed the very function for which the club exists: serving drinks and mixing with patrons.

Moreover, the evidence of record firmly establishes that the services were provided at Shockers. In other words, the selling of drinks and/or exotic entertainment took place at Shockers. No evidence was provided by Shockers that the work performed by Appellant Whiting occurred at a location other than the place of business.

When workers perform their duties at the workplace of the company, courts view this as one indication of an employment relationship rather than independent contractor status. For example, in Scott v. Fagan, 684 P.2d 805 (WY 1984), which addressed a dispute relating to unemployment benefits, the Supreme Court of Wyoming emphasized the importance of the physical premises where the work is performed. The Wyoming court concluded that work on the physical premises of a company by a worker is one factor that will strip the “trappings indicative of” independent contractor status.

Likewise, Courts from other jurisdictions have determined that where the function of the workers is virtually indistinguishable from the function of the company, then the workers are “employees” rather than “independent contractors.” In Boston Bicycle Couriers, Inc. v. Deputy Director of the Division of Employment and Training, 778 N.E.2d 964 (Mass. App. Ct. 2002), the Massachusetts court addressed the issue of whether couriers for a bicycle courier service were performing work outside the usual course of business.⁹

⁹The employer in that case, “Boston Bicycle Couriers, Inc.” operated, as its name suggests, a courier service.

The court found that a courier who claimed unemployment compensation benefits was an employee, and not an independent contractor, in part, based upon the following:

[R]eflecting the intertwining between BBC and its drivers, the services provided by the [claimant driver] were an integral part of BBC's business. Indeed, without delivery drivers like [claimant driver], BBC could not operate – a factor supporting the finding that the [claimant driver] was an employee of BBC.

[emphasis supplied]

Clearly, the same logic applies in the instant case. Shockers' business – exotic entertainment – is inextricably intertwined with the provision of drinks to patrons and the provision of exotic dancing. Appellant Whiting was integral to this operation: she was directed to sell drinks to patrons and to encourage the patrons to buy drinks for the dancers.

But for dancing and the sale of drinks, Shockers would not exist. As a waitress who mixed with patrons, Appellant Whiting's functions were fundamental to Shockers operation. Thus, Shockers failed to meet Prong B of the "ABC Test."

D. Shockers failed to establish that Appellant Whiting was involved in an independently established trade, occupation, profession or business.

Prong C of the "ABC Test" provides that a worker must be shown to be "customarily engaged in an independently established trade, occupation, profession or business." West Virginia Code § 21A-1A-16(7)(c).

The record in this case is devoid of any evidence to suggest that Appellant Whiting had established herself as an independent entity. No evidence of any of the following was offered: That Appellant Whiting had her own business cards; submitted her own bills or invoices to Shockers; made personal investments in her business; or maintained her own payroll records. No

evidence was presented to establish that Appellant Whiting has any financial assets arising out of or benefitting an independent business. No evidence was presented to establish that Appellant Whiting worked at any location other than Shockers' business.

A 2003 decision from the Supreme Court of South Dakota in Moonlight Rose Company v. South Dakota Unemployment Insurance Division, 668 N.W.2d 304, underscores the requirement that an entity establish that the workers had a business enterprise separate from that of an employer. In Moonlight, the court, citing certain criteria for establishment of an entity as an independent business, generally indicated that the South Dakota test requires:

that the individual have some relationship with an economic enterprise that is independent of the relationship with the company that is allegedly subject to unemployment insurance taxation.

The Court concluded that the flower sellers at issue in that case were not engaged in an independent trade or business because:

There is no evidence that any of the sellers sold flowers independent of their relationship with Moonlight. Significantly, [a worker] testified that if it wasn't for Moonlight he would not sell roses. Second, Moonlight's rose sellers did not hold themselves out as independent businesses by way of business cards or advertising. Third, Moonlight supplied each seller with basically all of the necessary items for this business. Fourth, there is not record evidence that the sellers maintained a business premise from selling flowers apart from Moonlight.

Based upon these factors, and others, the Court concluded that the workers were not in an independent business.

In the instant case, Appellant Whiting had no relationship with an economic enterprise independent of her relationship with Shockers. No evidence was offered to show that she worked for an entity other than Shockers. No evidence was presented that she advertised as an independent business or maintained an independent identity. No evidence was presented to

establish that she maintained a separate business location for performing her jobs. No evidence was offered to establish that Appellant Whiting had any personal, financial or proprietary interest of her own in Shockers' establishment. Based upon the evidence in this case, Shockers has failed to establish that the Appellant Whiting was engaged in an independent occupation or business.

E. Shockers has failed to establish that they have met each and every prong of the "ABC Test."

The "ABC Test" requires that each prong must be met and satisfied for an entity to establish that its workers are independent contractors – thereby relieving the employer of its obligation to pay unemployment premiums. As noted supra, this Court indicated in Expedited Transportation Systems, Inc. v. Vieweg, 529 S.E.2d 110 (W.Va. 2000), that the use of the conjunctive "and" requires that all three prongs be met.

Similarly, other jurisdictions, which have adopted the "ABC Test," have also held that the use of the conjunctive "and" requires that all three prongs be met. Where a single prong is not met by the entity, the workers are employees. See, e.g., Boston Bicycle Couriers, supra. (Because the elements of the "ABC Test" are conjunctive the employer must meet its burden under all three prongs); AFM Messenger Service, supra., (For the independent contractor exemption to apply, all three conditions must be satisfied under the test).

In the instant case, Shockers has failed to meet its burden under any of the three prongs. However, should the Court conclude that Shockers fails any of the prongs of the "ABC Test," the result would be the same: Appellant Whiting is an employee and she is entitled to unemployment benefits.

V. CONCLUSION

Both the ALJ and the Board of Review determined that Appellant Whiting was an employee of Shockers. Based upon the application of the "ABC Test," it is clear that she worked under the control and direction of Shockers, that she performed a job that was integral to the usual course of business performed by Shockers, and that she did this at their usual place of business and that she was not engaged in an independently established trade or business.

As the Pennsylvania Commonwealth Court indicated in C.A. Wright, supra., it would be a "travesty of the law" to permit an employer to require an employee to sign an independent contractor's agreement and not withhold social security or income taxes and thereby circumvent the law. In the instant matter, an individual like Ms. Whiting is short-changed by these actions – despite the fact that she was an employee, in fact, she has been denied unemployment benefits. Moreover, the Unemployment Compensation fund suffers from such activities as well. By requiring employees to sign an independent contractors agreement and not withholding taxes, Shockers has attempted to exempt itself from Unemployment Compensation premiums. If this practice is permitted, it could have long range impact on the Unemployment Compensation Fund and the workers of this state. Not only could workers like Appellant Whiting be denied benefits, but employers could continue to avoid payment of premiums into the Unemployment Compensation fund. Such a practice would frustrate the "benign purposes" of the fund and allow an employer to avoid premium payment to the fund.

BEP respectfully requests that the Order of the Circuit Court be reversed and that Appellant Whiting be granted the unemployment benefits to which she is entitled.

Respectfully submitted,

West Virginia Bureau of
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SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 32521

W and R INC., D/B/A
SHOCKERS LOUNGE,

Appellee/Respondent below,

v

Appeal from the Circuit Court of Kanawha County
Civil Action No. 03-AA-172
Hon. James C. Stucky, Judge

MARY A. WHITING,

Appellant Whiting/Claimant below;

BOARD OF REVIEW, WEST VIRGINIA BUREAU
OF EMPLOYMENT PROGRAMS; DONALD H. PARDUE,
ACTING COMMISSIONER, BUREAU OF EMPLOYMENT
PROGRAMS,


Intervenor.

CERTIFICATE OF SERVICE

I, Jeffrey G. Blaydes, do hereby certify that I have served a copy of the foregoing
BRIEF OF THE INTERVENOR, by placing a true copy, postage prepaid, in the United States
mail on this 2nd day of March, 2005, upon the following:

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