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STATE OF MARYLAND
DEPARTMENT OF LABOR, LICENSING AND REGULATION

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- DECISION -

EMPLOYER:

LANDSHARK ENTERPRISES, INC.

DATE: August 6, 1999

DECISION #02090-BH-99

DETERMINATION #9550062

EMPLOYER ACCT.

Issue: The issue in this case is whether payments to certain individuals constitute covered employment or represent payments to independant contractors and are thereby excluded from unemployment insurance covered wages.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200.*

The period for filing an appeal expires: September 6, 1999

- APPEARANCES -

FOR THE APPELLANT:
Frederic Firestone

FOR THE SECRETARY:
John T. McGucken

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

At the hearing before the Hearing Examiner, the Agency offered into evidence the report of the field auditor. The auditor's supervisor also testified. The employer presented testimony from the president of one of the four companies involved. The employer also introduced a copy of the standard contract between the drivers and the companies.

The Board held a hearing for the purpose of taking legal argument only. The Board also has considered the Memoranda of Law filed by both parties in this case.

The primary issue is whether or not certain individuals, specifically delivery drivers, are exempt from unemployment insurance coverage, because they are "messenger service drivers" within the meaning of LE, Section 8-206(d) [formerly 8-206(c)]. That section of the law states as follows:

> (d) Messenger service drivers. - Work that a messenger service driver performs for a person who is engaged in the messenger service business is not covered employment if the Secretary is satisfied that:
>
> (1) the driver and the person who is engaged in the messenger service business have entered into a written agreement that is currently in effect;
>
> (2) the driver personally provides the vehicle;
>
> (3) compensation is by commission only;
>
> (4) the driver may set personal work hours; and
>
> (5) the written agreement states expressly and prominently that the driver knows:
>
> (i) of the responsibility to pay estimated Social Security taxes and State and federal income taxes;
>
> (ii) that the Social Security tax the driver must pay is higher than the Social Security tax the driver would pay otherwise; and
>
> (iii) that the work is not covered employment.

Secondarily, the issue of whether or not these individuals are independent contractors within the meaning of LE, Section 8-205 was also raised as a result of the audit. However, the argument before the Board was focused on the issue of exemption pursuant to LE, Section 8-206(d).

FINDINGS OF FACT

This case arose out of four separate audits of four companies, all of whom are franchisees of the same corporation, doing business as "Takeout Taxi" (hereinafter referred to as "the employer"). The Board has consolidated all four cases. Takeout Taxi delivers food and goods from various restaurants and establishments to the homes and businesses of customers. It has agreements with various restaurants and other establishments to take orders from the public. Customers call the employer and place orders for pickup from a restaurant and delivery to the customer. The employer then calls the restaurant or establishment with the order and a driver is dispatched to the restaurant to pick up the order and deliver it to the customer. The employer is strictly the middleman, the delivery service, between the customer and the restaurant or establishment providing the product.

Upon delivery, the driver obtains payment from the customer and may also get a tip, at the customer's discretion. At the end of his or her shift, the driver delivers the money collected to the employer. The driver is paid by the employer strictly by commission, depending on how many deliveries are made. The employer, in turn, takes a fee for this service and turns the rest of the money over to the restaurant or establishment for whom the delivery was made.

All drivers provide their own vehicles and determine their own availability to work.

Although the employer specializes in the delivery of food from restaurants, they also deliver non-food items as well. Their franchise agreement does not limit them to the delivery of food and in fact they deliver for other types of establishments, such as Wal-Mart and Hechingers. However, there is no evidence that these other types of deliveries include anything that would be commonly referred to as a "message."

Drivers who are hired sign a contract which sets out various terms and conditions. See, Employer Exhibits #4 and #5. At the time of the audits, the contract met all the requirements of LE, Section 8-206(d) except for 8-206(d)(5)(ii), which requires the contract to state "expressly and prominently that the driver knows:...that the Social Security tax the driver must pay is higher than the Social Security tax the driver would pay otherwise."

The employer modified the contracts to include the missing provision sometime in 1996 or 1997.

CONCLUSIONS OF LAW

The issue to be decided in this case is one of first impression. There is little case law or legislative history to guide the Board in its decision. The question comes down to 1) what is meant by "messenger service" and 2) is a food (and other tangible goods) delivery business the same as a messenger service business?

The employer's position is that Section 8-206 does not define or limit the term "messenger service business" and that the statute does not distinguish between the types of packages being delivered, **i.e.**, food or a written message. The employer argues that the focus should be on the act of delivery rather than the type of package being delivered. Takeout Taxi, the argument goes, like all messenger businesses, simply picks up a package at one location and delivers it to another location, for a fee. The employer further argues that "delivery" and "messenger" are synonymous and points to the Revisor's Note in the statutory annotations to LE, Section 8-206, that states that "the word 'delivery', which formerly appeared in the language 'messenger service delivery business', is deleted as surplusage."

While this argument is not without some persuasiveness, it does not carry the day, given the remedial nature of the unemployment insurance statute and its bias in favor of inclusion. See Warren v. Board of Appeals, 226 Md.1, 172 A.2d 124 (1961). Where there is no specific legislative history or court cases to guide us, the Board must interpret a statutory exclusion from covered employment narrowly, rather than broadly. The Board will not find legislative intent where it is not clear. Deodat v. Just A Buck, 2315-BH-98. It would be a stretch to interpret the delivery of food as synonymous with the delivery of a message and such a stretch would be contrary to the intent of the statute. The Board further notes that the deletion of the word "delivery" from the original statute does not necessarily lead to the conclusion that "delivery" is synonymous with "messenger." All **messenger** services may include **delivery** as an intrinsic part of its service (thereby making the word "delivery" redundant); however not all **deliveries** include a message or messenger.

The employer also argues that ruling them not exempt from coverage places them at a disadvantage with messenger services who are now branching into other deliveries in direct competition with Takeout Taxi. In fact, this may be occurring because modern technology may be making the traditional messenger business obsolete. While this may be so, it is up to the legislature, not this Board, to amend the statute.

For these reasons, the Board concludes that the individuals who were the subjects of the audits in this case, performed services in covered employment and are **not** exempt, within the meaning of LE, Section 8-206(d).

The issue of whether these individuals are independent contractors, within the meaning of LE, Section 8-205, was not specifically argued before the Hearing Examiner, although it was addressed in the original auditor's report. At the hearing before the Board, it was raised and the possibility of remanding the case to a Hearing Examiner on this issue, was left open. However, upon review of the facts in this case, it is clear to the Board that the employer cannot sustain its burden under that section of the law.

Section 8-205 states that work that an individual performs under any contract of hire is not covered employment if the Secretary is satisfied that:

(1) the individual who performs the work is free from control and direction over its performance both in fact and under the contract;

(2) the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and

(3) the work is:

(i) outside of the usual course of business of the person for whom the work is performed; or

(ii) performed outside of any place of business of the person for whom the work is performed.

Without making findings regarding the first two prongs of this three part test, the Board concludes that the employer's own evidence and argument supports a conclusion that the work involved here is neither "outside of the usual course of business" of Takeout Taxi, nor is it "performed outside of any place of business" of Takeout Taxi, within the meaning of LE, Section 8-205(3). The business of this employer, as they pointed out, is strictly the delivery of goods from one location to another, which is exactly the service performed by the individuals in question. Furthermore, the Board finds that places of business of the employer are the "taxis" or automobiles of the drivers[1].

Therefore, the Board concludes that the services of the individuals who were the subject of the audits involved in these four cases, are in covered employment within the meaning of the unemployment insurance law.

DECISION

P. G. Deliveries, Inc. has not satisfied the Statutory requirements of Md. Code Ann., Labor & Emp., Sections 8-205 and 8-206(d) regarding services performed by the individuals listed in the Agency's audit report

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[1] See, Trahan Films, Inc., 32-EA-92, where the Board held that since the employer's business was to produce commercial films, the studios and locations where the films were shot were the places of business of the employer. See also, Personal Care, Inc., 00021-BH-99, where the Board, in distinguishing Trahan Films, on this issue, stated that each case must be decided on its own facts.

for the calendar years 1992, 1993, and 1994. These individuals' earnings were in covered employment and this employer was required to report such wages for Maryland unemployment insurance purposes.

The decision of the Hearing Examiner is affirmed.

Hazel A. Warnick, Chairperson

Donna Watts-Lamont, Associate Member

Clayton A. Mitchell, Sr., Associate Member

CE
Copies mailed on August 6, 1999 to:
LANDSHARK ENTERPRISES, INC.
Jerry Placek, Room 407
FILE

UNEMPLOYMENT INSURANCE--APPEALS DIVISION
EMPLOYER APPEAL
DECISION

IN THE MATTER OF THE APPEAL OF:

LANDSHARK ENTERPRISES, INC.

EMPLOYER ACCOUNT NUMBER

DETERMINATION NUMBER 9550062

BEFORE THE:

Department of Labor,
Licensing and Regulation
Appeals Division
1100 North Eutaw Street
Room 511
Baltimore, MD 21201
(410) 767-2421

February 21, 1996

FOR THE APPELLANT: CHUCK STEELE, JEFFREY LANGSNER, MARTIN LEV, RICHARD BARAN, FREDERIC FIRESTONE, ESQUIRE

FOR THE SECRETARY: JERRY PLACEK - R.D.U.S.

ISSUE(S)

The issue in this case is whether payments to certain individuals constitute covered employment or represent payments excluded from unemployment insurance covered wages under Md. Code Ann., Labor & Emp., Section 8-201 et seq.

PREAMBLE

The issue on the hearing notice was incorrectly stated. The parties hereto waived the right to a corrected notice, and the hearing proceeded pursuant to the issue as set forth above.

FINDINGS OF FACT

The employer filed a timely appeal to an Agency determination which held that payments made to one individual listed in an Agency audit of the 1992 calendar year, forty-six individuals listed an Agency audit of the 1993 calendar year, and seventy individuals listed in an Agency audit of the 1994 calendar year constituted covered wages for unemployment insurance purposes.

The employer, Landshark Enterprises, Inc., is a corporation which acquired the franchise rights to trade as "Takeout Taxi" in designated locations in Maryland. Over ninety-five percent of this employer's business involves food delivery from restaurants. The employer has entered into agreements with various restaurants to provide food delivery services. Customers call the employer to place their food orders after which the employer faxes the order to a restaurant, and dispatches a

driver to pick up the food, make delivery to the customer, and collect payment. The remaining small percentage of this employer's business involves the delivery of various other items to customers.

All of the individuals, identified by the Agency audit as having received payments, received those payments as a driver who provided delivery service for this employer's business. At the time of hire, the driver signs a written agreement designating the drivers as independent contractors. The section of that agreement that sets forth the responsibility for taxes consists of the following three sentences: "Independent contractor further agrees that he or she is responsible for payment of all Federal, State and local income taxes, including all contributions required of self-employed tax payers. These include, but are not limited to FICA and FUTA obligations, unemployment insurance and social security taxes. Independent contractor also agrees that he or she shall be responsible for accounting for tips and reporting said monies as income as required by the Internal Revenue Code and State and local tax laws."

All drivers must provide their own vehicles for making deliveries. The employer compensates the drivers by paying them a commission for each delivery. Drivers are entitled to the tips given to them by customers. The drivers notify the employer of the hours they are available to make deliveries after which the employer prepares a work schedule by listing the drivers needed for a shift from the pool of available drivers for that shift.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp., Section 8-201 provides that all compensation paid for personal services is considered covered employment unless otherwise exempt by Law.

Md. Code Ann., Labor & Emp., Section 8-206(c) provides that work that a messenger service driver performs for a person who is engaged in the messenger service business is not covered employment if:

(1) The driver and the person who is engaged in the messenger service business have entered into a written agreement that is currently in effect;

(2) The driver personally provides the vehicle;

(3) Compensation is paid by commission only;

(4) The driver may set personal work hours; and

(5) The written agreement states expressly and prominently that the driver knows:

(i) of the responsibility to pay estimated social security taxes and State and Federal income taxes;

(ii) that the social security tax the driver must pay is higher than the social security tax the driver would pay otherwise; and

(iii) that the work is not covered employment.

EVALUATION OF THE EVIDENCE

The Agency's audit disclosed that payments were made to different individuals. Pursuant to Section 8-201, those payments are considered to be covered employment and reportable wages under the unemployment insurance law unless there is a specific exclusion under the Law. The burden of proof then shifts to the employer to show that these wages are excluded under a provision of the Law. The employer is claiming that the wages paid to these individuals are excluded pursuant to the messenger service drivers exclusion as provided by Section 8-206(c). The employer also argues financial hardship based on the economic impact of having to pay any unemployment insurance taxes for these drivers. The Law fails to provide for any financial hardship exclusion, and therefore, that issue will not be addressed further.

The first issue that must be addressed as to the application of Section 8-206(c) is whether the employer is engaged in the messenger service business. Since there is no legislatively defined definition of "messenger service business," one must look toward the ordinary meaning of the language. Without even looking at any dictionary, an ordinary person would clearly not consider the employer's food delivery business to fall under the definition of a messenger service business. Webster's Seventh New Collegiate Dictionary defines messenger as "an employee who carries messages." Webster's Seventh New Collegiate Dictionary defines message as "a communication in writing, in speech, or by signals." The employer points to Webster's Seventh New Collegiate Dictionary definition of messenger which includes one who "does an errand," and that errand is further defined as "a short trip taken to attend to some business especially for another." Webster's Seventh New Collegiate Dictionary sets forth that "errand" is also "akin to...message." Clearly, Webster's reference to errand in the definition of messenger was in reference to an individual who is engaged in a business of delivering a message and was not intended to expand the definition of messenger to anyone who engages in the business trip for any reason. Consequently, it is concluded that the employer's food delivery business does not constitute a messenger service business for the purposes of Section 8-206(c). Therefore, the drivers are not messenger service drivers and may not be excluded from covered employment.

Additionally, even if the employer was engaged in the messenger service business, they must have shown compliance with all of the requirements set forth by Section 8-206(c) in order for these drivers to be excluded from covered employment. There is a written agreement as required by Section 8-

206(c)(1). The drivers provided their own vehicle as required by Section 8-206(c)(2). Compensation from the employer is by commission only as required by Section 8-206(c)(3). The drivers may set their own work hours as required by Section 8-206(c)(4). The written agreement does expressly state that the driver is independent from covered employment and responsible for his own taxes as required by Section 8-206(c)(5)(i) and (iii). However, the employer's written agreement fails to state expressly and prominently, as required by Section 8-206(c)(5)(ii), that the social security tax the driver must pay is higher than the social security tax the driver would pay otherwise. Therefore, even if it had been determined that these drivers were messenger service drivers, they would not have been excluded from covered employment under Section 8-206(c) for failure to meet all the requirements therein.

DECISION

Landshark Enterprises, Inc. has not satisfied the Statutory requirements of Md. Code Ann., Labor & Emp., Section 8-206(c) regarding services performed by individuals listed in the Agency's audit report for the calendar years 1992, 1993, and 1994. These individuals' earnings were in covered employment and this employer was required to report such wages for Maryland unemployment insurance purposes.

Therefore, the Agency's determination No. 9550062 is affirmed.

Jon Will, Esq.
Hearing Examiner

Notice of Right to Petition for Review

Any party may request a review **either in person or by mail** which may be filed in any local office of the Department of Labor, Licensing and Regulation, or with the Board of Appeals, Room 515, 1100 North Eutaw Street, Baltimore, MD 21201. Your appeal must be filed by **March 7, 1996.**

Note: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Copies mailed on February 21, 1996 to:

LANDSHARK ENTERPRISES, INC.
FREDERIC FIRESTONE, ESQ.
JOHN MC GUCKEN
Jerry Placek, Room 407
MP/FILE

(d) *Recording of assessment.* — In the event of default by an employer in the payment of any sum assessed pursuant to subsection (a) of this section, the Executive Director may file with the clerk of the circuit court of the county wherein the employer has his principal place of business, and a copy thereof with the clerk of the circuit court of any other county a certificate under its official seal stating: (1) The name of the employer; (2) his address; (3) the amount of the contributions and interest assessed and in default; and (4) that the time in which a judicial review is permitted, pursuant to subsection (c) of this section, has expired without such appeal having been taken and thereupon such clerk shall enter in the judgment docket of the court, the name of the employer mentioned in the certificate, the amount of such contributions and interest assessed and in default and the date such certificate is filed. Thereupon, the amount of such assessment so docketed, plus court costs, recording costs and accumulated interest on the assessment, shall become a lien upon the title to and interest in the real property, chattels real, and personalty of the employer against whom the assessment is made in the same manner as, for all the purposes of, and having the same force and effect as a judgment of the court duly docketed. No property of the employer used in connection with the business of the employer shall be exempt from levy.

The Executive Director is hereby authorized to compromise, settle and adjust any contributions and/or interest assessed against any employer where in the judgment of the Executive Director the best interests of the State of Maryland will be promoted or served thereby and may in such cases accept in full settlement of the contributions and/or interest assessed an amount less than that assessed.

(e) *Interest on past-due contributions.* — Contributions unpaid on the date on which they are due and payable, as prescribed by the Executive Director, shall bear interest at the rate of 1.5 per centum per month or fraction of a month from and after such date until payment plus interest is received by the Executive Director. Interest collected pursuant to this subsection shall be paid into the Special Administrative Expense Fund.

(f) *Collection by suit.* — If, after due notice, any employer defaults in any payment of contributions and interest, the amount due may be collected by civil action in the name of the State, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions and interest from an employer shall be heard by the court at the earliest possible date and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this article and cases arising under the Workmen's Compensation Law of this State. The Executive Director may proceed in the collection of contributions in the manner prescribed by Title 13, Subtitle 8, Part III of the Tax-General Article.

(g) *Priorities under legal dissolutions or distributions.* — In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this State, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other

claims except taxes with which it shall share pro rata. In the event of an employer's death, claims for contributions shall be allowable against his estate as preferred debts, as in the case of taxes under § 13-801 of the Tax-General Article. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the federal Bankruptcy Act of 1898, as amended, contributions then or thereafter due shall be entitled to priority as a tax, as provided in § 64 (a) of that act (U.S.C.A., Title 11, § 104 (a), as amended).

No final report or act of any executor, administrator, assignee, trustee, receiver, auditor or other fiduciary or officer engaged in administering the assets of any employer and acting under the authority and/or supervision of any court, shall be allowed or approved by the court unless the Executive Director shall have been given 10 days' written notice thereof, during which time he may file claim or interpose objection to such report or act.

(h) *Liability on acquisition of assets of employer.* — Any individual or employing unit which acquires the organization, trade, or business or a substantial part of the assets thereof from an employer, shall notify the Executive Director in writing by certified mail, return receipt requested, bearing a postmark from the United States Postal Service, not later than 10 days prior to the acquisition. Unless such notice is given such acquisition shall be void as against the Executive Director if, at the time of acquisition, any contributions or interest are due and unpaid by the previous employer; and the Executive Director shall have the right to proceed against such successor for the collection of such contributions or interest due in the manner prescribed in this section.

(i) *Forfeiture of corporate charter.* — The provisions of Title 3, Subtitle 5 of the Corporations and Associations Article of the Code which relate to forfeiture of a corporate charter for nonpayment of taxes shall apply to nonpayment of unemployment insurance contributions or interest.

(j) *Liability on dissolution of corporation.* — The provisions of §§ 3-407, 3-417, and 3-520 of the Corporations and Associations Article of the Code shall apply to the payment of unemployment insurance contributions and interest due and owing by any corporation.

(k) *Injunction against doing business.* — Any employer refusing to make reports required under this article, after ten days' written notice sent by the Executive Director to the employer's last known address by registered or certified mail, may be enjoined from operating in violation of the provisions of this article upon the complaint of the Executive Director, in any court of competent jurisdiction, until such reports shall have been made. When an assessment has become final pursuant to subsection (a) of this section, and the employer, after ten days' written notice sent by the Executive Director to the employer's last known address by registered or certified mail, refuses to pay contributions covered by the assessment, such employer may be enjoined from operating in violation of the provisions of this article upon the complaint of the Executive Director, in any court of competent jurisdiction, until such contributions have been paid. (An. Code, 1951, § 14; 1939, § 14; 1936, Dec. Sp. Sess., ch. 1, § 14; 1939, ch. 278, § 14; 1941, ch. 385, § 14; 1943, ch. 403,