Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2019-420 & 2019-421

APRIL TERM, 2020

McCarthy Construction LLC* v. Department of Labor	}	APPEALED FROM:
	}	
	}	Employment Security Board
	}	
	}	DOCKET NO. 05-18-030-01

In the above-entitled causes, the Clerk will enter:

Employer appeals decisions by the Department of Labor that two workers paid by employer were employees rather than contractors and therefore their services were subject to unemployment taxes. We affirm.

Employer is a small construction company that operates in southern Vermont and has been in business for over a decade. About three-quarters of its business is residential construction and the remaining portion is commercial construction. When a customer contacts employer, employer meets with the individual and prepares an estimate. If employer and the customer agree on price, a general schedule and payment arrangement are worked out. Employer has several employees who are paid through a payroll service. It also hires subcontractors.

In September 2017, employer registered as a limited liability company. This change in status caused the Department of Labor Unemployment Compensation and Wage Division to conduct an audit of employer's business. The auditor reviewed the three-year period from July 1, 2015, to June 30, 2017, as well as the period from July 1, 2017, to December 31, 2017.

The auditor determined that one of the subcontractors paid by employer during the three-year period from 2015 to 2017 and the period from July to December 2017, a drywall installer named Donald Grenier, was not a bona fide contractor but an employee, meaning that his pay was subject to unemployment taxes. The auditor also determined that Josh Moulton, who performed some demolition and scrap metal collection for employer on a single job during the period from July to December 2017, was an employee rather than a contractor. Based on the auditor's findings, the Unemployment Insurance Division issued assessments of unemployment contributions to employer in May and November 2018. Employer requested and received hearings before an administrative law judge (ALJ), who sustained the assessments. Employer then appealed to the Employment Security Board, which held a hearing in July 2019.

The Board applied the three-part "ABC" test set forth in 21 V.S.A. § 1301(6)(B) to determine whether Grenier and Moulton were employees or contractors. That section

provides that an individual who is paid for services is presumed to be an employee unless the employer shows that (A) the individual is free from the employer's control or direction of the performance of the services; (B) the services are outside the usual course of business of the employer or are performed outside of all of the employer's places of business; and (C) the individual is engaged "in an independently established trade, occupation, profession, or business." Id. An employer must show that a worker meets all three parts of the test; otherwise, the worker will be considered an employee whose wages are subject to unemployment taxes. In re Bourbeau Custom Homes, Inc., 2017 VT 51, ¶ 11, 205 Vt. 42.

The Board determined that employer had shown that Grenier, the drywall installer, met parts A and C of the above test because he operated free of employer's control or direction and was engaged in the independent trade of drywall installation. However, the Board found that employer had failed to show that Grenier met part B of the test. The Board found that drywall installation was a key component of residential and commercial construction and renovation and was therefore within the usual course of employer's business. Employer conceded that Grenier's services were performed at employer's worksites. The Board therefore affirmed the ALJ's conclusion that Grenier was an employee.

The Board determined that Moulton, the individual hired by employer to perform demolition and remove scrap metal, met part B of the ABC test because employer does not typically perform scrap metal removal in the course of its business. However, the Board found that employer had not demonstrated that Moulton was free from the control or direction of employer or was independently established in the trade of scrap metal removal or demolition. Accordingly, it affirmed the ALJ's conclusion that Moulton was an employee. Employer appealed both decisions to this Court.

On appeal, employer argues that the Board erred in determining that Grenier and Moulton were employees rather than contractors. Employer also claims that the Board abused its discretion in refusing to admit affidavits proffered by employer at the July 2019 hearing.

This Court gives great deference to decisions of the Employment Security Board, and "decisions within the Board's expertise are presumed to be correct." Great N. Constr., Inc. v. Dep't of Labor, 2016 VT 126, ¶ 12, 204 Vt. 1. We will affirm its factual findings unless they are clearly erroneous, and its conclusions if they are reasonably supported by the findings. 863 To Go, Inc. v. Dep't of Labor, 2014 VT 61, ¶ 8, 196 Vt. 551.

We agree with the Board that employer failed to demonstrate that Donald Grenier, the drywall installer, met the second prong of the ABC test by providing a service outside the usual course of employer's business. The Board found that employer is in the business of building and renovating primarily residential dwellings. Employer does not challenge this finding, which is supported by the evidence. The Board reasonably concluded that drywall installation—like carpentry, siding, and painting—is necessary to the business of general residential construction and renovation and therefore is a key component of employer's business. See Bourbeau Custom Homes, Inc., 2017 VT 51, ¶ 25, 205 Vt. 42 (concluding that carpentry, siding, and painting services were generally "necessary and central to the business of building homes"). The Board's interpretation is consistent with the remedial purpose of the unemployment compensation statute, which defines employment broadly to protect workers. See Fleece on Earth v. Dep't of Emp't & Training, 2007 VT 29, ¶ 17, 181 Vt. 458.

Employer argues that it does not perform drywall itself and that drywall installers have specialized skills and equipment and are traditionally hired as contractors rather than employees. However, "the intention of the parties to characterize their relationship as beyond the 'ABC' criteria is irrelevant if the substance of their relationship and their actions is not consistent with their expressed intent." Burchesky v. Dep't of Emp't Training, 154 Vt. 355, 360 (1989). As discussed above, the drywall work performed by Grenier was within the usual course of employer's residential construction business. Employer provided no evidence that Grenier performed highly specialized work that could not be provided by any worker or that employer did not typically focus on in its business. Cf. Great N. Constr., Inc., 2016 VT 126, ¶ 24 (holding that evidence showed carpenter, who performed highly specialized restoration work using his own unique equipment for general contractor that did not focus on such work, satisfied part B of ABC test). We emphasize that our decision should not be understood as a sweeping ruling concerning the role of drywallers in residential construction. Employer in this case bore the burden of establishing that Grenier performed specialized work outside of the ordinary course of employer's business, and the Board concluded that employer had not carried its burden. Under these circumstances, we see no reason to disturb the Board's decision.

We likewise affirm the Board's conclusion that Josh Moulton did not meet the first and third prongs of the ABC test. The Board found, and the record shows, that Moulton completed a questionnaire stating that employer supervised his work, set his working hours, and determined which job he should work on each day. Moulton did not provide his own materials or equipment but did provide some personal tools. He was paid by the hour. Employer testified with regard to the job Moulton worked on that it had been hired to "watch the people that were working on the job to make sure they were doing things efficiently and properly." These findings support the Board's conclusion that employer failed to show Moulton was not subject to employer's control or direction in the performance of his services. Although employer testified that it did not supervise Moulton's work, the Board was entitled to give this statement little weight in light of the other evidence. See Times-Argus Ass'n, Inc. v. Dep't of Emp't & Training, 146 Vt. 320, 323 (1985) (explaining weight to be given to testimony and inferences drawn therefrom are matters properly for Board, not this Court).

The record also supports the Board's conclusion that Moulton did not meet part C of the test. As the Board noted, employer presented virtually no evidence to demonstrate that Moulton was independently established in the trades of demolition or scrap metal removal. Although Moulton indicated that he provided similar services to other clients, he stated that he did not have his own employees or subcontractors, was not registered with the Secretary of State, did not have a registered trade name, and had not filed a Schedule C with his tax return. Employer therefore did not meet its burden of showing that Moulton had his own independent demolition or scrap metal business. See Great N. Constr., Inc., 2016 VT 126, ¶ 27 (holding that worker who provided similar services to others but was not registered as independent business, did not file Schedule C, and advertised only by word of mouth did not meet part C of ABC test).

Finally, employer argues that the Board abused its discretion by allowing the auditor to testify while refusing to admit affidavits proffered by employer. We see no error. Employment Security Board Rule 15(C) provides that "[e]xcept as otherwise provided by this rule all appeals to the Board shall be heard upon evidence in the record made before the ALJ." Rules of the Employment Security Board, Rule 15(C), Code of Vt. Rules 24 005 001, http://www.lexisnexis.com/hottopics/codeofvtrules. The notices of hearing sent to employer

stated in plain language that it had to present any relevant evidence at the ALJ hearing. The Board acted consistently with its rule in declining to admit the affidavits proffered by employer at the hearing. Employer claims that the Board acted contrary to the above rule by permitting the auditor to testify at the Board hearing. While it is true that much of the auditor's oral argument before the Board consisted of a factual recitation, those facts had already been entered into the record during the hearings before the ALJ. The record does not support employer's claim that the Board heard or relied upon new testimony from the auditor.

Affirmed.

BY THE COURT:

eth Robinson, Associate Justice

arold E. Eaton, Jr., Associate Justice

aren R. Carroll, Associate Justice