

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-0900225-001-BR

In the Matter of:

XXXXXXXXX XXXXXX XXXXXXXXXXXX
XXXXXXXXXXXX, XX
X/X XXXXXXXX & XXXXXXXX, XXXX, XX
XXXX X. XXX XXXXXXX, XXXXX X-XXX
XXXXXXXX, XX XXXXX-XXXX

ESA TAX UNIT
C/O ROBERT DUNN III
ASSISTANT ATTORNEY GENERAL
1275 W. WASHINGTON- 040A
PHOENIX, AZ 85007

Employer

Department

DECISION
AFFIRMED UPON REVIEW

The **DEPARTMENT**, through counsel, requests review of the Appeals Board decision issued on January 6, 2006, which **affirmed** that part of the Reconsidered Determination issued on March 9, 2005, and held that services performed by individuals as a Billing Processor constitute employment and remuneration paid to individuals constitutes wages for the services performed as a Billing Processor; and which **reversed** that part of the Reconsidered Determination issued on March 9, 2005, and held that services performed by individuals as Physicians Assistants (PA), Bookkeeper and Medical Advisor, do not constitute employment and that remuneration paid to Physicians Assistants, Bookkeeper and Medical Advisor does not constitute wages

The request has been timely filed and the Appeals Board has jurisdiction in this matter pursuant to A.R.S. § 23-672(F).

In the request for review, the Department, through counsel, refers to A.R.S. § 23-614(a) for the definition of "professional employer organization". That definition concerns "who" the employer may be when it is already established that there is an employer-employee relationship. The statutes that decide that issue are A.R.S. §§ 23-615, 23-613.01, and 23-617, as indicated in the Notice of Hearing. Reference to A.R.S. § 23-614 is not helpful to determining whether PAs are independent contractors or employees.

Counsel also contends that Bd. Exh. 13 does not support finding of facts (FOF) 8, 9, 10, or 16, in the Board's decision and is contrary to Bd. Exhibits 4, 5, 6, and 7. We agree that Bd. Exh. 13, does not cover those findings, but we amend the citations to cite Bd. Exhs. 4, 5, 6 and 7, in lieu of the present citations.

Counsel contends that FOF 8 does not exist in Bd. Exh.13 and is contrary to the provisions of Bd. Exhs. 4, 5, 6, 7, 16. FOF 8 is correct and is supported by Bd. Exhs. 4, 5, 6 and 7, which state in pertinent part: "PA shall be responsible for all costs and expenses including, but not limited to, costs of equipment provided by PA".

Counsel contends that FOF 9 is incorrect because PAs are not required to provide liability insurance for its services. Counsel's contention is correct, and we delete this finding. We note that, whether the PA must provide liability insurance is not a factor under Arizona Administrative Code, Section R6-3-1723(D) for consideration of determining whether PAs are independent contractors or employees.

Regarding FOF 10, counsel contends that the record indicates the PAs never hired any assistants, which indicates an employment relationship rather than an independent contractor relationship. This FOF is correctly stated, and it is supported by Bd. Exhs. 4, 5, 6 and 7.

Regarding FOF 16, counsel argues that PA's promise of indemnification is immaterial because XXXX is obligated to pay for malpractice insurance for PAs, which would be the primary source of indemnity for liability incurred by XXXX as a result of PA's conduct. Counsel's argument lacks merit. PAs indemnification to XXXX indemnifies XXXX from PA's acts causing liability to XXXX. If any PA causes liability to XXXX, the alleged victim would probably sue XXXX and the offending PA. Any damages that XXXX would be required to pay as a result of a lawsuit could be recovered from the offending PA under paragraph 11 of XXXX's and PA's agreement. Consequently, PA's indemnification to XXXX is not material.

Counsel offers contrary contentions on the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2) to which we respond:

a. Authority over Individual's Assistants

Counsel contends that no PA hired an assistant and since authorization was required, it indicates the right to control.

Although paragraph 8(b) of PA's agreement indicates that PAs agree to provide worker's compensation insurance for PAs' employees and agents, XXXX'X and PA's agreement does not require PAs to hire employees and the agreement does not mention nor require XXXX'X authorization for PAs to hire employees to help PAs perform their duties.

We still consider this factor significant in determining that the parties' relationship was that of independent contractor

b. Compliance with Instructions

Counsel contends that the contract between XXXX and the hospital and between XXXX and PAs gives XXXX the right to control.

PAs are subject to specific rules of practice under the authority of their licensing agency and must adhere to generally accepted medical practices in performing their duties. There is no provision in the contract that indicates that XXXX has the right to impose any specific method of performing the services.

Here, the PA is required to follow both the policies and procedures of XXXX and its client, XXXXXXXX XXXXXXXX XXXXXXXX (XXXXXX). Whether there are such policies and procedures is not material. The contract provides the right of control over the result, but not the specific methodology to be used. The PA is required to follow established medical procedures and this requirement is a function of the licensure, not of XXXX. In addition, by law, a PA must always be supervised by a physician. These factors indicate that the right to control the methods used by the PA is the result of a "provision of law", not the contract provisions. Consequently, PAs are not employees as provided under Arizona Administrative Code, Section R6-3-1723(B).

We still consider that this factor indicates an independent contractor relationship.

C. Oral or Written Reports

Counsel contends that both the XXXX'X contract with the PAs, and the XXXX contract with XXXXXXXX, require written reports detailing the procedures used in treating patients.

Because the Hospital requires the physicians, who require PAs to use the hospital's forms to prepare reports of all medical examinations, treatments, and procedures, does not indicate hospital control. What is indicated is the hospital's desire to have a standard format for such reports so that the hospital can comply with its duty to maintain such reports. The reports that the PAs must prepare are form reports required to satisfy sound documentation of medical procedures and treatment of patients. The Department ignores the importance to the hospital to have detailed reports of patients' treatment. Moreover, such reports are prepared for the hospital, not XXXX.

We still consider this factor significant in determining the parties' relationship was of an independent contractor nature.

d. Place of Work

Counsel contends that because the PA do not bring patients to a location where they have privileges, they are subject to control by XXXX and XXXXXX.

The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee.

The nature of the work means that a central location is selected and is not a control factor.

We still consider this factor significant in establishing the existence of an independent contractor.

e. Personal Performance

Counsel contends that by requiring personal performance, no greater control factor could be found.

Although PAs cannot assign their rights, duties and responsibilities to another PA without XXXX consent, we find that XXXX's consent is required because XXXX is concerned with the PA's qualifications and experience to perform their duties and responsibilities consistent with medical procedures in emergency medical care.

It is reasonable and logical for XXXX to have the authority to control what PAs are sent to provide services to its client, XXXXXX. XXXX has a contractual obligation which could be abrogated by the use of lesser qualified individual PAs. In addition, XXXX'X right to refuse to allow a substitute PA, serves as a mechanism to limit XXXX'X potential legal liability because, if a highly experienced PA assigns his contract to a less experienced PA, XXXX'X concern is not control, but legal liability.

We still think that this factor is neutral with respect to determining whether an employer-employee relationship exists between the parties. We certainly do not find that the facts show an employment relationship.

f. Establishment of Work Sequence

Counsel contends that the right to control factor is still present and establishes an employer employee relationship if not neutral.

Here the PA is free to follow his or her own patterns of work, subject only to medical triage judgments and work flow, and the requirements of a supervising physician. XXXX does not require any particular sequence of tasks designed to reach the completion, but expects each PA to exercise medically sound, professional judgment in performing all duties. Any control over the work sequence is established by the medical profession or is a function of law. The right to control is elusive because of the triage factors and medical procedures that must be followed by all medical practitioners providing emergency room services.

We still think that this factor indicates an independent contractor relationship.

g. Right to Discharge

Counsel contends that the contractual right to terminate a PA with no notice is evidence of control because it is similar to an employment at will doctrine.

The ability to terminate does not relieve the PA from liability, which is usually not present in an employment situation.

XXXX'X right to require the PA to continue providing services even if terminated "until such time as the patients being treated by PA no longer require its services", indicates discharge is not the remedy, but a possible lessening of liability. No employee could be required to continue working after being fired.

Here, although each party may terminate the contract on 30 days prior written notice. XXXX may terminate the agreement with PA "for cause". The enumerated causes involve the PA's ability to provide PA services consistent with established medical procedures and XXXX's concern about its liability for PA's services. Each party is liable for obligations and liabilities. An employee is normally not monetarily liable after a "discharge", for failure to have performed job obligations.

We still consider this factor significant in determining that the parties' relationship is that of independent contractor.

h. Set Hours of Work

Counsel contends that the PA is not able to miss a shift and do the work at another time.

The subject matter of the work precludes that option. However, a PA does not have to sign up for the shift and could obtain a substitute if one were unable to do a shift. There is no minimum number of shifts it would have to accept in order to remain under contract. The Department's argument that a physician in private practice is master of his own time because he can cancel his appointments to go play golf has no practical reality. The Department concedes that such behavior might result in loss of income and patient patronage.

Here, schedules are posted, but a PA is free to accept or reject any shift. Once accepted, the PA must personally cover that shift unless he finds a replacement as provided under paragraph 2(b) of the contract. A PA, individually, controls the days, times and hours he will perform services for XXXX. The PA is a master of his own time.

We still consider this factor significant in determining that the parties' relationship was that of independent contractor

i. Training

Counsel contends that the obligation of a PA to attend meetings is a control factor.

XXXX is an Arizona corporation. XXXX'X contract with PAs does not mention training because XXXX does not provide training. A PA's weekly meetings with a physician refers to his supervising physician, a live person, not XXXX, a corporation.

We still consider this factor significant in determining that the parties' relationship was that of independent contractor.

j. Amount of Time

Counsel contends that the factor should be neutral since some PA's work long hours and some short hours.

If the worker must devote his full time to the activity of the employing unit, it indicates control over the amount of time the worker spends working, and impliedly restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses.

Some PAs spend extensive time performing services for XXXX, while others devote less time. The election is made by the PA and there is no time restriction that prevents a PA from doing other gainful work of any kind. The PA has the freedom to work as much or as little as he wishes.

We still consider this factor significant in determining that the parties' relationship was that of independent contractor.

k. Tools and Materials

XXXXXXXXXXXXXXXXXXXX XXXX XXXXXXXXXXXXXXXXXXXXXXX
"XXXX shall furnish sufficient physical facilities, staff, equipment, and supplies for the operation of the facilities".

Most of the tools, facilities, and equipment for performing the work are not furnished by the PA. The nature of the work indicates that a PA would not normally furnish these work-related items regardless of the arrangement. It would be extremely impractical to expect a PA to provide hospital

equipment or facilities in order to perform services. The hospital provides, at no cost to the physician "Group", all equipment, facilities, supplies, utilities, telephone service, laundry, linen, and janitorial services. The nature of the hospital's emergency room facilities demonstrates the practical realities that compel a hospital, a physician and a PA to arrange for providing medical care that accommodates their separate services.

We still consider this factor significant in determining that the parties' relationship was that of independent contractor.

i. Expense Reimbursement

Counsel contends that it is XXXX that is obligated to provide medical malpractice insurance.

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Paragraph 7 of the PA's agreement require them to be responsible for all costs or expenses in performing their services such as equipment, fees, fines, licenses, bonds, and all other costs of doing business. Under Paragraph 8 of the PA's agreement, they are responsible for providing worker's compensation for themselves and employees they employ.

This factor indicates an independent contractor relationship.

Counsel addresses the additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E) that are equally appropriate for consideration in determining the relationship of the parties.

1. Availability to the Public

Counsel contends that there was no evidence that any PA was able to work simultaneously to provide PA services for another entity and that XXXX'X ability to direct night shifts limit that capability.

Generally, an independent contractor makes his services available to the general public, while an employee does not.

Here, just as with set hours of work or amount of time, some PAs are positively available to the public, but not all are.

The test here is not whether there is a control factor, but whether there is a positive practice of making his or her services available to the general public on a continuing basis. The nature of the PA's work, and the law which governs it, precludes a PA from offering services to the public. Some professionals offer their professional services to other professionals only, not the general public.

The absence of making his or her services available to the general public on a continuing basis is a function of the legal requirements for this type of work. That the worker is free to perform services for another entity which offers emergency room services to the public supports a finding that the worker is an independent contractor.

2. Compensation

Counsel contends that payment on an hourly basis shows a lack of independence.

Here, the PA is paid on an hourly basis. We note that XXXX does not bill patients for the services on an hourly basis, but on a "job basis", which is a standard, accepted medical practice. The PAs are being compensated for the time they spend performing services and making themselves available at the client's location. This is no different than hourly charges paid to lawyers, accountants or landscapers. The mere fact that compensation is paid based upon hours worked and billed does not control the nature of the relationship. We also note that the PA is being paid on an hourly basis because the nature of the service rendered does not lend itself to convert the PA's skills to a job basis billing as a hospital usually does.

We find that the absence of payment on a job basis is not a significant element in finding whether PAs are independent contractors.

3. Realization of Profit or Loss

Counsel contends that there are no potentials for profit or loss.

An employee is generally not in a position to realize a profit or loss as a result of his services. An independent contractor, however, typically has recurring liabilities in connection with the work being performed. The success or failure of his

endeavors depends in large degree upon the relationship of income to expenditures. Under paragraph 7 of the PA's agreement, they are responsible for all costs and expenses in performing their services. Under paragraph 14 of the PA's agreement, they are responsible for withholding income taxes, and social security taxes from their income, and they are responsible for obtaining and paying for health, disability, and life insurance premiums and paying for retirement benefits. The PA's responsibilities are liabilities and, in relationship to their income, establishes that they are in a position to realize profits or suffer a loss

We still find this factor is neutral as to whether an employer/employee relationship exists.

4. Obligation

Counsel contends that the PA does not incur an obligation for failure to perform or in walking off the job.

An employee usually has the right to end the relationship with an employer at any time without incurring liability. An independent worker usually agrees to complete a specific job. The specific job for the PA is to provide services at the emergency room of the hospital for a 12-month contractual period. Under paragraph 10 (c) of the PA's agreement, XXXX may seek immediate injunctive relief against any PA who breaches the terms of the agreement. For instance, under paragraph 9(A)(1) of the agreement, PAs must give to XXXX 30 days advance written notice (some PAs 90 days) to terminate their services. The PAs would be liable for damages for terminating their services before the 30 days advance notice.

We consider this factor significant in determining that the parties' relationship was that of independent contractor.

5. Significant Investment.

Counsel contends that the admitted lack of significant investment should not be labeled as "Not a determinative element", as the Board reasons.

Here, the PA has no significant investment. This is the result of the nature of the work, the ability to acquire the necessary

equipment and facilities and the costs of such acquisition. It is not a practical consideration in this situation. The lack of investment by the PA is a function of the type of work performed under the contract between XXXX and XXXXXX. It would not be practical for each of the PAs to make their own “significant investment” in order to establish an element as an independent contractor.

We find that absence of significant investment is not a determinative element in finding that the worker is an employee or an independent contractor. Rather, it is neutral in this case.

6. Simultaneous Contracts

Counsel contends that Simultaneous Contracts is not a control factor and should not be judged under the same reasoning, but should be judged on the basis of whether there are, in fact, Simultaneous Contracts.

An individual who works for a number of people or companies at the same time may be considered an independent contractor because he is free from control by one company. However, the person may also be an employee of each person or company depending upon the particular circumstances.

The evidence adduced clearly established that a PA is not prohibited from entering into similar contracts for services with any number of other entities. The Department and XXXX, in referring to PAs, stipulated that many PAs perform services at other emergency rooms and that the PAs’ agreement does not restrict them from performing services elsewhere (Bd. Exh. 13). Moreover, during 2001 and 2002, more than 80% of the PAs provided services to other entities (Bd. Exh. 13). As with many other factors, it is not the existence, or lack thereof, of the factor, but the parties’ right to do so or not at the parties’ discretion. Here, PAs may fully exercise, at their discretion, whether they will contract with other entities, and to what extent.

We find that the absence of simultaneous contracts is not a significant element in finding that the unrestricted right to enter into such simultaneous contracts, and that in 2001 and 2002, over 80% of the PAs had simultaneous contracts, is a significant factor in finding that the worker is an independent contractor.

In the analysis in our prior decision, that we affirm upon review, we have not determined the status of those performing services by merely counting the factors, but by weighing the factors and determining the importance of certain factors and ignoring those factors that are neutral. The **control** factors considered in determining whether a worker is an employee are considered in Arizona Administrative Code, Section R6-3-1723(D). One of the strongest control factors arises by operation of the law that a PA must be supervised by a physician. Had XXXX chose to fulfill its contract with XXXXXX by using only physicians, that particular control factor would not be present. But what remains significant is that the supervision factor arises as a provision of law and a necessary part of the licensing of a PA. That does not, of itself, create an employment relationship – just as the exclusive use of physicians does not eradicate the control factor. Here, XXXX, a corporate entity, the purported employer does not technically exercise that type of “operational control” over its contracted PAs. Supervising physicians have that control, but there is no implicit or explicit requirement that the supervising physician be affiliated with XXXX.

In a case where an employing unit contends that it is not an employer and the Department contends that it is, the Department has the burden of proof, by the preponderance of the credible evidence, to establish that an employment relationship exists. As noted, it is not an arithmetic calculation, but an analysis of pertinent elements under Arizona Administrative Code, Section R6-3-1723(D). In this case, the Department did not satisfy the burden of proof.

The Board's prior decision is fully supported by the greater weight of the credible and probative evidence of record.

THE APPEALS BOARD FINDS that:

1. The **DEPARTMENT**, through counsel, has not submitted any newly-discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the time of any hearing;
2. There was no prejudicial irregularity in the administrative proceedings on the part of the Department. Specifically, there was no material or prejudicial error in the admission or exclusion of evidence and no prejudicial errors of law were made at any hearing or during the progress of this matter;
3. There was no accident or surprise in the proceedings which could not have been prevented by ordinary diligence;
4. The Appeals Board's decision involved no abuse of discretion depriving any party of a full and fair hearing, and it was supported by the greater weight of the credible evidence and by applicable law;

5. All interested parties were notified of the filing of the request for review, and were allowed at least 15 days in which to respond. Accordingly,

THE APPEALS BOARD **AFFIRMS** its decision, there having been established no good and sufficient grounds which would cause us to reverse or modify that decision, or to order the taking of additional evidence.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT OF APPEAL TO THE ARIZONA TAX COURT`

This decision on review by the Appeals Board, is the final administrative decision of the Department of Economic Security. However, any party may appeal the decision to the Arizona Tax Court, which is the Tax Department of the Superior Court in Maricopa County. If you have questions about the

procedures on filing an appeal, you must contact the Tax Court at (602) 506-3763.

For your information, we set forth the provisions of Arizona Revised Statutes, § 41-1993(C) and (D):

C. Any party aggrieved by a decision on review of the appeals board concerning tax liability, collection or enforcement may appeal to the tax court, as defined in section 12-161, within thirty days after the date of mailing of the decision on review. The appellant need not pay any of the tax penalty or interest upheld by the appeals board in its decision on review before initiating, or in order to maintain an appeal to the tax court pursuant to this section.

D. Any appeal that is taken to tax court pursuant to this section is subject to the following provisions:

1. No injunction, writ of mandamus or other legal or equitable process may issue in an action in any court in this state against an officer of this state to prevent or enjoin the collection of any tax, penalty or interest.
2. The action shall not begin more than thirty days after the date of mailing of the appeals board's decision on review. Failure to bring the action within thirty days after the date of mailing of the appeals board's decision on review constitutes a waiver of the protest and a waiver of all claims against this state arising from or based on the illegality of the tax, penalties and interest at issue.
3. The scope of review of an appeal to tax court pursuant to this section shall be governed by section 12-910, applying section 23-613.01 as that section reads on the date the appeal is filed to the tax court or as thereafter amended. Either party to the action may appeal to the court of appeals or supreme court as provided by law.
4. The action cannot be initiated or maintained unless the appellant has previously filed a

timely request for review under section 23-672
or 41-1992 and a decision on review has been
issued.

A copy of the foregoing was mailed by certified mail on to:

(x) Er: XXXXXXXXXXX XXXXXX XXXXXXXXXXXX Acct. No: XXXXXXXX-XXX
XXXXXXXXXXXX, XX

(x) ROBERT DUNN III
Assistant Attorney General
1275 W. Washington - 040A
Phoenix, AZ 85007

(x) JOHN B. NORRIS Chief of Tax
Employment Security Administration
P. O. Box 6028 - 911B
Phoenix, AZ 85005

By: _____
For The Appeals Board