IN THE COURT OF APPEALS OF THE STATE OF NEVADA

INTERNATIONAL ACADEMY OF STYLE,
Appellant,
vs.
DIVISION OF INDUSTRIAL RELATIONS,
Respondent.

No. 82864-COA



*ORDER OF AFFIRMANCE*

International Academy of Style (IAS) appeals from a district court order denying a petition for judicial review in an administrative law matter. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

IAS, co-owned by Loni Casteel and Bonnie Schultz, is a beauty school licensed in Nevada that has operated since 1998.[1] Since the first year of its operation, IAS has hired what it labels "independent contractors" to provide additional instruction to its students. In its opening brief on appeal, IAS identifies these individuals as "cosmetology professionals" because they "own or work in salons" and "make their living from the performance of cosmetology services."[2] Each instructor was required to sign an "independent instructor agreement,"[3] which provided in relevant part that the instructors

[1]We do not recount the facts except as necessary for our disposition.

[2]For our purposes, we refer to these individuals as "cosmetology instructors."

[3]We note that the title of these agreements varied over the years: "Independent Instruction Contractor Contract" in 2013 and "Independent Instructor Agreements" in 2016. We refer to these documents as "independent instructor agreements" throughout this order for consistency.

were "independent contractors" and IAS would not be responsible for workers' compensation insurance.

In 2017, following an investigation, the Division of Industrial Relations (DIR) imposed two premium penalties on IAS because of lapses in workers' compensation insurance coverage: (1) $16,390.94[4] for the period of December 21, 2010, through November 30, 2015; and (2) $251.10 for the period of December 1, 2016, through December 30, 2016. IAS subsequently appealed to the Nevada Department of Administration and argued before an appeals officer that IAS was not considered the "employer" of the cosmetology instructors because the instructors were "independent contractors" and "independent enterprises." Further, IAS's position was that the cosmetology instructors were not in the same trade or business as IAS.[5] Therefore, IAS argued the premium penalties were wrongfully imposed. The appeals officer conducted a hearing at which Casteel testified as a witness. During her testimony, Casteel answered affirmatively when responding to whether IAS could still provide quality education *without* the cosmetology instructors. But she also testified that the cosmetology instructors "[show the students] what they do in the salon, so that the student can visually see it and connect with it."

The appeals officer issued a decision and order finding, inter alia, that the cosmetology instructors were "clearly in the same trade[,] business,

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Further, we note that the independent instructor agreements underwent significant revisions around 2015 or 2016, but for simplicity we refer to the updated agreements as the 2016 agreements.

[4]The first penalty amount was later corrected to be $16,190.19.

[5]We note that IAS argued several other points before the appeals officer that were not presented on appeal. Therefore, we need not address them.

occupation or profession as Ms. Casteel and Ms. Schultz." The appeals officer found that the cosmetology instructors were "furthering the operation of the business of the school by providing the instruction necessary to qualify as a cosmetology school." The appeals officer also conducted an analysis under the five-factor control test set forth in *Clark County v. State Industrial Insurance System*, 102 Nev. 353, 354, 724 P.2d 201, 202 (1986), which courts have previously used "in determining whether a putative employer has exercised enough control over a person to establish an employer/employee relationship under the [Nevada Industrial Insurance Act]." *Willison v. Texaco Ref. & Mktg., Inc.*, 109 Nev. 141, 143-44, 848 P.2d 1062, 1063 (1993) (describing the control test). Based on the record, we conclude that the appeals officer addressed each of the five factors of the control test and found that IAS had a level of control over each instructor, indicative of an employer-employee relationship.[6] Upon completing the control test analysis, the appeals officer determined that "the instructors [were] not independent contractors." Ultimately, the appeals officer found that the two premium penalties were properly imposed by DIR on IAS. The district court denied IAS's petition for judicial review and this appeal followed.

On appeal, IAS maintains that the appeals officer's determinations were impacted by clear errors of law by not properly applying

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[6]Although the appeals officer's decision does not specifically state that IAS and each of its instructors were in an employer-employee relationship, the appeals officer's findings as to each of the five factors of the control test coupled with the appeals officer's decision that the instructors were not "independent contractors," support that the appeals officer found the relationship between IAS and each of its instructors to be akin to that of an employer-employee.

NRS 616B.603,[7] and the premium penalties imposed by DIR should be reversed. IAS avers that the cosmetology instructors fulfilled all of the requirements to be defined as "independent enterprises" under NRS 616B.603(2) and that its "instructors are not in the same business as IAS because they are in the business of cosmetology practice, whereas the school is in the education business." Further, IAS argues the instructor's activities "are not indispensable to IAS and said activities, in this business, are not normally carried on through employees." Finally, IAS argues that substantial evidence does not support the appeals officer's findings regarding the five-factor control test and continues to maintain that the cosmetology instructors were in fact "independent contractors." In response, DIR argues that the cosmetology instructors are not independent enterprises as defined in NRS 616B.603(2), and the instructors are in the same trade, business, or profession as IAS under NRS 616B.603(1)(b). Specifically, DIR contends that "[t]he focus of NRS 616B.603 is the relationship between the instructors and IAS while on the job for IAS." Finally, DIR argues that even under the five-factor control test, IAS remains the statutory employer of the cosmetology instructors. For the reasons discussed below, we are not persuaded by the arguments put forth by IAS on appeal and conclude that substantial evidence supports the appeals officer's determinations.

As a preliminary matter, "[t]he standard for reviewing petitions for judicial review of administrative decisions is the same for [the appellate] court as it is for the district court." *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011). We review questions of law de novo,

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[7]NRS 616B.603(1) provides that a person who contracts with an "independent enterprise" that "is not in the same trade, business, profession or occupation" will not be considered the "employer" of that independent enterprise for workers' compensation purposes.

*Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010), but we "shall not substitute [our] judgment for that of the agency as to the weight of evidence on a question of fact," NRS 233B.135(3). But we may reverse a final decision if the final decision of the agency was affected by an error of law, if it was "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record," or if the decision was "[a]rbitrary or capricious or characterized by abuse of discretion." NRS 233B.135(3)(e) & (f). Substantial evidence is "evidence which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4). Therefore, "[w]e defer to an agency's findings of fact as long as they are supported by substantial evidence." *Phillips*, 126 Nev. at 349, 240 P.3d at 4. As a final consideration, we note that we will "not give any deference to the district court decision." *Warburton*, 127 Nev. at 686, 262 P.3d at 718.

Under Nevada's workers' compensation laws, employers "must procure workers' compensation coverage for their employees," thereby generally immunizing them "from common law liability for workplace injuries." *Harris v. Rio Hotel & Casino, Inc.*, 117 Nev. 482, 483, 25 P.3d 206, 207 (2001); *see also* NRS 616B.633 ("Where an employer has in his or her service any employee under a contract of hire, . . . the terms, conditions and provisions of [the workers' compensation NRS] chapters are conclusive, compulsory and obligatory upon both employer and employee."). Broadly, IAS's argument is that it need not procure coverage because the cosmetology instructors are "independent enterprises" and "independent contractors."[8]

[8]On appeal, IAS, by citing to the definition of "independent contractor," appears to argue that the cosmetology instructors were in fact independent contractors such that workers' compensation benefits were not required to be paid by IAS. Based on the facts of this case—that the cosmetology instructors were in the same trade, business, occupation, or profession as IAS—we

Under NRS 616B.603(1), a person is not considered an "employer" for workers' compensation purposes if "[t]he person enters into a contract with another person or business which is an independent enterprise" *and* "[t]he person is not in the same trade, business, profession or occupation as the independent enterprise." The "same trade" language under NRS 616B.603(1)(b) codified the "normal work" test found in *Meers v. Haughton Elevator*, 101 Nev. 283, 701 P.2d 1006 (1985). *See GES, Inc. v. Corbitt*, 117 Nev. 265, 269, 21 P.3d 11, 13 (2001) (noting the normal work test "originally articulated in [*Meers*]" is "now codified as NRS 616B.603(1)(b)"). Under the normal work test, we examine whether the "activity is, in that business, *normally* carried on through employees rather than independent contractors." *Meers*, 101 Nev. at 286, 701 P.2d at 1007 (internal quotation marks omitted).[9]

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conclude that even if the instructors could be characterized as independent contractors, this would not result in reversing the penalties imposed. *See Meers v. Haughton Elevator*, 101 Nev. 283, 285, 701 P.2d 1006, 1007 (1985) ("Nevada's Industrial Insurance Act is uniquely different from industrial insurance acts of some states in that sub-contractors and independent contractors are accorded the same status as employees." (internal quotation marks omitted)). The record indicates that before the appeals officer, IAS argued it was not responsible for workers' compensation coverage under NRS 616B.639, but IAS has not presented this argument on appeal, so we need not consider it. *See* NRS 616B.639(1)(a) & (b) (describing how if certain criteria are met—such as a contract in writing "provid[ing] that the independent contractor agrees to maintain coverage" and "[p]roof of such coverage is provided to the principal contractor"—a "principal contractor is not liable for the payment of compensation for any industrial injury to any independent contractor").

[9]Nevada authority indicates NRS 616B.603 and *Meers* should be read in conjunction. *See Richards v. Republic Silver State Disposal, Inc.*, 122 Nev. 1213, 1220, 148 P.3d 684, 688-89 (2006) ("Accordingly, the *Meers* normal work test and NRS 616B.603 have been conjunctively used in determining

The appeals officer concluded that the cosmetology instructors were in the same trade, business, occupation, or profession as Casteel and Schultz and appropriately cited to *Meers*. We agree. Irrespective of the semantic labels IAS attempts to assign to the activity being conducted by the cosmetology instructors, they were educating cosmetology students.[10] The proper focus of the inquiry is on the activity being done by the cosmetology instructors when in service to IAS at its facility, not the business they engaged in when working elsewhere at their respective salons. *Cf. D & D Tire, Inc. v. Ouellette*, 131 Nev. 462, 468-69, 352 P.3d 32, 36-37 (2015) (considering a party's purpose for being at a site during the time period surrounding an injury). Under *Meers*, the instruction being provided by the cosmetology instructors is an activity that is "normally" carried out by employees of the cosmetology school; that is, instructing students is an activity that is a part of IAS's normal business, as clearly demonstrated in part by its owners providing instruction on cosmetology skills related to hair, skin, and nails. *Cf. Meers*, 101 Nev. at 286, 701 P.2d at 1008 (concluding "that the specialized maintenance conducted by Haughton was not part of

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when a nonlicensed contractor is deemed the statutory employer or co-employee of an industrially injured employee in nonlicensed defendant and nonconstruction cases.").

[10]This is adequately supported in the record. IAS's own independent instructor agreements provide as much. In one example from 2013, the agreement provided, "I am contracted *to educate students* in all fields of Cosmetology." (Emphasis added.) Despite the appeals officer finding Casteel's testimony at the hearing to be self-serving and not credible, we note that she clearly described the "independent contractors" as providing educational/instructional services: "[W]e wanted people that actually were still working and still active in the industry *so that the students would in fact then learn* the most current techniques and the most current ways of doing anything." (Emphasis added.)

Centel's normal business" and "[a]lthough Centel had to maintain its physical facilities as part of its everyday function, . . . [the] specialized maintenance requiring skills and expertise not possessed by its employees is not a normal part of maintaining its building" (internal quotation marks omitted)).

This case is also similar to *Hays Home Delivery, Inc.*, in which Hays, a logistics management company, "enter[ed] into agreements with 'owner-operators,' instead of hiring drivers of its own, to deliver the merchandise." *See Hays Home Delivery, Inc. v. Emp'rs Ins. Co. of Nev.*, 117 Nev. 678, 680, 684, 31 P.3d 367, 368, 371 (2001) (concluding that Hays and an owner-operator driver were "in the same trade of delivering merchandise from retailers to end-customers"). Thus, we conclude that the appeals officer's decision that the cosmetology instructors were in the same trade, business, profession, or occupation was not affected by any error of law.[11] Further, there is substantial evidence in the record to support the appeals officer's findings in this regard.

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[11]Given that IAS is in the "same trade, business, profession or occupation" as the cosmetology instructors, we need not look any further under NRS 616B.603, as it would not matter whether or not each instructor was in fact an "independent enterprise" as defined under NRS 616B.603(2). *See Hays*, 117 Nev. at 683, 31 P.3d at 370 (highlighting the conjunctive nature of NRS 616B.603 in that "Hays must demonstrate that Green is an independent enterprise, *and* that Green and Hays are not involved in the same trade, business, profession or occupation" (internal quotation marks omitted)). IAS also argues that the appeals officer erred in reading NRS 616B.603 when finding "that the instructors are clearly furthering the operation of the business of the school by providing the instruction necessary to qualify as a cosmetology school," but we do not read this finding as introducing a new requirement or element into NRS 616B.603. This finding is supported in the record to the extent that the cosmetology instructors were in fact at IAS to instruct students. Such a finding is useful to applying the normal work test. *Meers*, 101 Nev. at 286, 701 P.2d. at 1007.

The appeals officer also proceeded to analyze the relationship between IAS and the cosmetology instructors by using the five-factor control test set forth in *Clark County*, 102 Nev. 353, 724 P.2d 201.[12] The control test's factors include "(1) the degree of supervision; (2) the source of wages; (3) the existence of a right to hire and fire; (4) the right to control the hours and location of employment; and (5) the extent to which the workers' activities further the general business concerns of the alleged employer." *Id.* at 354, 724 P.2d at 202.

The findings as to each factor by the appeals officer are supported by substantial evidence. First, the appeals officer properly noted that some level of supervision was inherently necessary to confirm that the instructors were meeting the requirements set forth in the instructor agreements, such as those requirements related to complying with standards set forth by the Board of Cosmetology. For example, one independent instructor agreement signed in 2013 provided that, "I am aware that all instruction and records shall be in a format that complies with the standards and policies of the accrediting agency for International Academy of Style." Further, the 2016 agreement also gave IAS the ability to terminate the agreement "for cause." To determine whether such grounds exist, some level of supervision must exist.

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[12]We recognize that the control test might be unnecessary given Nevada's use of the *Meers* normal work test and NRS 616B.603. *See Harris*, 117 Nev. at 491, 25 P.3d at 212 (noting that previously the court had "observed that the enactment of [NRS 616B.603] manifested the Legislature's intent to codify [*Meers*'s normal work test] for non-construction cases, thus abrogating use of the control test for determining employer immunity in non-construction cases" (footnote omitted)). Nevertheless, its application by the appeals officer further demonstrates that the relationship between IAS and each cosmetology instructor was that of employer-employee.

Second, nothing in the record contradicts the appeals officer's finding that the instructors were being paid from student tuition. Third, as mentioned above, the independent instructor agreements from 2016 indicated that IAS had the power to hire or fire because the agreements provided IAS the ability to terminate the agreement with the cosmetology instructors "for cause," such as if the "[i]nstructor fail[ed] to perform his or her services in a competent manner." This supports the appeals officer's finding that IAS was able to sever its relationship with the instructors.

As to the fourth factor, we recognize that some of the findings regarding the employer's control over time and location may be partially inaccurate as written,[13] but the record does in fact support that the instructors did not have unfettered control over their hours and location of employment. At the hearing, it was revealed that rarely did the instructors teach off IAS's premises. And as demonstrated in the 2016 independent instructor agreement, several restrictions were put in place before an instructor could teach off site or outside of the school's normal hours (e.g., "Use of IAS facilities for instruction outside of IAS normal hours of operations must be requested and approved in advance by IAS.").[14] Finally, without question, substantial evidence supports that the instructors' services furthered the general business concerns of IAS, which was to provide

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[13]For example, the appeals officer noted that "the instruction must be done at the school." However, our review of the record suggests that this may not be completely accurate, although there was no evidence presented at the hearing regarding specific instances of instruction at other locations.

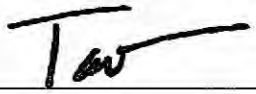
[14]Notwithstanding the supposed control the instructors had over their schedules and Casteel's testimony alleging there were no ramifications should an instructor fail to show up on a particular day, most of the agreements in the record clearly provided for specific days and times that the instructors would provide their services.

students with education related to the cosmetology field. Thus, the record contains substantial evidence that a reasonable mind could accept as adequate to support the conclusion that IAS and each of the cosmetology instructors were in an employer-employee relationship.

For the reasons set forth above, we conclude that the appeals officer's determination that the two premium penalties imposed by DIR was proper is supported by substantial evidence and is not clearly erroneous or impacted by an error of law. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



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cc: Hon. Barry L. Breslow, District Judge
Laurie A. Yott, Settlement Judge
Hutchison & Steffen, LLC/Reno
State of Nevada Department of Business and Industry/Div. of Industrial Relations/Las Vegas
Washoe District Court Clerk