COMMONWEALTH OF MASSACHUSETTS
APPELLATE DIVISION OF THE DISTRICT COURT DEPARTMENT
NORTHERN DISTRICT

HELIO COSTA JESUS

V.

CRL, INC. and another[1]

NO. 18-ADCV-33NO

In the SOMERVILLE DIVISION:

Justice: McCabe, J.
Docket No. 1410CV0467
Date of Decision Appealed: March 31, 2016
Date of Entry in the Appellate Division: March 6, 2018

In the APPELLATE DIVISION:

Justices: Coven, P.J., Crane & Flynn, JJ.
Sitting in: Boston, Massachusetts
Date of Hearing: July 13, 2018
Date Opinion Certified: October 12, 2018

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OPINION

COVEN, P.J. This appeal arises from a claim under the Massachusetts Wage Act, G.L. c. 149,

[1] Umberto Celiberti.

§ 148, and the Fair Minimum Wage Law, G.L. c. 151, § 1A, for overtime wages. The court awarded damages, interest, and attorney's fees in the amount of $66,163.81. Claiming the plaintiff was an

independent contractor and not an employee, CRL, Inc. and Umberto Celiberti (collectively, defendant) have appealed.

Defendant's business consists of small general contracting projects, excavation, construction, and framing. Plaintiff has no formal certification in construction. He worked for the defendant six days a week for ten hours each day from 2009 to 2014. Celiberti monitored the hours he worked. Celiberti gave direct orders to the plaintiff each day, telling him where he needed to be and what he needed to do. Plaintiff would remain on the job until he was picked up by Celiberti or Celiberti's father to be driven home.

For the first year of work, the defendant paid the plaintiff $12.00 per hour, but after the first year began paying him a fixed salary of $650.00 without any notice of the change.

A witness testified that he had previously worked for the defendant for approximately four years and, like the plaintiff, was paid in cash with no W-9 or W-2. He further testified that he witnessed the plaintiff working for the defendant and saw him at different job sites in Boston, Newton, and Charlestown. Another witness also testified to working for the defendant for five months and was paid in cash. He stated that the plaintiff began working for the defendant about four months after him and that he witnessed the plaintiff complete construction and demolition work.

Pursuant to G.L. c. 149, § 150, the plaintiff received a right-to-sue letter from the Attorney General permitting an individual to bring a private action against an employer to enforce the provisions of the Massachusetts Wage Act. Under the Fair Minimum Wage Law, G.L. c. 151, § 1A requires employers to pay "not less than one and one half times the regular rate at which [the employee] is employed." Section 1B of G.L. c. 151 permits an employee to bring a private cause of action for damages from the employer's violation of § 1A. *Somers v. Converged Access, Inc.*, 454 Mass. 582, 590

(2009). Individuals who provide services to an employer as an employee, rather than as an independent contractor, fall within the protection of G.L. c. 149 and G.L. c. 151, § 1A. *Id.* at 589.

General Laws c. 149, § 148B establishes a standard to determine whether an individual performing services for another shall be deemed an employee or an independent contractor for purposes of G.L.

c. 149 and G.L. c. 151. *Somers*, *supra* at 588-589. The employer bears the burden of proof and must prove three criteria by a preponderance of the evidence to establish that the individual in question is an independent contractor. *Id.* at 589. To determine whether a worker is an employee or independent contractor, the statute states that "an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless: (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and, (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." G.L. c. 149, § 148B(a). Under the statute, "Any entity and the president and treasurer of a corporation and any officer or agent having the management of the corporation or entity shall be liable for violations of this section." *Id*. at § 148B(d). Celiberti is the sole officer and director of CRL. Thus, pursuant to the statute, the plaintiff was authorized to seek damages against both the corporation and Celiberti.

The findings of the trial judge with regard to those questions of fact are to be accepted unless found to be clearly erroneous.[2] **The judge made sufficient findings based on the evidence as to each of**

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[2] "'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *Springgate v. School Comm. of Mattapoisett*, 11 Mass. App. Ct. 304, 309-310 (1981), quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Moreover, 'in applying the "clearly erroneous" standard, [Mass. R. Civ. P.] 52(a)

the statutory requirements.

requires that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."' *Demoulas v. Demoulas Super Mkts., Inc.*, 424 Mass. 501, 509 (1997). Therefore, 'so long as the judge's account is plausible in light of the entire record, an appellate court should decline to reverse it.' *Id*. at 510." *Crown v. Kobrick Offshore Fund, Ltd.*, 85 Mass. App. Ct. 214, 224 (2014). "In applying the clearly erroneous standard, due deference must be given to the trial judge's firsthand view of the evidence and better position from which to assess its weight and, particularly, its credibility." *Porcaro v. O'Rourke*, 2008 Mass. App. Div. 218, 221, quoting *Davis v. Davis*, 2007 Mass. App. Div. 123, 125.

With regard to the question as to whether the person is free from control and direction, the evidence showed that the defendant kept track of how many hours the plaintiff worked. Plaintiff worked for the defendant six days a week for ten hours each day over a period of five years. Celiberti gave direct orders to the plaintiff each day, telling him where he needed to be and what he needed to do. He would then stay on the job until he was picked up by Celiberti or Celiberti's father to be brought home.[3] The defendant had complete control over plaintiff's work, location, and hours. ***Sebago v. Boston Cab Dispatch, Inc.*****, 471 Mass. 321, 332 (2015).**

As to the question of whether the service is performed outside the defendant employer's usual course of business, the court can assess the usual course of business based on the employer's definition of its business and whether the service the individual is performing is necessary to the business of the employing unit or merely incidental. ***Carey v. Gatehouse Media Mass. I, Inc.*****, 92 Mass. App. Ct. 801, 805, 807-808 (2018). However, the employer cannot alter its definition of its usual course of business to try to invoke the independent contractor statute.** ***Id.*** **at 806 n.9. The services provided by the plaintiff were directly necessary to the work of the defendant and not merely incidental to the business.**

The third element of the statutory scheme is whether the plaintiff was customarily engaged in an independently established trade or business. The question is whether the worker is capable of performing the service to anyone or, conversely, whether the nature of the business compels the worker to depend on

a single employer for the continuation of the services. ***Sebago*****,** ***supra*** **at 336. There is no evidence to suggest that the plaintiff was capable of performing his services to anyone other than the defendant, and the plaintiff was dependant on this single employer for the continuation of work. Plaintiff worked for the defendant six days a week for ten hours a day for five years. Plaintiff has**

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The fact that the plaintiff had to have a friend inform defendant that he would not be coming to work due to an injury implies that there was an expectation that he would be present for work every day and that he needed to get permission to miss work.

no formal certification in construction and does not have a specific, independently established business or trade. Rather, he did

whatever work was required by the defendant and was dependent on the defendant to continue working.

The trial court's findings and conclusions are clearly supported by the evidence. However, it is unclear whether this case was decided under the Wage Act or the Fair Minimum Wage Law. Under either statute, the court must award treble damages and attorney's fees upon finding a violation. Here, the trial judge awarded double damages and attorney's fees. The matter is returned to the trial court for the entry of treble damages. Otherwise, the judgment is affirmed.

Plaintiff may file an appropriate motion in this Appellate Division for additional attorney's fees incurred in this appeal, *Fabre v. Walton*, 441 Mass. 9, 10 (2004), within fourteen days of the date of this opinion. Defendants shall have fourteen days thereafter to respond.

HON. MARK S. COVEN, Presiding Justice
HON. DANIEL C. CRANE, Justice
HON. GREGORY C. FLYNN, Justice

This certifies that this is the Opinion of the Appellate Division in this case.
A True Copy, Attest:

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Brien M. Cooper, Clerk