STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
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http://dwd.wisconsin.gov/lirc/

[redacted]

UNEMPLOYMENT INSURANCE DECISION

Soc. Sec. No. ***-**-7906
Hearing No. 13000921AP

[redacted] Petitioner

**Dated and mailed:**

AUG 2 6 2013

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**SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL**

An administrative law judge (ALJ) for the Division of Unemployment Insurance of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the ALJ. Based on its review, the commission agrees with the decision of the ALJ, and it adopts the findings and conclusion in that decision as its own, except that it makes the following modifications:

1. Delete the sixth full paragraph on the second page of the FINDINGS OF FACT and CONCLUSIONS OF LAW.

2. After the last paragraph on the second page of the FINDINGS OF FACT and CONCLUSIONS OF LAW, include the following paragraph:

   The claimant came to the United States in 2004 to work for AR Editions, Inc., a publisher of modern editions of early music, located in Middleton, Wisconsin. He worked as an editor of sheet music, and also translated sheet music to English from German, Russian, and Latin. Prior to coming to the United States, he worked as a translator in Germany, translating biographies, booklets for CD production, and other music-related projects, work that was likely outsourced for record companies.

3. Replace the paragraphs addressing the factors relating to instructions and training on the fifth page of the FINDINGS OF FACT and CONCLUSIONS OF LAW with the following paragraphs:

   a. *Instructions* – This factor looks at whether the individual is free from the employing unit's direction to comply with instructions concerning how to perform the services. In this case, the only instructions the claimant received related to the software and font he was to use to perform his translations. These instructions, similar to specifications used by contractors in construction projects, were not instructions as to how to perform his translation services, which he was free to do given his skill and expertise in that area. This factor is met.

   b. *Training* – This factor looks at whether the individual is free from training by the employing unit with respect to the services performed. Here, the claimant had no experience with the process of technical writing, design, and formatting, or with the software programs used in that process. He requested and received ongoing advice and feedback from the employing unit, and this kind of "learning while doing" with ongoing feedback from the employing unit constitutes training. This factor is not met.

4. Replace the paragraphs on the sixth and seventh pages of the FINDINGS OF FACT and CONCLUSIONS OF LAW addressing the conditions b., c., and d. with the following paragraphs:

   b. *The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.*

   Here, the claimant chose to perform the translation services at his residence, and he used his own equipment and materials to perform the services. This condition is met.

   c. *The individual operates under multiple contracts with one or more employing units to perform specific services.*

   This condition requires multiple contracts. Although the claimant had only one contract with the employing unit at issue, he had performed translating services for other entities or individuals in the past on an independent or outsourced basis, and also performed such services after his work with the employing unit at issue ended. It is not necessary that the multiple contracts exist during the claimant's base period or while he is performing services for the employing unit at issue. The relevant time period is that period in which the individual has been performing the work at issue. This condition is met.

d. *The individual incurs the main expenses related to the services that he or she performs under contract.*

The claimant did not purchase the software or the equipment he used to perform the services, nor did he have travel expenses to perform the services. His expenses, if any, were minimal. In addition, the employing unit had administrative expenses associated with his performance of the work, as well as the costs associated with the font provided to him and the training provided by its staff. This condition is not met.

5. Replace the paragraphs on the seventh and eighth pages of the FINDINGS OF FACT and CONCLUSIONS OF LAW addressing the conditions f. and g. with the following paragraphs:

f. *The services performed by the individual do not directly relate to the employing unit retaining the services.*

The claimant's services, translating an operations manual from English into German to be used for equipment manufactured by the employing unit and marketed in Germany and German speaking countries, are directly related to, and integrated into, the employing unit's worldwide sales business. This condition is not met.

g. *The individual may realize a profit or suffer a loss under contracts to perform such services.*

In this case, the parties' contract was not completed, the claimant's expenses were minimal, and his earnings exceeded his expenses. Given these facts, it was not possible that he would suffer a loss. This condition is not met.

6. Replace the first sentence in the second full paragraph on the last page of the FINDINGS OF FACT and CONCLUSIONS OF LAW with the following:

In sum, only three (b., c., and i.) of the nine conditions in the second part of the test are met.

**DECISION**

The decision of the administrative law judge, as modified, is affirmed. Accordingly, the wages paid to the claimant by the employing unit shall be included in the computation of the claimant's potential benefit eligibility, specifically the $500 paid to the claimant by the employing unit in the second calendar quarter of 2012.

BY THE COMMISSION:

Laurie R. McCallum, Chairperson

C. William Jordahl, Commissioner

David B. Falstad, Commissioner

MEMORANDUM OPINION

The petitioner, [redacted] Inc. (hereinafter "petitioner" or [redacted]"), is an international manufacturer of weighing systems. The claimant provided translation services for [redacted] during the second calendar quarter of 2012, a quarter included in the base period of his unemployment benefits claim, and was paid $500 for those services.

Accordingly, the department investigated the claimant's employment status with [redacted] and issued a determination finding him to be an employee of [redacted] for unemployment insurance benefits purposes. After a hearing, the ALJ affirmed the department's determination, and [redacted] timely filed a petition for commission review of the ALJ's decision.

In its petition for commission review, [redacted] asserts that, in addition to the factors and conditions that the ALJ found were met, an additional four conditions were met, specifically condition (a), that the claimant advertised or held himself out of being in business; condition (b), that the claimant performed his work where he wished, using his own equipment and materials; condition (e), that the claimant was obligated to redo unsatisfactory work without additional compensation; and condition (h), that the claimant had recurring business obligations.

The commission addresses the petitioner's arguments in its analysis below, and notes that commission review of a decision of an administrative law judge is not appellate in nature, but instead a *de novo* review of the factual record and the parties' arguments. *See Dane County Hockey Officials Assoc., Inc.*, UI Dec. Hearing No. S9800101MD (LIRC Feb. 22, 2000). Accordingly, the commission review is not confined to analysis of only those factors or conditions with which the petitioner disagrees. Its review encompasses each of the applicable statutory factors and conditions.[1]

[1] The commission notes that the claimant's attorney has also submitted a brief relating to this case. In that brief, he takes issue with the manner in which the department resolves this employment status issue in benefits and contribution cases. However, that matter is beyond the purview of the commission, and is more properly directed to the department. He also disagrees with aspects of the ALJ's decision, and the commission has noted his arguments when those arguments add to a discussion of the legal analysis.



[redacted]

## APPLICABLE LAW

Substantive changes were made to the statutory definition of "employee" in Wisconsin unemployment insurance law by 2009 Wisconsin Act 287, enacted on May 12, 2010, and applicable to services performed after December 31, 2010. The claimant's base period includes the second calendar quarter of 2012. Therefore, the analysis of the claimant's employment status will use the applicable 2011 law.

The commission notes that, in its interpretation of the new law, it has looked, when appropriate, to the legislative history giving rise to the change in the statute, specifically a report to the Unemployment Insurance Advisory Council[2] dated June 25, 2009, by the committee appointed to study and to suggest changes to the definition of "employee" under § 108.02(12).[3] *See Milwaukee County v. DILHR*, 80 Wis. 2d 445, 259 N.W.2d 118 (1977) (Wisconsin Supreme Court looks to Advisory Council comments made in conjunction with recommended law changes to determine or to clarify legislative intent), citing *Western Printing & Lithographing Co. v. Industrial Comm.*, 260 Wis. 124, 130, 50 N.W.2d 410 (1951).

Certain provisions in the law were left unchanged and are applicable both before and after December 31, 2010. These provisions include specific conditions from the old law that were considered by the committee to remain useful and were retained in the new law, as well as the general provisions that are cited below:

Wisconsin Stat. § 108.02 states, in relevant provisions, as follows:

> **108.02 Definitions**. As used in this chapter:
>
> > **(4)** BASE PERIOD. "Base period" means the period that is used to compute an employee's benefit rights under s. 108.06 . . .
> >
> > **(4m)** BASE PERIOD WAGES. "Base period wages" means:
> >
> > > (a) All earnings for wage-earning service which are paid to an employee during his or her base period as a result of employment for an employer;

**Definition of "employee" under law applicable to services performed after December 31, 2010**

Wis. Stat. § 108.02(12) provides, in relevant part, as follows:

> (a) "Employee" means any individual who is or has been performing services for pay for an employing unit, whether or not the individual

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[2] This advisory council exists as a part of the original unemployment compensation law enacted in Wisconsin in 1932. It is made up of an equal number of members of labor and management, with a nonvoting department representative as its chairperson. The council meets regularly, and is charged with submitting recommended changes in the unemployment insurance law to the Wisconsin legislature. *See* Wis. Stat. § 15.227(3).

[3] The committee's suggestions for changes to § 108.02(12)(bm) were adopted in the new law.

is paid directly by the employing unit, except as provided in par. (bm), (c), (d), (dm) or (dn).

(bm) Paragraph (a) does not apply to an individual performing services for an employing unit other than a government unit or nonprofit organization in a capacity other than as a logger or trucker, if the employing unit satisfies the department that the individual meets the conditions specified in subds. 1. and 2., by contract and in fact:

1. The services of the individual are performed free from control or direction by the employing unit over the performance of his or her services. In determining whether services of an individual are performed free from control or direction, the department may consider the following nonexclusive factors:

a. Whether the individual is required to comply with instructions concerning how to perform the services.

b. Whether the individual receives training from the employing unit with respect to the services performed.

c. Whether the individual is required to personally perform the services.

d. Whether the services of the individual are required to be performed at times or in a particular order or sequence established by the employing unit.

e. Whether the individual is required to make oral or written reports to the employing unit on a regular basis.

2. The individual meets 6 or more of the following conditions:

a. The individual advertises or otherwise affirmatively holds himself or herself out as being in business.

b. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.

c. The individual operates under multiple contracts with one or more employing units to perform specific services.

d. The individual incurs the main expenses related to the services that he or she performs under contract.

e. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.

f. The services performed by the individual do not directly relate to the employing unit retaining the services.

g. The individual may realize a profit or suffer a loss under contracts to perform such services.

h. The individual has recurring business liabilities or obligations.

i. The individual is not economically dependent upon a particular employing unit with respect to the services being performed.

(e) This subsection shall be used in determining an employing unit's liability under the contribution provisions of this chapter, and shall likewise be used in determining the status of claimants under the benefit provisions of this chapter.

This test involves first, an analysis of whether the claimant's services are performed free from control or direction by the employing unit, and second, whether the claimant meets six or more of nine specific conditions relating to economic independence and entrepreneurial risk.

Wisconsin Stat. § 108.02(12)(a) was not substantively changed by the new law[4]. It still creates a presumption that a person who provides services for pay is an employee, and it still requires the entity for which the person is performing those services to bear the burden of proving that the person is not an employee. *See Dane County Hockey Officials Association, Inc.,* cited previously; *Quality Communications Specialists Inc.,* UI Dec. Hearing Nos. S0000094MW, S0000095MW (LIRC July 30, 2001).

Therefore, since the record shows that the claimant performed services for [redacted] in 2012 for pay, [redacted] has the burden to rebut the presumption that he did so as a statutory employee. It must establish that he operated free from its control or direction and that he met at least six of the nine conditions set forth in the statute.

The commission notes that the claimant's status as an independent contractor or a statutory employee is determined by statute, and not by the terms of a private agreement. *Roberts v. Industrial Comm.,* 2 Wis. 2d 399, 86 N.W.2d 406 (1957). *See also Knops v. Integrity Project Management,* UI Dec. Hearing No. 06400323AP (LIRC May 12, 2006).

Furthermore, the statutory provision at issue, Wis. Stat. § 108.02(12)(bm), specifically states that an employing unit must meet the statutory criteria in the two subdivisions "by contract and in fact". In other words, a contract (or agreement) between the parties is not sufficient alone to establish that independent contractor criteria are met – and a hearing in which questions are

[4] The only change in its language is the omission of obsolete subparagraph (b).



[redacted]

asked and employment circumstances described is the proper setting to determine the actual facts of the employment.

Finally, the unemployment statute specifically states, at Wis. Stat. § 108.12, that "[n]o agreement by an employee to waive the employee's right to benefits or any other rights under this chapter shall be valid." In sum, the claimant's status as an independent contractor or an employee, for unemployment insurance purposes, is determined by statute, and not by any agreement or understanding between the parties.

**Analysis of Conditions**

The first part of the test provides five important statutory factors to consider, although these factors are not the only factors that may be considered in determining whether the claimant performs his services free from the control or direction of the employing unit. Each factor is a separate indicator of an employing unit's exercise of direction or control over the claimant, none of them are essential in any case, and each factor may be weighted differently depending upon the facts of each case.

**Wis. Stat. § 108.02(12)(bm)1. - Freedom from control or direction by the employing unit**

***a. Instructions*** - This factor looks at whether the individual is free from the employing unit's requirement to comply with instructions concerning how to perform the services. The ALJ found that this factor was not met because [redacted] required the claimant to use certain software and a particular font in performing his services.

The claimant, in his brief, takes issue with the ALJ's analysis of this factor. He argues that the claimant was free to perform his translation as he wished and that [redacted]'s requirements regarding software and font were related to how the final product would look rather than instructions for how the claimant would accomplish that design. The commission agrees.

[redacted] required the claimant to use a particular kind of software and a particular font in his translation work so that the operations manual that he was translating would look a certain way, presumably like the same manuals in other languages. This requirement seems similar to the specifications that a contractor receives for the construction of a building. In such cases, the specifications are instructions, or more accurately a description, of the particular job to be done, but are not instructions as to how to perform the various parts of the construction process, such as digging the foundation, laying the footers, pouring the concrete, and so on. So it is with the required software and font in this case. These were necessary aspects of the job [redacted] wanted done - a manual that looked a particular way. However, the claimant was not required to follow any instructions from [redacted] as to how to perform his work translating the manual's contents. He had skill and expertise in the translation process, and was free to perform that translating service on his own, using resource materials as he deemed necessary.



[redacted]

Accordingly, the commission finds that the claimant was not required to comply with instructions from [redacted] concerning how to perform his services. This factor **is met.**

**b.** ***Training*** - This factor looks at whether the individual is free from training by the employing unit with respect to the services performed. The ALJ found this factor met because the claimant, inexperienced in this kind of work, was expected to learn by doing.

Again, the claimant disagrees with the ALJ's analysis, arguing that because the claimant lacked experience in layout and design work, he relied on initial training from RLWS about layout and design tasks. The commission agrees.

The claimant did not have skill or expertise in the area of technical writing, layout or design, or with the software programs used to perform layout and design tasks. He requested and received advice and feedback from [redacted]'s technical writer on an ongoing basis, and also received feedback from [redacted]'s marketing director about his work. The commission believes that this kind of "learning while doing", with ongoing feedback from the employing unit, constitutes training by [redacted] even though it occurs on the job. Although frequently training occurs in a more formalized setting, before the job starts or during the first days of the job, it can also take place when the employing unit sets up an on-the-job training process with one or more workers employed by the employing unit designated as contact persons to help the individual learn how to do certain work, to provide feedback to the individual about his work, and to answer his questions about the work. The commission concludes that the claimant was being trained on the job by [redacted] to perform services with which he was unfamiliar. This factor **is not met.**

**c.** ***Personal performance*** - This factor looks at whether the individual is free from the requirement of personal performance of the services. The ALJ found that this factor was not met because [redacted] chose the claimant to do the work given his specific language skills, and presumably expected him to perform the work personally. The commission agrees. In the absence of any evidence that the claimant was free to delegate the work to others, the commission finds that this factor **is not met**.

**d.** ***Services at times or in a particular order or sequence*** - This factor looks at whether the individual is free from the requirement of performing services at times or in a particular order or sequence established by the employing unit. [redacted] did not require that the claimant perform his services at any particular times or in any particular order or sequence. The commission finds that this factor **is met**.

**e.** ***Oral or written reports*** - This condition looks at whether the individual is free from the requirement of making oral or written reports to the employing unit on a regular basis. The claimant was not required to make any oral or written reports, such as progress reports, to [redacted] on a regular basis. This factor **is met.**



[redacted]

No other factors were raised on the issue of whether the claimant was free from control or direction by [redacted], and the commission does not note any other relevant factors. Given that three of the five factors were met, [redacted] has established that the claimant performed his services free from its control or its direction.[5]

Accordingly, since both parts of the statutory test must be satisfied for an individual to be considered an independent contractor rather than an employee, it is necessary to determine whether [redacted] has established that six of the nine conditions in the second part of the test have been met.

**Wis. Stat. § 108.02(12)(bm)2. – Economic independence and entrepreneurial risk**

Several of these conditions, in whole or in part, are the same as conditions contained in the previous law. As noted previously, the committee recommending the changes in the law chose not to change these particular provisions due to their continuing relevance and usefulness. Accordingly, the commission decisions and case law relating to these conditions under the previous law would retain their applicability. In addition, two of the conditions (conditions f. and i.) are the same or substantively similar to the current conditions in the "employee" test applicable to non-profit and governmental organizations, and commission decisions and case law relating to those two conditions would be equally applicable in this context.

**a. *The individual advertises or otherwise affirmatively holds himself or herself out as being in business.***

This condition can be met if it is established that the individual is taking some kind of action to make the public aware of his business and his services. This can take the form of advertising his services as a business, such as through business cards available to the public, posting notices in the newspaper or elsewhere regarding his services, or having an actual place of business. There must be some kind of affirmative action taken by the claimant in which he holds himself out to the public as being in a particular kind of business.

[redacted] argues that this condition is met because the claimant contacted [redacted] and other employers soliciting "contract work" when he felt a financial strain; he indicated that he never considered himself to be an employee of [redacted]; and he sent an invoice to [redacted], indicative of independent contractor status. The commission does not agree with this argument.

There is no evidence in the record that the claimant made any effort to make the public aware that he had a translation business. He did not advertise, he had no business cards indicating a translation service, nor did he have an actual place of business, other than his home. In addition, his solicitations of work were submitted to specific entities or individuals for whom he had previously worked or

[5] The claimant, in his brief, agrees that three of the five factors are met, and that he was free from control or direction by [redacted] in the performance of his services.



[redacted]

had applied for a job, not to the public. There is simply no evidence that he held himself out to the public as having a viable translation business.[6] This condition **is not met.**

**b. *The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.***

The ALJ found that this condition was not met, utilizing the pre-2011 statutory condition 3 in his analysis. The commission disagrees. This condition is one that was specifically changed in the new law. It can be met if the individual uses his own equipment and materials in performing the services, and either maintains his own office[7] **or** performs most of his services in a location he chooses. It is not necessary for an individual to maintain his own office if he chooses where to do the work. In this case, the claimant chose to perform his work at home and used his own equipment and material to do the work. The commission agrees with [redacted] that this two-part condition **is met.**

**c. *The individual operates under multiple contracts with one or more employing units to perform specific services.***

This condition is similar to condition 4 under the pre-2011 test, retaining the first part of that condition relating to multiple contracts. As noted in *Gronna v. The Floor Guys,* UI Dec. Hearing No. S9900063WU (LIRC Feb. 22, 2000), the requirement of multiple contracts is based on sound legislative policy, as it "tends to show that an individual is not dependent upon a single, continuing relationship that is subject to conditions dictated by a single employing unit." The commission has consistently stated that this requirement may be satisfied by multiple contracts with separate entities or by multiple serial contracts with a putative employer if it is established that those contracts have been negotiated "at arm's length," with terms that will vary over time and will vary depending on the specific services covered by the contract. *See, e.g., Preferred Financial of Wisconsin, Inc.,* UI Dec. Hearing No. S0600240MW (LIRC Oct. 23, 2008), and cases cited therein; *VanPelt v. Quality Controlled Substances,* UI Dec. Hearing No. 07200634EC (LIRC Aug. 31, 2007) (not met when multiple job-specific agreements not negotiated at arm's length).

The commission notes that [redacted] does not dispute the ALJ's finding that this condition is not met. Apparently, [redacted] believes this condition is not met because [redacted] had only one agreement with the claimant. However, this condition can be satisfied if it is established that the claimant performed similar services for other

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[6] The claimant testified that, although he considered setting up such an independent business as a translator, he did not do so. In addition, although he obtained business cards after he discontinued his work for [redacted], these cards indicated his specialty as a musicologist and an editor, not as a translator.

[7] If an individual does not choose where to perform his services, it must be determined whether he maintains his own office. In such a case, the analysis would proceed utilizing the longstanding interpretation that the term "office" has received in cases involving condition 3 in the pre-2011 law, albeit without reference to a "separate business."



[redacted]

businesses/individuals as an independent contractor, even at time periods earlier than the services at issue. The commission has held that the time period relevant to this inquiry is the time period that the individual has been performing the type of work at issue, and is not confined to the specific base period of the claim. *See, e.g., Nature's Pathways LLC,* UI Dec. Hearing No. S0800258AP (LIRC Feb. 5, 2010) (claimant performed similar services under contracts with other entities in prior years); *Fisher v. WisPolitics.com,* UI Hearing No. 06004206MD (LIRC April 24, 2007) (claimant had similar contracts with other entities in prior years).

Although the record is not very developed, the claimant testified that he had performed translating services in Germany in the past for various clients, noting that such work was likely outsourced for record companies. He also wrote a few translations of artists' biographies from English to German for concert programs for a person in Germany in June 2013. The commission believes that this is sufficient evidence to establish that the claimant has performed services as a translator in the past, as well as after his work for [redacted] ended, and that some of these services have been on an outsourced basis, as an independent contractor.

However, before there can be a finding of multiple contracts, there is another issue to address – are these translating services that the claimant has performed as an independent contractor "similar services" to the services he performed for [redacted]? The commission notes that an argument can be made, as the claimant did in his brief, that the service he was providing for [redacted] was materially different from the translating that he had done in the past – it was technical and industrial in nature, involving a subject area and terms with which he was unfamiliar; it required expensive software programs involving formatting and design with which he was unfamiliar; and it required that he prepare a finished product for printing, a complete operations manual. He had never performed this kind of work before, and it could be argued that his simple translations of biographies and music-related matters were not a "similar service."

On the other hand, a translating business may accept different kinds of assignments - some may be a straight translation of text from one language to another, other jobs may include the preparation of a translated document that includes images and designs, and some translators may specialize in a particular kind of translation, such as music, technical, or industrial. However, the basic common element is that the individual/business is translating text from one language to another, and the translating aspect of the service is the crux of the work being done. Accordingly, although a translator may perform his services in different environments and contexts, the services are still considered to be translation services. In addition, in its longstanding interpretation of this condition, the commission has required that multiple contracts must be for "similar services," not necessarily "the same services."

After a careful review of the facts, the commission concludes that the claimant's previous independent work as a translator involved the performance of similar services to those services he performed for [redacted]. Accordingly, the commission finds that this condition **is met.**



[redacted]

**d. *The individual incurs the main expenses related to the services that he or she performs under contract.***

This condition is identical to condition 5 under the pre-2011 test. Applying this condition requires a determination of what services are performed under the contract, what expenses are related to the performance of these services, which of these expenses are borne by the person whose status is at issue, and whether these expenses constitute the main expense. In that regard, the commission has consistently held that, without a quantification of these expenses or an obvious conclusion as to the expenses borne by the respective parties, it must be found that this condition has not been met. *See, e.g, Schumacher v. Spar Marketing Services, Inc.,* UI Dec. Hearing No. 11203182EC (LIRC March 21, 2012), and other cases cited therein.

The ALJ found that this condition was met, and the claimant, in his brief, agrees.[8] However, the commission is not persuaded that this condition is met. The claimant, had he performed the entire contract, would have been required to purchase expensive software, as well as a new computer and a laser printer. It may be that the expense would be sizeable, although the entire purchase price of these items would not be treated as an expense in the month or year in which the purchase is made, but would be converted into a periodic depreciation expense, *see Quality Communications Specialists Inc.,* cited previously. However, the claimant chose not to purchase new equipment and software. He simply used what equipment he owned, and obtained a free 30-day trail of the software that would suffice to perform work on the first manual. As the commission noted earlier, these statutory criteria must be established "in contract and in fact." In fact, the claimant had few, if any expenses, in performing his work under the contract. In addition, there was no quantification of any expenses he may have had in the operation of his computer and printer, and he had no transportation expenses to do the work.

In addition, [redacted] had expenses, including the administrative costs of securing the claimant's services and compensating him for his services, costs associated with providing him with the proper font, and costs related to the training provided to him by the technical writer and the marketing director. Without any quantification of additional expenses on the part of the claimant, it has not been established that the claimant incurred the main expenses of performing his services. Accordingly, this condition **is not met.**

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[8] In concluding that the claimant incurred the main expenses of the services he performed, the ALJ and the claimant relied on the initial purchase prices of a computer, laser printer, and software programs that the claimant would likely need to purchase in order to complete the second operations manual. However, even setting aside their erroneous use of the entire purchase price of each piece of equipment in the calculation of expenses, the simple fact is that the claimant had few expenses for completing the first operations manual, which was the extent of his work for [redacted] under the contract.



[redacted]

e. ***The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.***

This condition replaces condition 6 of the pre-2011 law that read – "The individual is responsible for the satisfactory completion of the services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services." In its report, the committee of the Unemployment Insurance Advisory Council notes that its revision of the condition is based on its concerns that the phrase "liable for a failure to satisfactorily complete the services" in the older law invited controversy as to its proper interpretation. The report states that the revised condition "best reflects the decisions by the Commission and limits the range of doubt and controversy in the future."

[redacted] argues that this condition is met because the claimant's diary contains many references to redoing unsatisfactory work. However, that is not what this condition requires. Although an individual may choose to redo work for his own reasons, this condition looks at whether there is an agreement between the parties that it is the individual's obligation to redo unsatisfactory work for no additional compensation or that he is subject to a monetary penalty for unsatisfactory work. Here, there was insufficient evidence presented that the parties agreed that the claimant would be required to redo unsatisfactory work for no additional compensation or that he would be subject to a monetary penalty for unsatisfactory work. This condition **is not met.**

f. ***The services performed by the individual do not directly relate to the employing unit retaining the services.***

The committee of the Unemployment Insurance Advisory Council notes in its report that this condition is one of the factors currently used by the courts and the commission for government and nonprofit employers, citing the case of *Keeler v. LIRC,* 154 Wis. 2d 626, 631 (Ct. App. 1990). In *Keeler,* the Court of Appeals gave an example of the integration concept – a tinsmith was called upon to repair the gutter of a company engaged in a business unrelated to the repair or manufacture of gutters. Since the tinsmith's activities were totally unrelated to the business of the company retaining his services, his services were not "integrated" into the alleged employer's business, and were considered to be a factor evidencing an independent business.

The ALJ found that this condition was met. The commission disagrees. The claimant's services involved the translation and formatting of an operations manual from English into German to be used for equipment manufactured by [redacted] and marketed in Germany and in German speaking countries. Such services are directly related to, and integrated into, its worldwide sales business. In addition, [redacted] has translators on its staff for other languages, an indication that translation work is part of its international business. The commission finds that this condition **is not met.**



[redacted]

***g. The individual may realize a profit or suffer a loss under contracts to perform such services.***

This condition is identical to condition 8 under the pre-2011 test, specifically that the claimant may realize a profit (income received under the contract exceeds expenses incurred in performing the contract) or suffer a loss (income received under the contract fails to exceed expenses incurred in performing the contract). The test is whether, over the term of the contract between the claimant and [redacted], there was a realistic possibility that the claimant could realize a profit or suffer a loss. *See, e.g., Zabel v. Snyder's of Hanover,* UI Dec. Hearing No. 10000988MD (LIRC Sept. 2, 2010) (even though claimant suffered losses during certain weeks, there was no realistic possibility of loss over term of agreement), and cases cited therein.

The ALJ found that this condition was met and, although perhaps a closer case than condition d. regarding main expenses, the commission is not persuaded that this condition is met in this case. As with condition d., had the claimant completed the contract, it is possible that he could have realized a profit or suffered a loss, if his expenses in equipment and software programs exceeded his earnings from the work. He was not guaranteed a steady source of work, and his expenses could be substantial. That is the reason that he chose to discontinue his work under the contract. He was concerned about the risk of financial failure if he was required to make a sizeable investment in equipment and software, but was not successful in finding ongoing paying work. Given the claimant's expressed concerns and consequential discontinuation of the contract, there is a fair argument to be made that the condition is met in this case.

However, as with condition d., the facts are that the contract's term was cut short, the claimant did not complete his contract with [redacted], his expenses were minimal, and his earnings exceeded his expenses. Given that the statutory conditions must be met "in contract and in fact," the commission concludes that this condition **is not met.**

***h. The individual has recurring business liabilities or obligations.***

This condition is identical to condition 9 under the pre-2011 test, and requires proof of a cost of doing business that the claimant would incur even during a period of time that he was not performing work for [redacted], such as office rent, liability insurance, or a professional membership. *See, e.g., MSI Services Inc.,* UI Dec. Hearing No. S0600129AP (LIRC Sept. 5, 2008); *Gamble v. American Benefit LTD,* UI Dec. Hearing No. 04004847MD (LIRC Feb. 15, 2005) (overhead expenses that cannot be avoided by ceasing to perform services).

[redacted] argues that the claimant had recurring obligations, including the rent on his home and the cost of upgrading his computer and purchasing software. However, the rent on his home is not a *business* obligation, and he did not purchase any equipment to perform his services. There was no evidence presented of recurring business obligations. This condition **is not met.**



[redacted]

i. ***The individual is not economically dependent upon a particular employing unit with respect to the services being performed.***

This condition replaces condition 10 under the pre-2011 test – "The success or failure of the individual's business depends on the relationship of business receipts to expenditures". The Unemployment Insurance Advisory Council committee report states that "[f]or many years, economic independence has been acknowledged by the Commission and the courts as an important factor in the test applicable to government and nonprofit employers."

The economic dependence factor was addressed and interpreted in a published Court of Appeals decision, *Larson v. LIRC,* 184 Wis. 2d 378, 392, 516 N.W.2d 456 (Ct. App. 1994), as follows:

> [E]conomic dependence is not a matter of how much money an individual makes from one source or another. Instead, it refers to the survival of the individual's independently established business if the relationship with the putative employer ceases to exist.

The commission has relied on that reasoning in numerous subsequent cases. *See, e.g., Schumacher v. Spar Marketing Services, Inc.,* cited previously, and other cases cited therein. In four of those cases - involving, respectively, an instructor, an emergency preparedness workshop presenter, a percussionist, and a bassoonist - if the individual's relationship with the employing unit at issue ceased to exist, the individual's business would continue. The commission looked at the specialized skills and/or investment in equipment that the individual had, supporting an ability to perform specific services for others, as well as the fact that the individual did such work for others, demonstrating the independence of the individual's work from that of the employing unit at issue.

In contrast, in other cases in which an individual has performed services for multiple entities, the commission has considered whether the individual performed such services as part of an independently established business rather than as an employee, recognizing that individuals may work as acknowledged employees, holding several part-time jobs, or a part-time job and a full-time job. *See, e.g., Schumacher v. Spar Marketing Services, Inc.,* cited previously, and cases cited therein involving, respectively, a Spanish interpreter, a caregiver, and a sports referee.[9]

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[9] In *Wenzel v. School District of Stratford,* UI Dec. Hearing No. 08202476EC (LIRC Mar. 26, 2009), the commission looked at the income earned by the individual from the employing unit at issue and compared it to income earned from his primary source of income in determining economic (in)dependence. The commission found that Wenzel had little or no economic dependence on the employer for the work he was engaged in because his pay as a referee was incidental to his primary source of income, and that this was more consistent with Wenzel being an independent contractor than an employee. This economic dependence analysis in *Wenzel* is at odds with the court of appeals' decision in *Larson;* however, this was harmless error as the commission ultimately found that Wenzel's work as a referee was as an employee

Accordingly, in interpreting the new law, the commission has taken an approach that recognizes these various rationales. For example, in *Bentheimer v. Bankers Life & Casualty,* UI Dec. Hearing No. 10006546JV (LIRC Aug. 16, 2011), the claimant worked full-time for Bankers Life, an insurance company, and was clearly economically dependent on that business, as the commission found. Although she might move on to perform services for another insurance company if her relationship with Bankers Life ceased to exist, taking her skills and experience with her, she would not be doing so as an independently established business, but as an individual employee.

The commission notes that analysis of this condition must be made on a case-by-case basis, taking into consideration each claimant's circumstances and whether there are the characteristic signs of a viable independently established business. In this case, the claimant had skills and expertise as a translator and he worked as a translator for other entities in the capacity of an independent contractor over a number of years. Accordingly, he was not economically dependent upon [redacted]. If the employment relationship ended with [redacted], which it did, the claimant's independent work as a translator would survive, and it did, as evidenced by the translation work he did for the client in Germany in June, 2013. Accordingly, the commission finds that this condition **is met.**

In sum, three (b., c., and i.) of the nine conditions in the second part of the new test are met. Therefore, since the new Wis. Stat. § 108.02(12)(bm) requires that, first, the claimant be free from the control and direction of [redacted], and second, that at least six of the nine conditions in the second part of the test be met for the claimant to be considered an independent contractor, the claimant must be considered an employee, not an independent contractor, and his 2012 earnings from [redacted] shall be included in the department's computation of his base period wages.

cc: VICTOR FORBERGER
[redacted]

and not as an independent contractor. The commission is bound by and follows *Larson* in its analysis of the economic dependence factor.



[redacted]