2014 IL App (2d) 130033-U
No. 2-13-0033
Order filed May 27, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DOUGLAS A. BAYER, f/d/b/a Bayer Road Service, and BAYER ROAD SERVICE, INC.,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 11-MR-1460
THE DEPARTMENT OF EMPLOYMENT SECURITY; JAY ROWELL, in his capacity as Director of Employment Security,	)	Honorable Terence M. Sheen,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The Director of Employment Security's determination that plaintiffs' roadside service drivers were employees rather than independent contractors under section 212 of the Unemployment Insurance Act (820 ILCS 405/212 (West 2012)) was not clearly erroneous. Plaintiffs forfeited their arguments challenging the propriety of monetary judgments entered by the trial court by failing to provide a sufficient record on appeal and failing to cite legal authority.

¶ 2 Plaintiffs, Douglas A. Bayer and Bayer Road Service, Inc. (collectively, Bayer), operated a roadside service business and contracted with drivers to assist motorists. Following an audit

and a hearing, the Director of Employment Security (Director) determined that Bayer's drivers were not independent contractors within the meaning of section 212 of the Unemployment Insurance Act (Act) (820 ILCS 405/212 (West 2012)). Bayer filed a complaint for administrative review, and the trial court affirmed the Director's decision and entered two monetary judgments against Bayer. Bayer now appeals, and we affirm.

¶ 3 I. BACKGROUND

¶ 4 Douglas Bayer operated Bayer Road Service as a sole proprietorship before incorporating as Bayer Road Service, Inc., on November 23, 2008. Bayer contracted with insurance companies and automobile clubs to provide roadside assistance to motorists. Bayer separately contracted with individuals throughout Illinois and several surrounding states to respond to service calls.

¶ 5 On December 21, 2010, the Department of Employment Security (Department) sent a "Notice of Determination and Assessment and Demand for Repayment" to Bayer asserting that it had failed to pay employer contributions required by the Act. The notice stated that Bayer owed $6,289.53, which included $2,111.99 in interest, for the portion of 2008 during which Bayer operated as a sole proprietorship. On the same day, the Department issued a similar notice to Bayer encompassing the fourth quarter of 2008 and all of 2009, during which time Bayer operated as a corporation. This notice demanded payment of $16,106.78, including $3,702.67 in interest and $490 in penalties.

¶ 6 On January 7, 2011, Bayer filed protests with the Department regarding both notices, taking the position that it was not required to make employer contributions because its roadside service drivers were independent contractors under section 212 of the Act. The Director's representative, James Zatopa, conducted an administrative hearing on April 14, 2011. Two

witnesses testified at the hearing: Douglas Bayer and Christopher Cubr, the auditor who had examined Bayer's accounts.

¶ 7 Douglas Bayer's Testimony

¶ 8 Douglas testified that he was the owner of a roadside service business that performed tire changes, unlocks, jumpstarts, and gas delivery for motorists. Bayer contracted with insurance companies and automobile clubs to provide roadside assistance all over Illinois and several other states. During 2008 and 2009, Bayer had only one office, dispatching calls to its drivers from Douglas' residence in Willowbrook, Illinois. Bayer later moved its dispatch center to Burr Ridge, Illinois, and maintained the Willowbrook location as an administrative office. When the business was incorporated in November 2008, Bayer had only one dispatcher, but it later expanded to three or four dispatchers.

¶ 9 Douglas explained that calls would be received from automobile clubs and insurance companies when one of their customers required roadside assistance. Bayer assigned territory to drivers based on where they resided, and it maintained a list of drivers in each given geographical territory. Bayer then telephoned drivers in the appropriate territory to find one who was available to assist the customer. Drivers could accept the service calls they wanted, and there was no penalty for refusing a job. Drivers might travel as far as 10 to 40 miles for a service call, but the drivers could determine for themselves how far they were willing to travel. Douglas further testified that if a driver declined a call, a dispatcher would contact the next available individual. The drivers did not work out of service stations, but rather took calls from wherever they happened to be at the time.

¶ 10 Douglas testified that Bayer found its drivers on Craigslist and by word of mouth through other drivers. Douglas interviewed applicants at mutually agreeable locations and gave them

verbal training. Every applicant signed a "Bayer Road Service Independent Contractor Application Form" listing his or her educational background, work experience, and personal references.

¶ 11 Douglas testified that applicants also completed and signed the "Bayer Road Service Job Acknowledgment" form, which required applicants to circle "Yes" or "No" next to the following statements:

> "1. You are an independent contractor and responsible for your own food, fuel and transportation.
>
> 2. Bayer Road Service, Inc. pays when supporting paperwork is turned in completed. Our pay schedule is: *Job Invoices received Wednesday/Thursday by 12pm – Pay Tuesday*[.]
>
> 3. As an Independent Contractor you will receive a 1099 form at the end of the year, *NOT* a W2 [*sic*]. This means that Bayer Road Service, Inc. will not hold out any taxes or Social Security from your check.
>
> 4. Drivers are responsible for completing their own paperwork.
>
> 5. If damage is caused to a vehicle due to driver negligence, that driver is responsible for any damages." (Emphasis in original).

The bottom of this form stated: "If you still wish to apply as an Independent Contractor, sign below and return The Job Acknowledgment form along with the application to our offices."

¶ 12 Douglas testified that each driver performed services pursuant to a standardized independent contractor agreement. The agreement provided that either party could terminate the contract with or without cause, and the drivers acknowledged that they were not employees of Bayer, agreeing not to hold themselves out as such. The drivers agreed to indemnify and defend

Bayer for damages resulting from the drivers' performance of services under the contract. The agreement stated that the drivers would use their own business judgment in performing services and that Bayer did not reserve the right to control the manner in which the drivers' performed. Additionally, drivers were not restricted from working for other entities and were not required to devote any specific amount of time to performing services for Bayer. Drivers could accept or reject any engagement offered by Bayer. The agreement stated that Bayer would not provide equipment or reimburse drivers for business expenses. The drivers agreed to accept a flat fee that was to be determined prior to each engagement, and they acknowledged that Bayer would not withhold taxes from their checks. The agreement provided that the drivers were not eligible to participate in any benefit plans that Bayer offered its employees.

¶ 13 Douglas testified that the drivers provided their own vehicles, mostly four or six-cylinder vehicles rather than RVs or semi-trucks. Bayer did not insure or maintain the vehicles, nor did it reimburse drivers for expenses such as gas. However, Bayer did require drivers to verify that their vehicles were insured. While Bayer did not supply the drivers with uniforms or business cards, Douglas admitted that the drivers represented Bayer when they contacted customers.

¶ 14 Douglas explained that Bayer paid drivers a flat rate of $11-$13 per call and would not reimburse drivers for any costs incurred over that amount. Bayer paid the drivers weekly and did not withhold taxes or social security. Bayer paid individuals in their own names rather than under business names, and Douglas was not aware of any drivers having a business listing in the telephone directory. Nor was he aware of any of the drivers maintaining their own unemployment insurance accounts with the State of Illinois.

¶ 15 Douglas testified that drivers needed certain tools to perform their duties, and they could obtain them from Bayer pursuant to a "Tool Account Agreement." A tool account consisted of

lockout, tire service, and jumpstart tools, as well as a navigation system, a cell phone, a forms holder, two sign magnets, and an emergency light. The agreement provided that Bayer would deduct 10% from a driver's check each week up to $500 and that $250 would be reimbursed upon return of the tools in good condition.[1] Nevertheless, Douglas testified that the tools belonged to the drivers and that they would not return them to Bayer when they left Bayer. He also testified that Bayer would show drivers how to unlock vehicles if they did not know how to do it.

¶ 16 Furthermore, Douglas testified that each driver signed a non-disclosure agreement regarding confidential information, which was defined as "all data and information relating to the business and management of [Bayer] including work product, business operations, marketing and development operations, and customers." Drivers were restricted from divulging confidential information for a period of one year following the termination of the parties' relationship.

¶ 17 Douglas additionally testified that each driver signed a restrictive covenant, which provided:

> "In the event Contractor's service with the Company is terminated, then for one (1) year immediately following the termination date, Independent Contractor shall not, without first obtaining the prior written approval of the Company, directly or indirectly

[1] There are two other versions of the "Tool Account Agreement" in the record, but they were not mentioned in the parties' briefs on appeal. One alternate version provided a tool account of up to $1,000 with the entire amount to be reimbursed upon return of the tools. Another alternate version called for a $1,000 tool account, but said nothing about reimbursing the driver.

> engage or prepare to engage in the Road side [*sic*] service business in any way or in any place, or directly or indirectly engage or prepare to engage in any other activities in competition with the Company, or accept employment or establish a business relationship with a business engaged in or preparing to engage in competition with the Company, in any geographical location in which the Company as of the termination date either conducts or plans to conduct business."

This restrictive covenant was not triggered until the termination of the parties' relationship. During their relationship, Bayer did not prohibit drivers from maintaining other jobs, including working for Bayer's competitors. Douglas testified that some of the drivers did in fact have other jobs.

¶ 18 Christopher Cubr's Testimony

¶ 19 Christopher Cubr testified that he was the Department auditor who audited Bayer. He initially audited the corporation after a driver filed for unemployment benefits. He determined that Bayer Road Service, Inc. owed more than $5,000 in employer contributions for the year 2009, which prompted him to audit 2008 records. Cubr also examined the records for the period of 2008 during which Bayer had operated as a sole proprietorship. Cubr found that in 2009, Bayer had failed to report 99 workers, which included 97 road service drivers plus Douglas and his wife. Audit records entered into evidence at the administrative hearing showed that Cubr also identified 28 unreported workers for 2008 before the business was incorporated. Cubr determined that these workers were employees of Bayer because he had no evidence to demonstrate otherwise.

¶ 20 Cubr did not know whether Bayer supplied vehicles for its drivers, but he was aware that each driver signed an independent contractor agreement and that drivers paid for their own tools.

He testified that although drivers were permitted to refuse calls and to perform services in the manner they wanted and on the timeframe they chose, these were not significant factors because the drivers were performing services and getting paid. Nor would it be important to Cubr if the drivers had other jobs because that simply would mean that the drivers had more than one employer. According to Cubr, every worker is an employee unless the employer proves otherwise.

¶ 21 Cubr testified that he was not provided sufficient documentation to show that the drivers were operating independently established businesses separate and distinct from Bayer. Asked what evidence was lacking to prove that the drivers were not Bayer's employees, Cubr responded that there was no evidence that the drivers could contract with the world at large or that customers could call the drivers directly for roadside services. Nor did he see evidence that the customers, as opposed to Bayer, paid the drivers. Cubr did not find it relevant that the drivers were paid a flat rate or that they could lose money performing services for Bayer.

¶ 22 On May 16, 2011, Zatopa issued a written recommended decision concluding that the drivers were Bayer's employees for purposes of the Act and that Bayer was required to make employer contributions.[2] Bayer filed an objection. On September 19, 2011, the Director issued a decision adopting the recommendation.

¶ 23 On October 21, 2011, Bayer timely filed a complaint for administrative review in the trial court. On December 13, 2012, the trial court affirmed the Director's decision, and Bayer filed a

[2] Zatopa additionally recommended excluding the wages of 19 drivers from the calculation of amounts Bayer owed because their work was not localized in Illinois and their bases of operations were not in Illinois. *See* 820 ILCS 405/207 (West 2012). That portion of the recommended decision is not at issue in this appeal.

timely notice of appeal. On January 14, 2013, after Bayer filed its notice of appeal, the Director filed a motion in the trial court seeking monetary judgments of $6,578.43 against Douglas Bayer and $19,552.58 against Bayer Road Service, Inc., for unpaid contributions, penalties, and interest.

¶ 24 In the appendix to its brief, Bayer attached several documents that were not included in the record on appeal. Bayer represents in its brief that on January 31, 2013, the trial court granted the Director's motion for monetary judgments and entered judgments accordingly. Bayer represents that on February 25, 2013, leave was requested from this court to file an amended notice of appeal to include the trial court's January 31, 2013, order, which we granted.

¶ 25 II. ANALYSIS

¶ 26 Bayer argues that the Director erred in determining that its drivers were not independent contractors under section 212 of the Act. Bayer also contends that the trial court erred in entering monetary judgments after affirming the Director's decision without specifying what amounts were attributable to employer contributions rather than to interest or penalties.

¶ 27 A. The Director's Determination that the Drivers were Bayer's Employees

¶ 28 The Act "provides economic relief to those who are involuntarily unemployed[] through the collection of compulsory contributions from employers and the payment of benefits to eligible unemployed persons." *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 396 (2001). Whether Bayer is liable for contributions depends on whether it has an "employment" relationship with its drivers. *AFM*, 198 Ill. 2d at 396. The Act defines "employment" broadly as "any service *** performed by an individual for an employing unit."[3] 820 ILCS 405/206 (West 2012). The Act's definition of "employment" is more inclusive

[3] Bayer does not dispute that it is an "employing unit" under the Act. *See* 820 ILCS

than the common law concepts of master and servant and independent contractor. *AFM*, 198 Ill. 2d at 396-97 ("Thus, a person who is regarded at common law as an independent contractor may nonetheless be considered an employee under the Act."); *Jack Bradley, Inc. v. Department of Employment Security*, 146 Ill. 2d 61, 74 (1991).

¶ 29 Section 212 of the Act excuses an employing unit from the requirement to make contributions if it engages the services of an independent contractor. 820 ILCS 405/212 (West 2012). The party seeking to invoke this exception is held to a strict burden of proof (*AFM*, 198 Ill. 2d at 397-98) to demonstrate three elements: 1) the worker in question "has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact"; 2) "[s]uch service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed"; and 3) "[s]uch individual is engaged in an independently established trade, occupation, profession, or business" (820 ILCS 405/212(A),(B),(C) (West 2012)). These elements are conjunctive, so the employing unit will be subject to the Act if it fails to establish even one of them. *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 355 (2002); *Jack Bradley*, 146 Ill. 2d at 75. The labels used by an employing unit to describe its relationship with its workers are not controlling, and the terms of the Act must be construed liberally in favor of inclusion. *Carpetland U.S.A.*, 201 Ill. 2d at 355.

¶ 30 In administrative review appeals, we review the agency's decision, not the trial court's. *C.R. England, Inc., v. Department of Employment Security*, 2014 IL App (1st) 122809 at ¶ 40. Our standard of review depends on whether the appeal presents an issue of law, an issue of fact,

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405/204 (West 2012).

or a mixed question of law and fact. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill.2d 191, 205 (1998). A mixed question of law and fact is presented when the court is asked to examine "the legal effect of a given set of facts." *City of Belvidere*, 181 Ill. 2d at 205. Bayer's appeal from the Director's determination that the roadside service drivers were not independent contractors under section 212 of the Act presents a mixed question of law of fact. *Carpetland U.S.A.*, 201 Ill. 2d at 369 (2002). A reviewing court evaluates an agency's decision presenting a mixed question of law and fact under the clearly erroneous standard, which provides some deference to the agency's experience and expertise. *City of Belvidere*, 181 Ill. 2d at 205. Under the clearly erroneous standard of review, we will not reverse the Director's decision unless, after examining the entire record, we are " 'left with the definite and firm conviction that a mistake has been committed.' " *AFM*, 198 Ill. 2d at 395 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

¶ 31 The Director concluded that Bayer failed to establish any of section 212's three elements. The trial court affirmed the Director's decision, but addressed only Bayer's failure to prove the third element. We agree with the Director and the trial court that Bayer failed to establish the third element in that it failed to prove that its drivers were "engaged in an independently established trade, occupation, profession, or business," so we need not address the parties' arguments regarding the other elements of section 212. See *AFM*, 198 Ill. 2d at 398 (declining to address the first and second elements of section 212 because the appellant failed to prove the third element); *Jack Bradley*, 146 Ill. 2d at 76-77 (same); *SMRJ, Inc. v. Russell*, 378 Ill. App. 3d 563, 573-74 (2007) (same).

¶ 32 The Administrative Code (Code) explains that the phrase " '[e]ngaged in an independently established trade, occupation, or business' within the meaning of [section 212's

third element] means that the individual has a proprietary interest in the business that he or she can sell, give away or operate without hinderance from any other party." 56 Ill. Adm. Code 2732.200(e) (2013). We must consider "the business reality or totality of circumstances," and, while no single factor is determinative, the Code lists 13 factors that indicate that an individual is engaged in an independently established trade, occupation, profession, or business. 56 Ill. Adm. Code 2732.200(e) (2013).

¶ 33 The first factor is whether the "individual's interest in the business is not subject to cancellation or destruction upon severance of the relationship." 56 Ill. Adm. Code 2732.200(e)(1) (2013). Bayer argues that this factor weighs in its favor because the drivers were free under the independent contractor agreements to contract directly with the insurance companies, automobile clubs, and even Bayer's competitors while their contracts with Bayer remained in effect. Nevertheless, as the Director's decision noted, the restrictive covenants that the drivers signed provided that, upon the conclusion of their relationship with Bayer, the drivers had to obtain Bayer's written approval prior to "engag[ing] in the Road side [*sic*] service business in any way" or "engag[ing] in any other activities in competition with [Bayer] * * * in any geographical location in which [Bayer] as of the termination date either conducts or plans to conduct business." Even if the drivers could be said to have been operating independent trades or businesses apart from their work with Bayer, the restrictive covenants effectively ensured the destruction of those enterprises at the conclusion of the parties' relationship. The presence of a restrictive covenant, even absent evidence of enforcement, strongly supports the Director's decision and suggests an employment relationship rather than an independent contractor relationship. See *Ross v. Cummins*, 7 Ill. 2d 595, 600 (1956) (existence of oral noncompetition agreement supported the Director of Labor's decision that appellant's salesmen were not

independent contractors under section 212 of the Act). This first factor accordingly weighs against Bayer's argument.

¶ 34 The second factor is whether "[t]he individual has an investment of capital and owns the capital goods of the business enterprise." 56 Ill. Adm. Code 2732.200(e)(2) (2013). Bayer argues that the drivers' capital investment consisted of their vehicles, insurance, tools, and unreimbursed expenses. The Director responds by asserting that at $13 per service call, it would be unlikely that any of the drivers purchased a vehicle or automobile insurance specifically for their work with Bayer. As for the tools, the Director argues that the "Tool Account Agreements," through which many of the drivers obtained their equipment, more accurately resembled leases than sales because the drivers were partially reimbursed upon returning the tools to Bayer. The Director's decision noted that Bayer's drivers could lease all of their tools from Bayer and have no capital investment. Nevertheless, it appears that the drivers had at least some capital investment in their work by virtue of paying their own expenses and purchasing or renting the equipment that was necessary to complete service calls.

¶ 35 The third factor is whether "[t]he individual gains the profits and bears the losses of the business enterprise." 56 Ill. Adm. Code 2732.200(e)(3) (2013). Bayer argues that the clause in the independent contractor agreements obligating the drivers to "indemnify and defend [Bayer] *** for any damages *** or other losses that arise out of the performance of Contractor's services" shows that the drivers bore any losses under their contracts with Bayer. The Director takes the position that this clause is of no moment because, even as Bayer's employees, the drivers could be sued in their personal capacities if their conduct caused injury or damage to a customer. Bayer additionally argues that its drivers bore the gains and losses of their enterprises because they were not reimbursed for expenses, thereby making it more profitable for the drivers

to complete their service calls efficiently. The Director responds that the drivers earned a flat fee per service call and did not share in Bayer's profits or losses. It appears that the drivers bore the profits and losses of their work by virtue of being incentivized under the independent contractor agreements to work efficiently and accept service calls that would minimize travel time and out-of-pocket expenses. Nevertheless, as the Director's decision observed, there was no evidence presented suggesting that the drivers were in a position to negotiate with Bayer regarding their compensation, something one might expect to see if the drivers were truly absorbing the profits and losses of their own independently established trades, occupations, professions, or businesses.

¶ 36 Bayer concedes that there is no evidence to support the fourth through seventh factors: that "[t]he individual makes his or her services available to the general public or the business community on a continuing basis"; that "[t]he individual includes the individual's services on a Federal Income Tax Schedule as an independent business or profession"; that "[t]he individual performs services for the employing unit under his or her own business name"; and that "[t]he individual has a shop or office of his or her own." 56 Ill. Adm. Code 2732.200(e)(4-7) (2013).

¶ 37 The eighth factor is whether "[t]he employing unit does not represent the individual as an employee of the firm to its customers." 56 Ill. Adm. Code 2732.200(e)(8) (2013). The parties agree that there is no evidence that Bayer represented to its customers that the drivers were employees. This factor accordingly supports Bayer's argument.

¶ 38 The ninth factor is whether "[t]he individual hires his or her own helpers or employees, without the employing unit's approval, pays them without reimbursement from the employing unit, and reports their income to the Internal Revenue Service." 56 Ill. Adm. Code 2732.200(e)(9) (2013). The tenth factor is similar: whether "[t]he individual has an account number with the Agency and reports the wages of his or her workers monthly or quarterly, as the

case may be, to the Agency." 56 Ill. Adm. Code 2732.200(e)(10) (2013). Bayer admits that there is no evidence that the drivers did any of these things.

¶ 39 The eleventh factor is whether "[t]he individual has the right to perform similar services for others on whatever basis and whenever he or she chooses." 56 Ill. Adm. Code 2732.200(e)(11) (2013). The independent contractor agreements allowed the drivers to contract with other roadside service companies during their affiliation with Bayer, a consideration that weighs in favor of Bayer. Nevertheless, as the Director's decision noted, the restrictive covenants precluded the drivers from working in the roadside service industry upon the conclusion of their relationship with Bayer. This demonstrates that the drivers did not have the right to perform similar services for others on whatever basis and whenever they chose and supports the Director's decision.

¶ 40 The twelfth factor is whether "[t]he individual maintains a business listing in the telephone directory or in appropriate trade journals." 56 Ill. Adm. Code 2732.200(e)(12) (2013). Bayer presented no evidence that its drivers advertised their services in telephone directories, trade journals, or in any other medium, so this factor also supports the Director's decision. The final factor is whether, "[i]f the services require a license, the individual has obtained and paid for the license in his or her own name." 56 Ill. Adm. Code 2732.200(e)(13) (2013). The drivers were not required to obtain any special licenses to perform roadside assistance, so this factor is irrelevant.

¶ 41 After considering the factors identified in the Code, we are not " 'left with the definite and firm conviction that a mistake has been committed' " (*AFM*, 198 Ill. 2d at 395 (quoting *United States Gypsum Co.*, 333 U.S. at 395)) when the Director determined that the drivers were not "engaged in an independently established trade, occupation, profession, or business." 820

ILCS 405/212(C) (West 2012). While the drivers had some capital investment in their work and recognized gains or suffered losses according to their choices of which service calls to accept, there was no evidence that the drivers operated under business names, advertised their services, hired workers, or at any time performed similar work for other companies. Additionally, the restrictive covenants that the drivers signed effectively forced them out of the industry upon the conclusion of their engagement with Bayer. The Director properly considered the business realities and the totality of the circumstances in determining that Bayer did not maintain independent contractor relationships with its drivers.

¶ 42 Bayer nevertheless argues that the Director imposed an incorrect burden on it by requiring it to show that the drivers took affirmative steps to establish their own businesses. Bayer insists that the Director instead should have focused on whether the drivers *were capable* of engaging in an independently established trade, occupation, profession, or business. Bayer contends that the Director therefore committed a mistake of law that this court should review *de novo*. Bayer argues that the drivers were capable of satisfying many of the factors listed in the Code because Bayer did not specifically prohibit the drivers from engaging in an independent business or trade.

¶ 43 We reject Bayer's argument that we must review any portion of the Director's decision *de novo*. As previously stated, this case involves a mixed question of law and fact because it requires us to examine "the legal effect of a given set of facts." *City of Belvidere*, 181 Ill. 2d at 205. We accordingly apply the clearly erroneous standard of review. *City of Belvidere*, 181 Ill. 2d at 205.

¶ 44 The Director properly evaluated the facts in accordance with well-established legal principles. "[T]he test for an independently established business under section 212(C) is that the

employee's 'business' be capable of operation without hindrance from any other individual," which requires that "the employee's entrepreneurial enterprise must enjoy a 'degree of economic independence such that the enterprise could survive any relationship with the particular person contracting for services.' " *AFM*, 198 Ill. 2d at 400-401 (2001) (quoting *Jack Bradley*, 146 Ill. 2d at 78); see also *SMRJ*, 378 Ill. App. 3d at 574 ("The focus of the relevant inquiry is whether the individual workers had businesses or occupations which were capable of operation independent of a relationship with the employing unit."). The Code required the Director to consider "the business reality or totality of circumstances" when addressing the 13 factors relevant to the third element of section 212. 56 Ill. Adm. Code 2732.200(e) (2013). Whether Bayer's drivers actually hired their own workers or advertised their services, for example—as opposed to whether the drivers theoretically could do these things in the sense that they were not prohibited from doing so—are relevant and appropriate inquiries because they reflect the business reality of Bayer's arrangement with its drivers. See *Jack Bradley*, 146 Ill. 2d at 76 ("Under the Act, we are concerned with economic realities.").

¶ 45 In further support of its position, Bayer urges this court to embrace the reasoning of the Supreme Judicial Court of Massachusetts in *Athol Daily News v. Board of Review of the Division of Employment & Training* (786 N.E.2d 365 (Mass. 2003)). In *Athol*, the court held that certain newspaper carriers were independent contractors rather than employees for purposes of eligibility for unemployment benefits. *Athol*, 786 N.E.2d at 367. Massachusetts used a tri-part test similar to the Illinois test in section 212 to evaluate whether a worker was an independent contractor, the third element being: "such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." Mass. Gen. Laws ch. 151A §2(c). The agency in *Athol* cited *AFM* to

support its conclusion that the newspaper carriers did not meet this third element because they did not "have a proprietary interest in their delivery services to the extent that [they could] operate without a hindrance from any individual or force whatsoever." *Athol*, 786 N.E.2d at 372. The court rejected this legal standard as being "far too stringent," choosing instead to consider "whether the service in question could be viewed as an independent trade or business because the worker is capable of performing the service to anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services." *Athol*, 786 N.E.2d at 373. In the court's view, whether the carriers actually advertised their delivery services, for example, was irrelevant so long as the carriers were free to do so if they desired. *Athol*, 786 N.E.2d at 374.

¶ 46 Contrary to Bayer's assertion that *Athol* is consistent with Illinois law, the court in *Athol* rejected the standards set by our own supreme court in *AFM* as being "far too stringent." *Athol*, 786 N.E.2d at 373. The facts of *Athol* are readily distinguishable from the facts of the instant case. Unlike the carriers in *Athol*, Bayer's drivers were not paid directly by customers and did not set the prices that the customers paid. *Athol*, 786 N.E.2d at 368. Nor were the carriers in *Athol* subject to a restrictive covenant upon the termination of their engagement with the newspaper.

¶ 47 We also reject Bayer's attempt to analogize its drivers to the carpet installers who were deemed to be independent contractors in *Carpetland U.S.A.* Carpetland, a carpet retailer, informed its customers that it did not provide installation services and that it would subcontract any installation work to installers. *Carpetland U.S.A.*, 201 Ill. 2d at 365. The price of installation was subject to negotiation between Carpetland and the installers, and the installers contacted customers directly to arrange the timing of the installation. *Carpetland U.S.A.*, 201 Ill.

2d at 365. The installers provided their own tools; the only material that Carpetland provided to the installers was the carpeting or other flooring that the customer had purchased. *Carpetland U.S.A.*, 201 Ill. 2d at 366. Carpetland offered no training to the installers and did not restrict their ability to contract with Carpetland's competitors. *Carpetland U.S.A.*, 201 Ill. 2d at 366. Carpetland did, however, require its installers to guarantee their work for one year, so the installers bore the expense of any necessary repair work. *Carpetland U.S.A.*, 201 Ill. 2d at 366-67. In addition to its retail sales, Carpetland solicited bids from installers for commercial work and new construction. *Carpetland U.S.A.*, 201 Ill. 2d at 367. Carpetland also presented evidence that some of its installers operated under business names, hired their own employees, and maintained warehouses. *Carpetland U.S.A.*, 201 Ill. 2d at 356-58. Some of the installers even had their own accounts with the Department, filed corporate tax returns, had their own business cards, and advertised in newspapers and the yellow pages. *Carpetland U.S.A.*, 201 Ill. 2d at 358.

¶ 48 We disagree that there are any noteworthy similarities between its drivers and the installers in *Carpetland U.S.A.* Bayer's drivers were more like the product demonstrators who were held to be employees in *Jack Bradley*. Jack Bradley was a company engaged in advertising and public relations, and part of its business involved supplying vendors and retailers with food demonstrators to offer product samples to customers in supermarkets. *Jack Bradley*, 146 Ill. 2d at 66. Vendors and retailers contacted Jack Bradley requesting product demonstrators, and Jack Bradley facilitated the request by contacting individuals from a list of 200 to 250 available demonstrators. *Jack Bradley*, 146 Ill. 2d at 67-68. Before being placed on this list, the demonstrators signed an independent contractor agreement acknowledging that they were independent contractors who maintained "sole control of the manner and means of performing their services." *Jack Bradley*, 146 Ill. 2d at 68. The contracts established a standard hourly rate

of pay and provided that either party could terminate the contract with written notice. *Jack Bradley*, 146 Ill. 2d at 68. The demonstrators were free to decline jobs, and there was no penalty for doing so. *Jack Bradley*, 146 Ill. 2d at 68. If a demonstrator accepted a job, Jack Bradley provided the demonstrator with a written confirmation slip containing information about the job such as where to report and whom to contact. *Jack Bradley*, 146 Ill. 2d at 68.

¶ 49 At the supermarket, the vendors decided whether the demonstrator needed to perform an inventory check in order to count the number of products on hand. *Jack Bradley*, 146 Ill. 2d at 69. The vendors or retailers provided the demonstrators with necessary equipment and instructions concerning presentation, set-up, food preparation, and serving. *Jack Bradley*, 146 Ill. 2d at 69. Jack Bradley did not provide the demonstrators with any training, but did sometimes forward information to the demonstrators that it had received from the vendors. *Jack Bradley*, 146 Ill. 2d at 69. When the demonstrators finished their work, they recorded their time and ending inventory on sheets that were sent to Jack Bradley. *Jack Bradley*, 146 Ill. 2d at 70.

¶ 50 One of the demonstrators testified that she had occasionally been contacted directly by vendors to do demonstration work. *Jack Bradley*, 146 Ill. 2d at 70-71. She testified that she received a 1099 from Jack Bradley at the end of the year and that she did not indicate on her tax return that she operated a business. *Jack Bradley*, 146 Ill. 2d at 71-72. Additionally, there was testimony that it was not uncommon for demonstrators to work with companies similar to Jack Bradley or directly for the vendors. *Jack Bradley*, 146 Ill. 2d at 71.

¶ 51 Based on this evidence, the supreme court affirmed the Director's decision that the demonstrators were not independent contractors for purposes of section 212 of the Act. *Jack Bradley*, 146 Ill. 2d at 81. The court limited its analysis to the third element of section 212, explaining that "[t]he focus of any inquiry should *** be upon whether Bradley, Inc's food

demonstrators had businesses or occupations which were capable of operation independent of a relationship with Bradley, Inc. or other such 'demo' companies, *i.e.*, operations directly with vendors." *Jack Bradley*, 146 Ill. 2d at 80. The court found it significant that Jack Bradley, rather than the individual demonstrators, provided the written contacts and determined the rate of pay. *Jack Bradley*, 146 Ill. 2d at 80. The court also found it important that the demonstrators completed time sheets that were provided by Jack Bradley. *Jack Bradley*, 146 Ill. 2d at 80. Moreover, the testimony that some of the demonstrators worked for other demonstration companies or even directly for the vendors was "considerably offset" by the admission of the only demonstrator to testify that she claimed no business deductions and only filed a short tax form. *Jack Bradley*, 146 Ill. 2d at 79-80. The court concluded that the demonstrators had no proprietary interests in any demonstration business and that there was no evidence that the demonstrators were able to operate on their own without the benefit of a company like Jack Bradley. *Jack Bradley*, 146 Ill. 2d at 80-81.

¶ 52 Similarly, the evidence here supports the Director's conclusion that Bayer's drivers were incapable of operating without the benefit of a company such as Bayer. Like Jack Bradley, Bayer was in the business of connecting customers with workers who could provide the services that the customers required. Like Jack Bradley, Bayer maintained a list of capable workers and contacted the workers when job opportunities arose, opportunities that the workers were free to accept or reject without consequence. Indeed, Bayer's viability as a business depended on the need for an intermediary between the customers and the workers. The case against independent contractor status is even more compelling here than in *Jack Bradley* because there was no evidence that Bayer's drivers ever worked for competitors or contracted with insurance

companies or automobile clubs directly. Nor were the demonstrators in *Jack Bradley* limited by a restrictive covenant.

¶ 53 Accordingly, we hold that the Director's determination that Bayer's drivers were employees for purposes of the Act was not clearly erroneous.

¶ 54 B. The Monetary Judgments

¶ 55 Bayer additionally appeals from the trial court's January 31, 2013, order[4] entering two monetary judgments against it. Bayer argues that these judgments were entered in error because it proved that its drivers were independent contractors under section 212 of the Act. We reject Bayer's argument because we have already concluded that the Director's decision regarding the drivers' employment status was not clearly erroneous.

¶ 56 Alternatively, Bayer asks us to reverse the monetary judgments or remand for a new hearing to require the trial court to provide a breakdown of principal, interest, and penalties due. As an initial matter, the record on appeal does not include the trial court's January 31, 2013, order, Bayer's motion in this court for leave to file an amended notice of appeal, our order granting Bayer's motion, or the amended notice of appeal. Contrary to Bayer's assertion that we may consider documents included in the appendix to its brief, Bayer may not supplement the record on appeal through an appendix or by attaching documents to its brief. *Scepurek v. Board*

[4] Although not disputed by the parties, we note that the trial court retained jurisdiction to enter monetary judgments even after Bayer had filed its notice of appeal from the court's December 13, 2012, order affirming the Director's decision. *Illinois Health Maintenance Organization Guaranty Ass'n v. Shapo*, 357 Ill. App. 3d 122, 141 (2005) (trial court retained jurisdiction to enter monetary judgments after notices of appeal filed from orders affirming an administrative decision because the monetary judgments were incidental to the prior orders).

of Trustees of Northbrook Firefighters' Pension Fund, 2014 IL App (1st) 131066 at ¶ 1. The documents that are not included in the record on appeal, including the trial court's January 31, 2013, order, are not properly before this court. *Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 14 (2009).

¶ 57 Additionally, Bayer has forfeited any objection to the propriety of the January 31, 2013, order by failing to provide us with a transcript of the hearing, a bystander's report, or even a response brief filed in the trial court demonstrating its objection to the motion for monetary judgments or its proposal of an alternate calculation of the amounts owed. Bayer, as the appellant, bears the burden to "present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 58 Finally, Bayer failed to support its argument with citation to legal authority in accordance with Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). "Arguments without citation to authority do not merit consideration on appeal." *Yamada Corp. v. Yasuda Fire and Marine Insurance Co., Ltd.*, 305 Ill. App. 3d 362, 371 (1999). Therefore, Bayer has forfeited any arguments challenging the propriety of the monetary judgments.

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated, we affirm the decisions of the Director and the circuit court of Du Page County.

¶ 61 Affirmed.