WORKERS' COMPENSATION BOARD
ABUSE INVESTIGATION UNIT
(Appellee)

v.

WILFRED MORRISSETTE d/b/a LA CAB SERVICE
(Appellant)

Conference held: March 19, 2014
Decided: June 23, 2014

PANEL MEMBERS: Hearing Officers Jerome, Goodnough and Stovall
By: Hearing Officer Stovall

[¶1] Wilfred Morrisette, d/b/a LA Cab Service, appeals from a decision of a Workers' Compensation Board hearing officer (*Dunn, HO*), imposing a civil penalty of $10,000 on him pursuant to 39-A M.R.S.A § 324(3)(B) (Supp. 2013).[1] On appeal, Mr. Morrissette contends that the Abuse Investigation Unit (AIU) did not meet its burden to demonstrate that his transportation business had any

[1] Title 39-A M.R.S.A. § 324(3)(B) provides, in pertinent part:

> **3. Failure to secure payment.** If any employer who is required to secure the payment to that employer's employees of the compensation provided for by this Act fails to do so, the employer is subject to the penalties set out in paragraphs A, B and C. The failure of any employer to procure insurance coverage for the payment of compensation and other benefits to the employer's employees in compliance with sections 401 and 403 constitutes a failure to secure payment of compensation within the meaning of this subsection.
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> **B.** The employer is liable to pay a civil penalty of up to $10,000 or an amount equal to 108% of the premium, calculated using Maine Employers' Mutual Insurance Company's standard discounted standard premium, that should have been paid during the period the employer failed to secure coverage, whichever is larger, payable to the Employment Rehabilitation Fund.

employees during the period from January 1, 2009, through December 31, 2012, and therefore, the hearing officer erred when determining that he was required to secure the payment of workers' compensation in conformity with 39-A M.R.S.A. § 401 (2012).[2] We conclude that the record contains competent evidence sufficient to establish that Mr. Morrissette did have employees, and we affirm the hearing officer's decision.

I. BACKGROUND

[¶2] The board held an evidentiary hearing in this matter on May 7, 2013. Brian Small, a friend of Mr. Morrissette's, testified on his behalf as follows. Mr. Morrissette owns and operates LA Cab Service, a sole proprietorship doing business as a taxi service. He started the business in 2009 with one registered cab, which he owned and operated exclusively. Between 2010 and 2012, the business registered five additional vehicles that were operated by at least six drivers pursuant to a written "Taxicab Lease." Pursuant to the agreement, the drivers would pay LA Cab Service $6.00 per hour to lease a vehicle, and the drivers would otherwise keep all fares they collected. LA Cab Service did not maintain payroll records. None of the drivers worked for other cab companies and Mr. Small

[2] Title 39-A M.R.S.A. § 401 has since been amended. P.L. 2011, ch. 643 (effective Dec. 31, 2012). The applicable version of the statute, found at 39-A M.R.S.A. § 401 (Supp. 2012), provides, in pertinent part: "Every private employer is subject to this Act and shall secure the payment of compensation in conformity with this section and sections 402 to 407 with respect to all employees[.]"

acknowledged that that the lease did not provide for any penalty if a driver did not finish work, and the lease could be terminated at will by either party.

[¶3] During the period at issue, LA Cab Service paid $700 per month to rent a garage with an attached office for use as the business headquarters. The business operated 24 hours per day. In exchange for leasing the taxi to a driver at $6.00 per hour, LA Cab Service housed the vehicles and paid the office utilities as well as the phone bill, which averaged between $780-$800 per month and included dispatch services. LA Cab also licensed, registered, inspected, and insured all the vehicles, and maintained them in good running condition. At the start of each shift, LA Cab Service provided taxis with a full tank of gas and cellular walkie-talkie phones with GPS systems to the drivers. The drivers kept the fares they collected, purchasing additional fuel throughout the day as necessary, and returned the taxi with a full tank at the end of the shift.

[¶4] Mr. Morrissette's unsigned 2010 federal income tax return, specifically Schedule C, shows that his taxi and taxi leasing service took in $97,856.83 in gross income, and that from this revenue Mr. Morrissette deducted the expenses related to the operation of five vehicles he used for the business that year. The tax return indicates he paid $50,660 for repairs, parts, and labor for the company taxis, $7,707 for gasoline and oil, $13,293 for insurance, and $5,852 for taxicab lettering and paint.

[¶5] The hearing officer found that an employer-employee relationship existed between LA Cab Service and at least six individuals working between 2009 and 2012. Because Mr. Morrissette admittedly had not secured payment of workers' compensation for these employees, the hearing officer imposed a civil penalty of $10,000 for violating the provisions of the Act requiring that employers have workers' compensation coverage on their employees. See 39-A M.R.S.A. § 324(3)(B). Mr. Morrissette appeals.

II. DISCUSSION

[¶6] Mr. Morrissette contends that the hearing officer erred when finding that six of his drivers were employees and that he was required to secure the payment of workers' compensation for those individuals from 2009 through 2012.

A. Standard of Review

[¶7] The role of the Appellate Division on appeal is "limited to assuring that the "[hearing officer's] factual findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted).

B. Employees v. Independent Contractors

[¶8] The Act defines the term "employee" as "every person in the service of another under any contract of hire, express or implied, oral or written, except: . . . (7) An independent contractor." 39-A M.R.S.A § 102(11)(A)(7) (Supp. 2013). "Independent contractor" means "a person who performs services for another under contract, but who is not under the essential control or superintendence of the other person while performing those services." *Id*. § 102(13) (Supp. 2012).[3]

[3] Title 39-A M.R.S.A. § 102(13) (Supp. 2012) has since been repealed and replaced. P.L. 2011, ch. 643, §§ 7, 8 (effective January 1, 2013, codified at 39-A M.R.S.A. § 102(13-A) (Supp. 2013)). The Hearing Officer properly applied the statute that was in effect prior to January 1, 2013. The applicable statute further provides:

> In determining whether such a relationship exists, the board shall consider the following factors:
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> > **A.** Whether or not a contract exists for the person to perform a certain piece or kind of work at a fixed price;
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> > **B.** Whether or not the person employs assistants with the right to supervise their activities;
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> > **C.** Whether or not the person has an obligation to furnish any necessary tools, supplies and materials;
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> > **D.** Whether or not the person has the right to control the progress of the work, except as to final results;
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> > **E.** Whether or not the work is part of the regular business of the employer;
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> > **F.** Whether or not the person's business or occupation is typically of an independent nature;
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> > **G.** The amount of time for which the person is employed; and
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> > **H.** The method of payment, whether by time or by job.
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> In applying these factors, the board may not give any particular factor a greater weight than any other factor, nor may the existence or absence of any one factor be decisive. The board shall consider the totality of the relationship in determining whether an employer exercises essential control or superintendence of the person.

[¶9] LA Cab Service contends that the "Taxicab Lease" that states that drivers are independent contractors constitutes conclusive proof that they were not employees. However, employment status is not governed by how the parties choose to characterize their relationship in advance. How the parties frame their relationship in terms of written agreements or tax forms is secondary to whether the relationship in fact resembles that of employer-employee rather than employer-independent contractor. *Timberlake v. Frigon & Frigon*, 438 A.2d 1294, 1298 (Me. 1982).

[¶10] LA Cab Service also asserts that because the drivers had full control over which fares they accept and the hours they drive, the hearing officer was bound to conclude that drivers were independent contractors. We disagree. The hearing officer found the following facts, established in the record, which support his determination that LA Cab Service's drivers were employees and not independent contractors: the drivers did not supply their own vehicle, *see* 39-A M.R.S.A. § 102(13)(C); the drivers did not pay for repairs or maintenance for the vehicles, *id.*; the drivers did not obtain insurance for the vehicles and LA Cab did not permit them to operate its vehicles without being on the company's insurance policy, *id.*; LA Cab supplied the drivers with a cell phone and GPS system, *id*; the drivers were not permitted to hire an assistant to drive their vehicle, *see id.*

§ 102(13)(B); and LA Cab Service is in the regular business of providing taxi services to customers, *see id.* § 102(13)(E).

[¶11] The record further establishes that no contract existed for the drivers to perform a certain piece or kind of work at a fixed price for LA Cab Service, *see id.* § 102(13)(A). Although Mr. Small asserted that the lease is a contract similar to a leasing contract with a car rental company, the "Taxicab Lease" is for an unspecified period of time, neither indicates a fixed price for the work to be performed nor requires that the parties give notice for termination, and the lease contains no consequences for breach. *See Murray's Case*, 130 Me. 181, 186-188, 154 A. 352 (1931) (stating that an independent contractor relationship "presupposes the existence of a binding contract between the parties, for the breach of which a cause of action arises"). *See also West v. C.A.M. Logging*, 670 A.2d 934, 937-38 (Me. 1996) (holding that logger was an employee because: logging company supplied the truck he operated; there was no written contract to perform a discrete job; logger was paid by cord of wood hauled as opposed to by job; logging was integral part of company's business; logger was not permitted to hire assistants; and company had the right to control logger's performance).

III. CONCLUSION

[¶12] There is competent evidence in the record to support the hearing officer's determination that the drivers leasing taxis from Wilfred Morrissette d/b/a

LA Cab Service during the period from January 1, 2009, through December 31, 2012, were employees and not independent contractors. The hearing officer did not err when determining that Mr. Morrissette d/b/a LA Cab Service was in violation of the Workers' Compensation Act for failing to secure payment of workers' compensation and is subject to the penalties set forth in § 324(3) of the Act.

The entry is:

The hearing officer's decision is affirmed.

Any Party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2013).

Appellant:
Wilfred Morrissette
d/b/a LA Cab Service
28 ½ Riverside Drive
Auburn, ME 04210

Attorneys for Appellee:
Seanna Crasnick, Esq.
Matthew Marett, Esq.
Abuse Investigation Unit
Workers' Compensation Board
27 State House Station
Augusta, ME 04333