WORKERS' COMPENSATION BOARD
ABUSE INVESTIGATION UNIT
(Appellee)

v.

ERIC RING d/b/a LINCOLN SHUTTLE
(Appellant)

Argued: September 4, 2013
Decided: January 9, 2014

Panel Members: Hearing Officers Pelletier, Jerome and Greene
By: Hearing Officer Pelletier

[¶1] Eric Ring, d/b/a Lincoln Shuttle, appeals from a decision of a Workers' Compensation Board hearing officer (*Dunn, HO*), imposing a civil penalty of $2,500 on him pursuant to 39-A M.R.S.A § 324(3) (Supp. 2012).[1] On appeal, Mr. Ring contends that the Abuse Investigation Unit (AIU) did not meet its burden to

[1] Title 39-A M.R.S.A. § 324 (3) 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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> . . . .
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> **B.** The employer is liable to pay a civil penalty of up to $10,000 or any amount equal to 108% of the premium, calculated using Maine Employers' Mutual Insurance Company's standard discounted premium, that should have been paid during the period the employer failed to secure coverage, whichever is larger, payable to the Employment Rehabilitation Fund."

demonstrate that his transportation business had any employees and thus, the hearing officer erred when determining that he was required to secure the payment of workers' compensation pursuant to 39-A M.R.S.A. §§ 401, 403 (2001).[2] We conclude that the record contains competent evidence that is sufficient to establish that Mr. Ring did have employees, and we affirm the hearing officer's decision to impose a penalty.

I. BACKGROUND

[¶2] At the evidentiary hearing in this matter held on September 10, 2012, Mr. Ring testified that he is the owner and only employee of an unincorporated, sole-proprietorship doing business as Lincoln Shuttle, which, according to its advertising, provides both shuttle and courier services. Although one of the vehicles used in the business is registered to Eric Ring d/b/a "Lincoln Taxi," Mr. Ring testified that the majority of his customers use his courier service, and unlike taxi services, they pay a monthly fee for the transportation services he provides.

[¶3] Mr. Ring acknowledged that when he is unavailable, he uses two other drivers, Martin Tibbetts and Nicolas Tait, to meet his customers' transportation requirements. At Mr. Ring's request, Mr. Tibbetts and Mr. Tait each executed a W-9 taxpayer identification form for the benefit of the business. The form states

[2] Title 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[.]" Title 39-A M.R.S.A. § 403 (Supp. 2012) describes the methods by which an employer can comply with section 401.

that its purpose is to obtain taxpayer identification numbers for use when informing the IRS how much money a company has paid to persons or entities, for example, for services rendered. Mr. Ring did not permit a third potential driver who refused to sign and deliver a W-9 form to drive for the business.

[¶4] There are three vehicles registered to the business, and Mr. Tibbetts and Mr. Tait are listed as insured drivers on Mr. Ring's commercial auto insurance policy. Mr. Ring initially testified that Mr. Tibbetts and Mr. Tait were not compensated in any way for their driving work. Instead, he characterized them as unpaid volunteers. However, Mr. Ring amended this testimony to state that the two drivers were self-employed. Based on legal advice, Mr. Ring apparently believed that the W-9 tax forms conclusively established that the two additional drivers were not his employees, and that he was not required to secure payment of workers' compensation for them.

[¶5] Mr. Ring's 2011 federal income tax return, specifically Schedule C, shows that Mr. Ring's shuttle service took in $57,098 in gross income, and that from this revenue Mr. Ring deducted the expenses related to the operation of the three vehicles he uses for the business. In addition to depreciating the vehicles pursuant to federal tax law, the tax return suggests he paid $12,312 for gasoline, $2,049 for insurance and $4,973 for repairs and maintenance for the company vehicles.

[¶6] The hearing officer found that Mr. Ring's testimony that he had no employees was not credible, and based on the other evidence adduced at the hearing, determined that the two additional drivers were paid employees. Because Mr. Ring admittedly had not secured payment of workers' compensation for these employees, the hearing officer imposed a civil penalty of $2,500 for violating the provisions of the Act requiring that employers have workers' compensation coverage on their employees. [3]

II. DISCUSSION

[¶7] Mr. Ring contends that the hearing officer erred when finding that his two additional drivers were employees and that he was obligated to secure the payment of workers' compensation for those drivers.

A. Standard of Review

[¶8] 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). "With respect to factual determinations, the Appellate Division's review

[3] Title 39-A M.R.S.A. § 324 (3) provides for a civil penalty of up to $10,000 or an amount equal to 108% of the premium for an employer's failure to secure workers' compensation coverage for its employees. Mr. Ring has not challenged the amount of the penalty imposed.

is limited to a determination of whether the record discloses any reasonable basis to support the [hearing officer's] decision." *Id.* The hearing officer is entitled to resolve factual issues by evaluating the credibility of witnesses. *Gordon v. The Aetna Casualty & Surety Co.*, 406 A.2d 617, 619 (Me. 1979). In the role of fact finder, the hearing officer is not required to believe the testimony of any particular witness, expert or otherwise, even when the witness's testimony is uncontradicted. *See Dionne v. LeClerc*, 2006 ME 34, ¶ 15, 896 A.2d 923.

[¶9] Neither party filed a motion for additional findings of fact and conclusions of law. When there is no request for findings of fact after a hearing, the Appellate Division may infer that the hearing officer made all the findings necessary to support its determination if those findings are supported by evidence in the record. *Maietta v. Town of Scarborough*, 2004 ME 97, ¶ 17, 854 A.2d 223.

B. Employees v. Independent Contractors

[¶10] 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. 2012). "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).[4]

[¶11] Mr. Ring admitted that Mr. Tibbetts and Mr. Tait worked for him occasionally as drivers, but pointed to the W-9 tax forms they signed as proof that they were not his employees. However, employment status is not governed by how the parties choose to characterize their relationship in advance. In *Timberlake v. Frigon & Frigon*, 438 A.2d 1294 (Me. 1982), the Law Court observed that how the

[4] Title 39-A M.R.S.A. § 102(13) (Supp. 2012) has since been amended. P.L. 2011, ch. 678, §§ C-9, C-10 (effective August 31, 2012). 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.

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. *Id*. at 1298. The Court noted that withholding practices for tax purposes may simply reflect an attempt to avoid responsibility for providing workers' compensation coverage or other legal obligations. *Id*.

[¶12] The following facts, established in the record, support the hearing officer's determination that the Lincoln Shuttle 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 gas or maintenance for the vehicles, *id.*; the drivers did not obtain insurance for the vehicles used in the business but were listed as drivers on Lincoln Shuttle's policy, *id.*; and Lincoln Shuttle is in the business of providing transportation services to customers, *see id.* § 102(13)(E). The record further establishes that the drivers performed services for Lincoln Shuttle under a contract for hire. 39-A M.R.S.A. § 102(11)(A)(7). Although Mr. Ring first asserted that the drivers were volunteers, he later testified that they were self-employed. It was reasonable for the hearing officer to infer that they were paid for their services because they provided the W-9 form—for use by Lincoln Shuttle to report payments it made to the drivers to the Internal Revenue Service.

[¶13] Additionally, because Mr. Tibbetts and Mr. Tait operated a van and small trucks to transport items and provide courier services for Lincoln Shuttle, 39-A M.R.S.A. § 114 (Supp. 2012) may also have applied when determining the nature of their relationship with the business.[5]

[5] Title 39-A M.R.S.A. § 114 (Supp. 2012) (effective September 28, 2011), has since been repealed by P.L. 2011, ch. 643, § 10 (effective Dec. 31, 2012), but was nevertheless in effect for the majority of the time period relevant to this case. It states:

> **Independent contractor status for truckers and couriers**
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> **1. Presumption of employee status.** Notwithstanding section 102, subsection 13, the operator of a motor vehicle engaged in the business of freight transportation or courier and messenger services is considered an employee unless all of subsection 2 applies or the operator is able to provide proof of coverage by a valid workers' compensation insurance policy; in either of which case, the operator is considered an independent contractor. For purposes of this section, "motor vehicle" means a van, truck or truck tractor used for freight transportation or courier and messenger services.
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> **2. Factors to determine independent contractor status.** An operator of a motor vehicle is considered an independent contractor in the business of freight transportation or courier and messenger services if the operator:
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> **A**. Owns the motor vehicle or holds it under a bona fide lease agreement;
> **B.** Is responsible for the maintenance of the motor vehicle;
> **C.** Is responsible for substantially all of the principal operating expenses of the motor vehicle, including without limitation fuel, repairs, supplies and insurance. The operator may be reimbursed, including prospectively, for the operator's fuel surcharge fees and incidental costs, including tolls, permits and freight handling fees, by the entity contracting with the operator;
> **D.** Is responsible for paying the operator's personal expenses;
> **E**. Is responsible for supplying the necessary services to operate the motor vehicle;
> **F.** Is compensated based on factors directly related to the work performed, such as mileage-based rates, and not solely on the amount of time expended by the operator;
> **G**. Substantially controls the means and manner of performing the services related to the business of freight transportation or courier and messenger services in conformance with the specifications of a shipper and the law; and
> **H**. Possesses a certification statement affirming that the operator whose services are being acquired meets each of the factors in paragraphs A to G and that the operator is understood to be an independent contractor and not an employee. The statement must be supplied on demand to an insurance premium auditor or the board.
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> **3. Repeal.** This section is repealed October 1, 2013.

[¶14] Section 114(1) provides that "*the operator of a motor vehicle* engaged in the business of freight transportation or courier and messenger services *is considered an employee unless all of subsection 2 applies or the operator is able to provide proof of coverage by a valid workers' compensation insurance policy* . . . ."[6] (Emphasis added.)

[¶15] Section 114(2) provides that the operator of a motor vehicle engaged in freight transportation or a courier or messenger service is considered an independent contractor if all eight of the factors listed in paragraphs (A) through (H) are satisfied. Thus, in order to meet its burden of proof that the drivers were not independent contractors, the AIU had to disprove one of the eight factors listed in section 114(2).

[¶16] The record establishes that Mr. Tibbetts and Mr. Tait (1) did not own the motor vehicles they operated for Lincoln Shuttle nor did they hold the vehicles under a bona fide lease agreement,[7] *see* 39-A M.R.S.A. § 114(2)(A); (2) they did not have responsibility for maintaining the vehicles, *see id.* § 114(2)(B); and (3) they did not pay the operating expenses including fuel, repair, and insurance expenses, *see id*. § 114(2)(C). Therefore, the AIU negated at least three of the eight

[6] There is no claim that Mr. Tait or Mr. Tibbetts had secured the payment of workers' compensation for themselves.

[7] At oral argument on appeal, Mr. Ring asserted that his accountant had drafted a lease agreement that was in use by then, but he did not claim to have a lease agreement with his two operators at the time of the hearing.

factors required to support independent contractor status for the Lincoln Shuttle drivers.[8]

III. CONCLUSION

[¶17] There is competent evidence in the record to support the hearing officer's determination that the two additional drivers were employees of Eric Ring d/b/a Lincoln Shuttle, and not independent contractors. The hearing officer did not err when determining that Mr. Ring d/b/a Lincoln Shuttle 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.[9]

The entry is:

The hearing officer's decision is affirmed.

[8] Mr. Ring appears to argue that the case brought against him lacks legitimacy because a competitor purportedly informed the AIU about his uncovered employees. However, the record demonstrates how a business that does not obtain required insurance coverage can gain an unfair advantage over its law-abiding competitors by setting rates that do not factor in the cost of compliance with the employer's legal obligations, including not only the obligation to obtain workers' compensation insurance but also obligations regarding unemployment insurance, social security withholdings, and the like.

[9] In this case, the hearing officer did not explicitly consider the section 102(13) factors or evaluate whether the AIU negated any of the eight factors necessary to rebut the presumption of employee status afforded by section 114(1). However, we determine that it is unnecessary to remand the case for further proceedings because the hearing officer's findings are supported in the record and are sufficient to support the ultimate conclusion that Mr. Tibbetts and Mr. Tait were employees pursuant to section 114(1) and section 102(11)(7). *See Bouchard v. Frost*, 2004 ME 9, ¶ 8, 840 A.2d 109 (affirming a judgment based on a rationale different than that relied on by the trial court); *see also Maietta*, 2004 ME 97, ¶ 17, 854 A.2d 223.

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. 2012).

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