MATTER CLAIM WESNER LE FEVRE v. TEL-A-CAR NEW YORK INC. ET AL.

603 N.Y.S.2d 600 (1993) | Cited 0 times | New York Supreme Court | November 10, 1993

MEMORANDUM AND ORDER

White, J.

Appeal from a decision of the Worker's Compensation Board, filed May 1, 1992, which ruled that an employer-employee relationship existed between claimant and Tel-A-Car of New York Inc.

Claimant is a franchisee of Tel-A-Car of New York Inc., which operates a two-way radio dispatch transportation service. Tel-A-Car's obligation under the franchise agreement was to provide claimant with customers seeking transportation services for which Tel-A-Car received a percentage of the fare that it established. Claimant was required to undergo training, provide and pay for all of the operating expenses of a particular type of luxury car, and was required to lease a two-way radio from Tel-A-Car. In addition, to avoid the assessment of penalties, including the loss of the franchise, claimant had to abide by a dress code, maintain a clean car, be courteous under all circumstances and comply with Tel-A-Car's rules of operation. As long as he answered 20 calls a week, claimant was free to work as he chose and was not restricted to a particular territory.

It is well established that the issue of whether an employer-employee relationship exists is a factual issue for the Workers' Compensation Board, and its determination must be upheld even though there may also be other evidence which could have supported a contrary conclusion (see, Matter of Kurzyna v Communicar Inc., 182 A.D.2d 924, 582 N.Y.S.2d 295, lv denied 80 N.Y.2d 754, 587 N.Y.S.2d 906, 600 N.E.2d 633; Matter of Valverde v New York City Dept. of Hous. Preservation & Dev., 154 A.D.2d 756, 546 N.Y.S.2d 203, lv dismissed 77 N.Y.2d 833, 566 N.Y.S.2d 585, 567 N.E.2d 979). Here, the Board predicated its determination upon the fact that claimant was required to drive a particular type of luxury car, lease a radio from Tel-A-Car, charge the fares which were set by Tel-A-Car, was not allowed to pick up fares on his own and was only allowed to answer calls dispatched by Tel-A-Car. In our view, these incidents of control are sufficient to support the Board's determination (see, Matter of Weingarten v XYZ Two Way Radio Serv., 183 A.D.2d 964, 583 N.Y.S.2d 316, lv dismissed 80 N.Y.2d 924, 589 N.Y.S.2d 311, 602 N.E.2d 1127; Matter of Kurzyna v Communicar Inc., supra; Matter of Wittenstein v Fugazy Cont. Corp., 59 A.D.2d 249, 399 N.Y.S.2d 314, lv denied 43 N.Y.2d 648).

Tel-A-Car's contention that its compliance with the State Franchise Act (General Business Law art 33) does not constitute control over claimant was not raised before the Board and cannot be considered for the first time on appeal (see, Matter of Richardson v Hetelekides, 170 A.D.2d 912, 566 N.Y.S.2d 742).

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Yesawich Jr., J.P., Mercure, Crew III and Casey, JJ., concur.

Ordered that the decision is affirmed, without costs.