

Supreme Court, Appellate Division

Third Judicial Department

Decided and Entered: January 5, 2012

511594

In the Matter of the Claim of
SANDRA JENNINGS,
Respondent,

AFFIRMED Board's ruling that there was an employee/employer relationship

v

MEMORANDUM AND ORDER

AVANTI EXPRESS, INC.,
Appellant.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: November 16, 2011

Before: Peters, J.P., Rose, Kavanagh, McCarthy and Garry, JJ.

Cherry, Edson & Kelly, L.L.P., Tarrytown (Richard L. LaRose of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York City (Marjorie S. Leff of counsel), for Workers' Compensation Board, respondent.

Garry, J.

Appeal from a decision of the Workers' Compensation Board, filed April 2, 2010, which ruled that an employer-employee relationship existed between claimant's husband and Avanti Express, Inc. and awarded claimant workers' compensation death benefits.

Claimant's husband (hereinafter decedent) died in a motor vehicle accident while working as a courier for the employer. Claimant thereafter applied for workers' compensation death

benefits, and the employer controverted the claim on the basis that decedent was an independent contractor and not an employee. Following a hearing, the Workers' Compensation Law Judge found that there was an employer-employee relationship between decedent and the employer and awarded benefits. The Workers' Compensation Board affirmed, and the employer now appeals.

Whether an employer-employee relationship exists is a factual issue to be resolved by the Board and such determination will be upheld if substantial evidence exists in the record to support it (see Matter of Duma v Baca, 83 AD3d 1228, 1228 [2011]; Matter of Brown v City of Rome, 66 AD3d 1092, 1092 [2009]; Matter of Ellingwood v Liberty Group Publ., Inc., 38 AD3d 1108, 1109 [2007]). Factors relevant to the determination of an employer-employee relationship include the right to control the alleged employee's work and set his or her schedule, the manner and method of payment, the right to discharge and the furnishing of equipment (see Matter of Duma v Baca, 83 AD3d at 1228-1229; Matter of Brown v City of Rome, 66 AD3d at 1092). The record reveals that decedent's delivery schedule was determined by the employer, and the employer provided decedent with a vehicle, an E-Z Pass for the payment of tolls and GPS device. Further, the employer required decedent to dress in a certain manner and the employer paid decedent through a payroll service on a weekly basis according to a formula devised by the employer. We thus find that the Board's determination is supported by substantial evidence, and must be affirmed, despite the existence of evidence that could support a contrary conclusion (see Matter of Duma v Baca, 83 AD3d at 1229; Matter of Enriquez v Home Lawn Care & Landscaping, Inc., 77 AD3d 1149, 1151 [2010]; Matter of Brown v City of Rome, 66 AD3d at 1093).

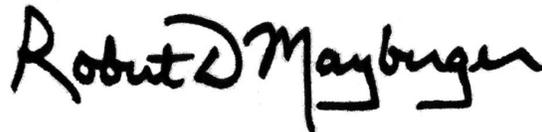
Peters, J.P., Rose, Kavanagh and McCarthy, JJ., concur.

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ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court