STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 13, 2020

IN THE MATTER OF:
Appeal Board No. 608391

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 608390 and 608391, the Commissioner of Labor appeals from the decisions of the Administrative Law Judge filed September 5, 2019, which sustained the employer's objection that the claimant and all other persons similarly situated were independent contractors and overruled the determination holding LEMUR MEDIAL LLC liable for additional contributions, effective January 1, 2018, based on remuneration paid to the claimant and to all other workers similarly situated as employees.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer and the Commissioner of Labor.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The company at issue works on an irregular basis with scenic design companies who need extra workers to help install retail store window displays. The claimant in this case was acquainted with the owner's now-former partner; he was looking for extra work and contacted the partner who told the claimant about an installation job. After helping the partner on the job, the partner referred him to the owner. During a subsequent conversation, the owner asked the claimant questions such as whether he was physically able to perform

the job, would be able to get to job sites on time, and was attentive to detail. These were the type of questions the owner routinely asked all potential workers. Once positive answers were given, the owner would send a Code of Conduct and a W-9 to the individual who would fill out and sign the W-9 and an acknowledgement of the Code.

The Code of Conduct's provisions included the following:

§ Workers were to wear functional clothing, including "non-offensive" shirts,

and were to avoid sandals, tank tops, and short shorts. At the request of Nike - a client of one of the scenic design companies - workers were not to wear a competitor's branded footwear when on a job at a Nike store.

§ Workers were to avoid using offensive language and to refrain from grumbling

about other workers or problems at the job site.

§ If the scenic design company did not provide a meal, it would reimburse the

workers for lunch; at the request of the scenic design company, workers were asked to limit their meal to $20.00

§ Workers were to show up on time and check in with the contact person from

the scenic design company.

§ Workers were expected to bring their own tool kit with them, which should

include such items as work gloves, screw drivers, a utility knife, and a tape measure.

§ When a job was complete, workers were to fill out an invoice, using a form

prepared by the company, with specified information such as the job name, the worker's name and address, the dates worked, and any overtime hours. Payment was on a flat rate, and workers would be paid within two weeks of submission of the invoice.

The owner would propose the flat rate, and the worker could either accept the

proposal or negotiate a different rate. The claimant accepted the offered flat rate of $250.00, which was paid for assignments lasting from five to 12 hours. An assignment that went more than 12 hours would result in overtime pay. An assignment that lasted less than five hours would result in a half day's pay. Workers would often be paid before the company was paid by its client and would be paid even if the client never paid the company. There was no reimbursement for tools purchased by the worker.

Generally, a scenic design companies would ask for only one or two workers. When a request came in, the owner would send text messages out to the people on his list of workers, asking if they were available. Workers could respond that they were available, or not available. After receiving a response that an individual was available, the owner would send a text message with the location, the time the job would start, and the name and telephone number of the contact person from the scenic design company. Once at the job site, all direction came from the contact person; neither the owner nor any other person from the company was present at the job site or gave any directions as how the work should be performed. When the job was complete, the worker would send a text message to the owner indicating the time of completion.

Workers were free to work for any other company. When on an assignment from this company, liability insurance was provided by the scenic design company. There was no disciplinary action taken for failing to follow any of the provisions of the Code, but depending on the infraction, for example, showing up drunk, the company would just not call that individual for future work.

OPINION: The credible evidence fails to establish that the company exercised sufficient supervision, direction, and control over the claimant and other workers to establish an employment relationship. As in Matter of Richins (Quick Change Artistry, LLC), 107 AD3d 1342 (3d Dept 2017), the company did not provide any direction on how the actual work was to be carried out and was not even present at the job site. Instead, all directions and supervision came from the company's client, the scenic design companies. In addition, workers could work for other companies and were free to turn down assignments, furnished their own supplies, and any reimbursement for meals came from the clients (see, also, Matter of John Lack, LLC, 112 AD3d 1042 [3d Dept 2013]; Matter of Lee, 127 AD3d 1389 [3d Dept 2015]; and Matter of Eiber Translations, Inc., 143 AD3d 1080 [3d Dept 1016]). Although workers had to sign a Code of Conduct, some of the requirements came from the client or from the client's client. In any event, the provisions in the Code of Conduct represent

incidental control only, and do not establish that degree of supervision, direction, or control which would exist in an employment relationship.

We are not persuaded by the decisions cited by the Commissioner of Labor on appeal. Unlike the circumstances in this case, the claimant in Matter of Morton, 28 NY 167 (1940), worked under a written agreement which expressly set out the methods of how she was to perform her duties. In Matter of Compu-Tech Software Services, Inc., 173 AD2d 1040 (3d Dept 1991), unlike here, the technicians signed agreements that restricted their activities with Compu-Tech's clients. In Matter of Pinti, 94 AD2d 833 (3d Dept 1983), the EMTs were reimbursed for expenses and the employer carried Workers' Compensation insurance for them; in addition, the EMTs had been considered to be employees until the employer decided to try and save money by making them independent contractors. In Matter of Pietrzak, 34 AD2d 864 (3d Dept 1970), control was established by a union contract which the employer signed. And in Matter of Eastern Suffolk School of Music, Inc., 91 AD2d 1123 (3d Dept 1983), music teachers were listed as faculty by the school, given mailboxes at the school, and expected to keep records of lessons.

Accordingly, we conclude that there was no employment relationship between the employer and the claimant and all other workers similarly situated and, consequently, the company is not liable for additional contributions.

DECISION: The decision of the Administrative Law Judge is affirmed.

The employer's objection that the claimant and all other persons similarly situated were independent contractors, is sustained.

The determination, holding LEMUR MEDIAL LLC liable for additional contributions, effective January 1, 2018, based on remuneration paid to the claimant and to all other workers similarly situated as employees, is overruled.

JUNE F. O'NEILL, MEMBER