CASE NO. 6275 CRB-4-18-5 CLAIM NO. 400105120	: COMPENSATION REVIEW BOARD
LUMARY AYALA-LOPEZ CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: MAY 23, 2019

FMP TRANSPORT, L.L.C.
EMPLOYER

and

QBE INSURANCE
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by David A. Zipfel, Esq., Law Offices of David A. Zipfel & Associates, L.L.C., 84 Connecticut Boulevard, East Hartford, CT 06108.

The respondents were represented by Charlene M. Russo, Esq., Morrison Mahoney, L.L.P., One Constitution Plaza, Hartford, CT 06103.

This Petition for Review from the May 8, 2018 Findings and Orders of Randy L. Cohen, the Commissioner acting for the Fourth District, was heard December 21, 2018 before a Compensation Review Board panel consisting of the Commission Chairman Stephen M. Morelli and Commissioners Scott A. Barton and Brenda D. Jannotta.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from the May 8, 2018 Findings and Orders (finding) of Commissioner Randy L. Cohen (commissioner) acting for the Fourth District.[1] The issue before the commissioner was whether the claimant was an independent contractor or an employee. The commissioner concluded that at the time of the accident for which benefits are claimed, the claimant was not an employee. The pertinent facts are as follows.

The claimant alleged that on February 22, 2017, she twisted her right foot while in the course of her employment. The claimant further alleged that at the time of the injury, she was working as a driver for FMP Transport, L.L.C. (FMP). FMP provided delivery services for the United States Postal Service (U.S.P.S.).

The owner and sole member of FMP is Paul Spadacenta. See November 1, 2017 Transcript, p. 28. In proceedings before the commissioner, Spadacenta testified that the claimant was not an employee but, rather, an independent contractor, and Spadacenta used both employees and independent contractors in FMP's mail delivery efforts. Id., pp. 53, 62.

In 2011, the claimant obtained a commercial driver's license and, after obtaining this license, worked for various entities hauling U.S.P.S. mail. In February 2016, the claimant formed a trucking business called Lumy's Star Trucking, L.L.C. (Lumy's). The claimant purchased a truck and entered into a contract with FMP to carry U.S.P.S. mail. See September 5, 2017 Transcript, pp. 7-9.

[1] We note that a motion for extension of time was granted during the pendency of this appeal.

Unfortunately, the claimant's truck broke down, and by September 2016, it could no longer be used by the claimant. The claimant contacted Spadacenta, and FMP rented a truck which allowed the claimant to continue hauling mail. The claimant argues that at the time that she ceased operating her own truck and drove the rented truck on behalf of FMP, her status changed from that of an independent contractor to an employee of FMP.

The commissioner found, inter alia, that when the claimant operated her own truck and hauled U.S.P.S. mail, she was paid $30 per hour and reimbursed for fuel. Id., 10. Additionally, the claimant was paid an hourly sum of "$5.05 per hour on 40 hours." Findings, ¶ 16; see also November 1, 2017 Transcript, p. 41. That sum was attributed to a health and welfare benefit which was paid to all drivers at the direction of the U.S.P.S. See November 1, 2017 Transcript, pp. 40-41. During the time period when the claimant was operating her own truck, the health and welfare benefit was combined with the hourly rate paid to Lumy's. Id., 42. When she began to drive the rented truck, FMP continued to make payments to Lumy's. However, FMP adjusted the amount paid to $25 per hour. See September 5, 2017 Transcript, p. 19. If the claimant utilized a substitute driver, the health and welfare benefit was to be paid to the substitute driver. See November 1, 2017 Transcript, p. 47.

During the time period when the claimant was operating her own truck, and also while she was operating the rented truck, the claimant was free to take any day off as long as there was a substitute driver for the truck(s). The claimant did not need Spadacenta's permission to utilize a substitute driver, but Spadacenta did request that the claimant notify him when using a substitute. The claimant usually paid the substitute drivers in cash. See Findings, ¶ 20.j.

Regarding the payment details, Spadacenta testified that FMP employees were paid every two weeks. Payments to employees included withholding for taxes and Social Security/Medicare, and these withholdings were reflected in W-2 forms. Payments to Lumy's did not include any withholdings and were documented in a 1099 form issued to Lumy's. See November 1, 2017 Transcript, p. 58.

The claimant drove the same route in both her own truck and the rented vehicle. When the claimant started making deliveries with the rented vehicle, no additional training was needed because the route, customers, and times of pickup and delivery were the same as when she drove her own truck. See Findings, ¶ 20.f; Conclusion, ¶ E.

The issue on appeal is whether the commissioner erred in concluding that the claimant was not an employee of FMP at the time of her injury. We find no error and affirm the commissioner's decision of May 8, 2018.

Whether a claimant was an employee on the date of an injury for which benefits are sought "is a question of fact." Rodriguez v. E.D. Construction, Inc., 126 Conn. App. 717, 727, *cert. denied*, 301 Conn. 904 (2011), *quoting* Chute v. Mobil Shipping & Transportation Co., 32 Conn. App. 16, 20, *cert. denied*, 227 Conn. 919 (1993). Such a determination is dependent upon the weight and credibility the trier assigns to the evidence and testimony. See Goulbourne v. State/Department of Correction, 5955 CRB-1-14-8 (July 29, 2015). "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, this

board does not engage in de novo review. As our Appellate Court stated in Diaz v. Dept. of Social Services, 184 Conn. App. 538 (2018), *cert. denied*, 330 Conn. 971 (2019):

> [T]he review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts…. [I]t is oblig[ated] to hear the appeal on the record and not retry the facts….
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> The [commissioner] alone is charged with the duty of initially selecting the inference [that] seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. (Citations omitted; internal quotation marks omitted.)

Id., 550-51, *quoting* Jodlowski v. Stanley Works, 169 Conn. App. 103, 108-109 (2016).

We also note that the appellant did not file a motion to correct; as such, the facts as found by the commissioner are unchallenged and this board is essentially "limited to reviewing how the commissioner applied the law." Corcoran v. Amgraph Packaging, Inc., 4819 CRB-2-04-6, 4948 CRB-2-05-5 (July 26, 2006); see also Mack v. Blake Drug Co., 152 Conn. 523, 525 (1965).[2]

We agree with the respondents that our Appellate Court's opinion in Rodriguez, supra, is instructive in this matter. See Appellees' Brief, p.10. In Rodriguez, the court stated:

> Our courts have long recognized that independent contractors are not within the coverage of the … [a]ct…. The fundamental distinction between an employee and an independent contractor depends upon the existence or nonexistence of the right to control the means and methods of work." (Citation omitted; internal quotation marks omitted.) Chute v. Mobil Shipping &

[2] In her brief, the claimant appears to argue that the commissioner should not have found certain facts and/or that such facts were unpersuasive. Advancing such an argument in a brief in the absence of a motion to correct renders the factual challenges a nullity. Administrative Regulation 31-301-4 provides in relevant part that "[i]f the appellant desires to have the finding of the commissioner corrected, he must, within two weeks after such finding has been filed, unless the time is extended for cause by the commissioner, file with the commissioner his motion for the correction of the finding and with it such portions of the evidence as he deems relevant and material to the corrections asked for…."

> Transportation Co., [32 Conn. App.16, 19–20, *cert. denied*, 227 Conn. 919 (1993)]. It is the totality of the evidence that determines whether a worker is an employee under the act, not "subordinate factual findings that, if viewed in isolation, might have supported a different determination." Hanson v. Transportation General, Inc., [245 Conn. 613, 624–25 (1998)]. "For purposes of workers' compensation, an independent contractor is defined as one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work." (Internal quotation marks omitted.) Chute v. Mobil Shipping & Transportation Co., supra, 20. "Many factors are ordinarily present for consideration, no one of which is, by itself, necessarily conclusive. While the method of paying by the hour or day rather than by a fixed sum is characteristic of the relationship of employer and employee, it is not decisive…. Nor is it decisive that the injured party uses his own tools and equipment…. The retention of the right to discharge, upon which the finding is silent, is a strong, but again not a controlling, indication that the relationship is one of employment." (Citations omitted.) Bourgeois v. Cacciapuoti, 138 Conn. 317, 321, 84 A.2d 122 (1951). Other persuasive factors that a person is holding oneself out to be an independent contractor include the issuance of 1099 federal tax forms; see Tianti v. William Raveis Real Estate, Inc., 231 Conn. 690, 699, 651 A.2d 1286 (1995); and engaging independently in business with third parties and doing business apart from the putative employer under a different name. See Chute v. Mobil Shipping & Transportation Co., supra, 20–21.

Id., 728–29.

The resolution of the present matter turns on the application of the facts to the legal question. As previously stated herein, conclusions ultimately reached by the commissioner are dependent upon the credibility accorded to the witnesses. In the case at bar, the commissioner specifically found Spadacenta to be "fully credible and persuasive" relative to his testimony indicating that the claimant was an independent contractor. Conclusion, ¶ A. The commissioner further concluded that the claimant was not "credible or persuasive as to the issue presented for the formal hearing." Conclusion,

¶ B. In addition, the evidence amply supported the commissioner's findings and conclusions.

There is no error; the May 8, 2018 Findings and Orders of Commissioner Randy L. Cohen acting for the Fourth District, is accordingly affirmed.

Commissioners Scott A. Barton and Brenda D. Jannotta concur in this opinion.