January 24, 2019

Are Taxi Drivers Independent Contractors?

New Jersey Court Finds Cab Driver Qualifies for Worker's Compensation Benefits

BY:

In a recent New Jersey Appellate Division matter, *Pendola v. Milenio Express Inc. d/b/a Classic,*the appellant, an auto cab driver, was denied workers' compensation benefits on the basis that appellant was not an employee of the auto cab company. Appellant appealed claiming he established an employment relationship because his work was an integral part of the auto cab company's business controlled by the company. The Appellate Court agreed and reversed.

Compensation courts in New Jersey apply the twelve factor set forth in *Pukowsky v. Caruso,* 312 N.J. Super. 171, 182-83 (App. Div. 1998). The twelve factors are: (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation-supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer[";] (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. [Ibid. (citation omitted).]

The compensation judge in *Pendola*, concluded the driver/petitioner was not an employee of the cab company. The judge found the cab company "exercised very little control over the means and manner of petitioner's performance." He noted that although petitioner was required by the "Taxi Division to paint his vehicle silver and to place the name 'Classic'" and the company's phone number on it, "he was otherwise left on his own to drive and pick up fares and unaccountable to Milenio/Classic." The judge noted claimant set his own schedule and was free to accept or reject the fares dispatched to him by Classic.

The compensation judge also found the cab company did not supervise petitioner, and that he was required to have an auto cab license and comply with the rules of the Taxi Division, that he furnished his own car and that, although he had been "associated with" Classic for eleven years, it was "only to the extent of being a driver of an auto cab which was dispatched by Milenio/Classic." The judge further found petitioner received no salary from Classic but was required to pay a dispatching fee of $150 per week. As to factor seven, the manner of termination of the relationship, the judge found that claimant "would only be prohibited from operating an auto cab by the Taxi Division for failing to comply with the Taxi Division rules and regulations, which would result in the revocation of his auto cab license by the Taxi Division." The judge found there was no annual leave.As to factor nine, whether petitioner's work was an integral part of company's business, the judge found Classic's business was "dispatching claimant and drivers of auto cabs." He found the cab company was not dependent on petitioner's, reasoning that were he "not available to transport a fare, another cab driver was waiting to do so. No one driver was essential to the effective functioning of the business." The judge further found that petitioner did not accrue retirement benefits and Classic did not pay social security taxes. As to the final factor, the judge found "based upon the arrangement" between the parties, "it is clear there was no intention that petitioner was to be an employee of Milenio/Classic."

The petitioner appealed, arguing the compensation court underestimated the degree of control the cab company exercised over its drivers relevant to factor one of the Pukowsky test and misconstrued critical factor nine, representing the "relative nature of the work test," which measures "the extent of the economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business."

The Appellate Court agreed with appellant, reasoning that The New Jersey Supreme Court has reiterated on numerous occasions that our State's comprehensive statutory scheme of workers' compensation coverage "for the compensation of injured workers 'is remedial social legislation and should be given liberal construction in order that its beneficent purposes may be accomplished.'" *Cruz v. Cent. Jersey Landscaping, Inc.,*195 N.J. 33, 42 (2008) (quoting *Torres v. Trenton Times Newspaper*, 64 N.J. 458, 461 (1974)).

As the Court held in *D'Annunzio v. Prudential Insurance Co. of America*, 192 N.J. 110, 122-24 (2007),and reiterated in *Estate of Kotsovska ex rel. Kotsovska v. Liebman*, 221 N.J. 568, 576, 595 (2015), "when 'social legislation must be applied in the setting of a professional person or an individual otherwise providing specialized services allegedly as an independent contractor,' the trial court should consider three factors: '(1) employer control; (2) the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue. '" *Kotsovska*, 221 N.J. at 594 (quoting *D'Annunzio*, 192 N.J. at 122);

The Appellate Court found that there was no dispute regarding appellant's economic dependence on the cab company. Appellant had been driving for the cab company for eleven years, and it was his sole source of income. Although one could debate whether the requirement that appellant paint his car silver and display prominently the Classic name and phone number was indicia of control by the cab company or merely enforcement of Newark auto cab regulations, the court found that other aspects of the relationship point unequivocally to a significant level of control by the cab company over its drivers. Besides requiring its drivers install a two-way radio in the cars, at their expense, the drivers were subject to the cab company's rules as to which drivers would receive a dispatched fare. Drivers were not free to pick up any nearby passenger calling the cab company for a ride. Drivers were required, pursuant to rules established by the cab company, to request the ride from the dispatcher, who would decide which driver would pick up the passenger based on how long the driver had waited since his last fare.

The Appellate Court concluded that the judge of compensation misapplied factor nine of *Pukowsky*, "whether the work is an integral part of the business of the 'employer.'" The Appellate Court applied the reasoning used in D'Annunzio 192 N.J. at 123.

Several questions elicit the type of facts that would demonstrate a functional integration: Has the worker become one of the "cogs" in the employer's enterprise? Is the work continuous and directly required for the employer's business to be carried out, as opposed to intermittent and peripheral? Is the professional routinely or regularly at the disposal of the employer to perform a portion of the employer's work, as opposed to being available to the public for professional services on his or her own terms? Do the "professional" services include a duty to perform routine or administrative activities? If so, an employer-employee relationship more likely has been established. [Id. at 123-24.]

Asking these questions here, the Appellate Court found that, the petitioner was one of the "cogs" in Classic's operation. His work as a driver willing to provide the rides Classic arranged was essential to the success of its business. The work of the drivers was certainly continuous, Classic operated twenty-four hours a day, and thus needed many drivers day and night to carry out its operations. Drivers such as the petitioner could not use their own silver Classic car to pick up fares dispatched from competitors of Classic or those attempting to call them directly. The drivers were thus prohibited from using their own cars to further any business but Classic's. Although a driver's passengers or hours might vary, the daily routine of picking up Classic's customers and delivering them to their destinations throughout Newark did not change.

The Appellate Court concluded that Classic was dependent on the petitioner and other drivers like him. The fact that the business required multiple drivers to operate did not reduce petitioner's importance to Classic's business or make him any less a "cog" in Classic's enterprise. Accordingly, the Appellate Division concluded that application of the *Pukowsky* test established petitioner as an employee of the cab company under New Jersey workers' compensation laws.

With the Appellate Division's holding that Pendola was one of the "cogs" in Classic's operation and that he qualified for workers' compensation benefits, it is unknown what effect this holding could potentially have on drivers who work for worldwide ridesharing programs such as Uber and Lyft. While Uber and Lyft drivers share more freedoms than the petitioner in *Pendola*, the argument can certainly be made that drivers who work for worldwide ridesharing programs such as Uber and Lyft are nonetheless "cogs" in these ridesharing programs' operations.