

NEW YORK WORKERS' COMPENSATION BOARD

FedEx Home Delivery
WCB #3040 1455
July 16, 2006

In an application for review filed on October 4, 2005, Crawford and Company, the third-party administrator for FedEx Home Delivery (hereinafter "Crawford"), requests review of the Workers' Compensation Law Judge's ("WCLJ") decision filed on September 8, 2005, which incorporated the WCLJ's findings made at a hearing held on August 31, 2005, in which the WCLJ established the claim for work-related injuries to the left arm and thigh, set the average weekly wage as \$536.69, authorized treatment and diagnostic testing, awarded compensation benefits for the period from January 28, 2004 to February 28, 2004 at the rate of \$357.79, held in abeyance awards for the period from February 28, 2004 to September 1, 2005, awarded an attorneys' fee in the amount of \$250.00, discharged and removed from notice First Niagara Protective Insurance, and found the claimant was an employee of FedEx Home Delivery when he was injured.

Crawford requests that the decision be reversed, the claimant be found to be an independent contractor, and the claim disallowed. The record shows that FedEx Home Delivery is a division of FedEx Ground Package System, Inc., formerly known as Roadway Package System prior to the acquisition of that business by the FedEx Corporation. Crawford asserts that FedEx Home Delivery is a continuation of the business operations of Roadway Package System without substantial modification, and notes that the Board Panel in a prior decision, Roadway Package System, WCB Case #59222501, filed on May 26, 1995, found that the claimant, who was injured while performing his work as a home delivery driver for Roadway, was an independent contractor. Crawford argues that the WCLJ was bound to follow this prior Board Panel decision, and that his decision is contrary to this established precedent as well as other Board decisions involving similar types of independent contractors. The administrator notes that the claimant signed a contract to perform services as an independent contractor for FedEx Home Delivery, under the terms of which the claimant was required to provide his own equipment and vehicle, was permitted to hire his own assistant, and otherwise specified the rights and obligations of the parties in a manner consistent with an independent contractor relationship. Crawford argues that the contract shows that claimant and FedEx Home Delivery exercised "mutual control" over the performance of his work, and therefore the WCLJ's finding of an employer/employee relationship is incorrect and should be reversed by the Board.

A rebuttal was filed on behalf of the claimant on October 26, 2005, wherein the claimant's attorney requests that the notice of decision be affirmed. The claimant's attorney contends that FedEx Home Delivery exercised sufficient control over the claimant's employment to establish an employer-employee relationship. The claimant's attorney asserts that FedEx Home Delivery dictated the type of vehicle the claimant could use, the claimant's uniform, the claimant's delivery route, and the type of equipment the claimant could use. Further, the claimant's attorney asserts that the claimant received a

weekly check from FedEx Home Delivery for the claimant's work. The claimant's attorney notes that there was a complete identity of interests between the claimant's work in delivering packages, which he did exclusively for the employer, and the employer's business operations, as a business engaged in the distribution of packages by means of ground transportation.

Evidence

A C-3 form was filed on February 11, 2004. On this form, the claimant alleged he was injured on January 27, 2004 when he slipped and fell while making deliveries in the employ of FedEx Home Delivery. A C-7 form was filed on behalf of FedEx Home Delivery, controverting the claim on several grounds, including that the claimant was not an employee. Testimony was taken from the claimant on November 9, 2004; testimony was taken at hearings held on March 14, 2005 and July 12, 2005 from a lay witness on behalf of FedEx Home Delivery, Mr. Loo; and several documents were produced, including the contract between the claimant and FedEx Home Delivery, a sample copy of a Certificate of Coverage for a Group Independent Contractor Work Accident Insurance, and the claimant's completed application for Group Independent Contractor Insurance.

The claimant testified that he began working as a package deliverer for FedEx Home Delivery in September 2003. At that time, the claimant signed an agreement that he never read. (See, document ID #100997233). The claimant stated that he reports to the FedEx Home Delivery terminal at 8:00 a.m., where he picks up his delivery truck. Personnel in the corporate offices located in Pittsburgh, PA determine which packages the claimant is assigned to deliver. He then loads packages assigned to him onto the truck and delivers the packages. The claimant's delivery route is based upon a computer generated route that is provided to him by the FedEx dispatcher. The manner of delivery of the packages is also determined by FedEx Home Delivery; for example, the scanner contains instructions on whether or not the claimant must obtain the customer's signature before a package can be left at the delivery address. The claimant's typical work day for FedEx Home Delivery involves ten to eleven hours of work. When he is finished delivering the assigned packages, the claimant returns to the terminal, hands in the scanner for review by the terminal manager, and parks the truck at the employer's terminal.

The claimant testified that he is required to wear a specific uniform that bears the FedEx Home Delivery logo, is required to use a scanner provided by FedEx Home Delivery, and is required to drive a truck bearing the FedEx Home Delivery logo. The uniform is supplied by FedEx Home Delivery without charge and the truck is leased by the claimant. Maintenance expenses for the truck are the claimant's responsibility, and the fuel expenses are shared by the claimant and FedEx Home Delivery. The claimant testified that he is not permitted to use the truck for personal use.

The claimant testified that he is paid each Friday. He is not paid an hourly rate, but rather, he is paid per package delivered. FedEx Home Delivery does not deduct taxes

from the claimant's wages, but does deduct insurance premiums on behalf of the claimant for First Niagara Protective Insurance Company, a disability insurance provider.

The claimant testified that FedEx Home Deliveries may provide its drivers with assistants to load the delivery truck at the terminal, and that he was provided with assistants to help him perform his deliveries after he returned to work. Any assistants that a driver needed were provided by FedEx Home Delivery. In order to take a vacation, the claimant was required to obtain permission from FedEx Home Delivery. While the claimant was responsible for finding a replacement driver when he was unable to work, any replacement driver he selected had to be approved by FedEx Home Delivery. If the claimant did not satisfactorily perform his job, his employment could be terminated by FedEx Home Delivery.

Mr. Loo, a senior manager for FedEx Home Delivery, testified on behalf of the employer. He testified that FedEx Home Delivery does not employ any delivery personnel. Rather, all delivery personnel are independent contractors. New delivery personnel are not interviewed or hired, but instead, they attend information meetings and sign a business contract with FedEx Home Delivery. This contract grants the contractor the exclusive right to deliver all packages within a certain geographic region. A contractor is free to swap delivery assignments with other contractors, but FedEx Home Delivery must approve all such transfers. If a contractor is unable to deliver all packages assigned during the required period, then Mr. Loo is allowed to give some packages to other contractors in order to complete the delivery on time.

Mr. Loo explained that compensation for the contractors is provided by FedEx Home Delivery and is based upon several factors. A contractor receives compensation according to the distance from the terminal that the deliveries take the contractor, the number of stops the contractor makes, and the number of packages delivered. FedEx Home Delivery collects all delivery fees from the customers and then dispenses the contractor's portion of the fee every Friday. FedEx Home Delivery does not withhold any taxes from these compensation payments. However, FedEx Home Delivery will deduct certain fees from the payments.

It was the testimony of Mr. Loo that these fees include leasing fees for uniforms, trucks, scanners, and insurance premiums. Contractors are required to wear a specific uniform, which the contractor must purchase or lease from a designated company. Contractors lease from FedEx Home Delivery the scanning equipment necessary to perform their deliveries. FedEx Home Delivery requires all contractors to provide their own insurance and to insure any person working with the contractor. FedEx Home Delivery will assist contractors in obtaining insurance by referring the contractor to an insurance company and by collecting the premiums for the insurance. Mr. Loo testified that all but one contractor at his location obtained their required insurance from First Niagara Protective Insurance Company and that FedEx Home Delivery is a signatory to every such insurance contract.

Mr. Loo testified that contractors are required to provide for their own delivery vehicle, which must meet certain FedEx Home Delivery specifications. These specifications include that the truck must be white, must display the FedEx Home Delivery logo, and must be clean. If a logo is faded, then FedEx Home Delivery will require the contractor to replace the logo. Although he does not conduct formal inspections, Mr. Loo stated that he will informally check the trucks regularly and that he would require a contractor to obtain a new logo if the current logo is faded. Contractors are responsible for all maintenance, insurance and fees for the delivery trucks. A contractor is permitted to use his delivery truck for personal reasons, but the FedEx logo must be covered and the contractor assumes liability for all packages within the truck. Most contractors park their delivery vehicle at the terminal at the end of their shift. Fuel expenses are the responsibility of the contractor, although FedEx Home Delivery collects a fuel surcharge from its customers which it pays to the package delivery contractors.

Further, Mr. Loo testified that its package delivery contractors are permitted to hire their own assistants. The contractors must obtain the approval of FedEx Home Delivery for any assistants they hire. The contractors' prospective assistants are required to undergo a background check by FedEx Home Delivery before their hiring is approved. Mr. Loo further testified that a contractor is permitted to operate more than one truck.

Finally, Mr. Loo testified the delivery route is not established by FedEx Home Delivery. However, for a fee, FedEx Home Delivery will provide the contractor step by step directions to a delivery. The contractor is permitted to set their own routes, so long as deliveries are timely made. Unless the package is time sensitive, a contractor is permitted to deliver the packages at any time on the assigned day.

The service contract between the claimant and FedEx Home Delivery is contained in the Board's file and has been reviewed by the Board. Among the provisions contained in the contract, included: an acknowledgment by the claimant that he was an independent contractor; a requirement that the claimant maintain vehicle, body, and property damage insurance in specific minimum amounts; a requirement that FedEx Home Delivery be added as an insured on all insurance contracts executed by the claimant and that FedEx Home Delivery be provided thirty days notice of any change to the insurance contract or cancellation of the insurance contract; a requirement that the claimant complete a "safe Driver Program" as sponsored by FedEx Home Delivery; the opportunity for the claimant to earn bonuses based upon the service and performance of the claimant and other package delivery drivers; and the option for the claimant, for a daily fee of \$3.50, to join the "Business Support Program", which entitled the claimant to receive logos and decals, business cards, a standard uniform, mapping software, a package scanner, D.O.T. compliant inspections, and D.O.T. compliant random drug tests.

A sample of the insurance contract between the claimant and First Niagara Protective Insurance is contained in the Board's file and was reviewed by the Board. The cover sheet for the insurance contract is titled "Group Independent Contractors Work Accident Insurance Certificate" and the group sponsor was identified as being FedEx Ground Packaging System, Inc. and FedEx Home Delivery. Based upon this insurance contract,

the term "gross income" was defined as relating only to those payments received by the claimant under a contract with the group sponsor, and the term "premium" was defined as the money paid to the insurance company by the group sponsor to pay for the claimant's insurance. Among the provisions of the contract was the reservation of the insurance company's right to audit the books of the group sponsor to determine the level of work performed by the claimant.

Discussion

The question presented for review is whether the claimant was working as an employee for FedEx Home Delivery or was working as an independent contractor when he was injured on January 27, 2004.

Crawford is correct that the Board's prior decision in *Roadway Package System*, supra, found that the claimant, who was injured while working as a package delivery person, was an independent contractor and not an employee. Crawford is also correct that the underlying facts of that claim are in many respects similar to the instant claim. In both cases, the claimant signed a contract stating that he is an independent contractor with respect to his work as a package deliverer. Further, each claimant was paid weekly based upon the number of packages delivered; each claimant was required by the terms of the contract to provide their own vehicles, uniforms, and equipment; in each case the contract provided that the claimant was permitted to hire assistants for the performance of such work with the approval of the company, as well as other similarities in the contract; and the packages that each claimant delivered were provided by the company. It further appears that FedEx Home Delivery System is the corporate successor to Roadway Package System, and continues to operate its package delivery business using the same or similar contractual arrangements with its package delivery drivers for the performance of their services.

The Board Panel declines to follow the Board's decision in *Roadway Package System*, supra, and affirms the WCLJ's decision that the claimant herein is an employee of FedEx Home Delivery. The Board Panel is cognizant of the requirement that an administrative agency must indicate its reasons for not adhering to its own prior precedent (see *Matter of Lantry v. State*, 6 N.Y.3d 49, 810 N.Y.S.2d 729 [2005]; *Matter of Charles A. Field Delivery Serv.* [Roberts], 66 N.Y.2d 516, 516-517, 498 N.Y.S.2d 111, 488 N.E.2d 1223 [1985]. See also *Matter of Paolucci v. Capital Newspapers*, 197 A.D.2d 811, 603 N.Y.S.2d 74 [3rd Dept., 1993]). The Board Panel finds that the Board's prior decision in *Roadway Package System*, supra, is not consistent with the liberal construction favoring the applicability of the Workers' Compensation Law generally, is at variance with the great weight of recent Board decisions involving workers performing similar delivery services for other employers, gives too much emphasis to the terms of the written contract governing the work performed by the package deliverers, and gives too little weight to the actual control exercised by the employer over the day to day activities of its package deliverers. The Board Panel sets forth the following additional findings and conclusions in support of its decision.

Workers' Compensation Law §2 defines the terms employer, employee, and employment. In order to further the social policy of the Workers' Compensation Law, the terms were defined broadly in an attempt to bring as many workers as possible within the protection of the Law. The statutory definitions state that an employer is any person or entity that employs at least one person, and employment is work performed "in a trade, business or occupation carried on by the employer for pecuniary gain, or in connection therewith." An employee is any person "engaged in one of the occupations enumerated in section three or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment". The operation of "trucks" and "vehicles" are among the specifically enumerated classes of covered employment set forth in Workers' Compensation Law §2, par. 3.

It has been held that a broad construction of the Workers' Compensation Law is favored to embrace all activities, which can, in any reasonable sense, be included within its coverage (*Matter of Wilson v General Motors Corp.*, 298 N.Y. 468 [1949]). In keeping with the liberal interpretation of the Workers' Compensation Law, unless otherwise specifically delineated in the statute, it is presumed that a worker in a particular business is an employee and within the employ of such business.

Indeed, Workers' Compensation Law §21 provides that in any proceeding involving a claim for workers' compensation benefits, "it shall be presumed in the absence of substantial evidence to the contrary...that the claim comes within the provision of this chapter," among other things. The presumption in favor finding an injured worker to be an employee is further emphasized and supported by the manner in which the Courts have interpreted and applied the Workers' Compensation Law. The Courts have stated that it is sufficient to find a claimant was an employee, if any one of the many indicia of control is present. However, such is not true for a contrary ruling. An alleged employer is required to demonstrate that a great number of the factors are not present before a finding can be made relieving the alleged employer of liability (*Matter of Worth v. C.T. Hubbell Lumber Corp.*, 29 A.D.2d 1025, 289 N.Y.S.2d 519 [3rd Dept., 1968]; *Matter of Grigoli v Nito*, 11 A.D.2d 581, 200 N.Y.S.2d 511 [3rd Dept., 1960]; *Commissioners of State Insurance Fund v. Kaplan*, 89 Misc. 2d 610, 392 N.Y.S.2d 971 [Civil Ct., N.Y. Cty., 1977]). The Workers' Compensation Board has the power and the duty to make a choice concerning whether a worker is an employee where either of two conflicting inferences may be drawn (*Matter of Denman v. Many & Zanetti*, 8 A.D.2d 576, 183 N.Y.S.2d 324 [3rd Dept., 1959], *affd.* 8 N.Y.2d 799, 202 N.Y.S.2d 16 [1960]).

The courts have denied businesses the right to insulate themselves against the "costs and bookkeeping inconvenience of work[ers'] compensation and other social benefits designed for the benefit of employees" (*Liverpool v. S.P.M. Environmental, Inc.*, 189 A.D.2d 645, 592 N.Y.S.2d 339 [1st Dept., 1993]). Further, the Board is authorized to look beyond an employment contract to ascertain the true nature of a relationship. *Commissioners of State Insurance Fund v. Kaplan*, *supra*.

In general, the courts have held that "the existence of an employer-employee relationship is a factual issue for the Board to resolve and its finding must be upheld if supported by

substantial evidence (see *Matter of Stamoulis v Anorad Corp.*, 292 AD2d 657, 738 N.Y.S.2d 754 [3rd Dept., 2002]; *Matter of Jhoda v Mauser Serv.*, 279 AD2d 853, 719 N.Y.S.2d 388, [3rd Dept., 2001]). The factors relevant to such a finding include the right to control the work, the method of payment, which party furnishes the equipment, the right to discharge and the relative nature of the work at issue (see *Matter of Stamoulis v Anorad Corp.*, supra at 657-658; *Matter of Gallagher v Houlihan Lawrence Real Estate*, 259 AD2d 853, 686 N.Y.S.2d 212, [3rd Dept., 1999]; *Matter of Winglovitz v Agway*, 246 AD2d 684, 667 N.Y.S.2d 509, [3rd Dept., 1998])." (*Matter of Topper v. Al Cohen's Bakery*, 295 A.D.2d 872, 744 N.Y.S.2d 260 [3rd Dept., 2002]).

The facts of this case show that FedEx Home Delivery exercised considerable control over the claimant's day to day work activities, and had the authority to terminate its relationship with the claimant. FedEx Home Delivery controlled the number of packages delivered by the claimant, provided the claimant with a computer generated route for their delivery, dictated the specifications for the equipment used by the claimant in performing his work (such as a truck with a FedEx logo and a specified scanner), and required the claimant to make deliveries on specified days and, on occasion, at certain times. The right of FedEx Home Delivery to terminate its relationship with the claimant included the right of termination if the claimant did not make timely deliveries.

The method of payment is consistent with the manner in which an employer pays an employee. All payments for delivering the packages were collected by FedEx Home Delivery, who then split the delivery fees with the claimant according to a clearly defined compensation schedule. The claimant's pay was determined in part on a piece-work basis; i.e. \$1.50 per address and \$.22 per package delivered, less expenses for truck lease payments, insurance and other deductible expenses. Although piece-work compensation is less common than it once was prior to the adoption of minimum hourly wage laws, the payment of wages on a piece-work basis is entirely consistent with the finding of an employer-employee relationship (see, e.g. *Matter of D'Andrea v. Berger Dress Co.*, 9 A.D.2d 573, 189 N.Y.S.2d 42,[3rd Dept., 1959]; *Matter of Shaw v. American Body Co.*, 189 A.D. 365, 178 N.Y.S. 369 [3rd Dept., 1919]).

The type of equipment to be used by the claimant in the delivery of packages was dictated by FedEx Home Delivery. There is no evidence the scanner had any application outside of employment with FedEx Home Delivery. The claimant's delivery truck was parked at the employer's terminal, and the claimant could not use the delivery truck for personal use without covering all the FedEx logos. Further, it was required that the logos be displayed in good condition and that all trucks be kept clean. While 9 or 10 of the 31 drivers who are supervised by Mr. Loo do not park their vehicle overnight at the FedEx terminal, Mr. Loo testified that he did not know what they did with the trucks at night. In view of the claimant's credible testimony that he never worked less than 10 hours per day in performing his package delivery work, the fact that he had the contractual right to use his truck for other types of work or for his own purposes is considered by the Board Panel to be insubstantial for determination of his status as an employee or independent contractor.

The uniform that the claimant was required to wear contained the logos and emblems for FedEx Home Delivery. Virtually all aspects of the claimant's work, including his uniform, his truck, the packages he delivered and the paperwork accompanying those packages, identified only FedEx Home Delivery as the shipper. The public perception of the claimant's work would be that he performs delivery services for FedEx Home Delivery, and there would not be any reason to believe that he did so as an independent business separate from that company.

There is also little evidence of any actual control that the claimant could, as a practical matter, effectively exercise over the business operations of his supposedly independent business. FedEx Home Delivery mandated the claimant obtain a minimum level of insurance, sponsored a group insurance policy, directed the claimant to a particular insurance company, collected the premiums from the claimant and paid them to the insurance company, was to be notified of any changes in insurance, and was listed in the insurance policy as an insured entity. The testimony of Mr. Loo showed that only one of the package delivery drivers who he supervised actually used a different insurance carrier other than the group insurance provided through FedEx Home Delivery.

While Mr. Loo testified that some of his contractors had their own assistants or other drivers, there is no evidence as to the frequency with which such assistants or other drivers were actually used by any of the contractors. The claimant's ability to hire assistants or other drivers is subject to the consent, approval, and investigation of FedEx Home Delivery. In addition, while the contract, by its terms, may permit a contractor to add a second delivery truck, Mr. Loo testified that doing so would only be permitted if FedEx considered there was sufficient continuous business in a contractor's geographic territory to justify it. Again, there is no evidence in the record that any of the FedEx package delivery drivers in Mr. Loo's office actually owned more than one truck, so the fact that there is a theoretical right to do so under the contract appears to be more illusory than real.

The predominate factors pertaining to the relative nature of the claimant's work activities support a finding that the claimant was an employee of FedEx Home Delivery. The claimant's only work activities involved the shipping of packages via ground transportation, a task that is identical with the paramount service provided by FedEx Home Delivery. The package delivery drivers perform an essential part of the work of the service provided by FedEx Home Delivery to its customers. The nature of the services performed by the package delivery drivers is exclusively dictated by the agreement between FedEx Home Services and its customers, who contract for the price, the timing of, and the requirements for the delivery of the packages. There is no indication that the package delivery drivers have any control over the nature of the services they provide.

In addition, extent, frequency and longevity of the claimant's relationship with FedEx Home Delivery suggest that the claimant was an employee. The claimant worked for FedEx Home Delivery regularly and exclusively for a period of more than two years, and there is no indication this employment was interrupted or sporadic. Further, the contract

between FedEx Home Delivery and the claimant contained longevity bonuses for the claimant and contained bonuses if all drivers maintained certain safety and efficiency requirements. The nature of the training provided by FedEx Home Delivery also denotes that FedEx Home Delivery expects the drivers to work with the company for extended periods. The fact that the contract between the claimant and FedEx Home Delivery identifies the claimant as an independent contractor is not binding upon the Board. A provision contained within a contract that purports to waive a claimant's right to compensation benefits is void because a claimant is only permitted to waive his rights to compensation benefits pursuant agreements that comply with Workers' Compensation Law §32. (Matter of Russo v. N.Y.C. Department of Corrections, 9 A.D.3d 528, 780 N.Y.S.2d 195 [3rd Dept., 2004]).

While there are some aspects of the claimant's work as a package delivery driver that would be consistent with a finding that the claimant is an independent contractor, the Board Panel finds that those factors are not compelling when considered in the context of the record as a whole. The Board Panel further notes that the Board's prior decision in Roadway Package System, supra, is at variance with the great weight of recent Board decisions involving workers performing reasonably similar delivery services for other employers.

It has been held that, in determining who is an employee within the meaning of the Workers' Compensation Law, only decisions under this or similar laws can be recognized as controlling. (In re Rheinwald, 168 A.D. 425, 153 N.Y.S. 598, [3rd Dept. 1915], appeal after remand, 174 A.D. 935, 160 N.Y.S. 1143 [1916], affd. 223 N.Y. 572, 119 N.E. 1074 [1918]). The status of package delivery drivers for FedEx Home Delivery Services, or its predecessor, Roadway Package System, as independent contractors or employees has been the subject of conflicting decisions under the workers' compensation laws of other States. In Hale v. Roadway Package Systems, 1998 VA Wrk. Comp. LEXIS 4902, the Virginia Workers' Compensation Commission found that the claimant, a package delivery driver, was an independent contractor. In Mazzone v. Roadway Package System, Inc., 1997 PAWCLR (LRP) LEXIS 204, 12 PAWCLR (LRP) 1041, the Pennsylvania Workmen's Compensation Appeal Board came to the opposite conclusion, and found that the claimant was an employee. The facts of these cases show that the contractual arrangement and basic structure of the package delivery drivers' work is similar in most respects to that set forth in the instant case. The differing outcomes reached in these two jurisdictions shows that the resolution of this issue is a difficult one, and that the weight given to different aspects of the package delivery drivers' work under a particular State's workers' compensation laws may have a significant bearing on their status as an employee or independent contractor in that State.

Historically, it has been difficult to determine the status of a worker, for Workers' Compensation Law purposes, whose work is subject to a contract or agreement identifying him as an independent contractor, but whose actual work duties and responsibilities involve many aspects more consistent with an employer-employee relationship. This has, in the past, lead to inconsistent decisions of the Board and the courts that have been difficult to reconcile.

One such area where this has occurred in New York has involved adult newspaper carriers, a type of worker performing a product delivery service that has several similarities to the package delivery services involved in the instant case. In *Matter of Paolucci v. Capital Newspapers*, 197 A.D.2d 811, 603 N.Y.S.2d 74 (3rd Dept., 1993), the claimant was initially found by the Board to be an independent contractor, with the Board relying on the purchase and sale agreement between the claimant and the newspaper publisher, that "she was free to pick up the papers at any time after they were printed, and that she could determine the means of delivery, arrange for substitutes and handle customer complaints," as the basis for that finding. The Appellate Division noted that the Board had previously found that a similar worker was an employee in a prior case involving an adult newspaper carrier, rescinded the Board's decision, and returned the case to the Board for further consideration. Thereafter, on remittal, the Board found that each of the adult newspaper carriers in *Paolucci* and three related cases was an employee within the meaning of the Workers' Compensation Law. On further appeal, the Appellate Division stated that there was substantial evidence for the Board's findings "that the employer required claimants to deliver the newspapers by a set hour each morning; that the employer fixed their territories and provided them with a route list containing specific instructions as to how they were to deliver newspapers to certain customers; that the employer handled customer complaints; and that the employer provided plastic bags and elastic bands for use in the distribution process" (*Matter of Paolucci v. Capital Newspapers*, 229 A.D.2d 751; 645 N.Y.S.2d 603[3rd Dept., 1996]). The Appellate Division concluded that "based on the degree of control exercised by the employer over the timing and method of claimants' delivery of newspapers, claimants were its employees within the meaning of the Workers' Compensation Law" (*Id.*).

Following the Appellate Division's decision in *Matter of Paolucci*, *supra*, the Board has applied the criteria considered therein to determine whether the claimant was an independent contractor or employee in several cases involving reasonably similar delivery work. In several additional cases involving adult newspaper carriers, the Board reiterated its findings in *Matter of Paolucci*, *supra*.

In *Buffalo News*, 2006 NY Wrk. Comp. 80503318; 2006 NY Wrk. Comp. LEXIS 2066, the Board Panel found that the newspaper publisher "dictated the claimant's earnings by setting the wholesale price that the claimant paid for the papers and the price that the claimant charged his customers," that the "customers themselves were assigned by Buffalo News off of an exclusive customer list maintained by Buffalo News," that the Buffalo News had "the power to terminate the claimant's employment at will," and that the nature of the work performed showed an identity of interests between those of the newspaper publisher and its carriers. The fact that the claimant furnished his own automobile and other equipment for performing his work, and that a written contract identified the claimant as an independent contractor, were found to be not dispositive, and the Board Panel held that the claimant was an employee. Similar cases involving adult newspaper carriers, which also found that the claimant is an employee, are *Liberty Publishing Group*, 2006 NY Wrk. Comp. 60309151; 2006 NY Wrk. Comp. LEXIS 2147, *The Buffalo News*, 2001 NY Wrk. Comp. 89804170; 2001 NY Wrk. Comp. LEXIS

91785, Times Herald Record, 2000 NY Wrk. Comp. 59711927; 2000 NY Wrk. Comp. LEXIS 111948, and Star-Gazette 2000 NY Wrk. Comp. 99802523; 2000 NY Wrk. Comp. LEXIS 107690. Additional factors found to be insufficient to support a finding of independent contractor considered in these cases include the fact that the claimant was paid on a piece work basis and was issued a 1099 statement for income tax purposes (Liberty Publishing Group, supra); and that the claimant purchased his own insurance coverage under a "Carrier Accident Protection" plan (Star-Gazette, supra). In short, the above line of cases involving newspaper deliverers is entirely consistent with and supports the WCLJ's decision in this case.

In the cases of *Matter of Topper v. Al Cohen's Bakery*, 295 A.D.2d 872, 744 N.Y.S.2d 260 (3rd Dept., 2002) and *Matter of Simonelli v. Adams Bakery Corp.*, 286 A.D.2d 805, 730 N.Y.S.2d 358 (3rd Dept., 2001), the Appellate Division affirmed the Board's determination that the bread route deliverers were employees and not independent contractors. The work performed by the claimant in *Matter of Simonelli*, supra, had substantially less evidence of control by the employer and more evidence of independence by the claimant in the performance of his work than is present in the instant case. In *Matter of Simonelli*, the Appellate Division noted that neither the claimant's work clothes nor his truck displayed the employer's logo, and the claimant was "free to expand his bread delivery routes, deliver other products and hire an associate at his own expense" among other things. Nevertheless, the Appellate Division affirmed the Board's findings that, in consideration of the evidence as a whole, the claimant was an employee and not an independent contractor.

With respect to other types of delivery services, the Board has considered various factors in determining whether the claimant was an employee or independent contractor. For example, in *U.S. Delivery*, 2000 NY Wrk. Comp. 9749461; 2000 NY Wrk. Comp. LEXIS 121775, the claimant was a messenger deliverer for that company when he was injured. The Board held that he was an independent contractor, and noted among other factors that the claimant worked when he chose; could accept or refuse routes offered to him by US Delivery; could decide when and in what order he chose to make the scheduled deliveries; and could accept work from other sources. A similar finding that the claimant, a bicycle messenger, was an independent contractor was made on similar facts in *Four Into One Delivery*, 2005 NY Wrk. Comp. 231802; 2005 NY Wrk. Comp. LEXIS 3035.

However, in *Elite Couriers*, 2001 NY Wrk. Comp. 9824517; 2001 NY Wrk. Comp. LEXIS 92572, a case involving an injury to a package courier, the employer's control over the distribution of the claimant's work and less flexibility with respect to the claimant's work schedule resulted in a finding that the claimant was an employee. In *SCI Subcontracting Concepts*, 2002 NY Wrk. Comp. 26025; 2002 NY Wrk. Comp. LEXIS 91851, the Board Panel noted that the employer provided a motorcycle bag for the claimant to use in his work as a messenger deliverer; that the claimant was required to wear a uniform; that the paperwork concerning his deliveries was under the employer's name; that his work was issued by the employer's dispatcher; and that a messenger who refused a delivery could be sent home for the day. The Board Panel found that these facts

were sufficient to show that the claimant was an employee, despite the fact that he signed a document stating that he was an independent contractor and was issued a form 1099 for income tax purposes.

The Board Panel decision cited by Crawford is distinguishable from the instant case. In *Lafayette Storage and Moving*, 97 NYWCLR 1215, WCB Case #7961 0841, among other things, the Board Panel specifically noted that the employer, a household moving and storage company, did not exercise any control over the delivery route used by the claimant. This is in sharp contrast to the instant case, in which FedEx Home Delivery Services provides the claimant with a computer generated route for delivery of the packages, as well as instructions concerning the requirements for making a delivery for each package.

Conclusion

The Board Panel finds, upon review of the entire record, that the claimant was an employee of FedEx Home Delivery when he sustained an injury on January 27, 2004 arising out of and in the course of his employment.

Accordingly, the WCLJ's decision filed on September 8, 2005 is affirmed. No further action is planned by the Board at this time.

All concur.