STATE OF MAINE

CUMBERLAND, SS.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
CIVIL DOCKET NO. WCB-16-541

ON APPEAL FROM THE WORKERS' COMPENSATION BOARD APPELLATE DIVISION

LARRY HUFF,
Employee/Appellant

vs.

REGIONAL TRANSPORTATION PROGRAM,
Employer/Appellee

and

MAINE EMPLOYERS' MUTUAL INSURANCE CO.,
Insurer/Appellee

RESPONSE TO APPELLANT'S PETITION FOR APPELLATE REVIEW

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RESPONSE TO PETITION FOR APPELLATE REVIEW

Regional Transportation Program, Inc. and its insurer, MEMIC, object to the Petition for Appellate Review because the Board did not commit legal error by finding Mr. Huff was not an employee of RTP, and because this case does not provide compelling facts for establishing a new interpretation of law.

STATEMENT OF FACTS

Regional Transportation Program (RTP) provides transportation to medical and related appointments for elderly and low-income individuals in Cumberland County. RTP relies on both employees and volunteers to provide rides to its clients. RTP relies on volunteer drivers, in large part, as a necessary cost savings mechanism. Instead of dispatching an employee in a van with multiple seats into a rural area to pick up one client, volunteers make those trips and leave drivers employed by RTP free to service more dense locations. At the time of the underlying litigation, between 25 and 30 volunteer drivers were donating their services to RTP.

Mr. Larry Huff began volunteering as a driver for RTP on November 11, 2011. He signed a "RTP Volunteer Driver Memorandum of Understanding" on that date which detailed his involvement with RTP as a volunteer, and specifically indicated that he would be reimbursed for his mileage only and would not be paid for his services. Mr. Huff's mileage reimbursement rate was $0.41 per mile. RTP's mileage reimbursement rate for volunteer drivers was set by contract with MaineCare.

RTP took several precautionary measures before allowing Mr. Huff to transport its clients, including requiring him to fill out an application with information about his driving record and any past criminal history. Mr. Huff was also required to complete a medical questionnaire that identified conditions that could possibly cause unsafe driving, and complete an

authorization for RTP to check into whether Mr. Huff had a prior history of child abuse or negligence. RTP also checked Mr. Huff's car for safety and gave him "RTP" magnets so clients could identify him as a driver.

As a volunteer driver, Mr. Huff would choose to drive to RTP in the morning where he would pick up a manifest outlining the clients he would give rides to during the day. In addition to clients listed on the manifest, Mr. Huff also made himself available to give unscheduled rides as needed. Mr. Huff was under no obligation to drive for RTP on any given day, a freedom not afforded to RTP employees.

As a volunteer driver, Mr. Huff provided his own car, paid his own auto insurance and was not paid any fringe benefits. Mr. Huff was not paid to drive or to wait for clients at appointments. In fact, the record indicates that Mr. Huff did not receive anything from RTP other than mileage reimbursement.

While transporting a client for RTP on August 21, 2012, Mr. Huff was involved in a serious motor vehicle accident. Mr. Huff's auto insurance was the primary payer, although RTP did have a policy that provided some coverage.

Mr. Huff filed a Petition for Award with the Workers' Compensation Board related to the August 21, 2012 accident. Because Mr. Huff's employment status was also at issue, the parties agreed to bifurcate the matter and tackle the issue of employment status first. A hearing was held on February 17, 2015, and a decision was issued on April 16, 2015 finding Mr. Huff to be a volunteer. Mr. Huff requested and proposed additional findings of fact, which were denied on May 27, 2015. Mr. Huff appealed the decision and the Appellate Division affirmed on November 15, 2016. Mr. Huff then filed the pending Petition for Appellate Review.

ARGUMENT

I. The Board did not commit legal error when it affirmed the finding that Mr. Huff was not an employee of RTP.

Appellate review may be granted where a decision contains a substantial error on a question of law. Appellate review is not appropriate here because the underlying decision fell well within the bounds of an Administrative Law Judge (ALJ) acting rationally, and the Appellate Division found competent support in the record to support the ALJ's decision.

The Appellate Division agreed with the ALJ below that Mr. Huff was not an employee pursuant to the Workers' Compensation Act because he was not ". . . in the service of another under any contract of hire, express or implied, oral or written." 39-A M.R.S.A. §102(11)(A). Specifically, the Appellate Division affirmed the finding that Mr. Huff was not an employee because he did not receive remuneration for services. *Huff*, at ₱ 7.

The Appellate Division's decision in this regard is consistent with case law. Prior cases that have found workers to be employees under a contract for services have identified some form of consideration as support for the contract: be it payment of an honorarium (*Cole v. Girls Scouts of America*, 2013 WL 7019305 (ME.Work.Comp.Bd.)(Stovall, HO)(Mr. Cole was given an honorarium based in part on the amount of work he performed in addition to being reimbursed for mileage and expenses incurred while working at the camp), or payments in the form of ski passes and free food (*Harriman v. EMK, Inc.*, 1998 Me. Super. LEXIS 58, 7-8 (Me. Super. Ct. Mar. 13, 1998)(Harriman's patrol services were given in exchange for free skiing any time, free beverages, and free ski passes for friends.)). Each instance involves the worker getting something of value from the employer in exchange for his or her service. Here, Mr. Huff was simply reimbursed for expenses; he was not paid for his services.

Yet, Mr. Huff argues that because of language in an IRS service bulletin, and because of testimony that Mr. Huff was able to make a profit from the reimbursement scheme, he should be considered an employee of RTP. Additionally, Mr. Huff argues he should be considered an employee because his case does not align with the Court's analysis in *Harlow v. Agway*, finding the worker there not to be an employee. For the reasons discussed below, Mr. Huff's arguments are not persuasive and the Petition for Appellate Review should be denied.

A. The Workers' Compensation Board is not constrained by the IRS when determining whether someone is an employee pursuant to the Workers' Compensation Act.

The crux of Mr. Huff's argument is that the IRS allows a higher mileage reimbursement rate for employees than for volunteers, and that because Mr. Huff received mileage reimbursements at the rate designated for employees, he must therefore be an employee. As the Appellate Division correctly pointed out, however, "the IRS's treatment of reimbursement rates for mileage is not dispositive of the issue as to whether Mr. Huff is an employee or a volunteer." *Huff v. Regional Transportation Program*, Me. W.C.B. No. 16-40 ₱ 10 (App. Div. 2016)(citing, *Brodeur v. NMC Homecare,* 654 A.2d 443, 445 (Me. 1995) and *Fletcher v. Hanington Brothers, Inc.,* 647 A.2d 800, 803 n.4 (Me. 1994)). In fact, the Board, with some unrelated exceptions, is not required to seek guidance from outside agencies to determine who is an employee. The legislature gave express authority to the Workers' Compensation Board to determine whether a worker is an "employee" for purposes of the Workers' Compensation Act. See, 39-A M.R.S.A. § 102(11). Therefore, the Board is not bound to interpret "employee" consistent with an IRS service bulletin.

Moreover, the ALJ below adequately supported the decision not to classify Mr. Huff as an employee, and that decision was affirmed by the Board's Appellate Division. While in some

instances it may be instructive for the Board to consider whether an unrelated agency considers someone an employee or not, the Board is not bound by those considerations. Here, the Board found there to be sufficient evidence in the record to conclude Mr. Huff was not an employee of RTP. Thus, there was not a substantial error on a question of law and the Petition for Appellate Review should be denied.

B. Reimbursement for mileage is not equivalent to payment for services.

The ALJ below as well as the Appellate Division appropriately concluded that the mileage reimbursement was not remuneration for services because the purpose of the payment was to make Mr. Huff whole for expenses associated with his volunteering, including Mr. Huff's payments for gas, maintenance, insurance and other expenses. Mr. Huff was not paid for providing services to RTP. *Huff*, at ₱ 9.

Mr. Huff hangs his argument to the contrary on the fact that the Board found credible his testimony that he was able to save about half of every mileage reimbursement check to use for living expenses. This argument fails for two reasons. First, testimony indicates that Mr. Huff did not consider payments for insurance or future major repairs when he testified about profiting from his mileage reimbursement checks. Therefore, as the Appellate Division indicated, the record does not contain enough information to know the true cost of Mr. Huff's expenses. *Huff*, at ₱ 9. It is entirely possible that once all expenditures are taken into account he did not profit from the reimbursement checks.

Second, the purpose of a mileage reimbursement is not payment for services, but is rather an effort to make volunteer drivers whole knowing they pay the costs associated with their volunteering. It therefore should not matter that Mr. Huff was thrifty enough not to use all the

reimbursement money for those purposes. Mr. Huff does not find this a compelling argument seemingly on the grounds that the reimbursement rate could be manipulated by a disingenuous actor to disguise mileage reimbursement as payment for services. Mr. Huff argues that one could simply pay $40 or $100 per mile, and as long as the payments were styled as mileage reimbursements no employment relationship would be created. However, this would clearly be disingenuous, and nothing in the record suggests RTP's reimbursement scheme was designed to mask payment for services as reimbursement for expenses. As noted above, the $0.41 per mile rate was established by contract between RTP and Maine Care for reimbursing volunteer drivers.

The ALJ below and the Board's Appellate Division found compelling support for their finding that Mr. Huff did not receive payment for services. While Mr. Huff argues there is some evidence to suggest otherwise, the Board's decision does not fall outside the bounds of a judge acting rationally. Thus, there was not a substantial error on a question of law and the Petition for Appellate Review should be denied.

C. *Harlow v. Agway* does not support Mr. Huff's argument that he should be classified as an employee.

Mr. Huff mistakenly relies on a comparison to the worker in *Harlow v. Agway, Inc.* to make the case that he was an employee. 327 A.2d 856 (Me. 1974). In *Harlow*, Mr. Harlow was working alone in his father's store. Harlow's brother was having Agway deliver sheet rock to his home, but for some reason the delivery could not be made at the home and was instead directed to the barn outside of the father's store. Mr. Harlow agreed to help the Agway driver unload the sheet rock and was injured in the process. *Harlow*, at 858. The Court found that Harlow was not an employee of Agway because he was a purely gratuitous worker who neither received nor expected to receive pay for his services. *Id.* at 859. Mr. Huff argues that because he received mileage reimbursements from RTP, he is different from the worker in Harlow and should be considered an employee.

However, the fact that the worker in *Harlow* did not invest any of his personal resources in his volunteer efforts with Agway makes the case an imperfect comparison. Here, the mileage reimbursement that Mr. Huff expected to receive, and did receive, was for the sole purpose of reimbursing him for his expenses. Mr. Harlow did not expend any resources while helping Agway and therefore could not have expected any reimbursement. What is significant, however, is that similar to Mr. Harlow, Mr. Huff did not receive pay for the service he provided. A more apt analogy may be a situation where a carpenter volunteers to help a friend build a shed. The carpenter purchases wood for the shed and the friend pays him back in cash. The carpenter is not now an employee of the friend simply because the friend made him whole by reimbursing his expenses.

Because *Harlow* does not compel a finding that Mr. Huff was an employee, the Board did not commit a substantial error of law. As such, Mr. Huff's Petition for Appellate Review should be denied.

II. There is no demonstrated need to revisit *Harlow v. Agway*.

Appellate review may be granted where there is a need to consider establishing, implementing or changing an interpretation of law. Mr. Huff mistakenly argues this case presents an opportunity to establish an interpretation of law by answering a question which the Court did not answer in *Harlow v. Agway*, namely whether "the right to compensation arises when one submits himself to the control of another in performing a type of labor without any expectation of pay," and is injured in so doing. *Harlow v. Agway*, 327 A.2d 856, 860 n.2 (Me. 1974).

Notwithstanding the Court's apparent invitation, the Workers' Compensation Act makes clear that to be considered an employee there must be a contract for hire. 39-A M.R.S.A. § 102(11)(A)(Employee includes . . . every other person in the service of another under any contract of hire, express or implied, oral or written . . .") A contract for hire implies the existence of some

type of valuable consideration in support of that contract. *See, Cole* and *Harriman.* To find otherwise, as Mr. Huff urges, would be in violation of the plain language of the statute.

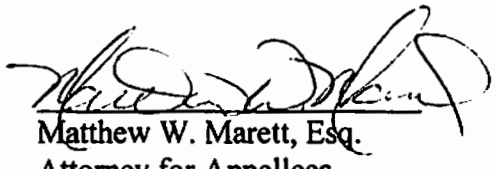
Additionally, Mr. Huff has not indicated why he believes a need exists to undertake establishing a new interpretation of law. Absent such a demonstrated need, appellate review should not be granted.

Moreover, reaching this issue on these facts could have unintended and negative consequences for organizations like RTP that rely heavily on volunteer drivers to fulfill their missions. It is possible that a holding on these facts may apply only to volunteer drivers and not volunteer laborers generally, which is arguably what the reserved question in *Harlow* was focused towards. Without a demonstrated need to establish this new interpretation of law, it would seem inappropriate to push this issue now, particularly given the potentially devastating consequences that Mr. Huff's proposed outcome would create for many volunteer run organizations.

CONCLUSION

Because the Appellate Division did not commit a substantial error on a question of law, and because there is not a demonstrated need to establish a new interpretation of law, Mr. Huff's Petition for Appellate Review should be denied.

Dated in Portland, Maine this 20th day of January, 2016.



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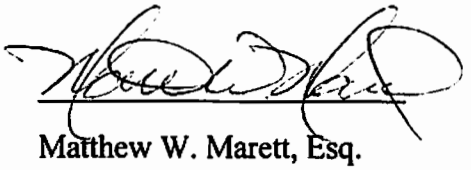
CERTIFICATE OF SERVICE

I, Matthew W. Marett, Attorney for the Appellees in the above matter, hereby certify that I have made service of the foregoing Response to Appellant's Petition for Appellate Review upon Nathan Jury, Esq., by sending one copy by U.S. Mail to MacAdam Jury, P.A., 45 Mallet Drive, Freeport, ME 04032, and upon John Rohde, General Counsel, Workers' Compensation Board, by sending one copy by U.S. Mail to the Workers' Compensation Board, 27 State House Station, Augusta, ME 04333, on January 20, 2016.



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