

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 27, 2024

534155

In the Matter of BANKERS LIFE &
CASUALTY CO.,

Appellant.

MEMORANDUM AND ORDER

COMMISSIONER OF LABOR,

Respondent.

Calendar Date: May 29, 2024

Before: Aarons, J.P., Pritzker, Lynch, Ceresia and Mackey, JJ.

Little Mendelson PC, Fairport (*Pamela S.C. Reynolds* of counsel), for appellant.

Letitia James, Attorney General, New York City (*Camille J. Hart* of counsel), for respondent.

Ceresia, J.

Appeal from a decision from the Unemployment Insurance Appeal Board, filed October 20, 2020, which ruled that Bankers Life & Casualty Co. was liable for additional contributions based on remuneration paid to certain persons.

Bankers Life & Casualty Co. is an insurance company that uses salespeople to sell its life and health insurance products. As a result of an audit for the period of January 1, 2007 to March 31, 2014, the Department of Labor issued a determination that assessed Bankers additional unemployment insurance contributions in the amount of \$452,958.05, based upon remuneration paid to its salespeople included in the audit. Bankers objected and, following hearings, the Administrative Law Judge (hereinafter ALJ) sustained the Department's determination, finding that Bankers exercised sufficient supervision,

direction or control over the services performed by the salespeople to establish an employment relationship and upholding the assessment of additional contributions. The Unemployment Insurance Appeal Board affirmed the ALJ's decision, and Bankers appeals.

We affirm. "Whether an employment relationship exists within the meaning of the unemployment insurance law is a question of fact, no one factor is determinative and the determination of the Board, if supported by substantial evidence on the record as a whole, is beyond further judicial review even though there is evidence in the record that would have supported a contrary conclusion" (*Matter of Jani-King of N.Y., Inc. [Commissioner of Labor]*, 214 AD3d 1088, 1089 [3d Dept 2023] [internal quotation marks and citations omitted]; accord *Matter of Relay Express Inc. [Commissioner of Labor]*, 204 AD3d 1265, 1266 [3d Dept 2022]). "Traditionally, the Board considers a number of factors in determining whether a worker is an employee or an independent contractor, examining all aspects of the arrangement. But the touchstone of the analysis is whether the employer exercised control over the results produced by the worker or the means used to achieve the results. The doctrine is necessarily flexible because no enumerated list of factors can apply to every situation faced by a worker, and the relevant indicia of control will necessarily vary depending on the nature of the work" (*Matter of Vega [Postmates Inc.- Commissioner of Labor]*, 35 NY3d 131, 137 [2020] [internal quotation marks, brackets, footnotes and citations omitted]; see *Matter of Paka [Same Day Delivery Inc.- Commissioner of Labor]*, 213 AD3d 1050, 1052 [3d Dept 2023]).

The record reflects that Bankers established the prices of their products and paid its salespeople according to a commission schedule it set that could be modified at any time at its discretion. Salespeople were required to sign a written agreement in order to sell Bankers' products and were not allowed to assign the written agreement without the prior written consent of Bankers. Pursuant to the agreement, Bankers maintained ownership of all policyholder data, forms, manuals and supplies provided to the salespeople and prohibited the salespeople from soliciting its policyholders for 24 months following the termination of the written agreement. Bankers provided sales leads; an office, desk and computer; and office supplies and marketing materials to any salespeople who wanted those services, for which those salespeople were required to pay \$200 a month into a general fund to cover the cost. Bankers reserved the right to reject any application for insurance submitted by the salespeople and handled any customer complaints regarding them. The foregoing proof, in our view, supports the Board's finding of an employment relationship between Bankers and its salespeople, notwithstanding the existence of evidence in the record that could support a different

conclusion (see *Matter of Gabel [Bankers Life & Cas. Co.-Commissioner of Labor]*, 199 AD3d 1199, 1203-1204 [3d Dept 2021], *lv dismissed* 39 NY3d 945 [2022]; *Matter of Paratore [Bankers Life & Cas. Co.-Commissioner of Labor]*, 199 AD3d 1196, 1198-1199 [3d Dept 2021], *lv dismissed* 39 NY3d 946 [2022]). Contrary to Bankers' contention, the guidelines adopted by the Department for determining an insurance broker's employment status do not " 'mandate a different result' " (*Matter of Thorndike [Penn Mut. Life Ins. Co.-Commissioner of Labor]*, 185 AD3d 1255, 1258 [3d Dept 2020], *lv dismissed* 37 NY3d 1090 [2021], quoting *Matter of Alemic [Herald Publ. Co.-Commissioner of Labor]*, 140 AD3d 1565, 1566 [3d Dept 2016]) and "we discern no inconsistency between either the guidelines and the common-law employer-employee test or the guidelines and the Board's decision" (*Matter of Gabel [Bankers Life & Cas. Co.-Commissioner of Labor]*, 199 AD3d at 1204 [internal quotation marks and citation omitted]; see *Matter of Paratore [Bankers Life & Cas. Co.-Commissioner of Labor]*, 199 AD3d at 1199).

Bankers also argues that the assessment of additional unemployment insurance contributions was arbitrary and capricious. Regarding the calculation of additional contributions, Labor Law § 571 provides that, "[i]f an employer fails to file a quarterly combined withholding, wage reporting and unemployment insurance return as required . . . for the purpose of determining the amount of contributions due or for the purpose of determining contribution rates under this article, or if such return when filed is incorrect or insufficient and the employer fails to file a corrected or sufficient return within [30] days after the commissioner requires the same by written notice, the commissioner shall determine the amount of contribution due from such employer and the amount of wages paid by such employer on the basis of such information as may be available."

In September 2013, the Department instructed Bankers that, based upon a final July 2013 decision of an ALJ finding that a salesperson who had worked for Bankers and had applied for unemployment insurance benefits was an employee entitled to benefits, Bankers must file supplemental reports and pay additional contributions due for all periods from January 2007 to date in which the claimant, and others similarly situated, performed services for Bankers. Bankers did not respond, and, in December 2013, the Department advised that the matter was referred for investigation and informed Bankers that further failure to respond may result in a subpoena being issued. After Bankers again did not respond, the Department issued a subpoena in March 2014 seeking "all information and records in [Bankers] possession concerning remuneration paid to employees or others for services . . . so that [the] Department may verify the number of

employees and the amount of their remuneration" for the time period of January 1, 2007 to December 31, 2013.

In May 2014, Bankers responded, indicating that it no longer had 1099 forms for 2007 and 2008. Bankers provided 1099 forms for 2009 through 2013 that belonged to its holding company, CNO Financial Group. The auditor assigned the matter by the Department contacted Bankers in July 2014, seeking the 1099s that only belonged to Bankers, not its holding company, as well as a list of individuals to whom the forms were issued and its earning statements for the years in question. Bankers did not respond, and the auditor was able to obtain Bankers' specific 1099 information for 2010 and 2011 from a confidential source. To determine how many of the 1099 forms were issued for sales agents who were employees of Bankers, the auditor divided the average annual number of sales agents who applied for unemployment insurance benefits and were found to be employees (seven) by the total average number of sales agents who had applied for benefits (nine), finding that approximately 78% of the 1099 forms represented employees. Using this ratio and the 1099 forms provided by both the confidential source and Bankers, the auditor determined the total assessment for additional contributions for each year audited.

We reject Bankers' argument that the Department did not request records related to the salespeople and lacked the authority to use the formula it devised to calculate the assessment. Initially, contrary to Bankers' contention, the Department did request to examine the relevant records, as it subpoenaed Bankers to provide "all information and records in your possession concerning remuneration paid to employees or others for services" for the time periods in question. Despite the subpoena, Bankers merely provided 1099 forms from its holding company. Although Bankers argues that, based upon the fact that some of the salespeople had been found in ALJ decisions to be independent contractors, the Department should not have considered all of its salespeople to be employees when determining the assessment, it did not provide the Department with any information concerning the salespeople other than 1099 forms, despite being requested to provide such records in the subpoena. Moreover, by using the 78% ratio, the auditor did take into account that not all the salespeople should be considered employees for assessment purposes. In our view, given the dearth of records provided by Bankers, the Department was entitled to use the information that was available to determine the assessment (*see* Labor Law § 571; *Matter of Marchon Eyewear Inc.*[*Commissioner of Labor*], 179 AD3d 1405, 1407 [3d Dept 2020]). Finding no error in the calculation of the assessment, the Board's decision will not be disturbed (*see Matter of Marchon Eyewear Inc.*[*Commissioner of Labor*], 179 AD3d at 1408; *Matter of Mamash Rest. Corp.*

[Commissioner of Labor], 270 AD2d 723, 723-724 [3d Dept 2000]; *Matter of Calon [Commissioner of Labor]*, 257 AD2d 855, 856 [3d Dept 1999]). Bankers' remaining contentions, to the extent not explicitly addressed, have been reviewed and found to be without merit.

Aarons, J.P., Pritzker, Lynch and Mackey, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court