Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00133811
Date of Claim: 08/13/2017
Date of Appeal: 10/30/2017
PC : 10
Appellant: Claimant
Mailing Date: 11/29/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER #1:
EMPLOYER #2: Lyft, Inc.

The claimant appealed on 10/30/17 from a determination of the Deputy, mailed on 10/25/17, holding the claimant disqualified for benefits from 6/18/17 on the ground that the claimant left work with the above named employer #2 voluntarily without good cause attributable to such work.

The claimant appealed on 10/30/17 from a determination of the Deputy, mailed on 10/26/17, holding the claimant disqualified for benefits from 6/18/17 through 7/15/17 on the ground that the claimant failed, without good cause, to accept or apply for suitable work from the above named employer #2.

The claimant and employer #2 with attorney participated in a duly scheduled telephone appeal hearing on 11/27/17.

FINDING OF FACT:

The claimant was employed by the above named employer #1 from 10/31/16 until 6/20/17 when the claimant was discharged for a reason that the Deputy found to be not disqualifying.

A claim for unemployment benefits was filed as of 8/13/17 establishing a regular base year from 4/01/16 through 3/31/17. The above named employer #2 is not a base year employer.

The claimant has been accepting work as a driver from the above named employer #2 since 7/10/17 in order to supplement her income while she seeks full time work. More than 90% of the work that the claimant accepted from the employer has been in New Jersey.

The above named employer # 2 provides a transportation service via its software application where individuals seeking transportation can log onto to the employer's software application and be paired with an available driver. The claimant did not have a set schedule to work and was not required to

work a minimum number of hours. When the claimant wanted to work for the employer, the claimant turned on the employer's software application and the employer would send the claimant work. When the claimant did not want to work for the employer, she turned the software application off.

The claimant used her own car to transport individuals seeking transportation for the above named employer #2. The employer paid the claimant by direct deposit into the claimant's bank account.

As of the date of this hearing, 11/27/17, the claimant is still an active employee and has never left her job with the above named employer #2. However, the claimant was unable to accept work from the employer during the period of 9/11/17 to 9/17/17 because her car was being repaired.

OPINION:

N. J. S. A 43:21-5 provides in part:

An individual shall be disqualified for benefits:

(a) For the week in which the individual has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes re-employed and works eight weeks in employment which may include employment for the federal government and has earned in employment at least ten times the individual's weekly benefit rate, as determined in each case.

In this matter, the claimant never left her job with the above named employer #2. Therefore, no disqualification arises under N. J. S. A 43:21-5(a) as the claimant did not leave her job with the above named employer #2 voluntarily without good cause attributable to the work.

N. J. S. A. 43:21-5 provides in part:

An individual shall be disqualified for benefits:

(c) If it is found that the individual has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the director or to accept suitable work when it is offered, or to return to the individual's customary self-employment (if any) when so directed by the director. The disqualification shall continue for the week in which the failure occurred and for the three weeks which immediately follow that week.

In this matter, the claimant did not have a set schedule to work and was not required to work a minimum number of hours. There is no evidence to indicate that the claimant refused any work from the employer. Therefore, no disqualification applies under N. J. S. A. 43:21-5 (c), as the claimant did not refuse an offer of suitable work from the above named employer #2.

This decision will have an impact on the employer #2's liability for benefit charges against its experience rating account. The deputy will make necessary adjustments and notify the employer thereof, including notice of the employer's right of appeal.

N. J. S. A. 43:21-4 Benefit eligibility conditions

An unemployed individual shall be eligible to receive benefits with respect to any week only if:

(c) (1) The individual is able to work, and is available for work, and has demonstrated to be actively seeking work....

N. J. S. A. 43:21-19(q)

"Week" means for benefit years commencing on or after October 1, 1984, the calendar week ending at midnight Saturday, or as the division may by regulation prescribe.

In this matter, the claimant was unable to accept work from the employer during the period of 9/11/17 to 9/17/17 because her car was being repaired. The claimant was considered unavailable work for the period of 9/11/17 through 9/17/17 when her car was being repaired. Therefore, the claimant is ineligible for benefits for 9/10/17 because it was less than seven calendar days, from 9/11/17 through 9/17/17, as the claimant was unavailable for work, and from 9/18/17 through 9/23/17, as there were less than seven calendar days, in accordance with N.J.S.A 43:21-4 (c)(1) and N.J.S.A. 43:21-19 (q).

DECISION:

No disqualification arises under N. J. S. A 43:21-5(a) as the claimant did not leave her job with the above named employer #2 voluntarily without good cause attributable to the work.

No disqualification applies under N. J. S. A. 43:21-5 (c), as the claimant did not refuse an offer of suitable work from the above named employer #2.

This decision will have an impact on the employer #2's liability for benefit charges against its experience rating account. The deputy will make necessary adjustments and notify the employer thereof, including notice of the employer's right of appeal.

The claimant is ineligible for benefits for 9/10/17 because it was less than seven calendar days, from 9/11/17 through 9/17/17, as the claimant was unavailable for work, and from 9/18/17 through 9/23/17, as there were less than seven calendar days, in accordance with N.J.S.A 43:21-4 (c)(1) and N.J.S.A. 43:21-19 (q).

The determination of the Deputy is modified.

/s/ Paul Yohannan
APPEALS EXAMINER

FA

Board of Review
PO Box 937
Trenton, NJ 08625-0937

SS #:
Docket #: DKT00129754
Date of Claim: 07/09/2017
Date of Appeal: 12/01/2017
Mailing Date: 01/22/2018

Decision of the Board of Review

IN THE MATTER OF:

ORDER OF DISMISSAL

EMPLOYER: LYFT, INC.

The claimant having filed an appeal on December 1, 2017, from a decision of the Appeal Tribunal mailed on November 2, 2017, and

IT APPEARING that the appeal was filed late, in that it was filed subsequent to the expiration of the statutory period of twenty days from the date of mailing of the Appeal Tribunal decision (N.J.S.A. 43:21-6(c));
and

Good cause not having been shown for such late filing;

IT IS ORDERED, that the aforesaid appeal be, and the same hereby is, dismissed.

BY DIRECTION OF THE BOARD OF REVIEW

BOARD OF REVIEW
William Scaglione

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00129754
Date of Claim: 07/09/2017
Date of Appeal: 10/10/2017
PC : 10
Appellant: Employer
Mailing Date: 11/02/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: Lyft, Inc.

The employer appealed on 9/11/17 from a determination of the Deputy, mailed on 8/31/17, holding that the services that the claimant performed for the employer were in employment.

The employer appealed on 9/11/17 from a second determination of the Deputy, mailed on 8/31/17, holding the claimant eligible for benefits without disqualification from 7/09/17.

The employer contends that the claimant was an independent contractor and not an employee. The employer further contends that if it can be shown that the claimant was an employee, the claimant either voluntarily left his job or was discharged for severe misconduct connected with the work.

The employer with attorney, the claimant assisted by interpreter, and a Deputy auditor participated in a duly scheduled telephone appeal hearing on 10/31/17.

FINDING OF FACT:

The claimant worked for the above named employer as a driver from 7/18/15 until 7/12/17. The claimant is no longer working for the above named employer because the employer de-activated the claimant's account as of 7/12/17. The employer deactivated the claimant's account because the claimant had more than three moving violations on his driving record in the prior three-year period. The claimant had three moving violations in 2015 and three moving violations in 2016.

During the period of 7/2015 until 7/12/17, the claimant also worked in a similar capacity for a company called Uber. The claimant is no longer working for Uber for the same reason that the claimant is no longer working for the above named employer.

A claim for unemployment benefits was filed as of 7/09/17.

The above named employer provides a transportation service via its software application where individuals seeking transportation can log onto the employer's software application and be paired with an available driver. The employer sets the price of the fares charged to individuals seeking transportation. The employer collects the fares from the individuals seeking transportation through a third party payment processor. The employer keeps 20 percent of the fares and compensates the driver by remitting 80 percent of the fares to the driver. As a driver, the claimant was not allowed to negotiate the price of the fares charged to individuals seeking transportation, and the employer set the amount of compensation for the claimant.

The claimant signed a written agreement with the above named employer which refers to claimant as an independent contractor.

The above named employer did not prevent the claimant from accepting work with other employers and the claimant was free to set his own days and hours of work by using his smartphone to log onto the employer's software application whenever he wanted work from the above named employer.

The claimant used his own vehicle to transport individuals for the above named employer. The employer required the claimant to have a four door vehicle newer than 2004 in order to get work from the employer. The claimant was responsible for the cost of maintenance, fuel, and maintaining insurance coverage for his vehicle. The employer provided supplemental insurance coverage as required by law.

The above named employer controls the software application that pairs individuals seeking transportation with available drivers. The claimant was required to give each passenger a rating after each ride, if the claimant did not give the passenger a rating, the claimant was automatically denied access for additional work through the employer's software application. The passengers were also required to rate the claimant as a driver. If the claimant continually got a low rating and fell below a certain threshold, the employer could have deactivated the claimant's account.

The claimant never worked out the employer's premises. All of the work that the claimant did for the employer was done out of his vehicle.

Other than a standard driver's license, the claimant did not need a special license to drive for the above named employer. The claimant did not establish a business and has no customers of his own. The claimant could not have worked as a driver for the above named employer if the employer had not granted the claimant access to the employer's software application that paired the claimant with individuals seeking transportation.

OPINION:

N. J. S. A. 43:21-19 (i) (6) provides:

Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R. S. 43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that:

(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact, and

(b) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which the service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation,

profession or business.

Although, the claimant signed an agreement with the above named employer which refers to claimant as an independent contractor, it is unemployment law that determines whether or not the services that the claimant performed for the above named employer are in employment, and not the written agreement.

Where an individual such as the claimant performs services for remuneration, such services are deemed employment unless all three requirements of the above statue, sometimes referred to as the ABC test, are met. When the service relationship fails to meet any of the test, statutory "employment" obtains. ***Gilchrist v. Div. of Emplov. Sec., supra, 48 N.J. Super. at 158.***

In this matter, the above named employer did not prevent the claimant from accepting work with other employers and the claimant was free to set his own days and hours of work. However, there is substantial evidence on the record to show that the employer exercised considerable control over the claimant. For example, the employer unilaterally set the price of the fares that were charged to individuals seeking transportation and the employer set the amount of compensation for the claimant. Another example of control is that the employer controlled the software application that paired individuals seeking transportation with available drivers. In essence, the software application that the employer provided to the claimant was a tool that allowed the claimant to work for the employer. Without that tool, the claimant could not have worked for the employer. Additionally, another example of control is that the claimant was required to give each passenger a rating after each ride, if the claimant did not give the passenger a rating, the claimant was automatically denied access for additional work through the software application. And finally, the employer could have penalized the claimant by deactivating the claimant's account if the claimant continually got a low rating from passengers and fell below a certain threshold. The Appeal Tribunal finds that the claimant was not free from control. Therefore, test A has not been satisfied.

Part B of the test contains two prongs joined by the word "or" which indicates that if one or both of the prongs is true, then part B of the test has been satisfied.

The claimant worked as a driver for the above named employer. The employer provides a transportation service via its software application. The services that the claimant provided for the employer were not outside the usual course of business for the employer. Therefore, the first prong of the test has not been satisfied. However, the claimant never worked out of the employer's premises, the service that the claimant performed for the employer was outside of all the places of business of the enterprise for which the service is performed. Therefore, the second prong of the test has been satisfied. Accordingly, test B has been satisfied.

In ***Gilchrist v. Div. of Emplov. Sec., supra, 48 N.J. Super. at 158***, the court concluded that Test C requires that "such individual is customarily engaged in an independently established trade, occupation, profession or business."

Also in ***Hargrove v. Sleepy's LLC,*** 220 ***N.J.*** 289(2015), the Supreme Court noted that "Part C of the statue is also derived from the common law. This part of the test "calls for an enterprise that exist and can continue to exist independently of and apart from the particular service relationship."

The claimant is clearly not in an independent business that would survive the termination of his relationship with the above named employer as evidenced for the following reasons: First, the claimant does not have his own customers. The claimant is dependent on the employer for individuals seeking rides. All of the individuals seeking rides that the claimant transports for the above named employer came through the employer's software application. The employer controlled the software application and the claimant would not have had access to those individuals seeking

transportation if the employer had not granted the claimant access to the individuals through its software application. It defies logic to believe that the claimant is engaged in an independent business when the claimant has no customers. Second, the claimant was not allowed to negotiate the price of the fares charged to individuals seeking transportation or negotiate his compensation from the employer. It is not reasonable to believe that the claimant is engaged in an independent business seeking to make a profit when the claimant was not allowed to negotiate the price of the fares charged to individuals seeking transportation or negotiate his compensation from the employer. After all, it is reasonable to expect that an independent contractor would run his business by negotiating compensation for his services that would maximize his profits. Third, the claimant opened the unemployment claim dated 7/09/17 after his account was de-activated which suggest to the Appeal Tribunal that the claimant was dependent for his livelihood on his relationship with the above named employer. And finally, other than a standard driver's license, no special license was needed by the claimant to work for the employer which suggest that the claimant does not have a profession that would exist independently after the claimant's separation from the employer. The Appeal Tribunal concludes that the claimant was not engaged is an independently established trade, occupation, profession or business that would survive the termination of the relationship with the above named employer. Therefore, test C has not been satisfied.

The evidence before the Appeal Tribunal indicates that an employer/employee relationship existed. Therefore, the remunerated services performed by the claimant for the above named employer were in employment, and all monies paid were covered earnings in accordance with N. J. S. A. 43:21-19 (i)(6).

N. J. S. A. 43:21-5 provides in part:

"an individual shall be disqualified for benefits:

(b) For the week in which the individual has been suspended or discharged for misconduct connected with the work, and for the seven weeks which immediately follow that week, as determined in each case...

In this matter, the claimant is considered to have voluntarily left his job. Therefore, no disqualification applies in accordance with N.J.S.A. 43:21-5(b) as the claimant was not discharged for simple misconduct connected with the work. The matter is better reviewed under N. J. S. A. 43:21-5(a).

N. J. S. A. 43:21-5 provides in part:

An individual shall be disqualified for benefits:

(a) For the week in which the individual has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes re-employed and works eight weeks in employment which may include employment for the federal government and has earned in employment at least ten times the individual's weekly benefit rate, as determined in each case.

N. J. S. A. 39:5H-20. Prohibition for applicant, driver to access digital network.

An applicant or driver shall be prohibited from utilizing the transportation network company's digital network as a transportation network company driver or from providing a prearranged ride as a transportation network company driver if:

b. The applicant's or driver's driving record check reveals more than three moving violations in the prior three-year period, or one of the following violations in the prior three-year period...

In this matter, the claimant was separated by the above named employer on 7/12/17 because the claimant had more than three moving violations on his driving record in the prior three-year period. As a result of his driving record, the claimant was statutorily barred from working for the above named employer in accordance with N. J. S. A. 39:5H-20(b). In essence, the above named employer could not allow the claimant to continue working for the employer because the claimant was statutorily barred from employment. The Appeal Tribunal finds that this case should be decided in accordance with ***Self v. Board of Review, 91 N.J 453 (1982),*** in which the Court held that an individual will be disqualified for voluntarily leaving work if the individual makes a "departure not attributable to the work." The claimant is considered to have left the job voluntarily because he was statutorily barred from employment as a result of his driving record. The claimant's driving record is not attributable to the job. Therefore, the claimant is disqualified for benefits as of 7/09/17, under N. J. S. A 43:21-5(a), as the claimant left work voluntarily without good cause attributable to such work.

N. J. S. A. 43:21-7 (c) (1) provides as follows:

Benefits paid with respect to benefit years commencing on and after January 1, 1953, to any individual on or before December 31 of any calendar year with respect to unemployment in such calendar year and in preceding calendar years shall be charged against the account or accounts of the employer or employers in whose employment such individual established base weeks constituting the basis of such benefits, except that, with respect to benefit years commencing after January 4, 1998, an employer's account shall not be charged for benefits paid to a claimant if the claimant's employment by the employer was ended in any way which, pursuant to subsection (a), (b), (c), (f), (g) or (h) of N.J.S.A. 43:21-5, would have disqualified the claimant for benefits if the claimant had applied for benefits at the time when that employment ended.

In this matter, the claimant voluntarily left the job for a disqualifying reason. Therefore, the employer is not liable for charges to its experience rating account for unemployment benefits received on the claim dated 7/09/17, in accordance with N.J.S.A. 43:21-7(c)(1).

DECISION:

The remunerated services performed by the claimant for the above named employer were in employment, and all monies paid were covered earnings in accordance with N. J. S. A. 43:21-19 (i)(6).

No disqualification applies in accordance with N.J.S.A. 43:21-5(b) for a discharge for gross misconduct connected with the work.

The claimant is disqualified for benefits as of 7/09/17, under N. J. S. A 43:21-5(a), as the claimant left work voluntarily without good cause attributable to such work.

The employer is not liable for charges to its experience rating account for unemployment benefits received on the claim dated 7/09/17, in accordance with N.J.S.A. 43:21-7(c)(1).

The determination of the Deputy is modified.

/s/ Paul Yohannan
APPEALS EXAMINER

FA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00129754
Date of Claim: 07/09/2017
Date of Appeal: 09/11/2017
PC : 10
Appellant: Employer
Mailing Date: 09/29/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: LYFT, INC.

The employer appealed on 9/11/2017 from a determination of the Deputy, mailed on 8/31/2017, holding the employer subject to experience rating charges on an unemployment claim dated 7/9/2017.

The employer contends that the claimant was an independent contractor and not in covered employment, in the alternative, that he voluntarily left the work without good cause attributable to the work, or alternatively, he was discharged for severe misconduct connected with the work. There were no other issues disputed by the appellant employer.

The appellant's attorney was unable to participate in a duly scheduled hearing on 10/5/2017.

FINDINGS OF FACT:

Prior to the hearing scheduled for 10/5/2017, the appellant's attorney notified the Appeals Tribunal she would be unable to participate in the scheduled hearing and pursue the appeal because she would be on an airplane and unable to communicate via telephone.

OPINION:

As the appellant's attorney was unable to participate in the hearing because she would be travelling, the appeal is dismissed without prejudice. The appeal may be reopened upon the appellant's application to the Appeal Tribunal. Any request to the Appeal Tribunal must be received within 180 days of the mailing date of this decision.

DECISION:

The appeal is dismissed without prejudice.

NOTE: TO REQUEST ANOTHER HEARING WRITE TO:

APPEAL TRIBUNAL
NEW JERSEY DEPARTMENT OF LABOR
PO BOX 936
TRENTON, NJ 08625-0936

You must include your name and Social Security number.

/s/ Michael Napier
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00126777
Date of Claim: 10/02/2016
Date of Appeal: 08/07/2017
PC : 10
Appellant: Claimant
Mailing Date: 08/31/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER #1:
EMPLOYER #2:
EMPLOYER #3: LYFT INC

The claimant appealed on 08/07/17 from a determination of the Deputy, mailed on 08/01/17, imposing a period of ineligibility for benefits from 10/02/16 through 07/01/17 on the ground that the claimant was employed full-time.

The claimant appealed on 08/07/17 from a Request for Refund from the Director, mailed on 08/01/17, imposing a liability to refund the sum of $10,786.00 received as benefits for the weeks ending 10/15/16 through 06/10/17 as provided by N.J.S.A. 43:21-16(d).

The claimant participated in a telephone hearing on 08/30/17.

FINDINGS OF FACT:

The claimant filed an unemployment claim dated 10/02/16, establishing a base year beginning 07/01/15 and ending 06/30/16. The above named employer #1 is the only employer in the base year. The claimant worked for the above named employer #1 as a dispatcher, working Sunday through Thursday, from 06:45 am to 03:45 pm, full time (40 hours per week), earning $26.96 an hour, from 10/16/10 through 10/05/16 when separated for reasons the Division found to be not disqualifying. The claim was established with a weekly benefit rate of $657.00, a partial weekly benefit rate of $788.00 and benefits were paid for the weeks from 10/02/16 through 06/10/17

The claimant works for the above named employer #2 as a table games dealer, working varying days per week, varying times per day, part time (less than 32 hours per week), earning $4.25 an hour, plus tips, from 04/09/16 where she is still employed. .

The claimant works for the above named employer #3, as a driver, varying days per week, varying times per day, per diem (limited to 16 hours per day), earning a calculated per trip rate, from 06/11/17 where she is still employed.

During the weeks from 10/02/16 through 08/26/17, the claimant was not working full-time. The claimant has been reporting her hours worked and her gross wages when claiming benefits. The claimant is still seeking full time employment and when successful will make any necessary adjustments to her relationship with employer #2 and #3 when that time occurs.

On a claim for benefits dated 10/02/16, with a weekly benefit rate of $657.00, the claimant received benefits for the weeks ending 10/15/16 through 06/10/17 in the amount of $657.00 each week, reduced for reported earnings, for a total of $10,786.00.

Division records indicate whether the claimant was or was not engaged in an independently established trade and was or was not in subject employment with employer #3 has not been determined by the Deputy.

OPINION:

N.J.S.A. 43:21-19(m)(l) provides:

"An individual shall be deemed 'unemployed' for any week during which he is not engaged in full-time work and with respect to which his remuneration is less than his weekly benefit rate..."

(2) "...the term 'remuneration' with respect to any individual for benefit years commencing on or after July 1, 1961, and as used in this subsection, shall include only that part of the same which in any week exceeds 20% of his weekly benefit rate (fractional parts of a dollar omitted) or $5, whichever is the larger."

(3) "An individual's week of unemployment shall be deemed to commence only after the individual has filed a claim at an unemployment insurance claims office, except as the division may by regulation otherwise prescribe."

The claimant's work with employers #2 and #3 is based upon business needs and fluctuates by week. The claimant's weekly reporting of hours worked and wages earned will determine whether; full, partial, or no benefit entitlement exists. During the weeks in question the claimant did not work full-time. Therefore, the claimant was considered unemployed and is not ineligible for benefits from 10/02/16 through 08/26/17 under N.J.S.A. 43:21-19(m)(l).

N.J.S.A. 43:21-16(d) provides for the recovery of benefits paid to an individual who, for any reason, has received benefits to which he was not entitled.

"A refund is recoverable even if the claimant receives unentitled benefits in good faith." Fisher vs. Board of Review, 123 N.J. Super. 263 (App. Div.1973).

In this case the claimant has not received an overpayment of benefits for the weeks in question. The claimant is not still obligated to refund the amount that was paid.

Therefore, the claimant is not liable for refund in the sum of $10,786.00, received as benefits for

the weeks ending 10/15/16 through 06/10/17, in accordance with N.J.S.A. 43:21-16(d).

The matter of whether the claimant was or was not engaged in an independently established trade and was or was not in subject employment with employer #3 is forwarded to the Deputy for their initial consideration.

DECISION:

The claimant is not ineligible for benefits from 10/02/16 through 08/26/17 in accordance with N.J.S.A. 43:21-19(m)(1).

The claimant is not liable for refund in the sum of $10,786.00 received as benefits for the weeks ending 10/15/16 through 06/10/17, in accordance with N.J.S.A. 43:21-16(d).

The matter of whether the claimant was or was not engaged in an independently established trade and was or was not in subject employment with employer #3 is forwarded to the Deputy for their initial consideration

The determination of the Deputy is reversed.

The determination of the Director is reversed.

/s/ Ronald Holtz
APPEALS EXAMINER

FA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT0012496I
Date of Claim: 06/04/2017
Date of Appeal: 07/18/2017
PC : 10
Appellant: Employer
Mailing Date: 08/11/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: LYFT INC

The employer appealed on 07/18/17 from a determination of the Deputy, mailed 07/03/17, holding the claimant eligible for benefits, without disqualification, from 06/04/17.

The employer contends that the claimant was an independent contractor. There were no other issues disputed by the appellant employer.

This matter is decided from information contained in the Division's files.

FINDINGS OF FACT:

The appellant, by statement, requested that the appeal be withdrawn.

OPINION:

After review of the matter, the Appeal Tribunal approves the appellant's request for withdrawal of the appeal.

DECISION:

The appeal is withdrawn.

/s/ Vicki Rubenstein
APPEALS EXAMINER

UA

508

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00124606
Date of Claim: 06/18/2017
Date of Appeal: 07/11/2017
PC : 10
Appellant: Employer
Mailing Date: 08/09/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: LYFT INC.

The employer appealed on 07/11/17 from a determination of the Deputy, mailed on 07/11/17, holding the claimant eligible for benefits, without disqualification, from 06/18/17.

The employer contends that the claimant was both an independent contractor and also was discharged for misconduct connected with the work. There were no other issues disputed by the appellant employer.

The claimant, the employer, the employer's attorney, and the Auditor for the Division participated in a telephone hearing on 08/08/17.

FINDINGS OF FACT:

The claimant worked for the above-named employer as a Transportation Network Driver, earning a seventy-five (75%) commission on each ride, from 10/03/16 through 06/13/17. On that date the claimant was effectively discharged as the employer deactivated the claimant's work status due to unsafe/reckless driving. The claimant recalls being given a total of three (3) warnings for this concern. On the 06/13/17 date of discharge the claimant pulled into a specific customer's pick up area. The customer had several items with her and she needed some time to store the items in the trunk and the back seat of the vehicle. Rather than putting the vehicle's gear into park the claimant left the vehicle in drive mode. At some point during the customer's transport of her items, while she was still outside of the vehicle, the claimant's driving foot slipped off the brake and nearly caused his vehicle to run over the customer's foot/feet.

The above-named employer provides a transportation service via their software application which allows for customers seeking transportation to log onto the employer's software application in order to be paired with an available driver. The employer fully controls this software which pairs individuals seeking transportation with available drivers. The employer sets

the cost/price of the ride fares charged to each individual customer. The employer collects these fares through a third party payment processor. The claimant was not allowed to negotiate the price of the fares, nor was the claimant allowed to negotiate the commission structure imposed by the employer. The claimant always used his own vehicle for these customer rides. The claimant paid for his own gasoline, insurance, and general maintenance. He was reimbursed for tolls based upon the built in cost of the ride.

The claimant required a valid driver's license, an updated inspection sticker, updated insurance and registration, and a clean criminal backround check in order to perform the work. No other special type of licenses were required for the job. The claimant had no customers of his own.

The claimant never worked out of the employer's premises as all of the work was performed from his vehicle.

OPINION:

N.J.S.A. 43:21-5. An individual shall be disqualified for benefits:

(b) For the week in which the individual has been suspended or discharged for misconduct connected with the work, and for the seven weeks which immediately follow that week, as determined in each case.

For the week in which the individual has been suspended or discharged for severe misconduct connected with the work, and for each week thereafter until the individual becomes reemployed and works four weeks in employment, which may include employment for the federal government, and has earned in employment at least six times the individual's weekly benefit rate, as determined in each case. Examples of severe misconduct include, but are not necessarily limited to, the following: repeated violations of an employer's rule or policy, repeated lateness or absences after a written warning by an employer, falsification of records, physical assault or threats that do not constitute gross misconduct as defined in this section, misuse of benefits, misuse of sick time, abuse of leave, theft of company property, excessive use of intoxicants or drugs on work premises, theft of time, or where the behavior is malicious and deliberate but is not considered gross misconduct as defined in this section.

In the event the discharge should be rescinded by the employer voluntarily or as a result of mediation or arbitration, this subsection (b) shall not apply, provided, however, an individual who is restored to employment with back pay shall return any benefits received under this chapter for any week of unemployment for which the individual is subsequently compensated by the employer.

If the discharge was for gross misconduct connected with the work because of the commission of an act punishable as a crime of the first, second, third or fourth degree under the "New Jersey Code of Criminal Justice,"N.J.S.2C:1-1 et seq., the individual shall be disqualified in accordance with the disqualification prescribed in subsection (a) of this section and no benefit rights shall accrue to any individual based upon wages from that employer for services rendered prior to the day upon which the individual was discharged.

The director shall insure that any appeal of a determination holding the individual disqualified for gross misconduct in connection with the work shall be expeditiously processed by the appeal tribunal.

The Board of Review has historically held that:

"Misconduct connected with the work also includes the concept of gross negligence. Essentially, gross negligence is doing harm to the interests of the employer by acts of commission or omission which, even if not willful, are of such a nature that the claimant should have known better than to commit such acts."

In this case, the final incident which led directly to the discharge was an act of negligence on the claimant's part which should easily have been avoided. As he recognized that the multiple packages being placed in his back seat and trunk were taking significant time, there was no reason for the claimant not to place his vehicle in park mode. By failing to take this very basic action he almost caused a very significant injury to this passenger. While the claimant denied any wrongdoing involving the other incidents which the employer documented, he did admit to having received three (3) prior warnings for safety concerns. It is apparent that the final act of negligence was not an isolated incident, but rather a pattern of negligence involving his driving duties. Hence, the claimant is disqualified for benefits under N.J.S.A. 43:21-5(b), as of 06/11/17 through 08/05/17 as the discharge was for misconduct connected with the work.

N.J.S.A. 43:21-19(i)(6) provides:

Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R.S. 43:21-1 et seq.) unless and until it is shown to the satisfaction of the Division that

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

When a claimant performs services for remuneration, these services are deemed to be employment unless **ALL** three requirements from the above-named statute, also known as the ABC test, are met. When the service relationship fails to meet all three prongs of this test then statutory "employment" is concluded. Gilchrist v. Div. of Employ. Sec., supra, 48 N.J. Super. at 158.

In this case, the above-named employer did not prevent the claimant from accepting work elsewhere, and the claimant was free to set his own days and hours of work. However the employer still exercised control over the claimant. As the employer always set the price of the car transport fare, and always set the exact same commission structure for this fare, the claimant had no say in this matter of monetary compensation. Also the employer always controlled the software application which allowed the claimant to perform his job by pairing up passengers with available drivers. This software was a requisite tool for the position and the claimant would have been unable to pick up customers and perform the driving tasks without this software. Also, the claimant was not involved in an independent business which could have continued once he was discharged. Both parties agreed that the claimant did not have his own customers as he was

always dependent upon the employer's software to locate and pick up every customer being charged for their transportation. Upon this discharge there was no possibility for the claimant to continue this type of driving work. Finally, excluding his driver's license, an updated inspection, insurance and registration for his vehicle, along with a clean criminal history, no other specific license requirement was needed by the claimant to work for this employer. This suggests that the claimant does not have a profession which would persist once he was separated by this employer on 06/13/17. Based upon the employer's failure to meet all of the ABC three prong test, evidence exists that there was an employee/employer relationship in this matter. The services performed by the claimant were in employment, and not as an independent contractor, under N.J.S.A. 43:21-19 (i)(6).

This decision will have an impact on the employer's liability for benefit charges against its experience rating account. The Deputy will make necessary adjustments and notify the employer thereof, including notice of the employer's right of appeal.

The matter of the claimant's potential liability for refund of benefits received is remanded to the Director for an initial determination in accordance with established procedures.

DECISION:

The remunerated services performed by the claimant for the above-named employer were in covered employment, as the claimant was not an independent contractor, in accordance with N.J.S.A. 43:21-19 (i) (6).

The claimant is disqualified for benefits under N.J.S.A. 43:21-5(b) as of 06/11/17 through 08/05/17 as the discharge was for misconduct connected with the work.

This decision will have an impact on the employer's liability for benefit charges against its experience rating account. The Deputy will make necessary adjustments and notify the employer thereof, including notice of the employer's right of appeal.

The matter of the claimant's potential liability for refund of benefits received is remanded to the Director for an initial determination in accordance with established procedures.

The determination of the Deputy is reversed.

/s/ Peter Toulas
APPEALS EXAMINER

FA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00124556
Date of Claim: 05/14/2017
Date of Appeal: 07/12/2017
PC : 10
Appellant: Employer
Mailing Date: 08/10/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: LYFT INC

The employer appealed on 07/13/17 from a determination of the Deputy, mailed on 06/28/17, that am employer-employee relationship exists.

The appellant employer contends that the claimant was an independent contractor and not an employee. The employer further contends the claimant was discharged for misconduct and therefore, they should not be held liable for employer charges.

The employer, with counsel, and the Deputy State Auditor participated in a duly scheduled hearing on 08/08/17.

FINDING OF FACT:

The above named employer is a transportation network company which provides a transportation service via its software application where individuals seeking transportation can log onto the employer's software application and be paired with an available driver. The employer sets the price of the fares charged to individuals seeking transportation. The employer collects the fares from the individuals seeking transportation through a third party payment processor. The employer keeps 20 percent of the fares. As a driver, the claimant cannot negotiate the price of the fares charged to individuals seeking transportation nor is the claimant allowed to negotiate his compensation from the employer.

The claimant uses his own vehicle to transport individuals for the above named employer. The claimant must pass his State's inspection. In order to drive for the above named employer, his vehicle must also be inspected and pass the company's inspection. The claimant is required to be insured for at least the minimum amount that is mandated by the State of New Jersey and that the premium is paid for by the

claimant. The company also provides a supplemental commercial policy. The claimant is responsible for all vehicle costs such as maintenance, repairs and gas.

The above named employer did not prevent the claimant from accepting work with other employers and the claimant was free to set his own days and hours of work by using his smartphone to log onto the employer's software application whenever he wanted to work for the above named employer.

The claimant never worked out of the employer's premises as the headquarters are located in San Francisco but the claimant could accept work from anywhere. All of the work that the claimant did for the employer was done out of his vehicle.

Other than a standard driver's license, the claimant does not need a special license. The above named employer controls the software application which pairs individuals seeking transportation with available drivers. The claimant could not have worked as a driver if the employer had not granted the claimant access to their software application which pairs the claimant with individuals seeking transportation.The employer also controls who does or does not have access to their software. They can control who can be active and who will be deactivated.

The claimant was discharged and deactivated by the above named employer for a violation of their terms of service rules/policy after having been given three warnings that is referred to as strikes.

The Deputy mailed a determination on 06/28/17. The employer received the determination letter on 0705//17. Counsel for the employer filed the appeal on 07/12/17.

OPINION:

N.J.S.A. 43:21-6(b) (1) provides that an appeal must be filed within ten (10) days of mailing of the determination, or within seven (7) days of the receipt of the determination

The employer filed a timely appeal as the appeal was filed within seven days of receipt of the determination letter. Therefore, the Appeal Tribunal has jurisdiction.

N. J. S. A. 43:21-19 (i) (6) provides:

Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R. S. 43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that

(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact, and

(b) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which the service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

Here, the claimant signed a Transportation Provider Service Agreement with the above named employer which refers to the claimant as an independent contractor, however, it is the unemployment law which determines whether or not the services that the claimant performed for the above named employer are in employment, and not the written agreement.

Where an individual such as the claimant performs services for remuneration, such services are deemed employment unless all three requirements of the above statue, sometimes referred to as the ABC test, are met. When the service relationship fails to meet any of the test, statutory "employment" obtains. ***Gilchrist v. Div. of Employ. Sec., supra, 48 N.J. Super. at 158.***

In this matter, the claimant was not prevented from accepting work with other employers by the above named employer and the claimant was free to set his own schedule for work. However, as per the evidence provided on the record which shows that the employer had a considerable amount of control over the claimant. For example, the employer had control over the software application which pairs individuals seeking transportation with available drivers. In essence, the software that the employer provided to the claimant was a tool that allowed the claimant to work for the employer. Without that tool, the claimant could not have worked for the employer. The employer set the price of the fares which were charged to individuals seeking transportation and the employer set the amount of compensation for the claimant. The employer also was able to take away the accessibility to the software and in this case deactivated the claimant's employment. In this matter, this Appeal Tribunal finds that the claimant was not free of control. Therefore, test A has not been satisfied.

Part B of the test contains two prongs joined by the word "or" which is a logical operator indicating that if one or both of the prongs is true, then part B of the test has been satisfied.

The claimant worked as a driver for the above named employer. The employer provides a transportation service via its software application. The services that the claimant provided for the employer was not outside the usual course of business for the employer. Therefore, the first prong of the test has not been satisfied. However, the claimant never worked out of the employer's premises, the service that the claimant performed for the employer was outside of all the places of business of the enterprise for which the service is performed. Therefore, the second prong of the test has been satisfied. Accordingly, test B has been satisfied.

In ***Gilchrist v. Div. of Employ. Sec., supra, 48 N.J. Super. at 158***, the court concluded that
Test C requires that "such individual is customarily engaged in an independently established trade, occupation, profession or business."

Also in ***Hargrove v. Sleepy's LLC. 220 N.J. 289(2015)***, the Supreme Court noted that "Part C of the statue is also derived from the common law. This part of the test "calls for an enterprise that exist and can continue to exist independently of and apart from the particular service relationship."

The claimant is clearly not in an independent business which would survive the termination of his relationship with the above named employer evidenced for the following reasons: First, there is no evidence on the record that the claimant had his own customers. The claimant is dependent on the employer as their software pairs the roaders with the driver. The employer controlled the software application and the claimant would not have had access to those individuals had the employer not granted the claimant access to the individuals through its software application. It's not logical to believe that the claimant is engaged in an independent business when the claimant has no customers. Second, the claimant is not allowed to negotiate the price of the fares charged to individuals seeking transportation or negotiate her compensation from the employer. It is not reasonable to believe that the claimant is engaged in an independent business seeking to make a profit when the claimant is not allowed to negotiate the price of the fares charged to individuals seeking transportation or her compensation from the employer. After all, it is reasonable to expect that an independent contractor would run his business by negotiating compensation for his services that would maximize his profits. And finally, other than a standard driver's license, no special license was needed by the claimant to work for the employer which suggests that the claimant did not have a profession that would persist if the claimant was separated from the employer. The Appeal Tribunal concludes that the claimant was not engaged as an independently established trade, occupation, profession or business that would survive the termination of the relationship with the above named employer. Therefore, test C has not been satisfied.

The evidence before the Appeal Tribunal indicates that an employer-employee relationship existed. Therefore, the remunerated services performed by the claimant for the above named employer were in employment, and all monies paid were covered earnings in accordance with N. J. S. A. 43:21-19 (i)(6).

N. J. S. A. 43:21-7 (c) (1) provides as follows:

Benefits paid with respect to benefit years commencing on and after January 1, 1953, to any individual on or before December 31 of any calendar year with respect to unemployment in such calendar year and in preceding calendar years shall be charged against the account or accounts of the employer or employers in whose employment such individual established base weeks constituting the basis of such benefits, except that, with respect to benefit years commencing after January 4, 1998, an employer's account shall not be charged for benefits paid to a claimant if the claimant's employment by the employer was ended in any way which, pursuant to subsection (a), (b), (c), (f), (g) or (h) of N.J.S.A. 43:21-5, would have disqualified the claimant for benefits if the claimant had applied for benefits at the time when that employment ended.

In this matter, it has not yet been determined if the claimant's separation from employment with the above named employer was for a disqualifying reason. Therefore, the employer cannot be relieved of benefit charges, and the employer is liable for charges to its experience rating account for unemployment benefits received on the claim dated 05/14/17, in accordance with N.J.S.A. 43:21-7(c)(1). However, as there is a separation issue that has not yet been adjudicated it will be remanded back to the Department of Labor Division of Unemployment for an original determination.

DECISION:

The appeal is timely in accordance with N.J.S.A. 43:21-6(b) (1).

The remunerated services performed by the claimant for the above named employer were in employment, and all monies paid were covered earnings in accordance with N. J. S. A. 43:21-19 (i)(6).

No disqualification arises under N. J. S. A 43:21-5(a) as the claimant did not leave the job voluntarily without good cause attributable to the work.

The employer is liable for charges to its experience rating account for unemployment benefits received on the claim dated 05/14/17, in accordance with N.J.S.A. 43:21-7(c)(1).

The determination of the Deputy is affirmed.

The Deputy should determine if the claimant needs a claims examiner appointment for the separation issue of discharge on 02/02/16, or a relief of charges, with the above named employer.

/s/ Maryann Moran-Smyth
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00123436
Date of Claim: 04/02/2017
Date of Appeal: 06/26/2017
PC : 10
Appellant: Employer
Mailing Date: 07/24/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: LYFT INC

The employer appealed on **06/26/17** from a determination of the Deputy, mailed on **06/14/17,** imposing a period of eligibility for benefits from 04/02/17, on the ground that the claimant was considered to be an employee rather than an Independent contractor, which then established sufficient base year wages to establish a valid claim.

The employer contends that the claimant is an Independent contractor and not an employee and therefore, they should not be liable for charges. There were no other issues disputed by the appellant employer.

The counsel for the (appellant) employer requested a dismissal without prejudice.

FINDINGS OF FACT:

The counsel for the (appellant) employer wishes time to determine if they if fact need to appeal.

The claimant has been disqualified under voluntary leaving and the above named employer has been relieved of charges,

OPINION:

As the counsel for the (appellant) employer wishes time to determine if they need to move the appeal forward.

The appeal is dismissed without prejudice. The appeal may be reopened upon the appellant's application to the Appeal Tribunal.

Any request to the Appeal Tribunal must be received within 180 days of the date of mailing of

this decision.

DECISION:

The appeal is dismissed without prejudice.

TO REQUEST ANOTHER HEARING, WRITE TO:

APPEAL TRIBUNAL
NEW JERSEY DEPARTMENT OF LABOR
PO BOX 936
TRENTON, NJ 08625-0936

You must include your name, Social Security and Docket numbers.

/s/ Maryann Moran-Smyth
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00115578
Date of Claim: 02/19/2017
Date of Appeal: 04/03/2017
PC : 10
Appellant: Employer
Mailing Date: 04/24/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: LYFT INC

The employer appealed on 04/03/17 from a determination of the Deputy, mailed on 03/22/17, that an employer-employee relationship exists.

The appellant employer contends that the claimant is an independent contractor and therefore, they should not be held liable for employer charges.

This matter is decided on information contained in the Division's files.

FINDINGS OF FACT:

On the claim dated 02/19/17, the above named employer is not a base year or lag employer.

There are no weeks and or wages from the above named employer that are used in the calculation of the claim.

OPINION:

The employer has not potential to be charged on the claim dated 02/19/17.

Therefore, there is now no justiciable issue before the Appeal Tribunal, the appeal is dismissed.

DECISION:

The appeal is dismissed.

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/s/ Maryann Moran-Smyth
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00114149
Date of Claim: 02/05/2017
Date of Appeal: 05/18/2017
PC : 10
Appellant: Employer
Mailing Date: 06/16/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: LYFT INC

For good cause shown, this matter is reopened as of 05/18/17.

The employer with attorney, and a Deputy auditor participated in a duly scheduled telephone appeal hearing on 06/14/17.

The claimant registered timely for the telephone hearing scheduled for 06/14/17. The claimant was not reachable when called to start the hearing.

FINDING OF FACT:

The employer appealed on 03/20/17 from a determination of the Deputy, mailed on 03/08/17, holding that the claimant worked as an independent contractor and there exists an employer-employee relationship between the claimant and the employer.
The employer contends that the claimant was an independent contractor and not an employee. The employer further contends the claimant left work voluntarily without good cause attributable to such work and object to benefit charges to their account for any unemployment benefits paid to the claimant on an unemployment claim dated 02/05/17.

A claim for unemployment benefits was filed as of 02/05/17 establishing a regular base year from 10/01/15 through 09/30/16, no wages were used from the above named employer to establish the claim for benefits.
The claimant applied to become a Lyft driver on 02/14/17, before being accepted the claimant would have to consent/agree to the terms of service at the time of the application process and terms of service agreement refers to claimant as an independent contractor. This process is completed electronically. The claimant was activated as of 02/20/17 and accepted her first ride on 02/22/17. The claimant accepted her last ride as of 03/10/17 and her account remains enabled.

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The claimant was paid per ride, per passenger 75 percent of the ride fare which is determined by the employer.

The above named employer is a transportation network company which provides a transportation service via its software application where individuals seeking transportation can log onto the employer's software application and be paired with an available driver. The employer sets the price of the fares charged to individuals seeking transportation. The employer collects the fares from the individuals seeking transportation through a third party payment processor. The employer keeps 25 percent of the fares. As a driver, the claimant cannot negotiate the price of the fares charged to individuals seeking transportation nor is the claimant allowed to negotiate his compensation from the employer.

The claimant uses her own vehicle to transport individuals for the above named employer. The vehicle has to be a 2005 or newer and the company emblem which is a removable placard is placed in the vehicle while the claimant works as a driver. The claimant provides her own auto insurance policy and the company provides a supplemental commercial policy. The claimant covers all vehicle costs for repairs and gas.

The above named employer did not prevent the claimant from accepting work with other employers and the claimant was free to set her own days and hours of work by using her smartphone to log onto the employer's software application whenever she wanted to work for the above named employer.

The above named employer controls the software application which pairs individuals seeking transportation with available drivers. The claimant only worked in New Jersey but at the request of the customer could be dropped off in New York but not pick up in New York.

The claimant never worked out of the employer's premises as the headquarters are located in San Francisco but the claimant could accept work from anywhere. All of the work that the claimant did for the employer was done out of her vehicle.
Other than a standard driver's license, the claimant does need a special license. The claimant has no customers of her own. The claimant could not have worked as a driver for the above named employer if the employer had not granted the claimant access to their software application which pairs the claimant with individuals seeking transportation.

OPINION:

N. J. S. A. 43:21-19 (i) (6) provides:

Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R. S. 43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that

(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact, and

(b) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which the service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

Here, the claimant signed a Transportation Provider Service Agreement with the above named employer which refers to claimant as an independent contractor, however, it is the unemployment law which determines whether or not the services that the claimant performed for the above named employer are in employment, and not the written agreement.

Where an individual such as the claimant performs services for remuneration, such services are deemed employment unless all three requirements of the above statue, sometimes referred to as the ABC test, are met. When the service relationship fails to meet any of the test, statutory "employment" obtains. ***Gilchrist v. Div. of Employ. Sec., supra, 48 N.J. Super. at 158.***

In this matter, the claimant was not prevented from accepting work with other employers by the above named employer and the claimant was free to set her own days and hours of work. However, as per the evidence provided on the record which shows that the employer had a considerable amount of control over the claimant. For example, the employer had control over the software application which pairs individuals seeking transportation with available drivers. In essence, the software that the employer provided to the claimant was a tool that allowed the claimant to work for the employer. Without that tool, the claimant could not have worked for the employer. The employer set the price of the fares which were charged to individuals seeking transportation and the employer set the amount of compensation for the claimant. Here, this Appeal Tribunal finds that the claimant was not free of control. Therefore, test A has not been satisfied.

Part B of the test contains two prongs joined by the word "or" which is a logical operator indicating that if one or both of the prongs is true, then part B of the test has been satisfied.

The claimant worked as a driver for the above named employer. The employer provides a transportation service via its software application. The services that the claimant provided for the employer was not outside the usual course of business for the employer. Therefore, the first prong of the test has not been satisfied. However, the claimant never worked out of the employer's premises, the service that the claimant performed for the employer was outside of all the places of business of the enterprise for which the service is performed. Therefore, the second prong of the test has been satisfied. Accordingly, test B has been satisfied.

In ***Gilchrist v. Div. of Employ. Sec., supra, 48 N.J. Super. at 158***, the court concluded that Test C requires that "such individual is customarily engaged in an independently established trade, occupation, profession or business."

Also in ***Hargrove v. Sleepy's LLC. 220 N.J. 289(2015)***, the Supreme Court noted that "Part C of the statue is also derived from the common law. This part of the test "calls for an enterprise that exist and can continue to exist independently of and apart from the particular service relationship."

The claimant is clearly not in an independent business which would survive the termination of his relationship with the above named employer evidenced for the following reasons: First, there is no evidence on the record that the claimant had her own customers. The claimant is dependent on the employer for individuals seeking rides. All of the individuals seeking rides that the claimant transports came through the employer's software application. The employer controlled

the software application and the claimant would not have had access to those individuals had the employer not granted the claimant access to the individuals through its software application. It's not logical to believe that the claimant is engaged in an independent business when the claimant has no customers. Second, the claimant is not allowed to negotiate the price of the fares charged to individuals seeking transportation or negotiate her compensation from the employer. It is not reasonable to believe that the claimant is engaged in an independent business seeking to make a profit when the claimant is not allowed to negotiate the price of the fares charged to individuals seeking transportation or her compensation from the employer. After all, it is reasonable to expect that an independent contractor would run her business by negotiating compensation for her services that would maximize her profits. And finally, other than a standard driver's license, no special license was needed by the claimant to work for the employer which suggests that the claimant did not have a profession that would persist if the claimant was separated from the employer. The Appeal Tribunal concludes that the claimant was not engaged as an independently established trade, occupation, profession or business that would survive the termination of the relationship with the above named employer. Therefore, test C has not been satisfied.

The evidence before the Appeal Tribunal indicates that an employer-employee relationship existed. Therefore, the remunerated services performed by the claimant for the above named employer were in employment, and all monies paid were covered earnings in accordance with N. J. S. A. 43:21-19 (i)(6).

N. J. S. A. 43:21-5 provides in part:

An individual shall be disqualified for benefits:

(a) For the week in which the individual has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes re-employed and works eight weeks (8) in employment which may include employment for the federal government and has earned in employment at least ten times the individual's weekly benefit rate, as determined in each case.

In this matter, although the employer contends that the claimant voluntarily left the job no separation has been found as the claimant's account remains active with the employer. Therefore, the claimant did not leave the job voluntarily without good cause attributable to the work and no disqualification applies under N.J.S.A 43:21-5 (a), as the claimant did not leave the job voluntarily without good cause attributable to the work.

N. J. S. A. 43:21-7 (c) (1) provides as follows:

Benefits paid with respect to benefit years commencing on and after January 1, 1953, to any individual on or before December 31 of any calendar year with respect to unemployment in such calendar year and in preceding calendar years shall be charged against the account or accounts of the employer or employers in whose employment such individual established base weeks constituting the basis of such benefits, except that, with respect to benefit years commencing after January 4, 1998, an employer's account shall not be charged for benefits paid to a claimant if the claimant's employment by the employer was ended in any way which, pursuant to subsection (a), (b), (c), (f), (g) or (h) of N.J.S.A. 43:21-5, would have disqualified the claimant for benefits if the claimant had applied for benefits at the time when that employment ended.

In this matter, the claimant has not been separated from employment with the above named employer for a disqualifying reason. Therefore, the employer cannot be relieved of benefit charges, and the employer is liable for charges to its experience rating account for unemployment benefits received on the claim dated 02/05/17, in accordance with N.J.S.A. 43:21-7(c)(1). However, the employer does not fall within the base year of the claim at the time the claimant filed the claim for unemployment benefits so no charges would apply at this time.

DECISION:

The remunerated services performed by the claimant for the above named employer were in employment, and all monies paid were covered earnings in accordance with N. J. S. A. 43:21-19 (i)(6).

No disqualification arises under N. J. S. A 43:21-5(a) as the claimant did not leave the job voluntarily without good cause attributable to the work.

The employer is liable for charges to its experience rating account for unemployment benefits received on the claim dated 8/07/16, in accordance with N.J.S.A. 43:21-7(c)(1). However, the employer does not fall within the base year of the claim at the time the claimant filed the claim for unemployment benefits so no charges would apply at this time.

The determination of the Deputy is affirmed.

/s/ Darcel France
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00114149
Date of Claim: 02/05/2017
Date of Appeal: 03/20/2017
PC : 10
Appellant: Employer
Mailing Date: 04/18/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: LYFT INC

The employer appealed on 03/20/17 from a determination of the Deputy, mailed on 03/08/17, holding the claimant eligible for benefits, without disqualification, from 02/05/17.

The employer contends that the claimant is an independent contractor and object to benefit charges. There were no other issues disputed by the appellant employer.

The appellant was unable to participate in a duly scheduled hearing on 04/18/17.

FINDINGS OF FACT:

The appellant was unable to participate in a scheduled hearing and pursue the appeal because the employers first hand witness was not available due to a time zone difference.

OPINION:

As the appellant was unable to participate in the hearing because the employers first hand witness was not available due to a time zone difference, the appeal is dismissed without prejudice. The appeal may be reopened upon the appellant's application to the Appeal Tribunal.

Any request to the Appeal Tribunal must be received within 180 days of the date of mailing of this decision.

DECISION:

The appeal is dismissed without prejudice.

NOTE: TO REQUEST ANOTHER HEARING, WRITE TO:

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APPEAL TRIBUNAL
NEW JERSEY DEPARTMENT OF LABOR
PO BOX 936
TRENTON, NJ 08625-0936

You must include your name, Social Security number, and the reason why you failed to appear.

/s/ Darcel France
APPEALS EXAMINER

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Board of Review
PO Box 937
Trenton, NJ 08625-0937

SS #:
Docket #: DKT00111497
Date of Claim: 12/04/2016
Date of Appeal: 03/21/2017
Mailing Date: 05/01/2017

Decision of the Board of Review

IN THE MATTER OF:

EMPLOYER: LYFT INC

The claimant filed a timely appeal from a decision of the Appeal Tribunal mailed March 13, 2017.

This matter is reviewed on the record below.

FINDINGS OF FACT AND OPINION:

The Findings of Fact and Opinion as developed by the Appeal Tribunal and the allegations of the appellant have been carefully examined.

Since the appellant was given a full and impartial hearing and a complete opportunity to offer any and all evidence, there is no valid ground for a further hearing.

On the basis of the record below, we agree with the decision reached.

DECISION:

The decision of the Appeal Tribunal is affirmed.

BOARD OF REVIEW
Joseph Sieber
Nancy Hunt
Joan Futterman

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Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00111497
Date of Claim: 12/04/2016
Date of Appeal: 02/13/2017
PC : 10
Appellant: Claimant
Mailing Date: 03/13/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: LYFT, INC.

The claimant appealed on 02/13/17 from a determination of the Deputy, mailed on 02/06/17, imposing a disqualification for benefits from 10/30/16 on the ground that the claimant left the above-named employer voluntarily without good cause attributable to such work.

The claimant participated in a telephone hearing on 03/13/17.

FINDINGS OF FACT:

This matter was heard in conjunction with Docket# 111495.

The claimant worked for the above-named employer as a full-time driver, from 01/15 through 10/14/16, when he voluntarily left his job because of lack of transportation. His vehicle was involved in a car accident on that day. He was unable to drive his vehicle. He had no means of transportation. He was aware he must have his own vehicle in order to remain employed. He left the job for that reason only.

He is willing to use public transportation to travel to and from work and traveling up to one hour to obtain work. He has been looking for forklift driver, warehouseman, cashier, stock and driver positions. He is willing to accept $12.00 per hour as his lowest rate of pay.

OPINION:

N.J.S.A. 43:21-5. An individual shall be disqualified for benefits:

(a) For the week in which the individual has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes reemployed

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and worked eight weeks in employment, which may include employment for the federal government, and has earned in employment at least ten times the individual's weekly benefit rate, as determined in each case.

This subsection shall not apply to an individual who voluntarily leaves work with one employer to accept from another employer employment which commences not more than seven days after the individual leaves employment with the first employer, if the employment with the second employer has weekly hours or pay not less than the hours or pay of the employment of the first employer.

The statue does not disqualify an employee from receiving benefits if he or she voluntarily quits a job with one employer in order to commence a new job with another, provided the following conditions are met: (1) the new job begins within seven days of leaving the former job; and (2) the weekly hours are equal to or more than the hours he or she worked for the former employer: or (3) the pay is equal to or more than what the employee received from the previous employer.

N.J.A.C. 12:17-9.1, Disqualification for Voluntary leaving- General Principles, provides:

(e) An individual's separation from employment shall be reviewed as a voluntary leaving work issue where the separation was for the following reasons, including but not limited to:

1. Lack of transportation;

In order to avoid disqualification under N.J.S.A. 43:21-5(a), a claimant must demonstrate that the reason for leaving was work connected. A claimant who leaves work for a personal reason, no matter how compelling, is subject to disqualification. ***Self v. Board of Review, 91 N.J. 453 (1982).***

In this matter, the claimant voluntarily left the job because of lack of transportation. He left the job for that reason only. Lack of transportation is a valid reason for leaving, it is personal. The burden of proof is on the claimant to establish good cause attributable to the work for leaving. The reason for leaving must relate directly to his employment, which was so compelling as to give him no choice but to leave his employment. As the claimant's reason was not work related, his reason was without good cause attributable to the work. Consequently, the claimant is disqualified as of 10/09/16, in accordance with N.J.S.A. 43:21-5(a) and N.J.A.C. 12:17-9.1(e)1.

In view of the period of disqualification imposed, the issue of the claimant's availability is academic.

DECISION:

A disqualification for benefits is imposed as of 10/09/16,as the claimant left work voluntarily without good cause attributable to such work, in accordance with N.J.S.A. 43:21-5(a) and N.J.A.C. 12:17-9.1(e)1.

In view of the period of disqualification imposed, the issue of the claimant's availability is academic.

The determination of the Deputy is affirmed, but modified as to the effective date of the disqualification.

/s/ Vicki Caldwell
APPEALS EXAMINER

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Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00111267
Date of Claim: 08/07/2016
Date of Appeal: 03/16/2017
PC : 40
Appellant: Employer
Mailing Date: 04/20/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: Lyft, Inc.

The employer appealed on 2/03/17 from a Notice of Monetary Determination and Request for Separation Information from the Deputy, mailed on 1/23/17, holding that the employer's account would be charged for any unemployment benefits paid to the claimant on an unemployment claim dated 8/07/16.

In their letter of appeal, dated 2/03/17, the employer contends the claimant was an independent contractor and not an employee. The employer further contends that if it can be shown that the claimant was an employee, the claimant voluntarily chose to discontinue ride sharing opportunities with the employer.

The employer with attorney, and a Deputy auditor participated in a duly scheduled telephone appeal hearing on 4/18/17.

FINDING OF FACT:

A combined wage claim for unemployment benefits was filed as of 8/07/16 establishing a regular base year from 4/01/15 through 3/31/16 based on wages earned with employers in New Jersey and Pennsylvania.

The above named employer provides a transportation service via its software application where individuals seeking transportation can log onto the employer's software application and be paired with an available driver. The employer sets the price of the fares charged to individuals seeking transportation. The employer collects the fares from the individuals seeking transportation through a third party payment processor. The employer keeps 20 percent of the fares and compensates the driver by remitting 80 percent of the fares to the driver. As a driver, the claimant is not allowed to negotiate the price of the fares charged to individuals seeking transportation nor is the claimant allowed to negotiate his compensation from the employer. The claimant is not allowed to accept cash from the individuals that the claimant transports except for tips.

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The claimant has been working as a driver for the above named employer since 10/16/15. There has been no separation from employment. The claimant has been using his vehicle to transport individuals for the above named employer. The employer disabled the claimant's account for a period of time when the claimant's vehicle insurance expired. The employer did not know how long the claimant's account was disabled. The claimant renewed his insurance and returned to work for the employer. Prior to the date of hearing on 4/18/17. The claimant last worked for the employer on 4/17/17.

The claimant signed a Terms of Service Agreement with the above named employer which refers to claimant as an independent contractor.

The above named employer did not prevent the claimant from accepting work with other employers and the claimant was free to set his own days and hours of work by using his smartphone to log onto the employer's software application whenever he wanted work from the above named employer.

The above named employer controls the software application that pairs individuals seeking transportation with available drivers. The claimant was required to give each passenger a rating after each ride, if the claimant did not give the passenger a rating, the claimant was automatically denied access for additional work through the employer's software application. The passengers were also required to rate the claimant as a driver. If the claimant continually got a low rating, the employer could have deactivated the claimant's account.

While working for the above named employer, the claimant was responsible for the cost of maintenance, fuel, and maintaining insurance coverage for his vehicle.

The claimant never worked out the employer's premises. All of the work that the claimant did for the employer was done out of his vehicle. The claimant only worked in Pennsylvania for the above named employer.

Other than a standard driver's license, the claimant does need a special license. The claimant has no customers of his own. The claimant could not have worked as a driver for the above named employer if the employer had not granted the claimant access to the employer's software application that paired the claimant with individuals seeking transportation.

The Deputy mailed a Notice of Monetary Determination and Request for Separation Information to the employer's address of record on 1/23/17. The employer received the determination of the Deputy on 1/27/17 and filed their first appeal by letter from the employer's attorney on 2/03/17.

OPINION:

N. J. S. A 43:21-6 provides in part:

(b) (1) Unless a claimant or any interested party, with seven calendar days after delivery of notification of an initial determination or within 10 calendar days after such notification was mailed to his or their last-known address and addresses, file an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith...

Since the appeal was filed within seven days, the appeal is timely in accordance with N. J. S. A. 43:21-6(b)(1).

N. J. S. A. 43:21-19 (i) (6) provides:

Services performed by an individual for remuneration shall be deemed to be employment subject to

this chapter (R.S. 43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that

(a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact, and

(b) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which the service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

Although, the claimant signed a Transportation Provider Service Agreement with the above named employer which refers to claimant as an independent contractor, it is unemployment law that determines whether or not the services that the claimant performed for the above named employer are in employment, and not the written agreement.

Where an individual such as the claimant performs services for remuneration, such services are deemed employment unless all three requirements of the above statue, sometimes referred to as the ABC test, are met. When the service relationship fails to meet any of the test, statutory "employment" obtains. ***Gilchrist v. Div. of Employ. Sec., supra, 48 N.J. Super. at 158.***

In this matter, the above named employer did not prevent the claimant from accepting work with other employers and the claimant was free to set his own days and hours of work. However, there is substantial evidence on the record to show that the employer exercised considerable control over the claimant. For example, the employer unilaterally set the price of the fares that were charged to individuals seeking transportation and the employer set the amount of compensation for the claimant. Another example of control is that the employer controlled the software application that paired individuals seeking transportation with available drivers. In essence, the software that the employer provided to the claimant was a tool that allowed the claimant to work for the employer. Without that tool, the claimant could not have worked for the employer. Additionally, another example of control is the claimant was required to give each passenger a rating after each ride, if the claimant did not give the passenger a rating, the claimant was automatically denied access for additional work through the software application. And finally, the employer could have penalized the claimant by deactivating the claimant's account if the claimant continually got a low rating from passengers. The Appeal Tribunal finds that the claimant was not free of control. Therefore, test A has not been satisfied.

Part B of the test contains two prongs joined by the word "or" which is a logical operator indicating that if one or both of the prongs is true, then part B of the test has been satisfied.

The claimant worked as a driver for the above named employer. The employer provides a transportation service via its software application. The services that the claimant provided for the employer were not outside the usual course of business for the employer. Therefore, the first prong of the test has not been satisfied. However, the claimant never worked out of the employer's premises, the service that the claimant performed for the employer was outside of all the places of business of the enterprise for which the service is performed. Therefore, the second prong of the test has been satisfied. Accordingly, test B has been satisfied.

In ***Gilchrist v. Div. of Employ. Sec., supra, 48 N.J. Super. at 158***, the court concluded that Test C requires that "such individual is customarily engaged in an independently established trade, occupation, profession or business."

Also in ***Hargrove v. Sleepy's LLC. 220 N.J. 289(2015)***, the Supreme Court noted that "Part C of the statue is also derived from the common law. This part of the test "calls for an enterprise that exist and

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can continue to exist independently of and apart from the particular service relationship."

The claimant is clearly not in an independent business that would survive the termination of his relationship with the above named employer evidenced for the following reasons: First, there is no evidence on the record that the claimant has his own customers. The claimant is dependent on the employer for individuals seeking rides. All of the individuals seeking rides that the claimant transports come through the employer's software application. The employer controlled the software application and the claimant would not have had access to those individuals had the employer not granted the claimant access to the individuals through its software application. It defies logic to believe that the claimant is engaged in an independent business when the claimant has no customers. Second, the claimant is not allowed to negotiate the price of the fares charged to individuals seeking transportation or negotiate his compensation from the employer. It is not reasonable to believe that the claimant is engaged in an independent business seeking to make a profit when the claimant is not allowed to negotiate the price of the fares charged to individuals seeking transportation or his compensation from the employer. After all, it is reasonable to expect that an independent contractor would run his business by negotiating compensation for his services that would maximize his profits. And finally, other than a standard driver's license, no special license was needed by the claimant to work for the employer which suggest that the claimant does not have a profession that would persist if the claimant was separated from the employer. The Appeal Tribunal concludes that the claimant was not engaged is an independently established trade, occupation, profession or business that would survive the termination of the relationship with the above named employer. Therefore, test C has not been satisfied.

The evidence before the Appeal Tribunal indicates that an employer/employee relationship existed. Therefore, the remunerated services performed by the claimant for the above named employer were in employment, and all monies paid were covered earnings in accordance with N. J. S. A. 43:21-19 (i)(6).

N. J. S. A. 43:21-5 provides in part:

An individual shall be disqualified for benefits:

(a) For the week in which the individual has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes re-employed and works eight weeks (8) in employment which may include employment for the federal government and has earned in employment at least ten times the individual's weekly benefit rate, as determined in each case.

In this matter, the claimant has not been separated from employment the above named employer. Therefore, the claimant did not leave the job voluntarily without good cause attributable to the work and no disqualification applies under N.J.S.A 43:21-5 (a) as the claimant did not leave the job voluntarily without good cause attributable to the work.

N. J. S. A. 43:21-7 (c) (1) provides as follows:

Benefits paid with respect to benefit years commencing on and after January 1, 1953, to any individual on or before December 31 of any calendar year with respect to unemployment in such calendar year and in preceding calendar years shall be charged against the account or accounts of the employer or employers in whose employment such individual established base weeks constituting the basis of such benefits, except that, with respect to benefit years commencing after January 4, 1998, an employer's account shall not be charged for benefits paid to a claimant if the claimant's employment by the employer was ended in any way which, pursuant to subsection (a), (b), (c), (f), (g) or (h) of N.J.S.A. 43:21-5, would have disqualified the claimant for benefits if the claimant had applied for benefits at the time when that employment ended.

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In this matter, the claimant has not been separated from employment with the above named employer for a disqualifying reason. Therefore, the employer cannot be relieved of benefit charges, and the employer is liable for charges to its experience rating account for unemployment benefits received on the claim dated 8/07/16, in accordance with N.J.S.A. 43:21-7(c)(1).

DECISION:

The appeal is timely in accordance with N. J. S. A. 43:21-6(b) (1).

The remunerated services performed by the claimant for the above named employer were in employment, and all monies paid were covered earnings in accordance with N. J. S. A. 43:21-19 (i)(6).

No disqualification arises under N. J. S. A 43:21-5(a) as the claimant did not leave the job voluntarily without good cause attributable to the work.

The employer is liable for charges to its experience rating account for unemployment benefits received on the claim dated 8/07/16, in accordance with N.J.S.A. 43:21-7(c)(1).

The determination of the Deputy is affirmed.

/s/ Paul Yohannan
APPEALS EXAMINER

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Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00111267
Date of Claim: 08/07/2016
Date of Appeal: 02/06/2017
PC : 40
Appellant: Employer
Mailing Date: 03/08/2017

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: Lyft, Inc.

The employer appealed on 2/06/17 from determination of the Deputy, mailed on 1/23/17, holding that the employer's account would be charged for any unemployment benefits paid to the claimant on an unemployment claim dated 8/7/16.

The employer contends the claimant was an independent contractor and not an employee. The employer further contends that if it can be shown that the claimant was an employee, the claimant voluntarily chose to discontinue ride sharing opportunities with the employer.

The matter is decided on information contained in the Division files.

FINDING OF FACT:

By fax letter dated February 28, 2017, the employer's attorney requested that the telephone hearing scheduled before the Appeal Tribunal on March 8, 2017, at 9:00AM EST be rescheduled for a later time, preferably after 12:00PM EST, because the employer's representative resides in California. The employer's representative is unavailable to participate at 9:00AM EST.

OPINION:

In this matter, the attorney's request is reasonable in view of the three hour time difference between New Jersey and California and constitutes good cause for a postponement. Therefore, the hearing is postponed without prejudice and a new hearing will be scheduled after 12:00PM EST.

DECISION:

The hearing is postponed without prejudice.

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/s/ Paul Yohannan
APPEALS EXAMINER

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