Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00161400
Date of Claim: 05/27/2018
Date of Appeal: 12/04/2018
PC : 10
Appellant: Employer
Mailing Date: 01/22/2019

Decision of the Appeal Tribunal

IN THE MATTER OF:

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

The employer appealed on 9/15/18 from a determination of the Deputy, mailed on 8/30/18, holding that the claimant eligible for benefits without disqualification from 5/27/18.

The employer contends that the claimant was an independent contractor and not an employee. The employer further contends that even if it can be shown that the claimant was an employee of Lyft, the claimant voluntarily chose to discontinue ride sharing opportunities through the Lyft platform without good cause for reasons not attributable to the work.

The employer #1 with attorney, the claimant, and a Deputy participated in a duly scheduled telephone hearing on 1/11/19.

FINDINGS OF FACT:

The claimant accepted work as a driver from the above-named employer #1 from 7/18/17 until 1/26/18. The claimant worked various days and hours. The claimant did not accept work after 1/26/18 because the claimant had returned to work for the above name employer #2 in January, 2018. A review of the Division records indicates that the Deputy did not make an initial written determination regarding the claimant's separation from the above-named employer #1.

The claimant worked for the above-named employer # 2 as a child care provider from 1/21/18 until 5/25/18. The claimant worked from 8:00AM to 3:30PM, Monday to Friday. The claimant earned $20.00 per hour.

A claim for unemployment benefits was filed as of 5/27/18.

The above-named employer #1 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 above-named employer #1 provided the claimant with some online training on how to use the employer's software application where individuals seeking transportation can log onto the employer's software application and be paired with an available driver.

The above-named employer #1 controls the software application that pairs individuals seeking transportation with available drivers. The claimant could not have worked as a driver for the above-named employer #1, if the employer had not granted the claimant access to the employer's software application that paired the claimant with individuals seeking transportation.

The above-named employer #1 uses a five-star rating system. The passengers rated the claimant. If the claimant had received a rating that was too low, the employer could have deactivated the claimant's account. Similarly, if the claimant canceled too many rides after accepting those rides, the employer could have deactivated the claimant's account.

The above-named employer # 1 set the price of the fares charged to individuals seeking transportation. The employer collected the fares from the individuals seeking transportation through a third-party payment processor. The employer paid the claimant through a third-party payment processor by direct deposit into the claimant's bank account. 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 was not allowed to negotiate the amount of her compensation from the employer. The employer kept 25 percent of the fares charged to individuals seeking transportation and compensated the claimant by remitting 75 percent of the fares to the claimant.

The claimant signed a written agreement with the above-named employer #1 which refers to the claimant as an independent contractor.

The above-named employer #1 did not prevent the claimant from accepting work with other employers.

The claimant was free to set her own days and hours of work with the above-named employer #1. When the claimant wanted to work for the employer, the claimant used her smartphone to log onto the employer's software application. Once the claimant logged on to the employer's software application, the employer sent the work to the claimant. The employer sequenced and dispatched the work that was sent to the claimant through the employer's software application.

The claimant did not have to accept a minimum number of work assignments from the above-named employer #1 in order to maintain an active account.

The claimant used her own vehicle to transport individuals for the above-named employer #1. The claimant was responsible for the cost of maintenance, fuel, and maintaining insurance coverage for her vehicle. The employer provided supplemental insurance as required by law.

The claimant never worked out the employer #1's premises. All of the work that the claimant did for the employer was done out of the claimant's vehicle.

Other than a standard driver's license, the claimant did not need a special license or certification to drive for the above-named employer #1.

The claimant does not have a business, does not advertise herself to the general public as a business, does not have a business website, and has no customers of her own.

The Deputy mailed a determination to the employer's address of record on 8/31/18. The employer received the determination of the Deputy on 9/04/18. On 9/10/18, the employer forwarded the determination of the Deputy to their lawyer for appeal. The employer's lawyer appealed the determination of the Deputy on 9/15/18.

OPINION:

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

(b) (1) Unless the claimant or any interested party, within 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…

N. J. A. C. 12:20-3.1 Presentation of appealed claims

(h) An appeal shall be considered on its merits if it is filed within seven calendar days after delivery of the initial determination or within 10 calendar days after such notification was mailed to the appellant's last known address, with the exception of an appeal filed pursuant to *N.J.S.A. 43:21-55.1*, which shall be considered on its merits if it is filed within 20 calendar days after delivery of the initial determination or within 24 calendar days after such notification was mailed to the appellant's last known address. Delivery of notification of an initial determination means actual receipt of the determination by the claimant or any interested party to the appeal.

(i) A late appeal shall be considered on its merits if it is determined that the appeal was delayed for good cause. Good cause exists in circumstances where it is shown that:

1. The delay in filing the appeal was due to circumstances beyond the control of the appellant; or

2. The appellant delayed filing the appeal for circumstances which could not have been reasonably foreseen or prevented.

In this matter, the employer had the determination of the Deputy for just six days before forwarding the determination of the Deputy to the employer's attorney on 9/10/18 for appeal. The employer relied on the attorney to file the appeal. The fact that the attorney did not file the appeal until 9/15/18 was beyond the control of the employer. Therefore, the appeal is late with good cause in accordance with N. J. A. C. 12:20-3.1(i) 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 an agreement with the above named employer #1 which refers to claimant as an independent contractor, it is unemployment law that determines whether 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 #1 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. However, there is substantial evidence on the record to show that the employer exercised considerable control over the claimant. For example, 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. Other examples of control are that the employer unilaterally set the price of the fares that were charged to individuals seeking transportation, the employer set the amount of compensation for the claimant, and the employer determined the order of work that was sent to the claimant through the employer's software application. And finally, the employer could have penalized the claimant by deactivating the claimant's account if the claimant got a star rating that was too low, or if the claimant cancelled too many rides after accepting the rides. 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 #1. 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 can continue to exist independently of and apart from the particular service relationship."

The evidence clearly indicates that the claimant was not engaged in an independent business that would survive the termination of her relationship with the above-named employer #1 as evidenced by the following reasons: First, the claimant was dependent on the employer for individuals seeking rides. Those individuals seeking rides are considered to be customers of the employer because all of the individuals seeking rides that the claimant transported for the above-named employer #1 came to the claimant through the employer's software application. It defies logic to believe that the claimant was engaged in an independent business when the claimant was dependent on the employer for her customers. Second, the employer controlled the software application that paired individuals seeking

rides with the claimant. 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. It defies logic to believe that the claimant was engaged in an independent business when the claimant was dependent on the employer for a tool that the claimant needed to work for the employer. Third, the claimant had no real opportunity to make a profit because the claimant was 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 was 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 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. Fourth, other than a standard driver's license, no special license or certification 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. And finally, the claimant does not have a business, the claimant does not advertise herself to the general public as a business, and the claimant has no customers of her own. It is not reasonable to believe that the claimant is engaged in a business when the claimant is not promoting herself as a business and has no customers. 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 reads 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 did not return work for the above-named employer #1 after 1/26/18 because she returned to work for the above-named employer #2. A review of the Division records indicates that the Deputy did not make an initial written determination regarding the claimant's separation from the above-named employer #1. The matter of the claimant's separation of employment from the above-named employer #1 is remanded to the Deputy for a written determination in accordance with established procedures. The Deputy is further instructed to send a copy of the written determination to both the claimant and the above-named employer #1.

DECISION:

The appeal is late with good cause in accordance with N. J. A. C. 12:20-3.1(i) 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).

The matter of the claimant's separation of employment from the above-named employer #1 is remanded to the Deputy for an initial written determination in accordance with established procedures. The Deputy is further instructed to send a copy of the written determination to both the claimant and the above-named employer #1.

The determination of the Deputy is affirmed.

/s/ Paul Yohannan
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00161400
Date of Claim: 05/27/2018
Date of Appeal: 09/15/2018
PC : 10
Appellant: Employer
Mailing Date: 10/15/2018

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: Lyft, Inc.

The employer appealed on 9/15/18 from a determination of the Deputy, mailed on 8/30/18, holding that the claimant eligible for benefits without disqualification from 5/27/18.

The employer contends that the claimant was an independent contractor and not an employee. The employer further contends that even if it can be shown that the claimant was an employee of Lyft, the claimant voluntarily chose to discontinue ride sharing opportunities through the Lyft platform without good cause.

The appellant was not able to participate in a duly scheduled phone hearing on 10/15/18.

FINDING OF FACT:

By fax letter dated October 11, 2018, the appellant's attorney requested a dismissal without prejudice of the hearing scheduled before the Appeal Tribunal on October 15, 2018, at 12:30PM because the employer's witness was not able to attend the hearing due to a scheduling conflict.

OPINION:

In this matter, the request of the appellant's attorney is reasonable. Therefore, the appeal is dismissed without prejudice.

The appellant may request another hearing by writing 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, please write to:

Appeal Tribunal
New Jersey Dept. of Labor
P. O. Box 936
Trenton, NJ 08625-0936

Please include your name, Social Security number, and the reason why you were unable to participate in the hearing.

/s/ Paul Yohannan
APPEALS EXAMINER

UA

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

SS #:
Docket #: DKT00160660
Date of Claim: 05/13/2018
Date of Appeal: 02/08/2019
Mailing Date: 03/01/2019

Decision of the Board of Review

IN THE MATTER OF:

ORDER AFFIRMING DENIAL
OF REQUEST TO REOPEN

EMPLOYER: LYFT INC

The claimant having filed a timely appeal from an Order of the Appeal Tribunal mailed January 18, 2019, which denied a request to reopen the decision of the Appeal Tribunal originally mailed on October 2, 2018 in accordance with N.J.A.C. 1:12-14.4(b), and

Our review of the record below having found no error on the part of the Appeal Tribunal in denying the request to reopen its prior decision; and our having no jurisdiction to review the appeal on other grounds;

IT IS ORDERED, that the Order of the Appeal Tribunal denying the request to reopen its decision be, and the same is, hereby affirmed.

BOARD OF REVIEW
Joseph Sieber
Nancy Hunt

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00160660
Date of Claim: 05/13/2018
Date of Appeal: 01/18/2019
PC : 10
Appellant: Claimant
Mailing Date: 01/18/2019

Decision of the Appeal Tribunal

IN THE MATTER OF:

In a letter mailed 10/16/2018, the appellant requests the decision of the Appeal Tribunal dated 10/02/2018, dismissing the appeal in accordance with N.J.A.C. 1:12-14.4(a), be vacated and a new hearing scheduled.

FINDINGS OF FACT:

In a decision mailed 10/02/2018, under DKT00160660, the Appeal Tribunal dismissed the appellant's appeal in accordance with **N.J.A.C.** 1:12-14.4(a) as the appellant failed to register for the telephone hearing or request an adjournment.

All interested parties to an appeal are sent a "Notice of Phone Hearing" in advance of the telephone hearing. The notice states, in part, that:

> Unlike the Unemployment fact-finding interview, the Office of Benefit Appeals WILL NOT INITIATE A CALL TO YOU UNLESS YOU HAVE REGISTERED FOR THE HEARING AS INSTRUCTED ABOVE. So, please remember to REGISTER NO LATER THAN 3:00 P.M., EST, ON THE BUSINESS DAY PRIOR TO YOUR SCHEDULED HEARING BEFORE THE APPEAL TRIBUNAL.
>
> Your appeal may be dismissed or you may be denied participation in the hearing if you fail, without good cause, to follow the instructions contained in this notice.

The appellant requested the matter be reopened, stating she did not register for the scheduled hearing on 10/02/2018 because she inadvertently did not see in the notice where she needed to register.

OPINION:

N.J.A.C. 1:12-14.4 Failure to appear

(b) If an appeal tribunal issued an order of dismissal for nonappearance of the appellant, the chief appeals examiner shall, upon application made by such appellant, within six months after the making of such order of dismissal, and for good cause shown, set aside the order of dismissal and shall reschedule such appeal for hearing in the usual manner. An application to reopen an appeal made more than six months after the making of such order of dismissal may be granted at the discretion of the chief appeals examiner.

The appellant states the reason she failed to register for the scheduled hearing on 10/02/2018 is that she inadvertently did not see in the notice where she needed to register.

The regulations do not expressly define what constitutes "good cause" under **N.J.A.C.** 1:12-14.4(b). In a related context, however, the regulations define "good cause" for permitting the filing of a late appeal from a denial of unemployment compensation benefits.

N.J.A.C. 12:20-3.1(i) provides:

A late appeal shall be considered on its merits if it is determined that the appeal was delayed for good cause. Good cause exists in circumstances where it is shown that:

1. The delay in filing the appeal was due to circumstances beyond the control of the appellant; or

2. The appellant delayed filing the appeal for circumstances which could not have been reasonably foreseen or prevented.

While the regulation at **N.J.A.C.** 1:12-14.4(b) does not define good cause, it is reasonable to extend the standard as set forth by **N.J.A.C.** 12:20-3.1(i) above to the appellant's failure to register. The appellant failed to register for the hearing because she inadvertently did not see in the notice where she needed to register. accordingly, the appellant makes no showing her failure to register for the hearing was due to circumstances beyond her control or "which could not have been reasonably foreseen or prevented." Therefore, the request to vacate the dismissal and schedule a new hearing is denied, in accordance with **N.J.A.C.** 1:12-14.4(b).

DECISION:

The appellant's request that the decision dismissing the appeal be vacated and a new hearing scheduled is denied, in accordance with **N.J.A.C.** 1:12-14.4(b).

/s/ Jason Jenkins
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00160660
Date of Claim: 05/13/2018
Date of Appeal: 09/07/2018
PC : 10
Appellant: Claimant
Mailing Date: 10/02/2018

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: LYFT INC.

The claimant appealed on 09/07/18 from a determination of the Deputy, mailed on 08/29/18, imposing a disqualification for benefits from 05/06/18, on the ground that the claimant left work voluntarily without good cause attributable to such work.

The appellant failed to register as instructed for a duly scheduled telephone hearing before the Appeal Tribunal on 10/02/18.

FINDINGS OF FACT:

All interested parties to the appeal are sent a "Notice of Phone Hearing" in advance of the telephone hearing. The notice states, in part, that:

Unlike the Unemployment fact-finding interview, the Office of Benefit Appeals WILL NOT INITIATE A CALL TO YOU UNLESS YOU HAVE REGISTERED FOR THE HEARING AS INSTRUCTED ABOVE. So, please remember to REGISTER NO LATER THAN 3:00 P.M., EST, ON THE BUSINESS DAY PRIOR TO YOUR SCHEDULED HEARING BEFORE THE APPEAL TRIBUNAL.

Your appeal may be dismissed or you may be denied participation in the hearing if you fail, without good cause, to follow the instructions contained in this notice.

In this case, the hearing notice was mailed to the appellant on 09/17/18. The appellant failed to register as instructed for the hearing scheduled for 9:00 a.m. on 10/02/18 and did not request an adjournment. As a result of appellant's failure to register as instructed for the hearing or to request an adjournment, no hearing was conducted.

OPINION:

N.J.A.C. 1:12-14.4 Failure to appear

(a) If the appellant fails to appear for a hearing before an appeal tribunal, the appeal tribunal may proceed to make its decision on the record or may dismiss the appeal on the ground of nonappearance unless it appears that there is good cause for adjournment. The appeal is dismissed in accordance with N.J.A.C. 1:12-14.4(a), as the appellant failed to register as instructed for the telephone hearing or request an adjournment.

DECISION:

The appeal is dismissed in accordance with N.J.A.C. 1:12-14.4(a).

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, claimant's Social Security number and/or docket number, and the **reason why you failed to register for the telephone hearing.**

/s/ Angeliki Morfogen
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00160525
Date of Claim: 07/08/2018
Date of Appeal: 11/16/2018
PC : 10
Appellant: Claimant
Mailing Date: 12/11/2018

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: Lyft, Inc.

For good cause shown, this matter is reopened as of 11/16/2018.

The claimant, and counsel for the employer, participated in a telephone hearing on 10/03/2018. Counsel for the employer participated in a telephone hearing on 12/10/2018. The decision is based on testimony and evidence adduced at both hearings.

FINDINGS OF FACT:

The claimant appealed on 09/06/2018, from a determination of the Deputy mailed 08/29/2018, imposing a disqualification for benefits from 07/08/2018, on the ground he left work voluntarily without good cause attributable to such work.

The claimant was employed with the above-named employer as a driver from 06/2016 through 07/12/2018 when he was separated from the employment.

Upon hire, drivers are provided the company Terms of Service which outlines the employment agreement. This agreement specifies that falling below the company's cancellation threshold can result in termination from the employment.

Drivers are notified of potential fares via an application (app) they install on their cellular telephones (cellphones). Drivers are entitled to "ignore" available fares as much as they like without penalty. However, if a driver cancels a fare after they accepted it, this counts toward their cancellation rating.

The claimant received a warning on 03/10/2018, advising him that he had been canceling rides, along with a link to the Terms of Service. On 07/01/2018, he received a message advising that he had been logged out of "driver mode" so that he could review the Terms of Service regarding

cancellations. On 07/12/2018, he received a message that he has exceeded the employer's threshold for canceling fares and his account was deactivated, thus terminating him from the employment.

The claimant registered for the hearing scheduled on 12/10/2018 at 2:00 P.M. but did not answer when the Examiner made two (2) attempts to reach him at the contact number provided.

This matter was heard in conjunction with docket #160527. The claimant was held ineligible for benefits from 07/08/2018 through 09/08/2018 on the ground he had reasonable assurance of reemployment with an educational institution under this docket, which was subsequently affirmed by the Board of Review.

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 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.

The employer contended the claimant was voluntarily separated from the employment when he continued to cancel fares after prior warnings. However, evidence at the hearing supports the claimant was discharged when the employer deactivated his account on 07/12/2018. Therefore, no disqualification arises under N.J.S.A. 43:21-5(a) and the matter will be reviewed as a discharge under N.J.S.A. 43:21-5(b), as the claimant did not quit.

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 five weeks which immediately follow that week, as determined in each case.

"Misconduct" means conduct which is improper, intentional, connected with the individual's work, within the individual's control, not a good faith error of judgment or discretion, and is either a deliberate refusal, without good cause, to comply with the employer's lawful and reasonable rules made known to the employee or a deliberate disregard of standards of behavior the employer has a reasonable right to expect, including reasonable safety standards and reasonable standards for a workplace free of drug and substance abuse.

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.

The claimant refuted in the initial hearing that he had received any messages regarding canceled fares and alleged he was discharged because customers gave him poor ratings. The matter was postponed to afford the employer an opportunity to present evidence of the messages regarding

the claimant's discharge for violating the Terms of Service by exceeding the threshold for cancellations. These documents were submitted to the Tribunal and substantiated the employer's position. The claimant registered for the duly scheduled hearing on 12/10/2018 but was unavailable when contacted by the Tribunal.

Evidence at the hearing established the claimant was discharged after he continued to cancel accepted fares despite prior warnings. The claimant had the option of not accepting fares if he was unable or unavailable to complete them but instead chose to continue accepting fares which he subsequently canceled. His actions demonstrated a willful and deliberate violation of the employer's policies and a disregard of the standards of behavior the employer had a right to expect. Therefore, they rose to the level of misconduct and he is disqualified for benefits from 07/08/2018 through 08/18/2018 under N.J.S.A. 43:21-5(b).

It should be noted that although the imposed period of disqualification ended as of 08/18/2018, the claimant remained ineligible for benefits through 09/08/2018 under the ruling set forth in Docket #160527.

The matter of the claimant's eligibility for benefits during later reported weeks of unemployment is remanded to the Deputy for an initial determination.

DECISION:

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 such work.

The claimant is disqualified for benefits from 07/08/2018 through 08/18/2018 under N.J.S.A. 43:21-5(b), as his discharge was for misconduct connected with the work.

It should be noted that although the imposed period of disqualification ended as of 08/18/2018, the claimant remained ineligible for benefits through 09/08/2018 under the ruling set forth in Docket #160527.

The matter of the claimant's eligibility for benefits during later reported weeks of unemployment is remanded to the Deputy for an initial determination.

/s/ Catharine Arruda
APPEALS EXAMINER

FA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00160525
Date of Claim: 07/08/2018
Date of Appeal: 10/10/2018
PC : 10
Appellant: Claimant
Mailing Date: 11/07/2018

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: LYFT, INC.

For good cause shown, this matter is re-opened as of 10/10/2018.

The claimant, and counsel for the employer, participated in a telephone hearing on 10/03/2018.

The appeal is hereby postponed, without prejudice for the reason(s) noted below.

FINDINGS OF FACT:

The claimant appealed on 09/06/2018, from a determination of the Deputy mailed 08/29/2018, imposing a disqualification for benefits from 08/20/2017, on the ground he left work voluntarily without good cause attributable to such work.

The employer was unable to participated in a rescheduled hearing on 11/07/2018 due to an unanticipated scheduling conflict.

OPINION:

In accordance with due process, the appeal is postponed without prejudice. The matter will be rescheduled and the parties notified in accordance with established procedures as soon as possible. **The parties must register for the re-scheduled hearing in accordance with the instructions provided in the Notice of Phone Hearing.**

DECISION:

The appeal is postponed without prejudice.

/s/ Catharine Arruda
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00160525
Date of Claim: 07/08/2018
Date of Appeal: 09/06/2018
PC : 10
Appellant: Claimant
Mailing Date: 10/05/2018

Decision of the Appeal Tribunal

IN THE MATTER OF:

POSTPONEMENT DECISION

EMPLOYER: LYFT, INC.

The claimant appealed on 09/06/2018, from a determination of the Deputy mailed 08/29/2018, imposing a disqualification for benefits from 08/20/2017, on the ground he left work voluntarily without good cause attributable to such work.

The claimant, and counsel for the employer, participated in a telephone hearing on 10/03/2018.

The appeal is hereby postponed, without prejudice for the reason(s) noted below.

FINDINGS OF FACT:

Additional documentation is needed from the employer before a decision can be rendered by the Tribunal.

OPINION:

In accordance with due process, the appeal is postponed without prejudice. The matter will be rescheduled and the parties notified in accordance with established procedures as soon as possible. **The parties must register for the re-scheduled hearing in accordance with the instructions provided in the Notice of Phone Hearing.**

DECISION:

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The appeal is postponed without prejudice.

/s/ Catharine Arruda
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00157481
Date of Claim: 03/05/2018
Date of Appeal: 06/19/2018
PC : 50
Appellant: Employer
Mailing Date: 09/06/2018

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: Lyft, Inc.

The employer appealed on 6/19/18 from a Notice of Disability Benefits Charged or Credited of the Deputy, mailed on 5/07/18, holding that the employer's disability experience rating account would be charged for State Plan disability benefits paid to the claimant.

The employer contends that the claimant was an independent contractor; not an employee, and therefore, not entitled to benefits.

The employer with attorney, a Deputy auditor, a Deputy from State Plan Disability, and the claimant participated in a duly scheduled telephone appeal hearing on 9/05/18.

FINDING OF FACT:

The claimant accepted work as a driver from the above named employer from 10/04/17 until 3/05/18. The claimant had a non-work connected accident after work on 3/05/18 and broke his left elbow. The claimant became disabled and was unable to perform his work duties as of 3/05/18.

A claim for State Plan disability benefits was filed as of 3/06/18.

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 above named employer controls the software application that pairs individuals seeking transportation with available drivers. 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 employer provided the claimant with access to an online tutorial that explained how to use the software application that pairs individuals seeking transportation with available drivers.

The passengers rated the claimant. The employer uses a five-star rating system. If the claimant had received a rating that was below a certain threshold, the employer could have deactivated the claimant's account.

The employer uses a cancellation ratio. If the claimant canceled a certain number of rides after accepting those rides, the employer could have deactivated the claimant's account once a certain threshold was reached.

The above named employer set the price of the fares charged to individuals seeking transportation. The employer collected the fares from the individuals seeking transportation through a third party payment processor. The employer paid the claimant through a third party payment processor. 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 was not allowed to negotiate the amount of his compensation from the employer. The employer kept 20 percent of the fares charged to individuals seeking transportation and compensated the claimant by remitting 80 percent of the fares to the claimant.

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

The above named employer did not prevent the claimant from accepting work with other employers.

The claimant was free to set his own days and hours of work. When the claimant wanted to Work for the employer, the claimant used his smartphone to log onto the employer's software application. Once the claimant logged on to the employer's software application, the employer sent the work to the claimant. The employer sequenced and dispatched the work that was sent to the claimant through the employer's software application.

The claimant did not have to accept a minimum number of work assignments from the above named employer in order to maintain an active account.

The claimant used his own vehicle to transport individuals for the above named employer. The claimant was responsible for the cost of maintenance, fuel, and maintaining insurance coverage for his vehicle. The employer provided supplemental insurance as required by law.

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 did not have any responsibility for soliciting new customers.

Other than a standard driver's license, the claimant did not need a special license or certification to drive for the above named employer. The claimant does not have a business. The claimant does not have his own customers and does not advertise himself to the general public as a business. And, the claimant does not have a business telephone listing or a business website.

The claimant returned to part time work for a different employer as of 8/20/18.

The Deputy mailed a Notice of Disability Benefits Charged or Credited to the employer's address of record on 5/07/18. The employer appealed the notice on 6/19/18. The Notice of Disability Benefits Charged or Credited does not contain a notice of right to appeal.

OPINION:

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

(b) (1) Unless the claimant or any interested party, within 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 Notice of Disability Benefits Charged or Credited does not contain a notice of right to appeal, the employer's appeal is not untimely 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 an agreement with the above named employer which refers to claimant as an independent contractor, it is unemployment law that determines whether 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 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. Other examples of control are that the employer unilaterally set the price of the fares that were charged to individuals seeking transportation, the employer set the amount of compensation for the claimant, and the employer determined the order of work that was sent to the claimant through the employer's software application. And finally, the employer could have penalized the claimant by deactivating the claimant's account if the claimant got a star rating below a certain threshold, or if the claimant cancelled a certain number of rides after accepting the rides. 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 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 that would survive the termination of his relationship with the above named employer as evidenced by the following reasons: First, the claimant was dependent on the above named employer for individuals seeking rides. Those individuals seeking rides are considered to be customers of the above named employer because all of the individuals seeking rides that the claimant transported for the above named employer came to the claimant through the employer's software application. It defies logic to believe that the claimant was engaged in an independent business when the claimant was dependent on the employer for his customers. Second, the employer controlled the software application that paired individuals seeking rides with the claimant. 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. It defies logic to believe that the claimant was engaged in an independent business when the claimant was dependent on the employer for a tool that the claimant needed to work for the employer. Third, the claimant had no real opportunity to make a profit because 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 was 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. Fourth, the claimant does not advertise himself to the general public as a business and has no customers of his own. It is not reasonable to believe that the claimant is as engaged in a business when the claimant is not promoting himself as a business and has no customers. And finally, other than a standard driver's license, no special license or certification 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. 43:21-7

(e) Contributions by employers to State disability benefits fund.

(3)(B) A separate disability benefits account shall be maintained for each employer required to contribute to the State disability benefits fund and such account shall be credited with contributions deposited in and credited to such fund with respect to employment occurring on and after January 1, 1949. Each employer's account shall be credited with all contributions paid on or before January 31 of any calendar year on his own behalf and on behalf of individuals in his service with respect to employment occurring in preceding calendar years; provided, however, that if January 31 of any calendar year falls on a Saturday or Sunday an employer's account shall be credited as of January 31 of such calendar year with all the contributions which he has paid on or before the next succeeding day which is not a Saturday or Sunday. But nothing in this act shall be construed to grant any employer or individuals in his service prior claims or rights to the amounts paid by him to the fund either on his own behalf or on behalf of such individuals. Benefits paid to any covered individual in accordance with Article III C.43:21-37 et seq. of the "Temporary Disability Benefits Law" on or before December 31 of any calendar year with respect to disability in such calendar year and in preceding calendar years shall be charged against the account of the employer by whom such individual was employed at the commencement of such disability or by whom he was last employed, if out of employment.

As the claimant's disability occurred within 14 days of the last day of work (or last paid and compensable employment) the disability claim was properly determined under state plan.

In this matter, since 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), the above named employer is liable for charges to its account for State Plan disability benefits paid to the claimant on a claim for State Plan for disability benefits dated 3/06/18 in accordance N. J. S. A. 43:21-7(e)(3)(B).

DECISION:

The appeal is not untimely 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).

The above named employer is liable for charges to its account for State Plan disability benefits paid to the claimant on a claim for State Plan for disability benefits dated 3/06/18 in accordance N. J. S. A. 43:21-7(e)(3)(B).

The determination of the Deputy is affirmed.

/s/ Paul Yohannan
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00157446
Date of Claim: 04/15/2018
Date of Appeal: 07/27/2018
PC : 10
Appellant: Claimant
Mailing Date: 08/30/2018

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER # 1:

EMPLOYER # 2: LYFT

The claimant appealed on 7/27/18 from a determination of the Deputy, mailed on 7/18/18, imposing a disqualification for benefits from 5/27/18 on the ground that the claimant left work voluntarily without good cause attributable to such work with employer # 1.

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

FINDINGS OF FACT:

There is no evidence that the unemployment office adjudicated the separation from work with employer # 2. It is therefore remanded to the Deputy for initial determination regarding the separation from work.

OPINION:

The claimant's separation from the above-named employer # 2 is remanded to the Deputy for initial determination to establish the reason for separation.

DECISION:

The matter is remanded to the Deputy.

/s/ Jerome Williams
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00156573
Date of Claim: 06/17/2018
Date of Appeal: 07/21/2018
PC : 10
Appellant: Claimant
Mailing Date: 08/20/2018

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: LYFT INC

The claimant appealed on 07/21/18 from a determination of the Deputy, mailed on 07/17/18, imposing a disqualification for benefits from 06/17/18 on the ground that the claimant left work voluntarily without good cause attributable to the work.

The claimant and the employer with counsel participated in a duly scheduled telephone hearing on 08/20/18.

FINDINGS OF FACT:

The claimant was employed as a driver for the above-named employer from 04/2018 through 06/17/18, when a separation from employment occurred due to the claimant's loss of a valid driver's license.

In March or April of 2018 the claimant was pulled over by the police and found that his driver's license was suspended due to unpaid court fees which stemmed from a hit and run accident which occurred in June or July of 2017. The claimant went to court on 06/18/18 and his driver's license was suspended for six (6) months until December 2018. Due to having a suspended license the claimant was no longer able to drive.

The claimant was required to upload his driver's license to the employer after he downloaded their application and was aware he needed a valid driver's license to work for the employer.

The employer was not able to find any record of the claimant in their system as a driver.

OPINION:

N.J.S.A. 43:21-5 reads as follows:

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 and works eight (8) weeks in employment which may include employment for the Federal Government and has earned in employment at least ten (10) times the individual's weekly benefit rate, as determined in each case.

N.J.A.C. 12:17-9.10 Loss of license needed as a condition of employment

(a) If an individual is discharged due to the loss of a prerequisite license which is necessary to perform the duties of his or her employment, such discharge shall subject the individual to disqualification for benefits for voluntarily leaving work if he or she engaged in an act which resulted in the loss of the license.

In this matter, the claimant's driver's license was suspended due to unpaid court fees related to a hit and run accident which occurred in June or July 2017. As the claimant needed a valid driver's license to drive for the employer and he lost his driving privilege when his license was suspended, the claimant's separation was due to the loss of a prerequisite of employment is considered voluntary under N.J.A.C. 12:17-9.10 (a). Therefore, a disqualification is imposed under N.J.S.A. 43:21-5(a), as of 06/17/18, as the claimant left the work voluntarily without good cause attributable to the work.

DECISION:

A disqualification for benefits is imposed under N.J.S.A. 43:21-5(a), as of 06/17/18, as the claimant left work voluntarily without good cause attributable to the work.

The determination of the Deputy is affirmed.

/s/ Darcel France
APPEALS EXAMINER

UA

Appeal Tribunal
PO Box 936
Trenton, NJ 08625-0936

SS #:
Docket #: DKT00154735
Date of Claim: 05/20/2018
Date of Appeal: 06/26/2018
PC : 10
Appellant: Employer
Mailing Date: 07/26/2018

Decision of the Appeal Tribunal

IN THE MATTER OF:

EMPLOYER: Lyft

The employer appealed on 6/26/18 from a determination of the Deputy, mailed on 6/15/18, holding that the services that the claimant performed for the employer were in employment.

The employer appealed on 6/26/18 from a second determination of the Deputy, mailed on 6/15/18, holding the claimant eligible for benefits without disqualification from 5/20/18.

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 left his job.

The employer with attorney, and a Deputy participated in a duly scheduled telephone appeal hearing on 7/26/18.

FINDING OF FACT:

The claimant accepted work as a driver from the above named employer from 10/13/16 until 4/29/17 when the claimant stopped working for the employer for an unknown reason. The employer did not de-activate the claimant's account, and continuing work was available for the claimant when the claimant stopped working for the employer.

A claim for unemployment benefits was filed as of 5/20/18.

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 above named employer controls the software application that pairs individuals seeking

[illegible] 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.

Both the passengers and drivers such as the claimant had the choice of rating each other. The employer uses a five-star rating system. If the claimant had received a rating from a passenger that was below a certain threshold, the employer could have deactivated the claimant's account.

If the claimant canceled a certain number of rides after accepting those rides, the employer could have deactivated the claimant's account once a certain threshold was reached.

The above named employer set the price of the fares charged to individuals seeking transportation. The employer collected the fares from the individuals seeking transportation through a third party payment processor. The employer paid the claimant through a third party payment processor. 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 was not allowed to negotiate the amount of his compensation from the employer. The employer kept 25 percent of the fares charged to individuals seeking transportation and compensated the claimant by remitting 75 percent of the fares to the claimant.

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

The above named employer did not prevent the claimant from accepting work with other employers.

The claimant was free to set his own days and hours of work. When the claimant wanted to work for the employer, the claimant used his smartphone to log onto the employer's software application. Once the claimant logged on to the employer's software application, the employer sent the work to the claimant. The employer sequenced and dispatched the work that was sent to the claimant through the employer's software application.

The claimant did not have to accept a minimum number of work assignments from the above named employer in order to maintain an active account.

The claimant used his own vehicle to transport individuals for the above named employer. The claimant was responsible for the cost of maintenance, fuel, and maintaining insurance coverage for his vehicle. The employer provided supplemental insurance as required by law.

The claimant was not permitted to have his own passengers in the car while the claimant was transporting passengers for the above named employer.

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 did not have any responsibility for soliciting new customers.

Other than a standard driver's license, the claimant did not need a special license or certification to drive for the above named employer.

The Deputy mailed two determinations to the employer's address of record on 6/15/18. The employer received the determinations of the Deputy on 6/19/18. The employer's lawyer appealed the determination of the Deputy on 6/26/18.

OPINION:

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

(b) (1) Unless the claimant or any interested party, within 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 employer had the determination of the Deputy for just seven days before an appeal was filed, the appeal is timely in accordance with N. J. S. A. 43:21-6(b)(1).

When an individual such as the claimant performs services for remuneration, those services are deemed to be in employment unless all three requirements of N. J. S. A. 43:21-19 (i) (6) are met. That is:

(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 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 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. Other examples of control are that the employer unilaterally set the price of the fares that were charged to individuals seeking transportation, the employer set the amount of compensation for the claimant, and the employer determined the order of work that was sent to the claimant through the employer's software application. And finally, the employer could have penalized the claimant by deactivating the claimant's account if the claimant got a star rating below a certain threshold, or if the claimant cancelled a certain number of rides after accepting the rides. 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 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 that would survive the termination of his relationship with the above named employer as evidenced by the following reasons: First, the claimant was dependent on the above named employer for individuals seeking rides. Those individuals seeking rides are considered to be customers of the above named employer because all of the individuals seeking rides that the claimant transported for the above named employer came to the claimant through the employer's software application. It defies logic to believe that the claimant was engaged in an independent business when the claimant was dependent on the employer for his customers. Second, the employer controlled the software application that paired individuals seeking rides with the claimant. 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. It defies logic to believe that the claimant was engaged in an independent business when the claimant was dependent on the employer for a tool that the claimant needed to work for the employer. Third, the claimant had no real opportunity to make a profit because 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 was 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. And finally, other than a standard driver's license, no special license or certification 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 accordingly under N.J.S.A. 43:21-5(b), as the claimant was not discharged for 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...

Decisions of the appellate tribunals must be based on competent evidence. Verbal or written information submitted outside of the hearing, is hearsay and not competent. When a hearing is held and the employer is accordingly interrogated, the Appeal Tribunal is bound in the absence of the claimant after due notice of hearing, to accept as competent, credible testimony before it even though it be contrary to the claimant's allegations.

In this matter, the claimant is considered to have voluntarily left the job as of 4/29/17 when the claimant stopped working for the employer for an unknown reason. The claimant's actions are evidence of the claimant's intention to sever the employer-employee relationship, and there is no evidence to indicate that the claimant had good cause for failing to return to work for the employer. Therefore, the claimant is disqualified for benefits as of 4/23/17, 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 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 5/20/18, 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 applies accordingly under N.J.S.A. 43:21-5(b), as the claimant was not

discharged for misconduct connected with the work.

The claimant is disqualified for benefits as of 4/23/17, 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 5/20/18, in accordance with N.J.S.A. 43:21-7(c)(1).

The determination of the Deputy is modified.

/s/ Paul Yohannan
APPEALS EXAMINER

UA