State of Wisconsin

Labor and Industry Review Commission

Miguel Urbina Employee **Roadie Inc.** Employer Hearing No. 21013172MD	**Unemployment Insurance Decision**[1] **Dated and Mailed:** July 8, 2022 urbinmi_usd.doc:101

The commission **modifies** the appeal tribunal decision to conform to this decision and, as modified, **affirms** the appeal tribunal decision. Accordingly, the wages paid to the employee by Roadie Inc. shall be included in the department's computation of the employee's base period wages for computing potential benefit eligibility.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
Georgia E. Maxwell, Commissioner

/s/
Marilyn Townsend, Commissioner

[1] **Appeal Rights**: See the blue enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, all other parties in the caption of this decision or order (the boxed section above), and the Department of Workforce Development. Appeal rights and answers to frequently asked questions about appealing an unemployment insurance decision to circuit court are also available on the commission's website, http://lirc.wisconsin.gov.

Procedural Posture

This case is before the commission to consider whether the employee, Miguel Urbina (the claimant), performed services as an employee for Roadie, Inc., (Roadie) for the purposes of determining unemployment insurance benefit eligibility. An administrative law judge (ALJ) of the Unemployment Insurance Division of the Department of Workforce Development (department) held a hearing as an appeal tribunal under Wis. Stat. § 108.09(3) to (5). Following the hearing, the ALJ issued an appeal tribunal decision that found that the claimant performed services for Roadie as an employee and that ordered that wages paid to the claimant by Roadie be included in his base period wages for the purpose of computing potential benefit eligibility.

The commission received a timely petition for review. The commission has considered the petition, the brief submitted by Roadie, and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

Findings of Fact and Conclusions of Law

The claimant worked as a delivery driver for Roadie a company that allows its customers to use a smart phone application (app) to connect with drivers who have agreed to perform delivery services through the app. The first day the claimant performed delivery services for Roadie was March 9, 2021, and the last day was August 5, 2021. Roadie paid him $632 for the driving services that he performed for Roadie during this period.

In order to work as a Roadie driver, a person must agree to the Roadie "Drivers Agreement" (exhibit 1, pages R1 through R7) and the Roadie "Terms and Conditions" (exhibit 2, pages R8 through R30). The claimant agreed to those documents when he established a driver's profile on the Roadie app on March 9, 2021.

It is within a driver's sole discretion to whether to accept a delivery assignment, and Roadie does not guaranty any minimum amount of revenue or require that a driver perform any minimum level of service. A driver must complete a delivery that he or she accepts within the time set by Roadie's customer, but otherwise there are no set times during which services must be performed.

Roadie does not provide formal training to its drivers other than instructional videos on how to use Roadie's app, which drivers are not required to watch. Roadie's contract permits drivers to hire helpers. (Ex. 2, R15.) If the helper does the delivery himself or herself, however, he or she would need to have his or her own profile on the app. The claimant testified that he believed that he had to do the deliveries he accepted on Roadie's app in person.

The claimant sometimes received text messages from Roadie if he was late with deliveries. Roadie's witness explained that these were automatic texts generated by

Roadie's app to remind drivers that they "needed to get moving" to complete a delivery by the sender's required time. (T.57). The claimant also received some instruction in terms of how a particular Roadie customer wanted its deliveries made, which came solely from the customer. (T.58).

The Drivers Agreement contains numerous instructions regarding "best practices" requiring grooming, maintaining a clean odorless vehicle, prohibiting the use of a Roadie logo or uniform, prohibiting smoking during deliveries, instructing drivers not to enter a customer's home or "employee-only" area, and instructing drivers not to bring a weapon on to a customer's premises, etc. (Ex. 1, pages R3-4.) Roadie's Drivers Agreement also a provision stating that drivers may not have animals in their delivery vehicles.

Roadie did not hold required meetings, but the claimant made reports through the app, which he described as

> A detailed description of the interaction, like let's say I left it on the porch. I would detail that I left it on the porch. I believe I had to take a picture and provide that.

He added that this reporting was something he did through Roadie's app, and which he thought went to Roadie. (T.40.)

Roadie uses a rating system, based on customer ratings of the driver's work. The customers provide the ratings, not Roadie, but Roadie's Terms and Conditions do provide for termination of the agreement by Roadie if there are too many cancellations or no-shows. Roadie also may deactivate a driver's account if he or she has an unsatisfactory star rating. (Ex. 2, page R22.)

The claimant has an office he uses for a side business producing music, but not for a delivery business. The claimant testified that he did not advertise, though on cross-examination he admitted having a Linked In account which describes him as self-employed in customer service. The Linked In account does not mention delivery services specifically, though there is a reference to Monofonik Muzk, the claimant's music producing venture. It also lists performing services at O'Reilly Auto Parts, though he added that he did not do delivery driving for them. Roadie does not require its drivers to display the Roadie logo; in fact Roadie prohibits it. Roadie does not limit what drivers can put on their profile, but the record does not contain any evidence that Roadie's customers actually see the profiles.

Roadie's witness testified that a driver might have to redo a delivery—that is, complete it for no extra pay if it was not done properly—but Roadie's witness also testified that added that that requirement was "situational." The Drivers Agreement contains an indemnity provision (Ex. 1; R.6). The claimant testified that he never had to redo any work, and only learned at the hearing that he would not have been paid if he had.

The claimant performed delivery services for another similar provider, Instacart, in the first few months he worked for Roadie, and affirmatively testified he did so under a contract with Instacart (T.52). He also did work for Premium Services, but that seemed to involve different duties (he described it as auditing).

The claimant incurred gasoline and "mileage" expense on his car in connection with the duties he performed for Roadie. Still, he cleared $4 or $5 when he made a delivery (T.46). Roadie did not provide equipment to help with the delivery (other than the app), nor did it reimburse any expenses. The claimant also mentioned insurance, cell phone, and data expenses, but there is no evidence he paid any more for those expenses because of his work for Roadie. Indeed, he denied have recurring business expenses.

Applicable statutes and cases

For the purposes of unemployment insurance law, "employee" means any individual who performs services for pay for an employing unit, whether or not paid directly by the employing unit, with certain exceptions. Wis. Stat. § 108.02(12)(a). One of the exceptions is at issue here, specifically Wis. Stat. § 108.02(12)(bm), which provides:

> (bm) Paragraph (a) does not apply to an individual performing services for an employing unit other than a government unit or nonprofit organization in a capacity other than as a logger or trucker, if the employing unit satisfies the department that the individual meets the conditions specified in subds. 1. and 2., by contract and in fact:
> 1. The services of the individual are performed free from control or direction by the employing unit over the performance of his or her services. In determining whether services of an individual are performed free from control or direction, the department may consider the following nonexclusive factors:
> a. Whether the individual is required to comply with instructions concerning how to perform the services.
> b. Whether the individual receives training from the employing unit with respect to the services performed.
> c. Whether the individual is required to personally perform the services.
> d. Whether the services of the individual are required to be performed at times or in a particular order or sequence established by the employing unit.
> e. Whether the individual is required to make oral or written reports to the employing unit on a regular basis.
> 2. The individual meets 6 or more of the following conditions:
> a. The individual advertises or otherwise affirmatively holds himself or herself out as being in business.

b. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.
c. The individual operates under multiple contracts with one or more employing units to perform specific services.
d. The individual incurs the main expenses related to the services that he or she performs under contract.
e. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.
f. The services performed by the individual do not directly relate to the employing unit retaining the services.
g. The individual may realize a profit or suffer a loss under contracts to perform such services.
h. The individual has recurring business liabilities or obligations.
i. The individual is not economically dependent upon a particular employing unit with respect to the services being performed.

The claimant does not come within the exclusion in Wis. Stat. § 108.02(12)(bm) simply by having purportedly agreed to Roadie's Terms and Conditions, which as described above is not in the record. Eligibility for unemployment insurance is determined by statute, not private contract or unilateral agreement. *Roberts v. Indus. Comm'n*, 2 Wis. 2d 399, 403, 86 N.W.2d 406 (1957). Wisconsin Stat. § 108.02(12)(bm)(intro.) itself requires proof of the conditions necessary for exclusion from the definition of employee "by contract and in fact." Consistent with the "broad, almost presumptive, coverage … intended by" the statutory definition of employee, *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 64, 330 N.W.2d 169 (1983), an employing unit that pays an individual for service has the burden of proving that the individual meets the statutory exclusion from the definition of "employee." *See,* Wis. Stat. § 108.02(12)(bm)(intro.). *See also, Gilbert v. LIRC*, 2008 WI App 173, ¶33, 315 Wis. 2d 726, 762 N.W.2d 671 (holding that if it is demonstrated that an individual performed services for pay, the individual is presumed to be an employee for purposes of unemployment insurance).

Discussion

The ALJ found that the claimant performed services for Roadie for pay and thus met the threshold definition of "employee" under Wis. Stat. § 108.02(12)(a) as an "individual who is or has been performing services for pay for an employing unit, whether or not paid directly by the employing unit…." She went on to conclude that Roadie did not meet its burden of proving that the claimant met the exception to the definition of "employee" under Wis. Stat. § 108.12(2)(bm) because, while the ALJ found that the claimant performed his services free of Roadie's control or direction under par. (bm)1., Roadie only proved that 5 of the 9 conditions under par. (bm)2 were met. Roadie appeals, asserting that the claimant did not perform services for it for pay, and further that it has proven that all 9 of the par. (bm)2. conditions were met.

1. Performance of service for pay for an employing unit (Wis. Stat. § 108.02(12)(a))

It is undisputed that the claimant performed services for pay—the question is to whom those services were provided. Roadie argues that the claimant performed then for the "senders", that is, Roadie customers or persons who requested delivery services through Roadie's app, not Roadie itself.

Referring to the threshold sub. (12)(a) test in *Princess House, Inc., v. DILHR*, 111 Wis. 2d 46, 64, 330 N.W.2d 169 (1983), the supreme court held that '[s]ervice has been defined as aiding the principal in the regular conduct of business." That definition supports the conclusion that claimant is Roadie's employee.

However, the supreme court has also looked at the right to control or direct the services. *See Price Cty. Tel. Co. v. Lord*, 47 Wis. 2d 704, 719, 177 N.W.2d 904 (1970). That approach that seems to make sense particularly in cases such as this where the putative employer is arguing that it as a conduit between the putative employee and some segment of the public, as when that the putative employer asserts that it merely provides a digital platform, or merely maintains a register, or merely acts a billing agent.

Roadie relies in part on commission decisions, *Ebenhoe v. Lyft Inc.*, UI Dec. Hearing No. 16002409MD (LIRC Jan. 20, 2017) and *Regina Rhyne v. Lyft*, UI Dec. Hearing No. 180004802EC (LIRC Mar. 20, 2019), which involve passenger drivers regulated by Wis. Stat. ch. 440. However, the claimant is not a passenger driver regulated by Wis. Stat. ch. 440. Roadie also asserts that the drivers do not perform services for it under the "*Kress*[2] factors" which determine to *whom* the services are performed for the purposes of sub. (12)(a) by looking at who actually controls the details of the work. *See, for example, Advance Research*, UI Dec. Hearing No. S1500294MW (LIRC Oct. 21, 2016) and *County of Door*, UI Dec. Hearing No. S0500025AP (LIRC March 28, 2007). *Kress Packing Co.,* 61 Wis. 2d at 182 and *Acuity Mutual,* 298 Wis. 2d at ¶¶ 87-88 provide:

> …the most important consideration in resolving questions as to the identity of the entity for which services are being performed is the presence or absence of a right to control the details of the work.

The court in *Kress* detailed four secondary factors to consider: (1) direct evidence of the exercise of the right of control; (2) method of payment of compensation; (3) furnishing of equipment or tools for the performance of the work; and (4) right to fire or terminate the employment relationship. Notably, the supreme court has also observed that relatively simple jobs may require little instruction, and the fact that certain job duties do "not necessitate elaborate explanation" in performing routine

[2]From *Kress Packing Co. v. Kottwitz*, 61 Wis. 2d 175, 182, 212 N.W.2d 97 (1973), and cited in *Acuity Mut. Ins. Co. v. Olivas*, 2007 WI 12, ¶87, 298 Wis. 2d 640, 726 N.W.2d 258.

tasks does not mean the worker is free from control. *See, Village of Prentice v. ILHR Department*, 38 Wis. 2d 219, 222, 156 N.W.2d 482 (1968).

Here, of course, Roadie requires use of its app, payment is made through Roadie, and Roadie can effectively discharge the claimant based on poor performance. The instructions contained in the Drivers Agreement are also indicative of control or direction over the details of the work. The claimant's status as Roadie's employee for the purposes of § 108.02(12)(a) is established under the "aiding the principal in the regular conduct of business" under the *Princess House* test; it is confirmed by the *Kress Packing* and *Acuity* factors.

2. Control or direction under par. (bm)1.

The next issue is whether the claimant performed his services free of Roadie's control or direction under (bm)1., an inquiry that looks at the extent of control or direction rather than who may exercise it. On this point, the commission may consider the five, nonexclusive factors set out in Wis. Stat. § 108.02(12)(bm)1., as well as other factors it deems relevant.

The only training that was offered involved use of the Roadie app, which does not weigh in favor of the exercise of control or direction by Roadie. The claimant could pick the sequence or order in which he performed services, subject of course to the customer's direction as to when and where the items were to be delivered. With respect to these two factors, Roadie's proof weighs in favor of a finding that the claimant preformed his services free of Roadie's control or direction.

Roadie's witness testified that the claimant could have helpers or others do his work for him, but they, too, would have to undergo a background check done by Roadie; that is, the drivers did not have complete freedom in picking helpers or subcontractors. The Drivers Agreement, again, specifically allows a driver to retain his or her own personnel, but the claimant testified credibly that he believed he had to do the work himself. The evidence in the record regarding this factor weighs against the conclusion that the claimant performed his services free of Roadie's control or direction.

Regarding reporting, the claimant sent in pictures of his completed delivery to Roadie, and his use of the app to report his progress (or lack of it) caused the app either to generate reminders or not. As outlined above, Roadie's Drivers Agreement set out substantial instructions about how the delivery services were to be performed. Exhibit 2, U41-42. Roadie's Drivers Agreement attempts to characterize these requirements as drawn from suggestions from customers, but they are instructions from Roadie nonetheless. Further at least some of the instructions are aimed at Roadie's business interests: it is hard to see why customers would care about, for example, use of Roadie signage or logos. In short, these instructions go far beyond

simply telling drivers to use the Roadie app, but instruct them how to deliver goods, and they include items that seem to protect Roadie's own business interests.

"Other factors" indicative of control or direction by Roadie (method of payment, right to fire) are also present. There is no evidence about who set the rate of pay, and certainly no evidence that the drivers set it. The claimant was paid through Roadie's agent, not directly by its customers. The Roadie agreement seems to indicate that the base rate is a take or leave it rate set by Roadie, but Roadie and a driver can negotiate an incentive rate in limited situations. (Ex. 1, R5.) Payment may also be withheld in Roadie's "reasonable discretion." *Id.*

In addition, the Court in *Princess House* looked to the duration of the contractual relationship as evidence of direction and control. In concluding that the dealers in that case were not controlled or directed by Princess House, the Court observed that the dealers could terminate the dealership agreement on thirty days' notice, while Princess House "[could] terminate only at the end of a ten-year period." *Princess House*, 111 Wis. 2d at 66. Here, of course, Roadie has the ability to the terminate the contractual relationship at any time based on too many cancellation or no-shows or poor performance give its star rating system (Ex. 2, page R22). The right to, in effect, fire or terminate the relationship was also a factor indicative of control or direction in *Lifedata v. LIRC*, 192 Wis. 2d 663, 669, 531N.W.2d 531 (Ct. App. 1995).

Weighing all of these factors, the commission concludes that Roadie failed to prove the claimant performed services free of Roadie's control or direction under par. (bm)1.

3. Independently established trade or business under par. (bm)2.

Having concluded that Roadie has failed meet its burden under Wis. Stat. § 108.02(12)(bm)1., the commission could end its inquiry and conclude that the claimant is not excluded from the definition of employee. Nonetheless, because evidence regarding the conditions under Wis. Stat. § 108.02(12)(bm)2. was presented at the hearing, the commission shall proceed to the question of whether Roadie met its burden of proof under that subdivision.

> *a. The individual advertises or otherwise affirmatively holds himself or herself out as being in business.*

Condition a. is not met. This condition derives from the Court of Appeals' observation in *Keeler v. LIRC*, 154 Wis. 2d 626, 633, 453 N.W.2d 902 (Ct. App. 1990) that "a truly independent contractor will advertise or hold out to the public, or at least a certain class of customers, the existence of an independent business." *See also Margoles v. State, LIRC*, 221 Wis. 2d 260, 270, 585 N.W.2d 596 (Ct. App. 1998). Simply working part-time for other delivery services does not establish that claimant actually held himself out as being in a delivery business.

Roadie contends that this condition is met because the claimant created a profile on its app, citing the unpublished Court of Appeals decision in *Varsity Tutors v. LIRC,* Case no. 2018AP1951 (Wis. Ct. App. Oct. 15, 2019). The individual involved in *Varsity Tutors* "created an online profile with Varsity that included (1) her first name; (2) her test scores for the subjects in which she intended to provide tutoring services; (3) a personal statement; and (4) her photograph." *Varsity Tutors,* slip op. ¶5. In this case, there is no evidence that a driver's account with Roadie provides any similar information or exposure to the Roadie customers seeking delivery. Roadie has failed to establish that the claimant held himself out as a having a delivery business to any class of customers, nor did he advertise such a business.

> *b. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.*

Condition b. is not met. Wisconsin Stat. § 108.02(12)(bm)2.b. is written in the conjunctive and Roadie must establish both prongs. The claimant did use his own equipment—his vehicle and cell phone—in performing the delivery services. However, he does not maintain an office, and he did not perform most of the services in a facility or location chosen by him. Rather, he picked up and delivered items for delivery as assigned by Roadie and directed by Roadie customers.

Roadie's customers choose where the work was done. The claimant could choose the locality where he was willing to accept assignments, but once he accepted and assignment, he had to actually do the work where the customer wanted it picked and delivered; the claimant could not accept an assignment and do it wherever he wanted. Reading the words "office," "facility," and "location" in context leads to the condition is concerned with the putative employee's freedom to do the work where he or she wants to do it, not that he or she can choose the geographic location where he is assigned work.

> *c. The individual operates under multiple contracts with one or more employing units to perform specific services.*

Condition c. is met. In addition to agree to Roadie's Drivers Agreement, the claimant performed delivery services under a contract with Instacart.

d. The individual incurs the main expenses related to the services that he or she performs under contract.

Condition d. is met. The commission has consistently held that, without a quantification of the "main expenses related to the services … perform[ed]" or an obvious conclusion as to the expenses borne by the respective parties, it must be found that the condition in Wis. Stat. § 108.02(12)(bm)2.d. is not met. *Behavioral Consultants*, UI Hearing Dec. No. S1500051MW (LIRC, Sept. 16, 2016). Here the claimant had expenses for his phone which he also used for personal purposes and vehicle-related expenses. The commission is satisfied that on the record before it, this condition has been met.

e. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.

Condition e. is not met. The claimant testified that he did not redo work and there is no evidence of that he was required to pay a "penalty." (2.e.) The testimony of Roadie's witness that Roadie could require work to be redone was handled on a "situational" basis leads to the commission to question whether this condition has been established in fact.

There is an indemnity provision in the Drivers Agreement. However, the existence of a boilerplate indemnity clause in a contract—with no evidence of actual enforcement—is sufficient evidence of proving that a worker is subject to a "penalty" for unperformed work. Roadie points to commission cases suggesting this condition is met by the indemnity clause alone, but in both the seminal commission decisions on this point, *MSI Services, Inc.*, UI Dec. Hearing No. S0600129AP (LIRC Sept. 5, 2008) and *Zoromski v. Cox Auto Trader*, UI Dec. Hearing No. 07000466MD (LIRC Aug. 31, 2007), the commission noted fact in addition to the indemnification clause in support of concluding this condition (actually, the statutory predecessor to this condition) was met, thus remaining true to the requirement of proof by contract and in fact.

Notably, *MRS Services* and *Zoromski*, were authored under a different version of statute which stated:

> The individual is responsible for the satisfactory completion of the services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services.

See 2005-06 Wis. Stat. § 108.02(12)(b)2.d. and (bm)6. That version does not mention redoing unsatisfactory work for no additional compensation and does not refer to a penalty.

f. The services performed by the individual do not directly relate to the employing unit retaining the services.

Condition f. is not met. This condition relates to the integration of the claimant's services to Roadie's business. *Report of Committee to Review the Unemployment Insurance Statutory Definition of "Employee," submitted to the Wisconsin Unemployment Insurance Advisory Council*, June 25, 2009, pages 30-31, provided online at http://dwd.wisconsin.gov/uibola/uiac/reports/2009eedefinition.pdf. Published appellate decisions have illustrated the integration requirement:

> by using the example of a tinsmith called upon to repair a company's gutters when the company is engaged in a business unrelated to either repair or manufacture of gutters. Because the tinsmith's activities are totally unrelated to the business activity conducted by the company retaining his services, the services performed by the tinsmith do not directly relate to the activities conducted by the company retaining these services and these services were therefore not integrated into the alleged employer's business.

Margoles v. LIRC, 221 Wis. 2d at 269 (citing *Keeler v. LIRC*, 154 Wis. 2d at 633 and *Moorman Manufacturing Company v. Indus. Comm'n*, 241 Wis. 200, 205-06, 5 N.W.2d 743 (1942)).

Roadie arranges for delivery services requested by its customers, albeit through its app rather than in person or over the phone. The claimant performs those delivery services for Roadie. This arrangement does not resemble that between a business and a tinsmith with whom the business only contracts to repair the gutters at the business's building. The only reasonable conclusion is that the claimant's services—the actual task of performing delivery services requested by Roadie's customers—are directly related to Roadie's business of arranging for those delivery services.

g. The individual may realize a profit or suffer a loss under contracts to perform such services.

Condition g. is not met. This condition requires a showing of a *realistic* possibility that the claimant could realize a profit or suffer a loss. Quality Communications Specialists, Inc., UI Dec. Hearing Nos. S0000094MW, S0000095MW (LIRC July 30, 2001). The ALJ correctly observes that the claimant was guaranteed payment if he properly finished an assignment, had few fixed expenses, and could easily estimate whether or not a particular order would be profitable. Under these facts, the commission does not believe that Roadie has met its burden of proving a realistic possibility that its drivers would incur a loss.

h. The individual has recurring business liabilities or obligations.

Condition h. is not met. This condition requires proof of business liabilities or expenses that would recur regardless of whether an individual is performing services at the time. That is, to show "recurring business liabilities and obligations," Roadie must show more than the expenses incurred in actually performing the services—such as the gasoline burned in performing delivery services—but rather expenses akin to "overhead" that would occur even when the claimant is not performing services for the employing unit.

Roadie argues that a number of expenses—vehicle insurance, driver's license, smart phone, and internet service—are sufficient to establish recurring business expense. However, there is no evidence that the claimant either acquired these for business as opposed to personal use, or that these personal expenses increased when he began using his vehicle, smart phone, and internet service to perform delivery services for Roadie.

A careful reading of the commission decision cited by Roadie regarding this condition, *Quality Communications Specialists*, suggests that the commission was referring to worker's compensation and general liability insurance coverage that the putative independent contractors actually carried under their contracts with Quality Communications, not simply insurance on vehicles they also used for personal purposes. Likewise, in *Sure Value Auto Sales, Inc.,* UI Hearing Dec. Nos. S0500191MD and S0800095MW (LIRC, July 30, 2021), the licenses referred as recurring expenses were buyer's licenses used only for business purposes, not the cost of renewing a driver's license acquired for personal purposes. While the *Quality Communications Specialists* decision held that precise quantification of the recurring *business* expenses was not necessary, it did not relieve the employing unit of the burden of proving that the expenses were actually incurred. On this record, the commission concludes that Roadie has not met its burden of proving that the claimant had recurring *business* expense.

i. The individual is not economically dependent upon a particular employing unit with respect to the services being performed.

Condition i. is met. The Court of Appeals has held that economic dependence is not a matter of how much money an individual makes from one source or another, but instead refers to the survival of the individual's independently established business if the relationship with the putative employer ceases to exist. *See Larson v. LIRC*, 184 Wis. 2d 378, 392, 516 N.W.2d 456 (Ct. App. 1994) (citing *Princess House,* 111 Wis.2d at 70). The *Larson* court further held that the following facts were relevant in determining that the individuals involved in that case were not economically dependent on their relationship with the putative employer:

> one individual testified that he typically, during a one-year period of time, works for about twelve different companies. He sometimes turns

> down work from Larson because of previous work commitments. Another individual works for Larson as both a director and an editor. She testified that she does business with Larson and others, including Larson's competitors, under the company name of Ranch Productions and her payment is made out to Ranch Productions. Additionally, the evidence showed that the other crew members worked for several enterprises other than Larson's, either on a "free-lance" basis or as employees.

Larson v. LIRC, 184 Wis. 2d at 393. In this case, the claimant testified that he performed delivery services for another entity, Instacart. Given the minimal amount the claimant earned from Roadie, and that he did similar work with Instacart, the commission is persuaded that Roadie has proven that the claimant was not economically dependent on Roadie.

In sum, the commission concludes that Roadie only established three of the nine conditions indicative of an independently established trade or business: multiple contracts (2.c.), main expenses (2.d.), and not economically dependent (2.i). Since this falls short of the required six, Roadie has not met its burden under either § 108.02(12)(bm)1. or 2.

The claimant therefore performed services for Roadie as an employee in employment, within the meaning of Wis. Stat. § 108.02(12) and (15), and the wages that Roadie paid or pays him for those services may be used to determine future benefit entitlement. See Wis. Stat. § 108.02(26).

cc: Michael Gotzler