State of Wisconsin

Labor and Industry Review Commission

Elizabeth A. Turcotte Claimant **Roadie Inc.** Employer Hearing No. 21011171MD	**Unemployment Insurance Decision**[1] **Dated and Mailed:** June 30, 2022 turcoel_usd.doc:101

The commission **modifies and affirms** the appeal tribunal decision. Accordingly, the wages paid to the claimant by Roadie Inc. totaling $1,442.38 shall be included in the department's computation of the claimant'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 the claimant's eligibility for unemployment insurance benefits. Acting as an appeal tribunal, an administrative law judge (ALJ) of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision. The commission received a timely petition for review. The commission has considered the petition and the brief submitted in support of the petition, and it has reviewed the evidence submitted at the hearing.

Findings of Fact and Conclusions of Law

The commission makes the same findings of fact and conclusions of law as stated in the appeal tribunal decision and incorporates them by reference into the commission's decision, subject to the following modifications:

1. Delete the last sentence of the third paragraph of the appeal tribunal's Findings of Fact and Conclusions of Law and insert as a new paragraph beginning thereafter:

> In order to work as a driver, the claimant was required to accept Roadie's Terms and Conditions (ex. 1) and its Drivers Agreement (ex. 2). The Drivers Agreement contains numerous instructions regarding "best practices" while making a delivery for Roadie including instructions regarding 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. 2, page U41-42). The claimant recalled a rule that she could not have pets with her when she performed a delivery, but later testified that could have been one of Roadie's customer's rules rather than Roadie's. In fact, Roadie's Terms and Conditions does have a provision stating that drivers may not have animals in their delivery vehicles (ex. 1, page U32).
>
> The claimant was paid on a per delivery basis. Roadie's witness testified that its customers, not Roadie, set the rate of pay. Neither Roadie's Terms and Conditions nor its Drivers Agreement, on the other hand, contains clear provisions regarding who determines what the Terms and Conditions refers to as the "pricing terms of the Gig provided to a Driver" (ex. 1, page U31 (Billing)). The Drivers Agreement does indicate that, in at least some instances, Roadie sets the payment amount (ex. 2, page U43, section VI.1). Billing is done through Roadie's designee, from which Roadie deducts a fee and periodically releases the remainder of the payment to the claimant following completion of a delivery assignment (ex. 1, page U31). However, payment may be withheld from the claimant and other drivers in Roadie's "sole discretion" (ex. 1, page U32 (Payment, Withholding, and Release).

The Roadie app allows customers to rate Roadie drivers. The Drivers Agreement permits Roadie to deactivate a driver's account if he or she has too many cancellations or no-shows or falls below a four-star rating by Roadie's customers (ex. 1, page U30).

2. Delete the last sentence of the third paragraph the appeal tribunal's Findings of Fact and Conclusion of Law and insert as a new paragraph beginning thereafter:

The claimant identified recurring expenses—that is, overhead expenses not associated with actually performing service at a specific time—for a cellphone, for auto insurance, and for auto registration, but added that she had to carry the insurance and maintain the registration anyway. There is no evidence that any of these expenses increased because she performed delivery services or operated a business.

3. Delete the tenth paragraph the appeal tribunal's Findings of Fact and Conclusion of Law and substitute

Roadie contended that the claimant performed her services free of its control or direction. The only training that was offered involved use of the Roadie app. Further, the claimant could pick the sequence or order in which she performed the delivery services.

However, the claimant was required to comply with instructions from Roadie about how to perform the driving services both by contract and in fact. As set out above, its Drivers Agreement contains a substantial amount of instruction. While Roadie attempted to characterize this a best practice guide based on the expectations of its customers, its Drivers Agreement specifically prefaces the instructions with "during the performance of driving services, that driver … shall:" (ex. 2; page U41, section IV.3). Moreover, some of the instructions about driver conduct during a delivery—for example the instruction that the drivers not wear clothing identifying Roadie—are clearly aimed at Roadie's interests and not its customers'.

The Terms and Conditions and the Drivers Agreement specifically allows drivers to work in teams or hire or engage others as employees or subcontractors (ex. 1, U23; ex. 2, U40). On the other hand, Roadies' witness testified that the claimant could hire helpers, but remained personally responsible for the completion of the job (T.21). The claimant herself testified that when she started driving for Roadie, third party deliveries were prohibited (T.40).

Roadie also failed to establish that the employee did not provide periodic reports to it, as use of the Roadie app reported to Roadie when a delivery was accepted and when it was performed, which allowed Roadie to monitor the progress of deliveries performed through its app and prevented more than one driver from being assigned to a delivery. The

applicant also testified that at times she reported by sending Roadie pictures indicating completion of the work.

The commission thus concludes that Roadie failed to prove three of the five factors in Wis. Stat. § 108.02(12)(bm)1.: subd. 1.a., c. and e. Subsection (12)(bm)1. does not require the commission to actually consider all five factors, much less give them identical weight. Rather, the statute itself indicates that the commission has discretion regarding which factors to apply and describes them as "nonexclusive." In other words, there is a degree of flexibility in selecting and applying factors used to determine control or direction, and some of the five factors may bear more weight than others in certain cases. *Report of Committee to Review the Unemployment Insurance Statutory Definition of "Employee," submitted to the Wisconsin Unemployment Insurance Advisory Council*, June 25, 2009, page 24.[2]

Here, other factors indicative of control or direction are also present. Right to fire or terminate the relationship is a factor in establishing control or direction under *Lifedata v. LIRC*, 192 Wis. 2d 663, 669, 531N.W.2d 531 (Ct. App. 1995). Roadie had by contract the right to termination its relationship with the claimant if she had too many "cancellation or no shows" or if her performance fell below an expected level under star rating system (ex. 1, page U30). There is no clear evidence in the written agreements about who set the rate of pay, but Roadie determined to the agent or entity through whom payment was made, and it had the right to withhold payment in its sole discretion (ex. 1, page U32).

In sum, considering the factors in Wis. Stat. § 108.02(12)(bm)1., Roadie has not proven that the claimant performed delivery services free of its control or direction.

4. Delete the 8th numbered subparagraph of the 12th full paragraph of the appeal tribunal's Findings of Fact and Conclusion of Law and substitute:

8. The claimant incurred cellphone, insurance, and vehicle licensing expenses that continued even while she was not performing delivery services specifically. However, it has not been shown that these were liabilities or obligations that were incurred to provide delivery services or do business, so much as personal expenses that coincided with a business use. That is, the record contains no evidence either that she incurred these continuing expenses initially to perform delivery work or that the amount she spent for insurance, licensing, and phone increased in amount as a resulting of conducting delivery services.

[2] The report is available at https://dwd.wisconsin.gov/uibola/uiac/reports/2009eedefinition.pdf.

5. Delete the first sentence of the 13th full paragraph of the appeal tribunal's Findings of Fact and Conclusion of Law, and substitute:

> Because Roadie only showed that 3 of the 9 conditions were met, the second part of the § 108.02(12)(bm) test was not met, and Roadie did not meet its burden of proving both prongs of the test.

Memorandum Opinion

For unemployment insurance purposes, "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).

The appeal tribunal found that the claimant performed services for Roadie as an employee for the purposes of the threshold definition of "employee" under Wis. Stat. § 108.02(12)(a). Turning to the exception to that definition under Wis. Stat. § 108.02(12)(bm), the appeal tribunal found that the claimant performed those services free of Roadies control or direction under Wis. Stat. § 108.02(12)(bm)1. However, the appeal tribunal further found that Roadie proved only four of the nine conditions under Wis. Stat. § 108.02(12)(bm)2. Since Roadie did not establish the required 6 conditions under that subdivision, the appeal tribunal found the claimant to be an employee of Roadie's under Wis. Stat. § 108.02(12).

1. The threshold definition of employee under par. (a).

On appeal, Roadie first argues that the claimant performed services for Roadie's customers, not Roadie. 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 alone supports the conclusion that claimant is Roadie's employee under sub. (12)(a).

The supreme court has also looked to who has the right to control the details of the work performed. *See Price Cty. Tel. Co. v. Lord*, 47 Wis. 2d 704, 719, 177 N.W.2d 904 (1970). On this point, Roadie relies in part on two prior commission which involved passenger drivers regulated by Wis. Stat. ch. 440. See *Ebenhoe v. Lyft, Inc.*, UI Dec. Hearing No. 16002409MD (Jan. 20, 2017) and *Rhyne v. Lyft, Inc.*, UI Hearing Dec. No. 18004800EC (LIRC Mar. 20, 2019). Those cases seemed to suggest a *per se* rule that such passenger drivers, at least, are not controlled or directed by the network transportation companies through whose platform or software application the drivers performed services. Here, however, the claimant is not a passenger driver regulated by Wis. Stat. ch. 440. Further, the commission recently explained *Ebenhoe* and *Rhyne* do not state a rule that even such passenger drivers are automatically performing services for the passengers instead of the platform company. *See Charisse Wilson v. Lyft*, UI Dec. Hearing No. 21011105 (LIRC Mar. 17, 2022).

Roadie also cites the *Kress Packing Co. v. Kottwitz*, 61 Wis. 2d 175, 182, 212 N.W.2d

97 (1973), and in *Acuity Mut. Ins. Co. v. Olivas*, 2007 WI 12, ¶87, 298 Wis. 2d 640, 726 N.W.2d 258. The commission has previously considered the holdings in those cases to determine the entity for *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, Advantage 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 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 the claimant to use its app, she is paid through Roadie's designated agent, and her payment may be withheld in Roadie's "sole discretion" (ex. 1, page U32). Further, Roadie can effectively discharge the claimant under the Drivers Agreement based on poor performance. The instructions contained in the Drivers Agreement, discussed above, are also indicative of the right to control the details of the work performed by claimant. The commission thus concludes that the *Kress* and *Acuity Mutual* standards support the appeal tribunal's conclusion that the claimant meets the threshold definition of "employee" under § 108.02(12)(a).

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

The next issue is whether the claimant perform her services free of Roadie's control or direction under (bm)1., an inquiry that looks more at the *extent* of control or direction than *who* may exercise it. For the reasons explained in the material inserted in the appeal tribunal decision by modification, the commission concluded that Roadie failed to prove that the claimant provided her delivery services free of its control or direction.

In support of its argument that the par. (bm)1. factors do not weigh favor of a finding of control or direction, Roadie again cites *Ebenhoe v. Lyft, Inc.*, and *Regina R. Rhyne v. Lyft, Inc., supra.* As discussed above, the commission's findings regarding the control or direction those was based on statutory language in Wis. Stat. ch. 440, subch. IV. Those statutory provisions do not apply to the claimant's services in this case.

3. The independently established trade or business conditions under par. (bm)2.

Because Roadie failed to meets its burden of proof under the first prong of the exception under § 108.02(12)(bm)1., the commission need not consider the second prong under subdivision 2., *see DWD v. LIRC*, 2010 WI App 123, ¶ 27 n.11, 329 Wis. 2d 67, 792 N.W.2d 182. However, evidence on that issue was presented at the hearing. For that reason, and for the sake of a complete decision, the commission proceeds to the nine "independently established trade or business" conditions under par. (bm)2.

On appeal, Roadie argues it has proven the existence of all nine of the "6 of 9" conditions under par. (bm)2. The commission cannot agree, as explained below.

> *a. 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 another delivery company does not establish that the claimant actually held herself out as being in the delivery *business*. Further, the claimant did not advertise her availability to perform delivery services. The commission declines to conclude that establishing a profile on Roadie's platform amounts to advertising or holding out, where, as here, there is no evidence that any class of customers or the public actually sees the online profile.

> *b. 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. This condition is written in the conjunctive and both prongs must be proven. Regarding the first prong, there is no evidence that the claimant maintained any type of home office. Once she accepted and assignment, the claimant had to actually do the work where the customer (such as Walmart) wanted it picked up and delivered; the claimant could not accept an assignment and do it wherever she wanted. The words "office," "facility," and "location" in subdivision 2.b. must be read together to determine who controlled where the services were performed. That is, the condition looks at the putative employee's freedom to do the work, once accepted, wherever he or she wants to do it, not that he or she chooses the geographic are or locality where he or she is assigned work.

> *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 record in this case contains no evidence establishing that the claimant ever actually redid work for not additional compensation or was subject to a *penalty* (as opposed to an unenforced requirement to make reimbursement). The claimant admitted that she had once not been paid when she did an unsatisfactory assignment, but nonpayment is different than a "penalty."

Roadie points to an indemnity provision in its Terms and Conditions and cites prior commission decisions suggesting that the inclusion of indemnity clauses within an independent contractor agreement satisfies this condition, even where there is no testimony that it has ever been enforced. The commission's prior holdings on this point lead back to two cases: *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). However, in both of those cases, the commission cited factors in addition to the indemnification clause, thus satisfying the requirement of proof by contract and in fact.

Further, *MRS* 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 prior version does not mention redoing unsatisfactory work for no additional compensation and does not refer to a penalty. The commission cannot conclude the subd. 2.e. condition has been proven *in fact* by the contractual language cited by Roadie.

> *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,"* pages 30-31. 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)).

In this case, the delivery services provided by the claimant directly relating Roadie's business of providing a platform for its customers to obtain delivery services, for which Roadie takes a fee.

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). While it apparently was possible that the claimant could sustain a loss on a particular delivery, the appeal tribunal correctly observes that the claimant was guaranteed payment if she properly finished an assignment, had few fixed expenses, and could easily estimate whether or not a particular order would be profitable. For example, if the price of gasoline or distance makes an assignment unprofitable, the claimant can refuse it. In short, the commission concludes that it has not been established that the claimant has a realistic possibility of loss in performance of her services.

h. The individual has recurring business liabilities or obligations.

Condition h. is not met. The commission modified the appeal tribunal decision to conclude that Roadie failed to establish that the claimant had recurring business liabilities or obligations. The appeal tribunal identified these as vehicle and cellphone expenses. Roadie argues that the conclusion that such expenses are recurring business obligations is supported by prior commission decisions including *Quality Communications Specialists* and *Sure Value Auto Sales, Inc.,* UI Hearing Dec. Nos. S0500191MD and S0800095MW (LIRC, July 30, 2021). However, a careful reading of *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 to 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.

In this case, absent evidence that the claimant actually bought more vehicle insurance or a more expensive cellphone or cell service because of her delivery services, the existence of these expenses has not been proven to be a recurring *business* obligation or liability as opposed to coincidental personal expenses. 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* obligation or liabilty.

cc: Attorney Michael R. Gotzler