

State of Wisconsin



Labor and Industry Review Commission

Chareese D. Wilson
Employee

Lyft Inc.
Employer

Hearing No. 21011105MD

**Unemployment Insurance
Decision¹**

Dated and Mailed:

March 17, 2022
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The commission **reverses and remands** the appeal tribunal decision. Accordingly, this matter is remanded to the Department of Workforce Development for further proceedings including: (1) the taking of additional evidence to permit both parties the opportunity to offer firsthand evidence regarding the factors and conditions set out in Wis. Stat. § 108.02(12)(bm), and (2) a decision by an appeal tribunal on the issue of whether the claimant is excepted from the definition of employee under Wis. Stat. § 108.02(12)(bm).

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

A hearing was held before an administrative law judge acting as appeal tribunal under Wis. Stat. § 108.09(3) on the issue of whether the claimant performed services for Lyft, Inc. (Lyft) as an employee. The claimant left the hearing before testimony was taken, in part because, even if found to be an employee of the Lyft, she would be ineligible for benefits under Wis. Stat. § 108.04(12)(f) because she receives social security disability insurance. Based on the evidence presented by Lyft, the appeal tribunal issued a decision which found the claimant was not Lyft's employee.

The claimant filed a timely petition for review. The commission, having considered the petition and the positions of the parties and having reviewed the evidence submitted at the hearing, makes the following:

Findings of Fact and Conclusions of Law

Lyft has developed a software application (app) that connects persons seeking transportation to individuals who provide driving services, which Lyft refers to as "ridesharing services." It is licensed as a transportation network company under Wis. Stat. §§ 440.40 to 440.495. Under those statutes, a "transportation network company" is a business that, for compensation, uses a digital network to connect passengers to participating drivers for the purpose of providing transportation network services to those passengers. Wis. Stat. § 440.40(6). "Transportation network services," in turn, means transportation provided to a passenger in the participating driver's personal vehicle. Wis. Stat. § 440.40(7).

According to documentation provided by Lyft's witness, the claimant applied to use Lyft's app on August 16, 2019 (exhibit 1, page U157), she was approved by Lyft for use of its app as a driver on August 23, 2019 (exhibit 1, page U157), and she provided a total of 949 rides using the Lyft platform between August 22, 2019 and November 20, 2020 (exhibit 1, pages U159 through 182). None of this was disputed at the hearing.

A person using Lyft's app is directed to an online "Terms of Service" document. A version of the Terms of Service document appears in the record at exhibit 1, pages U113-55.² The Terms of Service document contains a provision stating:

5. Payments

² The version of the Terms of Service agreement offered by Lyft was revised in December 2020, which was after the last date that it was shown that the claimant used Lyft's app. Exhibit 1, pages U113-55. The claimant did not offer testimony at the hearing to contest the use of this agreement as evidence. The burden of proof with respect to the definition of employee under §108.02(12)(a) does appear to rest with the employer, *Gilbert v. LIRC*, 2008 WI App 173, ¶33, 315 Wis. 2d 726, 762 N.W.2d 671, and, in his brief to the commission, the claimant himself cited portions of Terms of Service Agreement as evidence of control and as proof that he met the statutory definition of employee. Consequently, the commission concludes on this record that the parties have essentially stipulated that the December 2020 revision of the Terms of Service agreement is not materially different than the version under which the claimant performed services one month earlier, for the limited purposes of its analysis of the threshold definition under § 108.02(12)(a).

If you are a Driver, you will receive payment for your provision of Rideshare Services pursuant to the terms of the Driver Addendum, which shall form part of this Agreement between you and Lyft.

Exhibit 1, page U118 (*emphasis in original*). The driver Addendum, in turn, includes a provision stating in part:

1. Driver Fare. You are entitled to a Driver Fare for the Rideshare Services you perform for Riders, as provided in the Agreement and this Driver Addendum. The "**Driver Fare**" for a completed ride consists of a base fare or pickup fare amount plus incremental amounts based on the actual time and distance of the ride, as measured by Lyft. The applicable base fare, pickup fee, and/or time and distance amounts are shown in a rate card (the "**Rate Card**") in your driver dashboard. Your Rate Card amounts are subject to change in Lyft's discretion.... By continuing to use the Lyft Platform, you are deemed to accept these changes.

Exhibit 1, page U152 (*emphasis in original*). The Addendum further provides that a driver may receive additional payments including tips and states:

3. Payments, Adjustments and Settlement. Lyft will collect payment owed to you by Riders and other third parties as your limited payment collection agent and you agree that the receipt of such payment by Lyft satisfies the payer's obligation to you. Lyft reserves the right to adjust or withhold all or a portion of a Driver Fare or other payment owed to you (except tips) ...(ii) in order to resolve a Rider complaint (e.g. you took an inefficient route or failed to properly end a particular instance of Rideshare Services in the Lyft application when the ride was over), or (iii) if you end a ride at a location that is different than the destination submitted through the Lyft App. ...

4. Rider Charges. Lyft will charge the Rider an amount calculated or determined by Lyft on your behalf for the Rideshare Services you perform for Riders (the "**Rider Charges**") [Y]our payment for Rideshare Services shall be the Driver Fare as described ... above. ...

5. Lyft Fees. In exchange for facilitating the Rideshare Services that you provide to Riders, you agree to pay Lyft (and permit Lyft to retain) a fee based on each transaction in which you provide Rideshare Services ("the **Lyft Fees**"), comprised of a service fee ("**Service Fee**") and platform fee ("**Platform Fee**"). The Service Fee shall be a set amount for each ride as set forth in your Rate Card or Cities page at the time of the ride. The Platform Fee shall be a variable amount equaling the Rider Charges minus: (i) the Driver Fare, ... (iii) the Service Fee,.... For your convenience, Lyft may collect the Service Fee ... from Riders on your behalf to offset your payment of such fees to Lyft....

6. Payment Processing. Payment processing services are provided by Stripe.... By using the Lyft Platform to receive payment proceeds, you agree to be bound by the Stripe Terms, which may be modified from time to time. As a condition of Lyft enabling payment through Stripe, you authorize Lyft to obtain all necessary access and perform all necessary activity on your Stripe Connected Account to facilitate your provision of Rideshare Services.... Lyft reserves the right to switch payment processing vendors or use alternative back up vendors in its discretion.

Exhibit 1, pages U152-53 (*emphasis in original*).

In addition, the Terms of Service agreement provides that a “User” (which includes drivers and riders) may terminate the agreement without cause upon seven days prior written notice to Lyft. Any party may terminate upon material breach. However, Lyft may immediately, and unilaterally, terminate the agreement or deactivate an account if a driver “fall[s] below Lyft’s star rating or cancellation threshold.” Exhibit 1, page U127. Finally, the contract allows Lyft to unilaterally modify the terms and conditions of the Terms of Service agreement. Continued use of the Lyft app after the modification is deemed consent by a driver to the modification. Exhibit 1, page U114.

Wisconsin Stat. § 108.02(12)(a) provides:

(12)(a) “Employee” means any individual who is or has been performing services for pay for an employing unit, whether or not the individual is paid directly by the employing unit, except as provided in par. (bm), (c), (d), (dm) or (dn).

This definition of “employee,” of course, has been referred to by the Supreme Court as indicative of legislative intent of “broad, almost presumptive, coverage,” *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 64, 330 N.W.2d 169 (1983). The Court has also recognized that “the entire statutory scheme” of ch. 108, “indicates a desire on the part of the legislature to extend the protection of these laws to those who might not be deemed employees under the legal concepts governing the liability of a master for the tortious acts of his servant.” *Price County Tel. Co. v. Lord*, 47 Wis. 2d 704, 715-716, 177 N.W.2d 904 (1970). Interpreting § 108.02(12)(a) itself, the supreme court held that “[s]ervice has been defined as aiding the principal in the regular conduct of business.” *Princess House, Inc.*, 111 Wis. 2d at 64. In this case, the services that the claimant provides—driving—certainly can be said to aid Lyft in the regular course of its business of connecting riders seeking driving services with drivers.

However, the commission has also looked at control by a putative employer with respect to the § 108.02(12)(a) definition of “employee” to determine for *whom* the services are performed for the purposes of sub. (12)(a). *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). On this point, the commission has previously relied on *Acuity Mutual Ins. Co. v. Olivas*, 298 Wis.2d 640, ¶88, 726 N.W.2d 258 (2007), which in turn cites *Kress Packing Co. v. Kottwitz*, 61 Wis. 2d 175, 182, 212 N.W.2d 97 (1973), for the proposition that:

the primary test for determining an employer-employee relationship: Does the alleged employer have a right to control the details of the work? In assessing the right to control, four secondary factors are considered: (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.

The commission has also specifically considered the question of control by a transportation network company over a driver with respect to the threshold definition of “employee” in Wis. Stat. § 108.02(12)(a). In *Ebenhoe v. Lyft Inc.*, UI Dec. Hearing No. 16002409MD (LIRC Jan. 20, 2017), the commission concluded that Wis. Stat. §§ 440.40(3) and (6) and 440.41(2) are an expression of legislative intent that transportation network companies such as Lyft do not control, direct, or manage the work of a participating driver, but instead provide a technology platform through which a participating driver pays a fee to be connected to a passenger. Consequently, the commission concluded in that case that an individual who, like the claimant here, was a participating driver for a transportation network company was not an employee of the company under Wis. Stat. § 102.02(12)(a).

Wisconsin Stat. § 440.40(3) and (6) define “participating driver” and “transportation network company,” but do not mention control. Wisconsin Stat. § 440.41(2) states:

(2) No person may engage in transportation network services in this state unless the person is a participating driver for a licensed company. A licensed company is not considered to control, direct, or manage a participating driver or that participating driver’s personal vehicle used for engaging in transportation network services, except as provided in this subchapter or in a written agreement between the licensed company and the participating driver. [*Emphasis provided.*]

Wisconsin Stat. § 440.41(2) directs a factfinder to consider any written agreement between a participating driver and Lyft to determine the extent of control by Lyft over the participating driver. In *Ebenhoe*, the commission recognized the agreement between Lyft and drivers was relevant, though it examined it with respect to the exception under § 108.02(12)(bm) and not specifically the threshold test under § 108.02(12)(a). Indeed, in *Rhyne v. Lyft, Inc.*, UI Hearing Dec. No. 18004800EC (LIRC Mar. 20, 2019), the commission recognized that the written agreement between Lyft and its participating driver must be considered in determining whether the driver is a Lyft “employee” under § 108.02(12)(a), though it concluded that the agreement did not provide evidence of control over the driver by Lyft. *Id.*, slip op. page 5.³

³ *Rhyne* also looked to a floor debate by the Wisconsin Senate during the passage of 2015 Assembly Bill 143, which became 2015 Wisconsin Act 16, which enacted Wis. Stat. §§ 440.40 to 440.495. As the claimant and amicus in this case point out, the weight that floor debate is accorded as an indicator of legislative intent is something of an open question. See *Clean Wis., Inc. v. Wis. Dep’t of Natural Res.*, 2021 WI 71, ¶¶41, 398 Wis. 2d 386, 961 N.W.2d 346 (Dallet J., concurring “not all extrinsic sources are created equal, and the materials the dissent uses—a governor’s press release and one legislator’s floor statement—are generally unreliable indicators of a statute’s meaning”), but see ¶68 (Roggensack, J., dissenting “[we] have utilized floor debates as assists in statutory interpretation in the past,” citing *Strenke v. Hogner*, 2005 WI 25, ¶¶23-25, 279 Wis. 2d 52, 694 N.W.2d 296). Whatever weight it is accorded, however, floor debate cannot change the plain meaning of Wis. Stat. § 440.41(2). See *Operton v. LIRC*, 2017 WI 46, ¶ 29, 375 Wis. 2d 1, 894 N.W.2d 426 (where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history).

This case, of course, involves a different driver operating under a different agreement, one revised five years after the claimant in *Rhyne* began providing services for Lyft. Further, *Rhyne* does not expressly state the basis for its conclusion that the agreement in that case lacked sufficient elements of control to make the claimant a statutory employee under § 108.02(12)(a). In both *Ebenhoe* and *Rhyne*, however, the commission recognized the relevance of the written agreement between the parties with respect to control, direction or management of participating drivers by a transportation network company under § 440.41(2). Consistent with those prior cases, the Terms of Service agreement in this case must be examined to determine whether the claimant is presumptively Lyft’s employee under § 108.02(12)(a). And, in this case, the agreement provides evidence that Lyft exercised sufficient control over the performance of the claimant’s services to bring her within the broad, almost presumptive, definition of “employee” under Wis. Stat. § 108.02(12)(a).

Lyft effectively had the right to hire and fire the claimant under the Terms of Service agreement. Lyft is not obligated to automatically “hire” or approve all persons who apply to provide driver services through its app, as evidenced by the fact a week passed between when the claimant applied to use the platform and when Lyft approved her as a driver. Lyft effectively had the right to discharge the claimant based on poor performance by terminating the Terms of Service agreement or her user account if she fell below its “star rating” or cancellation threshold. Neither the star rating or cancellation threshold appear to be described in detail—or limited in any manner—in the Terms of Service agreement, suggesting Lyft had broad discretion to invoke them as a basis for termination of the relationship between it and the claimant.

Lyft also controlled the means of payment to the claimant. Lyft set not only the “Driver Fare,” but also the “Rider Charges,” and it retained the difference as a fee. It also had the right to withhold all of the payment to the claimant to resolve any complaints—apparently made directly to Lyft—by a person using Lyft’s app as a rider. While a third party processed the transactions, Lyft had the unilateral right to change the third party processor and “to obtain all necessary access and perform all necessary activity on [the claimant’s] account” with the processor. Direct payment by Lyft itself, of course, is expressly not a requirement of the threshold definition of employee under Wis. Stat. § 108.02(12)(a), and the record establishes that Lyft, not the driver or the rider, otherwise exercised considerable control over the amount and

As the commission in *Rhyne* recognized, Wis. Stat. § 440.41(2) provides that a transportation network company may exercise control over its drivers under the terms of the contractual agreement between the drivers and the company. It does not contravene the Supreme Court observation that § 108.02(12)(a) was indicative of legislative intent of “broad, almost presumptive, coverage,” under the unemployment insurance statutes. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 64, 330 N.W.2d 169 (1983).

manner of payment for the services.⁴

The commission therefore concludes that, as of week 30 of 2021, the claimant performed services for pay for Lyft within the meaning of Wis. Stat. § 108.02(12)(a) and so meets the definition of “employee” under that statute.

The next issue is whether Lyft can establish one of the exceptions listed in Wis. Stat. § 108.02(12)(a), including specifically the exception under par. (bm). That statutory paragraph, unlike par. (a), specifically requires proof by contract and in fact. However, the record contains no firsthand evidence regarding how the relationship between the claimant and Lyft operated in fact. Further, at least some of the conditions in par. (bm)2. require proof that the claimant herself actually had an office, advertised, or had recurring business expenses, not simply that she could have. Given the unusual circumstances in the way this case was heard and decided, including the claimant’s decision not to participate at hearing, the commission shall exercise its discretionary authority under Wis. Stat. § 108.09(6)(d) to remand for further proceedings including (1) the taking of additional evidence to permit both parties the opportunity to offer firsthand evidence regarding the factors and conditions set out in Wis. Stat. § 108.02(12)(bm), and (2) a decision by an appeal tribunal on the issue of whether the claimant is excepted from the definition of employee under Wis. Stat. § 108.02(12)(bm).

Memorandum Opinion

The commission must only consult with an ALJ with respect to his or her impressions and conclusions regarding the credibility of witnesses in situations where the ALJ heard conflicting testimony and the commission reverses the ALJ and makes contrary findings. *Braun v. Indus. Comm’n*, 36 Wis. 2d 48, 57, 153 N.W.2d 81 (1967). In this case, the ALJ did not hear any conflicting testimony, and the commission’s reversal is not based on a different assessment of witness credibility.

cc: Attorney Victor Forberger
Attorney Sarah Platt
Attorney Brenda Lewison

⁴ To the extent that Wis. Stat. § 440.44(5)(b) provides that passenger payments for transportation network services shall be made electronically using the transportation network company’s digital network, that provides evidence of the type of *statutory* control exercised by Lyft as recognized in Wis. Stat. § 440.41(2)(a). In any event, the statutory language did not require Lyft to assume the considerable additional control over the amount of payment, or ability to withhold payment, that is provided for in the Terms of Service agreement as set out above.