State of Wisconsin

Labor and Industry Review Commission

James P. Vanderloop Employee **Lyft Inc.** Employer Hearing No. 21016680MD	**Unemployment Insurance Decision**[1] **Dated and Mailed:** September 23, 2022 vandeja.doc:101

The commission **reverses** the appeal tribunal decision. Accordingly, the wages paid to the employee by Lyft shall be included in the department's computation of the employee's base period wages for computing potential benefit eligibility. There is no overpayment as a result of this decision.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/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 James P. Vanderloop (claimant) performed services for Lyft, Inc. (Lyft) as an employee. Following the hearing, 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

1. Facts.

Documents introduced at the hearing indicate that Lyft has a license 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).

The claimant was a driver for Lyft from March 2019 to October 2021. He became a driver after completing online application that created a driver profile. Before he was allowed to drive, he was given a test or tests, which included a road test, a cognitive test, and a physical. He testified that, as part of this process, it was recommended he take a driving course.

Lyft's app informed the claimant that riders wanted to be picked-up, and if he accepted an assignment, the app told him where to go. He consulted with Lyft about problem customers. He understood that he was supposed to follow Lyft's rules and expectations, and that he could be removed from its app if he declined too many rides.

As part of the application process, the claimant accepted Lyft's Terms of Service Agreement which included a Driver's Addendum. He also accepted periodic revisions to that agreement online. A copy of that agreement revised as of December 9, 2020, is at exhibit 4.

The Terms of Service document contains a provision stating:

> **5. Payments**
> 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 4, page U133 *(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 4, page U166 *(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. …
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> **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. …
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> **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….
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> 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 4, pages U167-68 *(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 4, page U143. 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 4, page U129.

The claimant did not believe that he had a business as a driver. He used his personal car, paid the gasoline and vehicle maintenance expenses associate with his work for Lyft, and carried vehicle insurance. However, he did not testify that the car insurance increased as a result of his Lyft services. He has never had to redo a passenger delivery. His testimony indicates that his expenses were approximately two-thirds of what he was paid for his driving services. According to department records, Lyft paid him $5,348.12 for quarter 4 of 2019 and quarters 1 through 3 of 2020.

2. General definition of employee under § 108.02(12)(a)

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 its 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.[2]

[2] *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. The

Footnote cont'd

This case, of course, involves a different driver operating under a different agreement, one revised several 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 him within the broad, almost presumptive, definition of "employee" under Wis. Stat. § 108.02(12)(a).

Lyft 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. Lyft effectively had the right to discharge the claimant based on poor performance, by terminating his user account if he fell below its "star rating" or cancellation threshold. Neither the star rating

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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). The clear wording of Wis. Stat. § 440.41(2) thus provides that a network company such as Lyft may "control, direct, or manage a participating driver" through a written agreement between the company and the driver. In justifying the contrary conclusion, the dissent relies on floor debate rather the actual wording of Wis. Stat. § 440.41(2), much less any statutory language in Wis. Stat. ch. 108. However, the majority believes it "is not at liberty to disregard the plain, clear words of the statute," because legislative intent "is expressed in the statutory language" and "[i]t is the enacted law, not the unenacted intent, that is binding on the public." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶¶44, 46, 271 Wis. 2d 633, 681 N.W.2d 110.

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).

nor 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 manner of payment for the services.[3]

The commission therefore concludes that 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.

3. Exception under § 108.02(12)(bm)

a. Applicable 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), 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:

[3] 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.

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.

Notably par. (bm), unlike par. (a)., specifically places the burden of proof on the employing unit and requires proof by contract and in fact. Further, an employing unit must meet it burden with respect to both prongs of par. (bm): both the five "factors" in subd. 1 and the nine "conditions" in subd. 2.

b. Application of statutory conditions.

After carefully reviewing the hearing testimony and record, the commission concludes that Lyft has failed to meet its burden with respect six of the nine conditions under Wis. Stat. § 108.02(12)(bm)2., specifically, the conditions in subd. 2.a., b., e., f., g., and h.

> 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.

The claimant himself testified that he did not believe he had a business as a driver. While this is not dispositive, it is probative evidence which tends to indicate he did not hold himself out as being in business. Lyft contends that this condition is met because the claimant created a profile on its app, noting that commission has previously held that using websites alone may satisfy the advertising requirement. For example, in an unpublished Court of Appeals decision in *Varsity Tutors v. LIRC,* Case no. 2018AP1951 (Wis. Ct. App. Oct. 15, 2019), the court of appeals found that this requirement was met by the profile that an individual posted on Varsity Tutors' app. The individual involved in *Varsity Tutors* "created an online profile with Varsity Tutors 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 its brief, Lyft asserts that "[r]iders can see the name, picture, and vehicle of a driver before agree to the ride." However, that is considerably less information than provided by the tutor in Varsity Tutors also who provided relevant test scores and a personal statement. More problematic, the commission sees no evidence about this point in the hearing record; the claimant testified that he created a profile but not that any of the information he provided was available to riders. Lyft has failed to meet its burden regarding this condition.

> 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 Lyft must establish both prongs. The claimant did use his own equipment—his vehicle and cell phone—in performing the delivery services. However, there is no evidence that he maintains 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 passengers as assigned by Lyft and as directed by Lyft customers.

That is, Lyft'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; the claimant could not accept an assignment and perform it wherever he wanted. Reading the words "office," "facility," and "location" in context leads to the conclusion that this condition is concerned with the putative employee's freedom to do the work once it has been assigned where he or she wants to do it, not that he or she can choose the geographic location where the work is assigned.

> 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 never had to redo work and there is no evidence that he was required to pay a "penalty." The claimant did state that he would not be paid if delivered an object to a customer that the customer had left behind after leaving his vehicle. However, Lyft pointed to no evidence in the record establishing that the claimant was actually *obligated* to return forgotten items to a passenger by locating and driving the forgotten items to the passenger after the fact.

There is an indemnity provision in the Terms of Service Agreement. However, the existence of a boilerplate indemnity clause in a contract—with no evidence of actual enforcement—is not sufficient evidence of proving that a worker is subject to a "penalty" for unperformed work. Lyft 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 facts 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 Lyft'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)).

Lyft arranges for driving services requested by its customers, albeit through its app rather than in person or over the phone. The claimant performs those driving services for Lyft. 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 driving services requested by Lyft's customers—are directly related to Lyft's business of arranging for those driving 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 claimant was guaranteed payment if he properly finished an assignment and could easily estimate whether or not a particular order would be profitable. Under these facts, Lyft has not 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," Lyft 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. Lyft does not assert in its brief that this condition is present in this case.

On this point, the commission notes some expenses—vehicle insurance, driver's license, smart phone, and internet service— might appear to be recurring "overhead" type of expenses. 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 Lyft.

In *Quality Communications Specialists*, the commission did indicate that insurance could be a recurring expenses for the purposes of this condition. However, a careful reading of that case indicates 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.

4. Conclusion

Because Lyft has failed to meet its burden of proving that the six of the nine conditions in Wis. Stat. § 108.02(12)(bm) are present in this case, the commission limits its fact findings to that issue and does not proceed to consideration of the evidence submitted with respect to the conditions under Wis. Stat. § 108.02(12)(bm)1. *See DWD v. LIRC and Dunham Express Corp.*, 2010 WI App 123, ¶27 n.11, 329 Wis. 2d 67, 792 N.W.2d 182. In other words, it is not necessary for the commission to address whether the claimant performed his services free of Lyft's control or direction under Wis. Stat. § 108.02(12)(bm)1.

The commission therefore concludes that Lyft has thus failed to meet its burden of proof under Wis. Stat. § 108.02(12)(bm)2., and the claimant therefore is not excluded from the definition of employee under that paragraph. Rather, the claimant performed services for Lyft as an employee in employment, within the meaning of Wis. Stat. § 108.02(12) and (15), and the wages that Lyft paid him for those services during the fourth quarter of 2019 and the first three quarters of 2020 may be used to determine benefit entitlement. See Wis. Stat. § 108.02(26).

Memorandum Opinion

The commission need 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.

GEORGIA E. MAXWELL, COMMISSIONER (dissenting)

I respectfully dissent from the majority opinion.

I do not agree with the majority's decision to attempt to depart from its prior, well-reasoned holdings in *Ebenhoe v. Lyft Inc.*, UI Dec. Hearing No. 16002409MD (LIRC Jan. 20, 2017) and *Rhyne v. Lyft, Inc.*, UI Hearing Dec. No. 18004800EC (LIRC Mar. 20, 2019), *aff'd sub nom. Wisconsin Department of Workforce Development v. Wisconsin Labor and Industry Review Commission et al.*, case no. 19CV1043 (Wis. Cir. Ct. Dane Cnty. Oct. 21, 2019).[4] Those decisions correctly concluded that a plain reading of the text of subch. IV of Wis. Stat. ch. 440, as well as the direct statements of two senators of different political parties during floor debate, established the Legislature's very clear intent that participating drivers using software developed by network transportation companies like Uber and Lyft be treated as independent contractors for unemployment insurance purposes. As a result and based on its review of the law and the Lyft terms of services agreement, the commission concluded that the drivers at issue in those cases did not provide services for Lyft, and therefore, they were not "employees" within the meaning of Wis. Stat. § 108.02(12)(a). For several years after the commission's thorough explanation of its reasoning in *Rhyne*, and its affirmance by the circuit court, the department's appeal tribunals have consistently and correctly held that contrary department determinations (such as the decision issued by the majority today) constitute "departmental error" requiring waiver of the resulting benefit overpayment. Indeed, the commission itself did so recently in *John D. Cunningham v. Lyft,* UI Dec. Hearing No. 2100615MW (LIRC Dec. 29, 2021) . *Ebenhoe* was even also cited favorably by the court of appeals in *Varsity Tutors LLC v. LIRC,* Appeal No. 2018AP1951 (Wis. Ct. App. Oct. 15, 2019). I disagree with the majority's decision to re-interpret the Lyft terms of service agreement without any explanation for how or why the commission is doing so, and without explaining what has changed in the terms of service agreement that warrants a different conclusion since the commission interpreted essentially the same agreement in *Ebenhoe* and *Rhyne.*

While I agreed with the majority in *Chareese Wilson v. Lyft Inc.*, UI Dec. Hearing No. 21011105MD (LIRC Mar. 17, 2022), the commission's decision in that case was unique, and *Wilson* was a very unusual case. In that case, the claimant and her attorney had walked out and refused to participate in the hearing, and there was a very limited record of evidence. The commission remanded the matter for further hearing to fully develop the insufficient record. The commission did not decide the independent contractor issue, and the matter was expected to come before the commission again for further review after the remand. The *Wilson* case did not in any way expressly overrule the commission's decisions in *Ebenhoe* and *Rhyne*, and I

[4] See also *John D. Cunningham v. Lyft,* UI Dec. Hearing No. 2100615MW (LIRC Dec. 29, 2021) (waiving an overpayment resulting from the department's initial determination that a claimant was not an employee, as that determination was an error of law in light of *Ebenhoe* and *Rhynes*.

disagree that the *Wilson* case can be interpreted as reversing the commission's long-standing *Ebenhoe* and *Rhyne* cases. In fact, nowhere in *Wilson* does the commission state that *Ebenhoe* and *Rhyne* are reversed. The majority's decision in this case disregards and is inconsistent with the commission's prior reasoned decisions.

For the foregoing reasons, I respectfully dissent.

/s/
Georgia E. Maxwell, Commissioner

cc: Attorney Sarah J. Platt