State of Wisconsin

Labor and Industry Review Commission

Hazel D. Lindsey Employee **Lyft Inc.** Employer Hearing No. 21011523MD	**Unemployment Insurance Decision**[1] **Dated and Mailed:** September 23, 2022 lindshah_urr.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 Hazel D. Lindsey (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.[2] 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

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 for which Lyft paid her $5,464.72 as shown in exhibit 1. She became a driver after completing online application that included licensure and other personal information. She did not remember if she signed an agreement when she began working for the employer, but did recall reading some type of instruction when she originally applied online. Lyft introduced a written contract as an exhibit at the hearing, but that document had been revised in December 2020. The claimant would not have approved or accepted that form of an agreement, as she stopped working for Lyft in March 2020.

Exhibit 7 is a statement from the claimant, which she testified was accurate, in which she stated she received instructions from Lyft about how to do the job, that she received video training from Lyft, and that she was required to personally perform the driving services.

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

---

[2] In its brief, Lyft states that it "agrees with Ms. Lindsey that she is not properly classified as an employee." Ms. Lindsey's petition states that she is appealing the appeal tribunal decision in this matter; that that decision determined that she was ineligible for benefits based on her services for Lyft; that she had also been denied for Pandemic Unemployment Assistance; and that the initial determination, which was reversed by the appeal tribunal decision, held that the service she had performed were as an employee. The appeal tribunal decision did not assess an overpayment, and Ms. Lindsey's petition asks for further hearing on that issue. While Ms. Lindsey's petition might have been clearer, the commission conducts a *de novo* review, *Gilbert v. LIRC*, 2008 WI App 173, ¶ 7, 315 Wis. 2d 726, 762 N.W.2d 671, and it "has the duty to 'find the facts and determine the compensation irrespective of the presentation of the case'" by the parties. *United Parcel Serv., Inc. v. Lust*, 208 Wis. 2d 306, 313-14, 560 N.W.2d 301 (Ct. App. 1997) (citations omitted).

> (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. The employee has thus met the broad, almost presumptive definition of "employee" under Wis Stat. § 108.02(12)(a).

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 *Kress Packing Co. v. Kottwitz*, 61 Wis. 2d 175, 182, 212 N.W.2d 97 (1973), (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. *Id. See also*, *Acuity Mutual Ins. Co. v. Olivas*, 2007 WI 12, ¶88, 298 Wis.2d 640, 726 N.W.2d 258. These secondary tests are described as subsidiary, not because they are unimportant, but because they are tests based on evidentiary facts that support the primary test. *Village of Prentice v. DLIHR*, 38 Wis. 2d at 223.

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 the 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. 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). 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

Footnote cont'd

This case, of course, involves a different driver and the record does not include a copy of the actual contract under which the employee performed services. 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). Even though Lyft failed to produce the written agreement that actually governed the relationship between it and the claimant, the commission concludes that the record contains sufficient evidence to conclude that Lyft exercised sufficient control to establish that the claimant performed services for it.

Lyft effectively had the right to hire the claimant as it is not obligated to automatically "hire" or approve all persons who apply to provide driver services through its app. It may also be reasonably inferred from the record that Lyft controlled the means of payment to the claimant. Certainly, the record indicates payment came from Lyft, and the employee credibly testified she would contact Lyft about problems in payment.[4]

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.

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:
> 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.

---

169 (1983).

[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.

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. Again, the record does not contain the actual contract between the parties. However, the claimant credibly testified at the hearing that the information she provided to the department, as documented in exhibit 7, was accurate. That document indicates the claimant informed the department, as she testified at the hearing, that she received instructions from Lyft about how to do the job, and that she received video training from Lyft. In addition, exhibit 7 establishes that the claimant was required to personally perform the driving services. Lyft thus has failed to prove the absence of the first three of the five control or direction factors, specifically Wis. Stat. § 108.02(12)(bm)1.a., b., and c.

Paragraph (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." The Court of Appeals stated that a factor supporting a finding of control or direction for the purposes of determining whether workers were excluded from the statutory definition of "employee," includes an employing unit's ability to set the fees charged to third persons by putative employees. *Lifedata Med. Servs. v. LIRC*, 192 Wis. 2d 663, 669, 531 N.W.2d 451 (Ct. App. 1995). Here, it is reasonable to infer from the evidence in the record that Lyft sets the fees, other than the amount of tips, that were charged from the claimant's services.

Because Lyft has failed to meet its burden of proving that the claimant performed her services for Lyft free of Lyft's control or direction, 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)2. *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 was engaged in an independently-established trade or business under Wis. Stat. § 108.02(12)(bm)2.

The commission therefore concludes that Lyft has thus failed to prove that the claimant performs services to free of its control or direction under Wis. Stat. § 108.02(12)(bm), 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 her for those services may be used to determine benefit entitlement. See Wis. Stat. § 108.02(26).

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.

GEORGIA E. MAXWELL, COMMISSIONER (dissenting)

I respectfully dissent from the majority opinion. First, no party appealed the appeal tribunal's decision that the claimant is not an employee of Lyft. The claimant's petition is not entirely clear, but she asks for a hearing on the possibility of benefits paid and waiver of the repayment of those benefits. She is essentially asking the commission to review the issue of the overpayment and the issue of whether the overpayment should be waived. The parties' briefs also address only the overpayment issue. The majority decision gives the actual issue on appeal one sentence in its decision.

While the commission has broad authority to take up other issues, it should not be an invitation to re-interpret the Lyft terms of service agreement without the benefit of the arguments of the parties, 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*. I do not think it is appropriate in this case because it was not an issue that the parties appealed or wanted addressed by the commission, it deprives the parties of their due process

rights to be heard and present arguments on those issues, and it is inconsistent with the commission's prior practice in the *John D. Cunningham v. Lyft,* UI Dec. Hearing No. 2100615MW (LIRC Dec. 29, 2021) which was cited by Lyft in its brief. I would follow the commission's practice in the *Cunningham* decision and address only the issue appealed in this case, i.e., the overpayment issue.

I also 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). 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. *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).

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 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.

Because I think that the commission should not address issues that have not been appealed or briefed to the commission in this case, I think that proceeding to address the other issues, such as addressing the exceptions under sub. (12)(bm), as the majority does in an incomplete manner here, is unwarranted and unnecessary.

For the foregoing reasons, I respectfully dissent.

/s/
Georgia E. Maxwell, Commissioner

cc: Attorney Sarah Platt