STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

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DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 19, 2020

IN THE MATTER OF:
Appeal Board No. 610510

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the determination holding (hereafter the "company") liable for contributions, effective beginning the first quarter of 2016, based on remuneration paid to the claimant and to all other couriers similarly situated as employees. The company requested a hearing and objected contending that the claimant and all other similarly situated were independent contractors.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the company and the Commissioner of Labor. By decision filed January 31, 2020 (A.L.J. Case No. 019-17649), the Administrative Law Judge overruled the company's objection and sustained the determination.

The company appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the company.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The company provides logistic services for clients. The company posts ads online through services such as Craigslist for courier drivers. The claimant is a driver who answered such an ad for courier work. The company communicated with the claimant by text and email. The company's owner questioned the claimant regarding his driving experience and insurance coverage. The company requires that all drivers to provide their EIN

information or social security card, driver's license, driver's license abstract, insurance declaration page with insurance limits of 100/300/50, insurance identification card, and vehicle registration.

The claimant does not operate a business. He was sent an independent contractor service agreement, which he signed. The service agreement required the claimant to comply with the guidelines of the company's client to which he was assigned. The claimant was required to maintain a professional appearance and manner while on the customer's premises, and he was required to have a personal cell phone or other communication device so he could be reached while making deliveries. He was not reimbursed for the device. The company required that couriers adhere to all security procedures while driving clients' products, including keeping vehicle windows up and all doors locked and secured while the clients' materials were on board. The service agreement required the claimant to maintain a 98% on-time delivery rate. The claimant was required to maintain the confidentiality of financial information, delivery client contact information, contact information of other couriers and employees of the company, and any information identified as confidential by the company or delivery client.

The claimant was paid $120 per day or $600 per week, which was not negotiated. The company covered the claimant under its blanket liability insurance policy. The claimant drove his personal vehicle. He was not reimbursed for the cost of gas, tolls, car insurance, or vehicle maintenance. While the claimant could work for competitors, he could not work for a competitor while on a job for the company.

The claimant was assigned to an auto parts warehouse. The client assigned the claimant to a certain warehouse location which could be changed as needed. The claimant reported to the warehouse each morning and received a manifest with a list of deliveries and the time when each delivery was due. The claimant was told by the client the order of deliveries. The claimant could determine the route. If claimant took too long making a delivery, the client could reprimand the claimant. The claimant would arrange time off for vacation or illness by notifying the company, and the company would make other couriers available to the client.

The claimant was paid weekly by a third-party administrator that acted as a "settlement company." The claimant did not issue invoices. Before a run the claimant advised the client of his odometer reading and then again at the end

of a run. This information was provided to the settlement company and the claimant was then paid by direct deposit to a debit card. A fee for this service was deducted from the claimant's pay by the settlement company. The claimant did not know how his pay was calculated. The claimant received a 1099 tax form.

When the company's insurer determined that, due to his driving record, the claimant was a liability, the company ended its relationship with the claimant.

OPINION: The credible evidence establishes that the company herein exercised sufficient supervision, direction and control over the claimant to establish an employment relationship. The record establishes that the company screened the claimant regarding his driving record, required him to maintain certain insurance levels, set a standard regarding the claimant's appearance, and required the claimant to be reachable throughout the workday and adhere to specific security procedures. The company required the claimant to comply with the client's requirements, which included a set daily work schedule and completion of deliveries within certain time frames. The company required the claimant to maintain a 98% on-time delivery rate. The claimant did not negotiate his rate of pay, did not issue invoices, and when the company's insurer deemed the claimant's driving record unacceptable, the company discharged the claimant.

On a similar record, the Court held that another courier driving for this company was an employee and not an independent contractor (see Matter of Murray [TN Couriers LLC], Docket No. 530318 [3rd Dep't, Oct. 1, 2020]). We reach the same conclusion in this case, as the company's exercise of control over the claimant was more than just incidental. Matter of Jennings, 125 AD3d 1152 [American Delivery Solutions, Inc.] (3rd Dep't 2015), and Matter of Yoga Vida, 28 NY3d 1013 (2016) are distinguishable. In Jennings, the Court did not find that the courier was subject to standards regarding appearance, insurance, security, or timeliness. Yoga Vida did not involve couriers, but rather involved yoga instructors who, unlike the claimant or other couriers, were offering a service that was unique to each instructor (see Matter of Vega [Postmates], 35 NY3d 131, 139 [2020]). Accordingly, we conclude that the company is liable for additional contributions.

DECISION: The decision of the Administrative Law Judge is affirmed.

The employer's objection contending that the claimant and all other similarly

situated were independent contractors is overruled.

The determination holding (hereafter the "company") liable for contributions, effective beginning the first quarter of 2016, based on remuneration paid to the claimant and to all other couriers similarly situated as employees is sustained.

RANDALL T. DOUGLAS, MEMBER