STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: FEBRUARY 22, 2023

IN THE MATTER OF:
Appeal Board No. 614701

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determinations, assessing Dynamex Operations East Inc. (or Dynamex Operations East LLC) (hereafter "Dynamex" or "the employer") $914,734.41 in additional contributions due for the period 2008 through 2016 based on remuneration paid to drivers (also referred to as "contractors") included in the audit as employees, and assessing Dynamex a 50 percent fraud penalty pursuant to Labor Law § 570 (4). Objecting to the

assessment, Dynamex requested a hearing.

In 019-04612, an Administrative Law Judge (ALJ) held hearings at which testimony was taken. There were appearances on behalf of Dynamex and of the Commissioner of Labor. By decision filed August 5, 2019, the ALJ overruled Dynamex's objection and sustained the determinations.

Dynamex appealed to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of Dynamex. In Appeal Board No. 607700, the Board rescinded the ALJ's decision and ordered a further hearing and new decision.

In , the ALJ held hearings at which testimony was taken. There were appearances on behalf of Dynamex and of the Commissioner of Labor. By decision filed March 9, 2021, the ALJ overruled Dynamex's objection and sustained the determinations.

Dynamex appealed to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of Dynamex. By remand

order filed December 14, 2021, the Board ordered a further hearing. Telephone conference hearings were held at which testimony was taken. There were appearances on behalf of Dynamex and the Commissioner of Labor. At the third further hearing, the matter was adjourned per Dynamex's request to settle the matter, which written settlement offer was made on May 27, 2022. After the Commissioner of Labor rejected the offer to settle by letter dated October 14, 2022, an additional hearing was held.

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

FINDINGS OF FACT: Dynamex is a logistics broker in the transportation industry that provides, in relevant part, parcel pickup and delivery service for its customers via drivers using motor vehicles not governed by New York State Transportation Law § 2 (4-a) (a "commercial motor vehicle" with a "gross

vehicle weight rating or gross combination weight of ten thousand one pounds or more"). Dynamex had no drivers as acknowledged employees - it deemed all drivers to be independent contractors.

On December 3, 2015, the Court upheld employer-employee relationships between Dynamex and three individual drivers in the Matter of Voisin (Dynamex Operations East Inc.), et al.,134 AD3d 1186 (3d Dept 2015), affirming three claims in combined Appeal Board Nos. 572890 & 572891 (claimant RV); combined Appeal Board Nos. 574760 & 574761 (claimant RR); and combined Appeal Board Nos. 575194 & 575195 (claimant GK). On February 4, 2016, the Court again upheld an employer-employee relationship between Dynamex and an individual driver (claimant JG) in the Matter of Garbowski (Dynamex Operations East Inc.), 136 AD3d 1079 (3d Dept 2016), affirming combined Appeal Board Nos. 579107 & 579108. In these four claimant cases (RV, RR, GK, JG) (hereafter "the four claimants"), three cases held Dynamex liable effective 2009 while a third case held Dynamex liable effective 2008.

On January 20, 2017, the Department advised Dynamex that the "Appellate Division affirmed the decisions of the Unemployment Insurance Appeal Board" holding the four claimants to be "your employees and not independent contractors. If the remuneration received by the [four] claimants and all others similarly employed was not included in your payroll reports for the period from January 1, 2008 to date, you are required to file supplemental reports which include this remuneration within 20 days from the date of this letter" (emphasis in the original). Dynamex filed amended reports for the four

claimants, only. Pursuant to the Department's internal office memo dated April 7, 2017, the Commissioner was unable "to secure" the foregoing demand for supplemental reports for any other driver similarly employed as the four claimants. On June 29, 2017, the Department notified Dynamex of an intended audit and to submit various enumerated books and records from 2008 through the current date. Dynamex did not respond to this request for books and records. On August 7, 2017, the Department issued a subpoena for various enumerated books and records for the same period. The Department received, in part, the IRS 1099 forms for numerous drivers.

While excluding from the audit certain drivers identified by or otherwise paid in their business names, the Department included in the audit as employees, for each calendar year, hundreds of 1099 individual drivers who were paid in their individual capacity. For example, 2014 included 376 drivers, 2015 included 357 drivers, and 2016 included 260 drivers. By Investigation Report dated and issued November 8, 2017, the Department assessed Dynamex $914,734.41 in additional contributions due for the audit period 2008 through 2016.

On February 6, 2018 and May 2, 2018, the Department issued the initial determinations holding Dynamex liable for the $914,734.41 in additional contributions. The Department further assessed Dynamex the fraud penalty based upon its failure to report the earnings of numerous drivers similarly employed as the four claimants who have been determined to be employees as upheld by the "Appellate Division", which "action indicates an intent on your part to avoid payment of New York State Unemployment Insurance contributions." Dynamex requested a hearing.

Prior to the hearings, Dynamex requested and participated in several informal conferences with the Department in June 2018 wherein Dynamex argued, in part, that not all Dynamex drivers were similarly situated to the four claimants, that Dynamex received inadequate guidance on the term "similarly situated", and that Dynamex should not be charged with the fraud penalty. No resolution occurred following the conferences and an ALJ held three hearings before sustaining the determinations on August 5, 2019, which Dynamex appealed. Neither at the conferences nor at the hearings did Dynamex contend that some individual drivers worked as master contractors.

By remand order dated October 15, 2020, the Board rescinded the ALJ's decision and ordered a further hearing to provide Dynamex with an opportunity to present evidence that it had changed its business model. An ALJ held two

additional hearings on January 28 and March 4, 2021 for Dynamex to present evidence, in part, of its change in business model and operations - other than the Agreement effective 2014, Dynamex presented little to no documentary evidence of the alleged changes. Dynamex presented no evidence at these hearings that some individual drivers worked as master contractors. The ALJ sustained the determinations on March 9, 2021, which Dynamex appealed.

By remand order dated December 14, 2021, the Board order further hearings to again provide Dynamex with another opportunity to present evidence of its changed business model. At the first of these hearings held on March 8, 2022, Dynamex (1) conceded that all drivers were employees for the audit period 2008 through 2013, (2) continued its claim that all other drivers from 2014 through 2016 (hereafter "contested period") were not similarly situated to the four claimants, and (3) claimed, for the first time, that some individual drivers worked as master contractors who engaged other drivers in the contested period.

During the contested period, Dynamex operated in the greater New York City and Long Island region, many of the deliveries involved medical or pharmaceutical parcels. Dynamex categorized drivers into at least four categories: (1) on-demand drivers who were engaged to perform an on-demand delivery, namely, a one-time delivery not previously made aware until received; (2) dedicated drivers who were engaged to perform regular and repeated deliveries with the same pickup and delivery locations; (3) scheduled drivers who were engaged to perform pre-scheduled non-regular non-repeat deliveries to be made in the future; and (4) distribution drivers who were engaged to deliver to various locations packages that were unloaded from tractor-trailers and sorted by Dynamex at a Dynamex location. From 2014, Dynamex purportedly made the following changes:

* Implemented a digital platform utilized by customers, drivers, and Dynamex dispatchers that allowed a customer to register its delivery order and for electronic communications between the dispatcher and driver.

* Stopped using Nextel phones and transitioned to personal smartphones, on which drivers installed Dynamex's mobile app (dxMobile) that offered delivery orders to drivers.

* Stopped using the physical chain of custody or manifest forms, which drivers completed electronically on the mobile app.

* Added multiple-day (e.g., next-day) delivery services to its same-day delivery service.

* Stopped requiring geographic work area and permitted drivers to work anywhere.

* Stopped using uniforms and identification badges, except if the client mandated its use or if the client provided its own vendor identification badge.

* Stopped leasing vehicles or equipment, providing tools or equipment, and holding meetings.

* Permitted drivers to decline job offers without retribution and to field customer complaints.

* Required drivers to purchase cargo insurance to cover the drivers' responsibility for lost or damaged cargo.

* Permitted drivers to negotiate the job's service fee (payrate).
* Stopped paying drivers if the customer did not pay Dynamex.

Dynamex also revised its independent contractor agreement effective 2014, labeled INDEPENDENT CONTRACTOR AGREEMENT FOR TRANSPORTATION SERVICES (2013),
which provides, in part, as follows (hereafter "the Agreement"):

* The driver may accept or decline work offers without justification or consequence.

* Once accepted, the driver is contractually "bound to perform the service" and devote "best efforts" in the performance of the service.

* The driver may perform concurrent delivery services for competitors and may commingle cargo to the extent allowed by law.

* Dynamex shall pay the service fee that has been negotiated and agreed upon by the parties, but the contactor shall forfeit the service fee if the delivery is not fully performed.

* The driver may hire or engage others to perform the work.

* The driver shall maintain a professional appearance consistent with the standards in the commercial delivery industry while on the customer's premises.

* The driver shall comply with, and obtain and pay for, all customer-required security identification.

* The driver shall use only lawfully registered, licensed, and permitted vehicles that meet all regulatory and industry standards, as well as any safety standards specified by the customer.

* The driver shall purchase, and keep in full force and effect, commercial general liability insurance and commercial auto liability insurance, both with designated coverage limits.

* The driver may purchase supplemental on-dispatch liability insurance covering the duration the vehicle is used to perform transportation services; and Dynamex shall purchase such supplemental on-dispatch liability insurance on the driver's behalf if the driver's insurance coverage lapses or otherwise fails to meet the requisite insurance coverage.

* The driver shall purchase, and keep in full force and effect, Workers' Compensation insurance or Occupational Accident insurance from any source.

* The driver shall cooperate with and assist Dynamex in the defense of lawsuits against Dynamex arising out of the driver's performance.

* Dynamex shall deduct the cost of insurance premiums, purchased from an insurance carrier made available by Dynamex, from the settlement payments owed to the driver.

* To the extent required to cover the loss or damage to parcels, the driver shall purchase, and keep in full force and effect, Motor Truck Cargo and/or Financial Cargo Liability insurance with designated but different liability coverage for pharmaceutical freight or retail freight.

* During the term of this Agreement and for a period of six (6) months thereafter, the driver shall not use any confidential proprietary information, belonging to Dynamex or its customers, for any purpose, including to solicit, divert, or take away any of the customers of Dynamex.

* A "Material Breach" of this Agreement shall include the "proven use of drugs or alcohol by driver or driver's personnel while in the performance of driver's services under this Agreement".

* Dynamex may conduct drug and alcohol screening for cause (e.g., motor vehicle accident) or to determine a material breach.

* Driver may lease from Dynamex certain technology equipment, e.g., commercial scanners.

* Driver may participate in a brand promotion and marketing program.

Beginning in at least 2014, all drivers executed the Agreement and Dynamex completed its on-boarding form (A/P Vendor Maintenance Form). For those customers (e.g., pharmaceutical companies or governmental agencies) requiring a background check (including driving abstract, and drug and alcohol screening) of a driver, Dynamex engaged a third-party entity for such background check that was paid by the driver. Dynamex provided the requisite credentials for the driver to access the platform and to receive offers of delivery services via the mobile app. Drivers advised the dispatchers of any preferred geographic work location and/or type of work, e.g., localized in Manhattan NY versus long-haul deliveries. Some customers provided photo identification badges to the drivers designating them as a "vendor".

Customers provided delivery orders to Dynamex by telephone or self-entry in the platform via their web portal. If an order was received by telephone, Dynamex employees entered the order into the platform. Medical dispatchers specialized in customers having medical and pharmaceutical parcels, and such dispatchers were familiar with the drivers who passed the background checks servicing such customers. From among 12 to 15 Dynamex dispatchers situated in New York during the contested period, a dispatcher selected appropriate drivers to offer each customer's order based on numerous factors, including but not limited to, the parcel size versus the driver's vehicle, the parcel type versus the driver's certification, and the pickup and destination locations versus the driver's geographic work request. For example, regarding a delivery order of two pallets of paper, the dispatcher offered such order only to a driver who possessed a box truck. After selecting the appropriate drivers for a delivery order, the dispatcher had the platform simultaneously transmit to those selected drivers the delivery order, which contained various information, including but not limited to, the customer's actual parcel item

and/or parcel size (e.g., a lab specimen or pallets of paper), the customer's pickup and destination locations, the customer's delivery time requirements, and the driver's service fee amount. The platform can detect whether the delivery offer was opened on a driver's smartphone. The first driver who accepted the delivery offer was given the assignment.

Drivers utilized their own vehicles (e.g., sedans, vans, box trucks) to perform the deliveries. Dynamex had the ability to track its drivers via the GPS-enabled mobile app. Many packages (e.g., lab specimens) had bar codes to be read by the smartphone. In addition to scanning bar codes, drivers completed various smartphone entries, including chain of custody and order close out.

If a driver was unable to fulfill an order that was accepted, the driver contacted the dispatcher who found a replacement driver. Upon a customer's inquiry, a dispatcher provided requested information regarding a delivery, e.g., the driver's identity. Upon notice from a driver, a dispatcher relayed any delays to the customer. Customers made various complaints to drivers and/or to Dynamex.

Dynamex handled the billing and collection from its customers. Generally, Dynamex paid a driver a service fee for each delivery based on a set percentage (e.g., 70 percent) that Dynamex charged its customer. On occasion, a driver negotiated a higher service fee than offered due to various circumstances, e.g., a holiday

period. Every two weeks, Dynamex issued settlement checks to individual drivers in their personal capacity without deductions for withholdings. Drivers are not reimbursed for expenses. Each settlement check made deductions for various costs, including the pro-rata cost of various insurance coverage purchased through Dynamex. Dynamex issued IRS 1099 forms to the drivers.

At the hearing held on March 8, 2022 (sixth overall hearing following the Board's remand order issued December 14, 2021), Dynamex, for the first time, argued and identified the "master contractors" who engaged other drivers using their own vehicles or vehicles owned by master contractors. When offering deliveries, the dispatcher made offers to master contractors (along with individual drivers) based on their lists of vehicles available to provide delivery services. If a master contractor was assigned a delivery offer, Dynamex would not necessarily know the identity of the specific master

contractor's driver who fulfilled the delivery order. Except for minor details, all drivers operated in a similar fashion. One exception included the settlement check payments issued to the master contractors who paid their engaged drivers.

Dynamex offered to settle with the Department, in part, to exclude from the audit assessment the master contractors. While not disputing the accuracy of this list of master contractors, the Commissioner rejected the settlement offer. Many of these master contractors had earnings for only one year while a minority of master contractors had various earnings from year to year in the contested period (Exhibit R-8), e.g.,

MASTER CONTRACTOR
2014 GROSS
EARNINGS
2015 GROSS
EARNINGS
2016 GROSS
EARNINGS
Budhou, Parmanand
17,083
84,313
0
Calle,
Victor
4,512
141,147
117,677
Charles, Inc.
7,597
0
0
Hernandez, Carbuccia
Fernando
$750,291
0
0
Jamieson, Renald
0
145,730

81,851
Johnson,
Balfour
0
105,215
96,344
Martinez, Maria
0
115,682
107,509
Mills,
Kendall
109,114
6,717
0
Ndiaye, Camine
0
116,152
107,392
Oestevez
Trucking
0
0
1,249
Perez, Guillermo
0
125,587
115,816,
Raymond,
Herold
0
83,317
85,074
Rodriguez, Daniel
0
123,906
144,723
Rodriguez,
Henry
0

100,241
98,279
Sumareh, Mohamadou
490,987
37,1911
52,749

In further support of its position, Dynamex presented evidence of a sample master contractor (F Toure Inc.) that executed the Agreement in 2015, agreed to earn 58 percent commission for on-demand delivery services, and agreed to a "technology charge" of "$5.00 per bi-weekly settlement period" (Exhibit R-5). This Agreement further authorized Dynamex to "deduct the dollar amounts for the items noted ... from all contractor settlement payments made to [the driver]. ... [and if the driver has engaged] Indirect Driver[s] ..., their deductions will be withheld from [the driver's settlements" too, with the following denotated items: "OC ACC INS $18.73; OC ACC FEE $2.07; TECHNOLOGY CHARGE $2.50; UNIFORMS $10.00; COMM GENERAL LIAB INS/CARGO $11.00" (Exhibit
R-5). This Agreement also identified five individuals working for this

corporate master contractor on Dynamex's Master IC's Indirect Driver's, Employee's & Helper's List, (Exhibit R-5). This corporate entity was not included in the audit.

Another sample master contractor (Mohamadou Sumareh) executed the Agreement in 2014 that provides, in part, the on-demand delivery services for "GOOGLE" at the rate of "$26.00 per hour"; a "technology charge" of "$5.00 per bi-weekly settlement period"; the identification of the sole cargo van; and no identification of indirect drivers or helpers (Exhibit R-6).

Also, Dynamex's New Transportation Services Provider Qualification Checklist (Rev 4) for this driver, in part, lists the Agreement was executed as an independent contractor as opposed to a "Master" independent contractor; confirms Dynamex uploaded the driver's photo for an "Identification Badge"; confirms the adequacy of the motor vehicle report, the criminal background check report, the negative drug testing result, the insurance forms, the vehicle registration, and the driver's license; and confirms the on-boarding form (A/P Vendor Maintenance Form) was completed (Exhibit R-6). Also, this driver completed Dynamex's Independent Contractor Profile (last revised February 1, 2013) that contains similar questions as a job application,

including but not limited to, the driver's name, address and personal identifying information; how the driver heard about Dynamex; whether the driver worked for Dynamex before and the circumstances under which it ended; two references; two emergency contacts; the driver's current availability for work; the driver's current work status and duration of unemployment; the driver's prior work history; and the driver's motor vehicle accidents and traffic convictions for the past three years (Exhibit R-6).

OPINION: The credible evidence establishes that Dynamex, although it altered its operations effective 2014 with a revised independent contractor agreement, exercised sufficient supervision, direction, or control over the individual drivers to establish an employment relationship. Here, Dynamex utilized job-application like on-boarding forms; Dynamex screened all drivers via background checks; and required drivers to use the mobile app. Dynamex obtained and filtered the delivery orders from its customers; Dynamex selected the drivers and found replacement drivers when needed without customer input; Dynamex mandated chain of custody and proof of delivery processing through the mobile app; Dynamex had the ability to track its drivers via the GPS-enabled mobile app; Dynamex was available to field customer complaints; Dynamex handled the billing and collection from its customers; Dynamex unilaterally set the rate of compensation except for an occasional negotiated rate; and Dynamex regularly paid drivers every two weeks regardless of collection.

Further, the Agreement provided that the driver shall devote "best efforts" and is expected to maintain a professional appearance; that drivers must purchase specific liability coverage; that Dynamex shall purchase some insurance on behalf of driver; that drivers shall cooperate in the defense of lawsuits; that drivers shall submit to drug and alcohol screening for cause; and the drivers are prohibited from soliciting or diverting Dynamex's customers during the term of the Agreement and for a period of six (6) months thereafter.

Regarding the identified master contractors, we are not persuaded by Dynamex's contention that they must be deemed independent. Significantly, not only did Dynamex not make such argument in two prior appeal statements, Dynamex did not raise it until the sixth hearing held on March 8, 2022, even though Dynamex was specifically given that opportunity at two prior hearings per the Board's remand order dated October 15, 2020. Moreover, the documentation of the two sample master contractors is inconsistent with the testimony from Dynamex asserting that it no longer provided identification badges or uniforms, or

that it no longer leased equipment. Very telling are the listed charges for technology and uniforms, and the uploading of the driver's photo for an "Identification Badge". In particular, the documentation for the alleged master contractor Mohamadou Sumareh reveals that he completed Dynamex's job-application like Independent Contractor

Profile, that he was working on an hourly basis of $26.00 to service Google, that he executed the Agreement as an independent contractor as opposed to a "Master" independent contractor, and that he provided no list of indirect drivers or helpers.

In support of Dynamex's position, Dynamex asserts that a given master contractor's annual gross earnings (e.g., $750,291.00 or $490,987.00) is too high for any one individual to earn, and that such driver engages other drivers to provide the delivery services. However, Labor Law § 560 (2) states

the following:

Whenever any helper, assistant, or employee of an employer engages any other person in the work which said helper, assistant, or employee is doing for the employer, such employer shall for all purposes hereof be deemed the employer of such other person, whether such person is paid by the said helper, assistant, or employee, or by the employer, provided the employment has been with the knowledge, actual, constructive, or implied, of the employer. (Emphasis added.)

Dynamex concedes it had actual knowledge that these master contractors engaged other drivers-helpers who were performing the same work performing delivery services. See Matter of Hodges, 171 AD2d 206 (3d Dept 1991); Matter of Kelly (Richards & Donahue, Inc.), 28 AD2d 786 (3d Dept 1967); and Appeal Board No. 429639. Accordingly, regardless of whether the Department included in the audit such other drivers as employees, the high earnings of some of these master contractors who may have utilized other drivers do not prohibit the finding that these individuals are employees of Dynamex.

This case is similar to Matter of Khaychuk (Amazon Logistics, Inc.), __ AD3d __, NY Slip Op 07104 (3d Dept 2022) and Matter of Vega (Postmates Inc.), 35 NY3d 131 (2020), in which the Courts held an employer-employee relationship for drivers who obtained work through a smartphone app linked to an electronic platform. Like Khaychuk and Vega, Dynamex mandated the use of its digital

platform and mobile app; Dynamex controlled the assignment of delivery orders via the dispatchers selecting the drivers, as well as finding a replacement driver when needed, without customer input; and Dynamex unilaterally set the rate of compensation except for an occasional negotiated rate. Also, Vega reaffirmed the holding in the Matter of Rivera, 69 NY2d 670 (1986) that "[a]lthough the operative technology has changed in the interim decades, this case is indistinguishable from Matter of Rivera, where we held that substantial evidence supported the Board's conclusion that a similar delivery person was an employee of the delivery company-even though he set his own delivery routes and did not have a set work schedule but called the company's dispatcher whenever he wished to engage in work, accepting only the jobs he desired" Matter of Vega (Postmates Inc.), 35 NY3d at 139. See also Matter of Lowry (Uber Technologies), 189 AD3d 1863 (3d Dept 2020).

Significantly, even with the revised Agreement effective 2014, we find that the instant drivers are like the four claimants the Court held to be employees of Dynamex in the Matter of Garbowski (Dynamex Operations East Inc.), 136 AD3d 1079 (3d Dept 2016); and Matter of Voisin (Dynamex Operations East Inc.), et al.,134 AD3d 1186 (3d Dept 2015). Further, on numerous occasions, the Court has upheld similar drivers to be employees of similar logistics brokers performing similar delivery services. See Matter of Iwuchukwu (Active Transport Services), __ AD3d __, NY Slip Op 00701 (3d Dept 2023); Matter of Paka (Same Day Delivery Inc.), __ AD3d __, NY Slip Op 00704 (3d Dept 2023); Matter of Legros (Northeast Logistics, Inc.), 205 AD3d 1245 (3d Dept 2022); Matter of Smith (TN Couriers, LLC), 204 AD3d 1182 (3d Dept 2022); Matter of Rivera (Northeast Logistics, Inc.), 204 AD3d 1185 (3d Dept 2022); Matter of Chichester (Northeast Logistics, Inc.), 204 AD3d 1195 (3d Dept 2022); Matter of Relay Express Inc., 204 AD3d 1265 (3d Dept 2022); Matter of Hosang (Crystal Cargo Inc.), 202 AD3d 1241 (3d Dept 2022); Matter of Sow (NY Minute Messenger, Inc.), 201 AD3d 10 (3d Dept 2022); Matter of Fiorelli (Stallion Express, LLC), 201 AD3d 1045 (3d Dept 2022); Matter of

Dorsey (NY Go Express Inc.), 196 AD3d 941 (3d Dept 2021); and Matter of Thomas (US Pack Logistics, LLC), 189 AD3d 1858 (3d Dept 2020).

Finally, we note that the list of master contractors includes a corporation (Charles, Inc.) that cannot be deemed an employee, like F Toure Inc., which was not included in the audit assessment. Upon verification that such entity is a corporation, it should be excluded from the audit assessment. See Matter of New York and New Jersey Freightways, Inc., 55 AD2d 989 (3d Dept 1977);

Appeal Board No. 604247; and Appeal Board No. 565640.

We are unpersuaded by Dynamex's argument that the 50 percent fraud penalty is unwarranted because it reasonably believed that no other driver was similarly situated to the four claimants. Labor Law § 570 (4) provides that an employer

is subject to the penalty if "any part of any deficiency is due to fraud with intent to avoid payment of contributions". Even though Dynamex contends there is a lack of evidence to demonstrate that it knew or should have known that it would be liable for contributions after changing its business model effective 2014, a large "part of [this] deficiency" results from prior to 2014, namely, the period from 2008 through 2013. Significantly, when the Third Department decisions (December 3, 2015 and February 4, 2016) became final, Dynamex knew or should have known to file amended returns for the four claimants and all other 1099 drivers paid in their personal capacity. Notably, the Department did not issue the fraud penalty determination until February 6, 2018, more than a year after January 20, 2017 when the Department specifically instructed Dynamex to file amended reports for remuneration received by the four claimants and all others similarly employed from 2008. Further, although Dynamex contends that the meaning of "similarly situated" is unclear, and that the "factual question of whether other individuals" are similarly situated as the four claimants "has been left open for resolution in subsequently pursued cases" (Matter of Robinson [NY Times Newspaper Div. of the NY Times Co.], 168 AD2d 746 [3d Dept 1990]), Dynamex, at a minimum, conceded that all drivers were employees for the period 2008 through 2013. Under these circumstances, the Commissioner reasonably concluded that at least some part of the underpayment was due to fraud with intent to avoid payment of contributions. See Matter of Body Electric Corp. of America, 89 AD3d 1331 (3d Dept 2011); Matter of Mamash Restaurant Corp., 270 AD2d 723 (3d Dept 2000); and Matter of Executive Education Institute Inc., 270 AD2d 601 (3d Dept 2000). Accordingly, the fraud penalty should be sustained.

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

The initial determination, assessing Dynamex $914,734.41 in additional contributions due for the period 2008 through 2016 based on remuneration paid to drivers included in the audit as employees, as modified, is sustained.

The initial determination, assessing Dynamex a 50 percent fraud penalty

pursuant to Labor Law § 570 (4), is sustained.

The amounts of the additional contributions due and the fraud penalty are referred to the Department of Labor for recalculation not inconsistent with this decision.

MICHAEL T. GREASON, MEMBER

1 2015 gross earnings taken from Hearing Exhibit 7, Schedule of Additional Total Remuneration.

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