

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD



INGLEWOOD OFFICE OF APPEALS
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<p>Claimant [REDACTED]</p> <p>UBER Account No: [REDACTED] Employer-Appellant</p>	<p>Case No. 5371509 - Reopened (Formerly Case No. 5338037)</p> <p>Issue(s): 5067, 5005, LATE 1, 621, 926</p> <p>Date of Application to Reopen: 11/18/2014</p> <p>EDD: 0170 BYB: 04/06/2014</p>
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Date and Place of Hearing(s):

- (1) 02/27/2015 Inglewood
- (2) 03/12/2015 Long Beach
- (3) 04/03/2015 Inglewood
- (4) 04/24/2015 Inglewood

Parties Appearing:

- Claimant, Employer
- Claimant, Employer
- Claimant, Employer
- Claimant, Employer

DECISION

The decision in the above-captioned case appears on the following page(s).

The decision is final unless appealed within 20 calendar days from the date of mailing shown below. See the attached "Notice to Parties" for further information on how to file an appeal. If you are entitled to benefits and have a question regarding the payment of benefits, call EDD at 1-800-300-5616.

C. DeSilvestro, Administrative Law Judge

FILE COPY

Date Mailed: 06/01/2015

Case No.: 5371509

Inland Office of Appeals

CLT/PET: [REDACTED]

ALJ: C. De Silvestro

Parties Appearing: Claimant, Employer

Parties Appearing by Written Statement: None

ISSUE STATEMENT

The employer appealed a department determination that found the claimant was an employee of the employer/appellant and the issue in this matter is whether or not there was an employer/employee relationship between the claimant and the employer/appellant.

The issues of the timeliness of the appeal, the failure to appear at the initial hearing, and the failure to submit a request to reopen in a timely manner are also present in this matter.

FINDINGS OF FACT

The claimant filed a claim for unemployment insurance benefits effective April 6, 2014 with a weekly benefit amount of [REDACTED]. The department found that the employer appellant, UBER Technologies Inc. (UBER), was one of the claimant's employers. The claimant had been working on a part-time basis providing services as a driver for the appellant.

In October 2013, the claimant learned about opportunities to drive for the appellant, UBER. The claimant was approached by one of UBER's recruiters who encouraged her to apply to become one of the drivers for the appellant. This recruiter helped the claimant log into the employer/appellant's website and file an application. The recruiter also took pictures of the claimant's driver license and her insurance registration. The claimant then received communication from UBER through e-mail. She was informed of the requirements to become a driver. The claimant provided her personal information and had to pass a background check. This background check was, in fact, to be repeated every three months. The claimant's car had to be inspected by a vendor as determined by UBER. The claimant's car also had to meet certain specifications in terms of size and year and safety features.

Once the claimant was approved to become a driver, she was given a telephone by UBER containing the software application to be used to communicate with UBER and received the requests for services.

The claimant was asked to complete a city test to verify her general knowledge of landmarks and geography. She was required to watch a tutorial video on how to use the software application and regarding other applicable rules and policies.

The appellant, UBER Technologies Inc. (UBER), is in the business of arranging transportation services for their clients. They conduct their business through a software application available in cellular phones. The clients or "riders" have to enter into a contractual agreement with UBER to access and use their services. The riders obtain the services through a technology platform, an application they obtained from their own cellular telephones. The riders then contact UBER through the application to request transportation services. The riders inform UBER when they need the services. The rider informs UBER where they need to be picked up and the destination. UBER determines the charges for the services which are charged directly to the rider's credit card account with UBER. UBER requires riders to be at least 18 years of age or the age of legal majority in the jurisdiction and to provide a valid credit card in order to be able to use the UBER services.

UBER has the sole discretion to establish the charges. They use their own formula to determine the charges for each individual trip. Under their own discretion, they determine and allow promotional discounts and determine when there is a surge and rise in prices. The claimant did not have any control on the determination of the charges for the services or the collection of such charges. The claimant was not allowed to make or change, establish or collect the charges for the services with the riders. The claimant was instructed by UBER not to request or receive a tip except in the situations specified by UBER. The claimant had no knowledge of the amount the rider was being charged until UBER provided that information to the claimant through their application after the services were provided. She was not allowed to engage in any cash transactions with the riders. If the rider canceled the request for services, UBER had the discretion to charge a cancellation fee. If a rider wanted a change in the charges or was dissatisfied with the services, only the rider could request a change from UBER who will then decide whether or not to revise the charges or give a reimbursement.

The claimant provided the services by logging into the UBER application when she was ready to work. UBER sent the claimant the request for services through the application when riders in the area covered by the claimant, requested transportation services. The claimant had a limited amount of time, approximately ten seconds, to accept the request for services. Once she accepted the request for services, she was given the pickup information. The claimant was not given at that time information regarding the destination of the rider. This was given to the claimant at the time that she arrived to pick up the rider.

UBER provided some insurance coverage for the period of time between the time the claimant logged in and the time that she accepted a trip. This was a limited insurance. Once the claimant began the trip, UBER provided a more comprehensive insurance until she logged out or completed the trip. The claimant was responsible to pay her gasoline and car repairs, except for those caused by the rider's conduct. If there was any damage done to her car by the riders, UBER would make the necessary repairs.

While the claimant was logged in, she could only offer transportation services to UBER's customers as referred by UBER. She could not pick up customers on the street. The claimant was required to display the sign provided by UBER in her car while she was logged into the application. The claimant did not have her own business license to provide public transportation. She provided the services under the umbrella of UBER's licenses. The claimant was given an area where she could provide the services.

UBER kept tracking records of all the claimant's trips. The claimant chose when to log in and provide services and when to log out. She had other part-time jobs at the time. When the claimant was logged into UBER's application but did not accept trips, UBER sent her messages asking about the situation. UBER tracked the amounts of trips accepted and refused by the claimant. UBER expected an 80 percent acceptance of trips. If the claimant fell below this expectation, she was warned that her account could be deactivated, therefore losing her ability to work as a driver by using the UBER application. The claimant was also warned by UBER when she had not logged on for a while and was threatened with deactivation. When the claimant failed to provide certain documents requested by UBER, the claimant was temporarily deactivated.

UBER had the right to suspend or deactivate the claimant's account, or terminate her services in cases of inactivity for long periods of time, bad ratings from a rider or complaints of reckless driving or failure to provide required documents.

The claimant was expected to maintain a customer service rating at a certain number and if she fell below that expected rating number, she would receive a warning, giving her an opportunity to increase it. The riders/customers were given the opportunity by UBER to make comments on the claimant's services directly to UBER using the application in their phones. The claimant received weekly reports of her customer service ratings prepared by UBER. The claimant understood that if her customer service ratings were low, her ability to obtain assignments was limited. She was warned about increasing the customer service rating to UBER's threshold. When the claimant's customer service rating was below the threshold, she was informed that she had approximately one month to increase the rating, or she would be deactivated. In the event that she was deactivated, the claimant had to send a request to be activated again.

The claimant also received messages from UBER advising her that her account was in danger of deactivation because her acceptance rate had dropped below 85 percent and when she had not logged in for a while. On those occasions when the claimant contacted the UBER's support staff to discuss the matter, she was told that it was just a warning.

The claimant's account had actually been deactivated for failure to provide certain documents that the appellant needed. The employer/appellant, UBER, had a representative with whom the claimant communicated via text or e-mail, as needed, regarding questions about the compensation percentage changes, promotions and regarding the warnings that she had received.

The claimant received payment for her services in a weekly basis. The amount of compensation was determined solely by UBER. UBER determined the percentage of the charges to the riders that would go to the claimant. This payment went directly to the claimant's banking account, as pre-arranged with UBER. UBER had the sole discretion to determine the changes to the percentages in her compensation. The claimant did not have the right to negotiate or alter the percentages of compensation. Those times when UBER put into effect a promotion where the claimant was eligible to receive a higher percentage of the charges, she had to make an agreement to remain locked in for a certain minimum of hours and to accept more than 90 percent of the trips requested. The claimant had also received a bonus amount for referring a friend to UBER and becoming a driver for UBER. There was an occasion when UBER sent a message to the drivers indicating that they were offering a guaranteed amount per hour, "in appreciation for all their hard work and dedication."

Once the claimant began a trip, the route was normally chosen by the rider. UBER recommended routes through their application. In those cases where the distance and time of a trip completed by the claimant was different from the distance and time calculated by UBER's application, she had to send an e-mail to UBER's support personnel to explain the difference in the distance and time and to ask UBER to adjust the charges to the rider.

Through the GPS System in the UBER's software application, the claimant's work was monitored. UBER was able to monitor how many trips the claimant made, how many hours the claimant drove, and the locations where the claimant was at all times. The claimant received a weekly review from UBER showing the amount of trips done, the amount of fares charged, the number of hours online, the amount of fares per hour, the acceptance rate and the driver's ratings. For each one of these reports categories, UBER will highlight their own average number for each category for comparison purposes.

The employer prepared their appeal letter on October 1, 2014 and was delivered to the mail room on October 2, 2014. The envelope, however, was postmarked on October 3, 2014. The last day to file a timely appeal was October 2, 2014.

The first hearing was scheduled for October 28, 2014. On October 22, 2014, the employer's representative contacted the Office of Appeals to request a reset. The witnesses for the employer were unavailable due to a pre-arranged vacation. The request to reset was denied.

After the matter was dismissed for failure to appear, the employer requested reopening again explaining the employer's witnesses' inability to attend the prior hearing.

REASONS FOR DECISION

An appeal from a determination must be filed within 20 days of mailing or personal service of the notice. The time to appeal may be extended for good cause, which includes, but is not limited to, mistake, inadvertence, surprise, or excusable neglect. (Unemployment Insurance Code, section 1328.)

In determining whether good cause exists for extending an appeal period, a liberal interpretation should be applied which takes into account the legislative objective of reducing the hardship of unemployment. (Gibson v. California Unemployment Insurance Appeals Board (1973) 9 Cal.3d 494.)

In the present case, the evidence on the record established that the employer had in fact prepared the appeal letter and mailed it on the last that they had to file a timely appeal. Therefore, it is concluded that the employer filed a timely appeal.

An appeal dismissed for nonappearance may be reopened if the appellant shows good cause for failing to appear at the hearing. (California Code of Regulations, title 22, section 5067(e).)

The application to reopen an appeal shall be filed within 20 days after service of the decision dismissing the appeal. (California Code of Regulations, title 22, section 5067(a).)

Unless otherwise specified in the code or the regulations, the time for filing or service may be extended, or late filing or service permitted, upon a showing of good cause. (California Code of Regulations, title 22, section 5005.)

In this case, the evidence established that the employer had communicated with the Office of Appeals in advance of the first hearing to inform them of the fact that their witness was unavailable for the date of the hearing due to a pre-arranged vacation. Under the circumstances, it is concluded that the employer had good cause for the failure to appear at the first hearing and the matter is reopened pursuant to California Code of Regulations, Title 22, section 5067.

The request to reopen was submitted on November 17, 2014, which is the last day to file a timely request to reopen. Therefore, the application to reopen was within the time limit pursuant to California Code of Regulations, Title 22, section 5067(a).

"Employee" includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (Unemployment Insurance Code, section 621(b).)

In *Empire Star Mines Co., Ltd. v. California Employment Commission* (1946) 28 Cal.2d 33, the Supreme Court of California stated:

"... In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations]"

In addition to the primary factor of the right to control the manner and means by which the work is completed, the following secondary factors are considered in determining whether or not an employment relationship exists (*Tieberg v. California Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 950):

- (a) The extent of control which may be exercised over the details of the work;
- (b) Whether or not the one performing services is engaged in a distinct occupation or business;
- (c) Whether the work is usually done under the direction of an employer or by a specialist without supervision;
- (d) The skill required in the particular occupation;

- (e) Who supplies the instrumentalities, tools and place of work for the one performing services;
- (f) The length of time for which the services are to be performed;
- (g) The method of payment, whether by time or by the job;
- (h) Whether or not the work is part of the regular business of the principal;
- (i) Whether or not the parties believe they are creating a relationship of master and servant; and
- (j) Whether the principal is or is not in business.

"The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and the worker does not furnish an independent business or professional service relative to the employer." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, 1376, citing *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 357.)

In *Santa Cruz Transportation Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, the court held that cab drivers were employees. The taxicab company set the hours of work, coordinated meal breaks, required the drivers to complete trip sheets and maintained a dress code. The work performed by the drivers was part of the company's regular business. The drivers' livelihoods depended on the company's dispatchers. The court looked beyond the form agreements, which stated the drivers were independent contractors, concluding that the substance of the relationship was employment. It found that the company controlled the behavior of the drivers by retaining an implicit threat that it would make less work available if the drivers refused work too often.

In *Air Couriers International v. Employment Development Department* (2007) 150 Cal.App.4th 923, the company was in the business of delivery of packages. The drivers used their own vehicles and paid their own driving expenses. They delivered to the company's customers under the direction of the company's dispatchers. They could select their own routes, but the company established pick-up and delivery deadlines and required the drivers to use company-furnished forms in order to receive payment. The company billed its customers and collected payment. The drivers generally worked continuously for the company and were paid at regular intervals. Although the drivers could turn down jobs, this was done infrequently because of the fear that the company would stop providing work. The drivers did not have their own businesses or work in a

separate profession. The court held the drivers were employees because the company "exerted control over the drivers to coordinate and supervise the company's basic function: timely delivery of packages." (Id. at p. 939.)

In the present case, the evidence showed that the appellant, UBER, was in the business of providing transportation services to their clients "riders." The employer/appellant had the necessary licenses to provide these services. The claimant did not have her own business license to provide services in public transportation and could not establish her own clientele. The services provided by the claimant were an integral part of the appellant's business. Without these drivers, in fact, the employer's business of public transportation services would not exist. The services provided by the claimant were typically done by employees under the supervision of their employer, which did not require any special skills. The claimant was required to display UBER's business sign in her car when providing the services. Although the claimant used her own car, UBER required it to meet certain specifications and had to be inspected by UBER's agents or vendors. In addition, UBER provided insurance while the claimant's car was being used to provide the services.

The evidence showed a distinct and strong right to control by the appellant UBER in the manner and means in which these services were provided. The appellant had complete control on who could obtain the services. The riders could only obtain the services by entering into a contractual agreement with UBER. The claimant was not involved in these transactions. The employer/appellant communicated directly with the client or rider and established the pick-up and destination points of the trip. The appellant, UBER, had sole discretion in determining the amount to be charged for the services and when and how to collect these charges. Only UBER could make adjustments to the charges and decide requests for reimbursements.

The claimant, once logged on UBER application indicating readiness to work, was informed of the requested trips. She could only provide the services to those riders referred by UBER and could not pick up other riders on the street who were not processed by UBER's application. The claimant could not obtain or develop her own clientele. UBER also determined which drivers will be offered the trips. The claimant was not told of the destination until she arrived at the pick up point.

The appellant, UBER, had absolute control in determining the compensation the claimant would receive for the services. The appellant established a percentage to be paid to the claimant, and whether or not at certain times this percentage rate will change, was decided by the appellant. The time and method of payment for her services were determined by the appellant. The claimant was paid in a weekly basis through direct deposit to her bank account. The appellant provided

the claimant with a weekly statement reflecting the trips done, amounts collected for services and amounts disbursed to her.

There was clear evidence of supervision and right to discharge at will. The claimant had to be approved by UBER in order to become a driver. She had to submit to background checks as required by UBER and had to complete tutorial videos. The claimant's work was also supervised through regular reports containing customer service ratings. The claimant was warned when the numbers in her customer service ratings were below the acceptable number as established by the appellant. She was warned of deactivation when her acceptance of trips fell below the minimum percentage required by the appellant. The appellant had, in fact, deactivated the claimant's account, not allowing her to use the application to obtain work, when she failed to provide certain documents required by the appellant.

Every aspect of the trip completed by the claimant for the clients of UBER were controlled by UBER without the claimant's intervention. The claimant was authorized to provide services in a specified area by the appellant. The only aspect of the trip left to the rider's discretion was the route. Even in those cases, if the claimant had deviated from the suggested route by the appellant's applications, she might need to explain the reasons.

Based on the evidence and given consideration to all the factors used to determine an employment relationship pursuant to section 621 of the code and principles established by relevant precedent case law, it is concluded that there was in fact an employer/employee relationship between the claimant and the employer/appellant.

DECISION

The appellant has established that the appeal was filed in a timely manner.

The employer/appellant had good cause for the failure to appear at the initial hearing and the matter is reopened pursuant to California Code of Regulations, Title 22, section 5067. The request to reopen was filed in a timely manner pursuant to section 5005 of the California Code of Regulations, Title 22.

The department determination is affirmed. There is an employer/employee relationship between the claimant and the employer/appellant pursuant to section 621 of the code.

ING/mc cds 2/6

Case No. 5371509

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DECISIONS SENT TO

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