COMBINED APPEAL BOARD NOS. 588563 & 588564

PRESENT: RAN DALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination holding POSTMATES INC. (herein the “employer” or “Postmates”) liable for additional tax contributions effective 3rd quarter 2014 based on employee remuneration paid to LV (herein the “claimant”) and to any other individual similarly employed as an on-demand courier (delivery driver). (Appeal Board No. 588563 and A.L.J. Case No. 015-22529)

The Department of Labor deemed the claimant to be an employee and credited the claimant with remuneration from the employer regarding the claim for benefits filed effective June 15, 2015. (Appeal Board No. 588564 and A.L.J. Case No. 015-23789)

The employer requested a hearing, contending that the claimant and all other individuals similarly employed performed services as independent contractors.
The Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the employer and of the Commissioner of Labor. By decision filed November 27, 2015, the Administrative Law Judge sustained the employer's objection and overruled the initial determination.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted on behalf of the Commissioner of Labor and of the employer.

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

FINDINGS OF FACT: Postmates, headquartered in California, has operated in about 40 cities across the country, including an operation located in Brooklyn New York. Postmates is in the business of providing on-demand pickup and delivery services to consumers who place orders from local restaurants or stores. Postmates utilized proprietary software (herein the "platform") that matched available couriers with the consumers' pickup and delivery requests (herein the "request"), which are normally fulfilled in an hour. This platform is available on Postmates' web portal or via Postmates' smartphone download 365 days a year, 24 hours a day. Consumers could track the progress of their request on a map in real time.

Postmates advertised online seeking couriers. Prospective couriers provided online their personal information (e.g., name, date of birth, social security number). They were provided with "Postmates PEX Card Usage and Independent Contractor Acknowledgement Agreement", which they executed electronically with a copy of their driver's license attached. The "PEX CARD USAGE" policy stated, in full, as follows:

a) Authorized Use Only. I agree to only use the Postmates provided PEX card for purchases dispatched or assigned to me by Postmates. Any unauthorized use will be considered theft and/or fraud, and if I use the PEX Card for any reason other than Postmates job related duties, I will be suspended and may be subject to penalties.

b) Loss Report. If the assigned PEX card is lost or stolen, I will report the loss immediately.

The Independent Contractor Acknowledgement Agreement, in part, requested couriers to identify the mode of transportation (e.g., walker or driver) the courier will utilize in handling requests. Postmates conducted criminal background checks and orientations, at which engaged couriers were educated in how to handle a request, including the use the smartphone app. They were also provided with a PEX card (prepaid expense/debit card) and an inexpensive promotional gift (a bag bearing Postmates' logo). Couriers were free to log in and out of the platform as frequently they wished; and they were deemed available to handle on-demand requests whenever they were logged in.

Consumers made requests by entering requisite information (including store location, items ordered, and credit card payment information). Upon such a request, the platform identified available couriers closest to the request; and then it filtered and simultaneously sent minimal information to several identified couriers. Couriers are free to accept, reject or ignore requests, of which Postmates kept a track record. If a request was rejected or not accepted before it expired, the platform passed the request on to other available couriers. If no couriers accepted a request, the request is lost and no revenue is generated. If a courier became unavailable after accepting a request, then the courier is able to remove himself from the request, at which time the platform advised the consumer and sought to find a replacement courier.

After a courier accepted a request, the platform identified and acknowledged the first courier to accept; the platform sent all pertinent request details to the courier; the platform calculated and made available the estimated time of delivery; the platform sent the courier's driver's license photo and number to the consumer; the consumer was free to contact the courier directly; the courier was free to contact the consumer directly; the platform transferred the requisite amount of money onto the courier's PEX card that was used to purchase the requested products; and the courier delivered the products to the consumer.

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When a request was completed, the courier made a completed entry in the platform; Postmates, which set the delivery fee solely based on the delivery distance, charged the fee to the consumer's credit card; and Postmates directly deposited into the courier's bank account the non-negotiable 80% of the charged fee, which was paid on a rolling basis within 4 to 7 days after completion. If a consumer's credit card transaction was rejected and Postmates was unable to collect the fee, Postmates took the loss and paid the courier. Postmates imposed no minimum or maximum number of requests to accept or reject; it imposed no restriction to work elsewhere or for competitors; and it provided neither travel expense reimbursement nor uniforms. Couriers were given a monetary payment as a referral bonus for any referred couriers who joined and handled a minimum number of requests.

Postmates fielded complaints received via email from consumers; it monitored poor ratings received on the platform; and it terminated its relationship with couriers by prohibiting them from logging onto the platform for various reasons (including, negative consumer feedback and/or fraudulent activity). On at least some occasions, Postmates was liable to the consumer for the delivery of incorrect or damaged products.

Pursuant to the foregoing, the claimant became engaged as an on-demand courier for Postmates wherein he was logged in and available from June 8 through June 15, 2015. The claimant utilized his personal bicycle as his mode of transportation. The claimant rejected or ignored about 50% of the requests sent by the platform. Postmates terminated the claimant's relationship based on negative consumer feedback and/or fraudulent activity.

OPINION: The credible evidence further establishes that the employer exercised, or reserved the right to exercise, sufficient supervision, direction or control over the services of the claimant and any other "on-demand couriers* similarly situated to hold them to be employees. Here, Postmates advertised for and screened on-demand couriers via an online application and criminal background check; it provided and educated the drivers regarding its proprietary software and PEX cards; it controlled the amount of information passed along to its couriers before and after accepting a request; it chose which couriers to offer a request; it kept track of a courier's rate of acceptance; it handled replacement of couriers; it calculated and provided an estimated time of delivery; it procured and sent the courier's photo to the consumer; it deposited the requisite amount of money onto the provided PEX card; it established the delivery fee and the courier's non-negotiable rate of pay; it handled collections and paid couriers on a regular basis even if a delivery fee was uncollected; it provided a monetary referral incentive; it retained liability for incorrect or damaged deliveries; and it fielded complaints and monitored consumer satisfaction ratings.

The Court has held that "it is incumbent on the Board to decide like cases the same way or explain the departure". Matter of Charles A. Field Delivery Service Inc., 66 NY2d 516 (1985), rev'd 112 AD2d 505 (3rd Dept 1985). See, also, Matter of Casey [Larkfield Lottery], 140 AD2d 925 (3rd Dept 1988). Here, the instant case is similar to other on-demand couriers (delivery drivers) where employment relationships were found. See, Matter of Rivera [State Line Delivery Service Inc.], 69 NY2d 679 (1986), cert denied 481 US 1049 (1987); Matter of Garbowski [Dynamex Operations East Inc.], 136 AD3d 1079 (3rd Dept 2016); Matter of Voisin [Dynamex Operations East Inc.], 134 AD3d 1186 (3rd Dept 2015); Matter of Kelly [Frank Gallo Inc.], 28 AD3d 1044 (3rd Dept 2006), lv dismissed 7 NY3d 844 (2006); Matter of McKenna [Can Am Rapid Courier Inc.], 233 AD2d 704 (3rd Dept 1996); Matter of Caballero [Reynolds Transport Inc., DBA Moon-Lite Express], 184 AD2d 984 (3rd Dept 1992); Matter of CDK Delivery Service, Inc., 151 AD2d 932 (3rd Dept 1989); Matter of Alifi [BND Messenger Service Inc.] 149 AD2d 883 (3rd Dept 1989); combined Appeal Board Nos. 574431 & 574432; and combined Appeal Board Nos. 562014 & 562015.

Also, this case is akin to other route couriers (delivery drivers) where employment relationships have been upheld. See, Matter of Fox [James Whalen, DBA Whalen's Service], 69 NY2d 679 (1986), cert denied 481 US 1049 (1987); Matter of Ross [Majestic Messenger Service], 69 NY2d 679 (1986), cert denied 481 US 1049 (1987); Matter of Gill [Strategic Delivery Solutions LLC], 134 AD3d 1362 (3rd Dept 2015); Matter of
Mitchum [Medifleet Inc.], 133 AD3d 1156 (3rd Dept 2015); Matter of Watson [Partsfleetc Inc.], 127 AD3d 1461 (3rd Dept 2015); combined Appeal Board Nos. 573852 & 573853; combined Appeal Board Nos. 573781 & 573783; combined Appeal Board Nos. 572107 & 572108; combined Appeal Board Nos. 571025 & 571026; combined Appeal Board Nos. 564618 & 564714; combined Appeal Board Nos. 562176 & 562177; combined Appeal Board Nos. 561726 & 561727; and combined Appeal Board Nos. 556034 & 556035.

We are not convinced that Matter of Jennings [American Delivery Solution Inc., DBA Perfect Delivery Svcs.], 125 AD3d 1152 (3rd Dept 2015) is controlling. Not only were those drivers delivering lost luggage from airports to luggage owners, but they negotiated the rate of pay, received no training, and were responsible for lost or damaged luggage. As these factors do not exist here, Jennings is sufficiently distinguishable from the instant case.

Finally, the employer's reliance on cases from other agencies and jurisdictions outside of the Unemployment Insurance Appeal Board are not binding on the Board. See, e.g., Matter of Bartenders Unlimited Inc., 289 AD2d 785 (3rd Dept 2001); Matter of Enjoy the Show Management Inc., DBA Teasers, 287 AD2d 822 (3rd Dept 2001); and Matter of Simonelli [Adams Bakery Corp.], 286 AD2d 805 (3rd Dept 2001).

Under the totality of the circumstances, the claimant and any other on-demand couriers (delivery drivers) similarly situated were employed as employees in covered employment for purposes of unemployment insurance. Accordingly, the employer's objection should be overruled and the initial determination of liability for unemployment insurance tax contributions should be sustained.

DECISION: The combined decisions of the Administrative Law Judge are reversed.

The initial determination, holding POSTMATES INC. liable for additional tax contributions effective 3rd quarter 2014 based on employee remuneration paid to the claimant and to any other individual similarly employed as an on-demand courier (delivery driver), is sustained.
(Appeal Board No. 588563 and A.L.J. Case No. 015-22529)

The employer's objection is overruled.

The employer is liable with respect to the issues decided herein.

The claimant is deemed an employee of and is credited with remuneration from this employer.
(Appeal Board No. 588564 and A.L.J. Case No. 015-23789)

PW:DK RAN dall T. DOUGLAS, MEMBER

*Subject of Change