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February 1, 2019

Hon. John P. Asiello
Clerk of the Court
New York State Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Re: *Matter of Vega (Postmates)*,
APL-2018-00143

Dear Mr. Asiello:

Please accept this letter as the submission of respondent Postmates Inc. under Rule 500.11.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f), Postmates Inc. declares that it has no parent corporation. Postmates Inc. has four subsidiary companies wholly owned by Postmates: Curated.by Inc., a Delaware corporation, which in turn has one subsidiary, Kuwalu Limited (an English and Welsh corporation); Postmates Ltd. (a Canadian corporation); Postmates Servicios, S. de R.L. de C.V. (a Mexican corporation); and Postmates, S. de R.L. de C.V. (a Mexican corporation).

INTRODUCTION

The Third Department correctly determined that Claimant Luis Vega and similarly situated delivery providers ("Delivery Providers") are independent

contractors based on the undisputed facts that Delivery Providers accept or reject delivery opportunities at their discretion, may work for competitors, and decide if, when, and how they perform the deliveries they choose to complete. This Court and the Appellate Division have consistently reversed the Unemployment Insurance Appeal Board ("Board") and held claimants to be independent contractors based on *exactly* these same factors. For instance, in *Matter of Yoga Vida NYC, Inc. (Comm'r of Labor)*, 28 N.Y.3d 1013 (2016), this Court held yoga instructors were independent contractors where they made their own schedules, could work for competitors, and were not on payroll. Here, Postmates provides Delivery Providers all the freedoms this Court found supported independent-contractor status in *Yoga Vida*. In fact, Postmates exerts far *less* control than the business in *Yoga Vida*, which limited how and when yoga instructors could offer classes and could terminate a working relationship with instructors if they advertised classes with competitors. *Yoga Vida* is therefore controlling here.

In arguing for this Court to overturn the Third Department decision, the Commissioner asks for deference to the Board. But the Commissioner then abandons the Board's actual reasoning, in conflict with the well-established precedent that an agency decision cannot be affirmed for reasons it does not give. For example, the Commissioner relies on the supposed facts that "Postmates precluded couriers from … accepting payment from customers" and Postmates "controlled the timing of deliveries indirectly." Comm'r Br. at 13-14. But these supposed facts were not found by the Board and are unsupported by the record. Moreover, the *only* way the Commissioner attempts to distinguish *Yoga Vida* and *Matter of Ted Is Back Corp. (Roberts)*, 64 N.Y.2d 725 (1984), is to put forward an extreme and novel theory that couriers and other people with supposedly "mechanical" tasks are virtually always employees. Fatal to the Commissioner's argument, however, neither the Board nor any New York court has adopted this theory, and it is inconsistent with this Court's precedents. Moreover, this Court and the Appellate Division have repeatedly held that delivery persons can be independent contractors. And if delivery persons are ever independent contractors, they are here, where they can turn down delivery opportunities at will, work for competitors *at the same time* they are using the Postmates app, and complete the deliveries they choose to undertake according to the manner and means they desire.

As for the Board's actual reasoning, it provided a laundry list of supposed facts that have little, if any, relevance to the factors this Court has repeatedly relied upon in deciding independent-contractor status. The Board also failed to consider this Court's and the Third Department's recent case law. In short, the Third

Department correctly recognized that there is no legal basis to affirm the Board because the Board undisputedly performed the wrong analysis and the supposed facts upon which it relied demonstrate at most incidental control. Under the correct analysis, this case falls well within the precedents establishing that there is no substantial evidence of control. Indeed, based on exactly the same facts the Third Department relied upon for its decision, the New York Workers' Compensation Board just found that a former Delivery Provider for Postmates was an independent contractor. This Court should affirm the Third Department's same conclusion based on well-established law.

FACTS AND PROCEDURAL BACKGROUND

A. The Postmates Platform

Postmates is a company that created and operates a web-based and mobile Platform. *See* A8:2-5; A18:24-A19:13. Unlike online retailers that ship items to customers from remote distribution centers, Postmates facilitates a marketplace of deliveries from local businesses through a network of freelance Delivery Providers. A18:24-A19:13; A20:20-24; A24:2-6. By connecting local customers, local merchants, and local Delivery Providers, the Postmates marketplace can provide customers with their desired goods quickly while also supporting local businesses and offering Delivery Providers a convenient way to earn money.

Postmates' customers and Delivery Providers access the online marketplace through the Postmates Platform. A12:13-22. Once a customer makes a delivery request on the Platform, the Platform alerts Delivery Providers who are logged onto the system and are nearby the pickup location for the delivery. A21:18-25. Upon receiving notification of the available delivery opportunity, Delivery Providers are free to accept, reject, or ignore the proposed delivery at their discretion. A24:2-6; *see* A117 at § 2(d). Postmates engages all of its Delivery Providers as independent contractors, and all Delivery Providers who use the Postmates Platform execute an Independent Contractor Acknowledgement Agreement. *See* A117 at § 2(a).

If a Delivery Provider chooses to accept a delivery request, he or she: (i) receives information on the specifics of the customer's request; (ii) picks up the requested item(s); and (iii) delivers the order to the customer. A17:3-17; A18:21-23. The Delivery Provider then marks the order as complete on the Platform and the customer's credit card is charged for the order. A40:12-41:6. That charge includes a delivery fee, which functionally is split between the Delivery Provider and Postmates. A71:21-72:2; A84:8-12.

Postmates does not create work schedules for Delivery Providers, nor does it set minimum or maximum delivery thresholds. A28:10-14; A64:24-65:3; *see* A117 at § 2(d). Postmates does not punish Delivery Providers for rejecting or ignoring any particular delivery requests. A26:3-5; A117 at § 2(d). Moreover, if a Delivery Provider is unable to complete a particular delivery after accepting it, absent fraud or theft, he or she can drop a request and still remain active on the Platform. A48:20-49:8.

Delivery Providers also enjoy substantial autonomy when completing orders. Postmates does not require that Delivery Providers wear a uniform or display the company's logo. A32:4-8; A117 at § 2(g). Postmates also does not require that Delivery Providers take any specific route or means of transportation to complete deliveries. A30:15-23; A59:23-60:4; A117 at § 2(f). Postmates does not reimburse Delivery Providers for the costs associated with making deliveries. A43:9-11; A117 at § 2(b). While the Platform does provide the customer with an estimated time of arrival for the delivery, Delivery Providers are not required to make the delivery within that timeframe. A46:2-8; A47:11-15. Delivery Providers are also free to offer their services to Postmates' competitors and may even complete deliveries placed through a competing service at the same time they are completing deliveries placed through Postmates. A28:18-24.

Assuming a Delivery Provider passed the background check, they were invited to attend a brief information session on how to operate the Postmates app. A15:17-21; A68:22-69:3.[1] During that information session, Delivery Providers were also given a PEX card (along with information about that card), which they can use to purchase customer orders in situations where a merchant requires on-location payment. A52:7-20; A53:4-13; A53:20-54:11. Even after Delivery Providers begin accepting delivery requests, they are never subjected to direct supervision by anyone at Postmates, nor are they required to file any reports. A64:11-19.

Postmates does not provide Delivery Providers with hourly wages or salaries and does not maintain an ordinary payday for them. A84:22-23; A117 at §§ 2(e), (h). Instead, Postmates pays Delivery Providers a delivery fee for completed orders on a rolling basis. A84:24-25; A117 at § 2(e).

[1] Today, this informational session is presented to prospective Delivery Providers via a video on the Postmates website.

B. Claimant Luis Vega

Mr. Vega used the Platform over the course of one week, during which time he sporadically accepted delivery opportunities during self-selected windows of time on six non-consecutive days. *See* A120. Postmates eventually blocked Mr. Vega from accessing its Platform following customer complaints regarding his failure to deliver requested items in contravention of the terms he accepted in his Independent Contractor Agreement. A109:6-9.

C. The ALJ Decision

On August 28, 2015, following Postmates removing Mr. Vega from its Platform, the New York State Department of Labor notified Postmates of its decision to classify Mr. Vega as an employee of Postmates for purposes of the New York State Unemployment Insurance Law. *See* A118-19. Postmates appealed this decision, and on November 20, 2015, participated in a hearing on the merits at which live witness testimony and documentary evidence was offered. *See* A1-116.

On November 27, 2015, Administrative Law Judge ("ALJ") Wendy Pichardo issued an opinion holding that Mr. Vega was not an employee of Postmates. *See* A121-A126 (ALJ Opinion). The ALJ found that Postmates did not exercise sufficient supervision, direction, and control over Mr. Vega to make him an employee because he: (i) was free to reject, ignore, or accept deliveries at his discretion; (ii) was free to work for other companies and set his own schedule; (iii) was free to choose his own mode of transportation for making deliveries and was not reimbursed for his out-of-pocket delivery expenses; (iv) was not required to make a minimum or maximum number of deliveries; (v) was not required to report to Postmates or submit any paperwork to the company; and (vi) was not provided with Postmates business cards or decals. *See* A123.

D. The Board Decision

The Department of Labor appealed, and the Board reversed. *See* A127-30 (Board Decision). The Board's decision initially (and mistakenly) referred to Mr. Vega as a "teaching artist," and held that Postmates was "akin" and "similar" to traditional delivery businesses. *See* A129. The Board did not dispute or set aside the ALJ's key factual findings supporting the ALJ's independent contractor determination. *See id.* Instead, the Board focused on other factors entirely, providing the following list of supposed facts upon which it relied:

> Postmates [1] advertised for and screened on-demand couriers via an online application and criminal background check; [2] it provided and educated the drivers regarding its proprietary software and PEX cards; [3] it controlled the amount of information passed along to its couriers before and after accepting a request; [4] it chose which couriers to offer a request; [5] it kept track of a courier's rate of acceptance; [6] it handled replacement of couriers; [7] it calculated and provided an estimated time of delivery; [8] it procured and sent the courier's photo to the consumer; [9] it deposited the requisite amount of money onto the provided PEX card; [10] it established the delivery fee and the courier's non-negotiable rate of pay; [11] it handled collections and paid couriers on a regular basis even if a delivery fee was uncollected; [12] it provided a monetary referral incentive; [13] it retained liability for incorrect or damaged deliveries; and [14] it fielded complaints and monitored consumer satisfaction ratings.

Id.

E. The Third Department Decision

Postmates appealed, and the Third Department reversed. The majority (Egan, Jr., J.P., joined by Devine and Mulvey, JJ.) held that there was no substantial evidence to support the Board's employee determination. The majority explained that Delivery Providers:

- have "no application and no interview";
- do not "report to any supervisor";
- "unilaterally retain the unfettered discretion as to whether to ever log on to Postmates' platform and actually work";
- are "free to work as much or little as he or she wants";
- "may accept, reject or ignore a delivery request, without penalty";
- "maintain the freedom to simultaneously work for other companies, including Postmates' direct competitors";

- "are free to choose the mode of transportation they wish to use for deliveries";
- "provide and maintain their own transportation";
- "choose the route they wish to take for the delivery";
- "are not required to wear a uniform";
- "are not provided any identification card or logo";
- "are only paid for the deliveries they complete"; and
- "are not reimbursed for any of their delivery-related expenses."

Matter of Vega (Postmates Inc.—Comm'r of Labor), 162 A.D.3d 1337, 1338-39 (3d Dep't 2018). The Third Department further explained that other facts relied upon by the Board do "not constitute substantial evidence of an employer-employee relationship to the extent that it fails to provide sufficient indicia of Postmates' control over the means by which these couriers perform their work." *Id.* at 1339 (citing *Yoga Vida*, 28 N.Y.3d at 1016).

Judge Lynch (joined by Clark, J.) dissented, accepting the Board's decision because Postmates "sets the fees, provides financing for the transaction through the PEX cards, as necessary, handles customer complaints, bears liability for defective deliveries and actually tracks the delivery." *Id.* at 1341.

STANDARD OF REVIEW

A decision of the Board should be reversed if it is not supported by substantial evidence. *Yoga Vida*, 28 N.Y.3d at 1015. "Substantial evidence" means "proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached factfinder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably—probatively and logically." *Id.* (quotation marks omitted).

Contrary to the Commissioner's suggestion (Comm'r Br. at 11), this is exactly the test applied by the Third Department here, *see* 162 A.D.3d at 1338-39, in exactly the same manner that this Court has consistently applied it. The Commissioner ignores the meaning of the substantial-evidence standard for reviewing an employee

determination of the Board: where "the record as a whole does not demonstrate that the employer exercises control over the results produced ... [and] the means used to achieve the results, the Board's determination that the company exercised sufficient direction, supervision and control over the instructors to demonstrate an employment relationship is unsupported by substantial evidence." *Yoga Vida*, 28 N.Y.3d at 1015 (internal citations and quotation marks omitted; omission and brackets in original). "Incidental control over the results produced—without further evidence of control over the means employed to achieve the results—will not constitute substantial evidence of an employer-employee relationship." *Matter of Hertz Corp. (Comm'r of Labor)*, 2 N.Y.3d 733, 735 (2004).

ARGUMENT

THE THIRD DEPARTMENT CORRECTLY HELD THAT THERE IS NO SUBSTANTIAL EVIDENCE TO SHOW THAT POSTMATES CONTROLS THE RESULTS OR MEANS USED BY DELIVERY PROVIDERS

"An employer-employee relationship exists when the evidence shows that the employer exercises control over the results produced or the means used to achieve the results. However, control over the means is the more important factor to be considered." *Matter of Empire State Towing and Recovery Ass'n, Inc. (Comm'r of Labor)*, 15 N.Y.3d 433, 437 (2010) (internal citations and quotation marks omitted). Here, there is no substantial evidence of control. Rather, as the Third Department recognized, Delivery Providers enjoy unfettered freedom to choose if, how, and when they work, which makes them independent contractors as a matter of law.

A. Delivery Providers Using Postmates Meet All The Factors Identified By This Court To Support Independent-Contractor Status

"Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule." *Bynog v. Cipriani Grp.*, 1 N.Y.3d 193, 198 (2003).[2] All five factors weigh entirely

[2] *Bynog* was not an unemployment insurance case, but it decided whether a person was an employee under the Labor Law, it applied the test of "control," and it cited an unemployment insurance case. The same rationale applies to the other case law

in favor of the Third Department's decision that Delivery Providers are independent contractors.

1. Delivery Providers Work At Their Own Convenience

Delivery Providers unquestionably work at their convenience. They have complete discretion as to whether and when to log in to the Platform. A27:22-28:3; A61:10-13; A65:24-66:8; A83:15-84:4. The contract is unequivocal on this point: "I understand I am permitted to determine my own work schedule …." A117 at § 2(d); *see also* A64:24-65:3; A83:15-84:7. As the Commissioner concedes, "[c]ouriers log in and out of the Postmates platform whenever they wish and are considered available to handle on-demand requests only when logged in." Comm'r Br. at 3. Furthermore, even when they are logged in, Delivery Providers are completely free to decline or ignore a proposed delivery opportunity. A24:2-6; *see* A117 at § 2(d). The Commissioner concedes that "the selected couriers can accept, reject, or ignore the request." Comm'r Br. at 4. The Board did not dispute these facts (*see* A128) and did not attempt to explain why this factor could be disregarded.

2. Delivery Providers Are Free To Work For Others

The undisputed evidence also establishes that Delivery Providers have the unfettered ability to work for other companies, *including Postmates' competitors*. A28:18-24. This freedom continues even when the Delivery Provider is in the midst of performing a delivery opportunity obtained on Postmates' Platform. A28:15-24; A29:8-16; A63:16-22; A72:18-73:4; A117 at § 2(c). The Board recognized that Postmates "imposed no restriction to work elsewhere or for competitors," A129, but provided no explanation of why it disregarded this factor in its analysis.

The Commissioner does not dispute these facts, but asserts that "Postmates precluded couriers from … accepting payment from customers for services not requested through Postmates' platform." Comm'r Br. at 14. However, the record states that the Delivery Provider *could* take money from the requester, but he was advised against it. A86:14-19. Regardless, the Board did not rely on this point, and it therefore cannot be the basis for affirming the Board's decision. "A fundamental principle of administrative law long accepted by this court limits judicial review of an administrative determination solely to the grounds invoked by the agency, and if those grounds are insufficient or improper, the court is powerless to sanction the

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discussed below applying the "control" test outside the unemployment insurance context.

determination by substituting what it deems a more appropriate or proper basis." *Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 593 (1982).

3. Delivery Providers Receive No Fringe Benefits

The undisputed evidence establishes that Delivery Providers do not receive fringe benefits. They are responsible for their own expenses and equipment (A32:2-3; A43:9-11), and receive no benefits of any kind (A51:21-23; A70:5-8). Indeed, the Commissioner concedes this point. Comm'r Br. at 6. The Board noted that there was no expense reimbursement, A129, but then ignored this point in its analysis.

4. Delivery Providers Are Not On Postmates' Payroll

Delivery Providers do not receive a salary from Postmates; they are paid based only on the deliveries they choose to undertake. A84:18-85:3. The Independent Contractor Agreement states: "I understand that I will be paid for jobs 7 days after such jobs are completed, and not on any specific, regularly scheduled payday." A117 at § 2(e); *see also id.* at § 2(h) ("I understand that I get compensated per delivery, and not on an hourly or salary basis.").

The Board did not mention the lack of salary in its decision, instead basing its decision on the uncited proposition that Postmates "pa[ys] couriers on a regular basis even if a delivery fee was uncollected." A129. However, this statement is true only to the extent it means that Delivery Providers are paid based on the particular delivery after each delivery is completed. A40:9-20; A42:8-43:8; A84:18-85:3. The record is clear and undisputed that Postmates does not pay Delivery Providers a set hourly rate or on scheduled paydays. And the Commissioner does not argue otherwise.

5. Delivery Providers Are Not On A Fixed Schedule

Delivery Providers have the very opposite of a fixed schedule: as discussed *supra* at 9, they can work at any time, as much or as little as they want. This complete discretion to determine if, when, and for how long they used Postmates to offer their services is the hallmark of an independent contractor. The Board recognized the flexible schedule and the fact that "Postmates imposed no minimum or maximum number of requests to accept or reject." A129; *see also* Comm'r Br. at 4. But once again, the Board ignored this factor in its analysis.

B. Other Relevant Factors Further Establish That Delivery Providers Are Independent Contractors

Two other factors also support the Third Department's conclusion that Delivery Providers are independent contractors.

First, all Delivery Providers execute an Independent Contractor Acknowledgement Agreement specifying that they are independent contractors, not employees. *See* A117 at § 2(a). This factor, while not dispositive, must be considered. *Carlson v. Am. Int'l Grp., Inc.*, 30 N.Y.3d 288, 301(2017). However, the Board and Commissioner fail to consider this factor at all.

Second, Delivery Providers have complete control over how they perform deliveries. Workers who exercise sole discretion over how they perform work are independent contractors. *See, e.g.*, *Empire State Towing*, 15 N.Y.3d at 437 (rejecting Board finding of employee status and holding that attorney who "enjoyed autonomy and discretion" was independent contractor); *Matter of Bogart (LaValle Transp., Inc.—Comm'r of Labor)*, 140 A.D.3d 1217, 1219 (3d Dep't 2016) (reversing the Board and holding delivery drivers independent contractors where they "were not required to lease their vehicles from LaValle," "there was no dress code," "[n]o one from LaValle supervised the drivers," and drivers "were free to choose whatever routes they desired").

This factor applies fully here. Delivery Providers control every aspect of how a delivery is performed, including what equipment and mode of transportation they use, what route they follow, what clothing they wear, what stops they make, and how long they take. A30:15-32:8; A43:9-11; A57:24-25; A58:9-15; A60:18-21; *see* A117 at §§ 2(b), (c), (g). Delivery Providers' exclusive control over mode, route, stops, and timing weighs heavily in favor of independent contractor status. Once again, the Board did not dispute these facts or explain why it chose to disregard their importance.

The Commissioner goes outside the Board's findings to suggest that while "couriers were nominally free to deliver items when they wished," Postmates "controlled the timing of deliveries indirectly" by touting speed, providing an estimated time of arrival, and tracking customer reviews. Comm'r Br. at 13. However, the Board made no such finding; the undisputed evidence establishes that there was no time requirement placed on Delivery Providers, and the estimates provided to customers were non-binding. A66:22-67:2; A82:23-83:14.

C. The Lack Of Control For All Seven Factors Discussed Above Makes Delivery Providers Independent Contractors As A Matter Of Law

As discussed above, all of the factors this Court has established as germane to an analysis of independent-contractor status support the Third Department's determination that Postmates does not exercise any meaningful control over the means or results of the delivery, and that Delivery Providers are therefore independent contractors. Indeed, the New York Workers' Compensation Board—in a 10-1 full board decision attached hereto—just decided that a former Delivery Provider for Postmates was an independent contractor and not an employee based on the very same facts.[3]

1. This Court's Precedents Establish That A Person Is An Independent Contractor Based On The Factors Present Here

This Court has repeatedly held that the *exact* set of factors discussed above (or even a subset thereof) requires reversal of a Board decision that a worker is an employee. *Yoga Vida* is directly on point. In *Yoga Vida*, this Court reversed the Board and held that non-staff yoga instructors were independent contractors. The bases for this decision were: the instructors "make their own schedules," "the studio does not place any restrictions on where the non-staff teachers can teach," and the instructors are not on payroll. 28 N.Y.3d at 1015. Delivery Providers enjoy *all* of the same freedoms cited by *Yoga Vida*.[4] Indeed, *Yoga Vida* was a much closer case because, as Justice Fahey noted in dissent, "Yoga Vida determines the class schedule," along with the "length of the class, the type of class taught, [and] the difficulty level," and "although non-staff instructors are free to tell their students about other locations at which they teach, Yoga Vida considers whether a non-staff instructor has advertised for a class directly conflicting with a Yoga Vida class in

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[3] While the Third Department has held that a workers' compensation decision is not binding for purposes of unemployment insurance, *Matter of Simonelli v. Adams Bakery Corp.*, 286 A.D.2d 805, 806 (3d Dep't 2001), it is certainly relevant given that it applies essentially the same legal test.

[4] The only other factor this Court mentioned in *Yoga Vida* is that the instructors are not "required to attend meetings or receive training," 28 N.Y.3d at 1015, and the same is true here with the sole exception of a one-time information session, which plainly does not constitute control. *See infra* at 17.

determining whether to continue its relationship with that instructor." *Id.* at 1017. Here, in contrast, Postmates does not control the schedule or how the task is performed and does not punish Delivery Providers for working with competitors.

Similarly, in *Ted Is Back*, this Court affirmed the Third Department's reversal of the Board and held that the salespeople were independent contractors where they "worked at their own convenience, were free to hold outside employment," "were not reimbursed for expenses and received no salary or drawing account," and "were paid strictly on a commission basis." 64 N.Y.2d at 726. Similarly, in *Scott v. Mass. Mut. Life Ins. Co.*, 86 N.Y.2d 429 (1995), this Court held summary judgment was correctly granted that an insurance agent was an independent contractor because she "was responsible for financing her own operating expenses and support staff, was paid by performance rather than a salary, did not have Federal, State or local taxes withheld from her pay, could sell competitors' products and had agreed by contract to operate as an independent contractor." *Id.* at 433-34. Just like *Yoga Vida*, *all* of the factors relied upon in *Ted Is Back* and *Scott* are also present here. In short, this Court's precedents establish that a claimant's control over whether, when, how, and for whom they perform services requires reversal of a Board decision that a claimant is an employee.

2. The Board's Attempt To Distinguish This Court's Precedents On Grounds Not Mentioned By The Board Is Meritless

The Board and the dissenting opinion ignore *Yoga Vida*, *Ted Is Back*, and *Scott* entirely. The Commissioner attempts to distinguish *Yoga Vida* and *Ted Is Back* solely because they involved a yoga instructor and a salesperson rather than a delivery person. Comm'r Br. at 21. But this attempt fails for several reasons.

First, this reasoning was not adopted by the Board, and therefore cannot be the basis for affirming its decision.

Second, *Yoga Vida* and *Ted Is Back* never suggested that the nature of the business is a factor in determining independent-contractor status. And the Commissioner cites no case—from this Court or any other—suggesting that the nature of the work (rather than the control thereof) is relevant to that inquiry. Thus, the Commissioner's suggestion that certain kinds of business are categorically or presumptively excluded from having independent contractors is legally baseless.

Third, the Commissioner's theory has no logical basis. Whether a business exercises control over a delivery person depends on the actual control it does or does not exercise, not an assumption about the supposed "nature" of delivery as no more than a "mechanical" task. Comm'r Br. at 21. Moreover, the Commissioner's assertion that the Delivery Provider's "job consists in the mechanical execution of delivery requests," *id.*, is factually unsupported, and ignores the freedom Deliver Providers exercise in *choosing* delivery opportunities and *how* to complete those deliveries.

Fourth, this Court has held that workers whose tasks are seemingly just as "mechanical" as delivery persons are independent contractors. *See Bynog*, 1 N.Y.3d at 198-99 (banquet waiters); *Ferber v. Waco Trucking, Inc.*, 36 N.Y.2d 693, 694 (1975) (delivery company that unloaded trucks).

Finally, to the extent the nature of the business matters, the crucial consideration here is that Postmates is an on-demand platform, *not* a delivery company. The Third Department has repeatedly reversed the Board and held that on-demand platforms that simply match people who want to perform a service with those people looking for the service to be performed—where those service providers could choose which assignments to take—do *not* give rise to employment relationships. *See Matter of Courto (SCA Enters. Inc.—Comm'r of Labor),* 159 A.D.3d 1240, 1241 (3d Dep't 2018) (on-demand appraisers); *Matter of TMR Sec. Consultants, Inc. (Comm'r of Labor)*, 145 A.D.3d 1402, 1403-04 (3d Dep't 2016) (on-demand security guards); *Bogart*, 140 A.D.3d at 1219 (on-demand delivery drivers); *Matter of Chan (Confero Consulting Assoc., Inc.—Comm'r of Labor)*, 128 A.D.3d 1124, 1125-26 (3d Dep't 2015) (on-demand "mystery shopper").

3. The Case Law Specific To Delivery Persons Also Establishes That The Delivery Providers Here Are Independent Contractors

Even if the relevant case law were inexplicably limited to delivery persons, this Court has recognized them as independent contractors where, as here, the business exercised at most incidental control. In *Shapiro v. Robinson*, 102 A.D.2d 822 (2d Dep't 1984), the Appellate Division held that summary judgment should have been granted that a courier was not an employee where the courier "furnished his own truck, set his own route, was paid by the job, had his own business and

worked for Scodek [a construction company] only on specific jobs." *Id.* at 822.[5] This Court affirmed, holding that "[w]e agree with the Appellate Division that there is no tender of evidence sufficient to support the contention that Robinson was an employee of Scodek." *Shapiro v. Robinson*, 63 N.Y.2d 896, 897 (1984).

The Commission relies heavily on a one-paragraph memorandum opinion from this Court in three consolidated cases. Comm'r Br. at 17-19 (citing *Matter of Rivera (State Line Delivery Serv.—Roberts)*, 69 N.Y.2d 679 (1986)). But this Court's opinion did not discuss *any* of the facts or *any* of the factors that bore on its decision. Moreover, to the extent that some of the facts can be culled from the decisions below, they demonstrate ample basis for distinguishing the outcome. In the first case, "the employer, at its pleasure, daily dispensed delivery assignments—most of which had time deadlines for completion" and "workers like claimant were responsible for completing bills of lading displaying, not theirs, but the employer's letterhead." *Matter of Rivera*, 120 A.D.2d 852, 854 (3d Dep't) (Yesawich, Jr., J., dissenting), *rev'd*, 69 N.Y.2d 679 (1986). In the second case, scheduling choice was strictly limited: "Claimants were *required* to call the Majestic dispatcher to find out what work was available. Claimants could turn down assignments but rarely did so. … They were *required* to check with dispatcher for any additional pickups or deliveries on their route." *Matter of Ross (Roberts)*, 119 A.D.2d 857, 857 (3d Dep't) (Mikoll, J., dissenting) (emphases added), *aff'd sub nom. Matter of Rivera*, 69 N.Y.2d 679 (1986). And in the third case, "[t]he Board concluded that claimant was required to make pickups and deliveries at certain times" and the business "carried workers' compensation coverage on the drivers." *Matter of Fox*, 119 A.D.2d 868, 870 (3d Dep't), *rev'd sub nom. Matter of Rivera*, 69 N.Y.2d 679 (1986). In short, all three consolidated cases involved couriers who were required to get assignments or complete deliveries in a particular manner.[6]

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[5] While this was not an unemployment insurance case, the court applied the same legal standard of "control." 102 A.D.2d at 822.

[6] The Commissioner briefly mentions two other cases from this Court, both of which concerned delivery persons who were—unlike the Delivery Providers here—required to make assigned deliveries. *See Matter of Charles A. Field Delivery Serv., Inc. (Roberts)*, 66 N.Y.2d 516, 517 (1985); *Matter of Wells (Utica Observer-Disptach & Utica Daily Press, Inc.—Roberts)*, 87 A.D.2d 960, 960 (3d Dep't 1982), *aff'd sub nom. Matter of Di Martino (Buffalo Courier Express Co., Inc.—Ross)*, 59 N.Y.2d 638 (1983).

Furthermore, notwithstanding the Commissioner's erroneous assertion that only three cases have found delivery persons to be independent contractors, the Appellate Division frequently holds that delivery persons are independent contractors where, as here, they are free to accept or reject assignments, are not paid a salary, and do not have set delivery times. In the unemployment insurance context, there are several such cases. *See Bogart*, 140 A.D.3d at 1219-20; *Matter of Werner (CBA Indus.—Hudacs)*, 210 A.D.2d 526, 526-28 (3d Dep't 1994); *Matter of Jennings (Am. Delivery Sol., Inc.—Comm'r of Labor)*, 125 A.D.3d 1152, 1153 (3d Dep't 2015); *Matter of Pavan (UTOG 2-Way Radio Ass'n—Hartnett)*, 173 A.D.2d 1036, 1038 (3d Dep't 1991). The Commissioner attempts to distinguish these cases principally because the drivers could negotiate their pay, *see* Comm'r Br. at 20-21, but this Court held as a matter of law that fixed fees do not establish control. *See Yoga Vida*, 28 N.Y.3d at 1016; *see also Mace v. Morrison & Fleming*, 293 N.Y. 844, 844-45 (1944).

Outside the unemployment insurance context, but still applying the same test of "control," numerous cases have likewise held delivery persons independent contractors. *See, e.g.*, *Chaouni v. Ali*, 105 A.D.3d 424 (1st Dep't 2013); *Zeng Ji Liu v. Bathily*, 145 A.D.3d 558, 558-59 (1st Dep't 2016); *Alves v. Petik*, 136 A.D.3d 426, 427 (1st Dep't 2016); *Barak v. Chen*, 87 A.D.3d 955, 957-58 (2d Dep't 2011).

The Commissioner lists in an addendum and sprinkles throughout the brief Third Department cases to support the idea that a particular fact matters in deciding employee status, while ignoring the other facts that were critical to the results in those cases. The vast majority of the cases concerned delivery persons who were *required* to accept assignments, which is a clear exercise of control not present here. Of the remaining cases, in one, the business would take away the delivery person's leased truck if he refused assignments. *See Matter of Wilder (RB Humphreys Inc.—Comm'r of Labor)*, 133 A.D.3d 1073, 1073-74 (3d Dep't 2015). In another, there was a noncompetition requirement. *See Matter of Scott (CR England Inc.—Comm'r of Labor)*, 133 A.D.3d 935, 938-39 (3d Dep't 2015). And in the rest, the business exercised control over the timing of deliveries. *See Matter of Kelly (Frank Gallo, Inc.—Comm'r of Labor)*, 28 A.D.3d 1044, 1044 (3d Dep't 2006); *Matter of Varrecchia (Wade Rusco, Inc.—Sweeney)*, 234 A.D.2d 826, 826 (3d Dep't 1996); *Matter of CDK Delivery Serv., Inc. (Harnett)*, 151 A.D.2d 932, 932 (3d Dep't 1989); *Matter of Alfisi (BND Messenger Serv.—Harnett)*, 149 A.D.2d 883, 883 (3d Dep't 1989). In short, there is a clear line in the case law—consistent with the plain meaning of control—whereby a delivery person is an employee only if the business

requires taking assignments, prevents work for others, or dictates timing. The absence of such control establishes an independent-contractor relationship.

D. The Board Erroneously Relied On Factors Irrelevant To The Issue Of Control

Rather than considering the factors and case law discussed above, the Board relied on a laundry list of purported facts, *see supra* at 6, that—as the Third Department correctly held—do not constitute substantial evidence of control as a matter of law. Instead, they concern steps that businesses would take equally for employees or independent contractors.

1. Postmates' Administrative And Safety Practices (Facts 1, 2, And 8)

The first fact cited by the Board—placing ads to attract Delivery Providers to use its Platform—clearly does not constitute control over means or results. *See Werner*, 210 A.D.2d at 528 (holding that whether workers were "solicited through advertising … [is] neutral in its implications"). Similarly, Postmates' performing a criminal background check is a basic safety measure (A37:2-8) that has nothing to do with whether the worker is an employee. *See, e.g.*, *Yoga Vida*, 28 N.Y.3d at 1013 (licensing requirement showed merely "incidental control" consistent with an independent-contractor relationship); *Zeng Ji Liu*, 145 A.D.3d at 559 (holding background check of taxi driver constitutes mere incidental control). The Commissioner cites no case law to the contrary.

Furthermore, with respect to the second fact cited by the Board—that Postmates offers a one-time information session to Delivery Providers on how to use its technology (and no further training), A26:6-14—initial training or informational sessions are inconsequential to the classification determination. *See, e.g.*, *Werner*, 210 A.D.2d at 528 ("The information supplied would have to have been given to an independent contractor in the same measure as to an employee."); *see also, e.g.*, *Matter of Holleran (Jez Enters., Inc.—Comm'r of Labor)*, 98 A.D.3d 757, 758 (3d Dep't 2012); *Simonelli*, 286 A.D.2d at 806. Indeed, this Court has held even "regular company meetings … are not inconsistent with [a person's] status as an independent contractor." *Scott*, 86 N.Y.2d at 434. The sole cases the Commissioner cites on this issue relied principally on the fact that the delivery persons were *required* to accept delivery assignments, a key indicator of control not present here. *See Matter of Mitchum (Medifleet, Inc.—Comm'r of Labor)*, 133 A.D.3d 1156, 1157 (3d Dep't

2015); *Matter of Watson (Partsfleet Inc.—Comm'r of Labor)*, 127 A.D.3d 1461, 1462 (3d Dep't 2015).

2. The Information And Opportunities Passed On To Delivery Providers (Facts 3 and 4)

The third and fourth facts cited by the Board are that Postmates controls the information and opportunities passed along to Delivery Providers. But the Board provided no explanation as to how these facts have any bearing on the level of Postmates' control over the results produced by Delivery Providers or the means they used. Since Delivery Providers can drop an opportunity even after accepting it (A69:18-23), the fact that they receive full information about the request only after accepting does not indicate any control by Postmates. And in *Yoga Vida*, the yoga studio chose which teaching opportunities to offer to its finite group of yoga instructors, thereby exercising much greater control over opportunities than Postmates does here, and yet those instructors were not considered employees. 28 N.Y.3d at 1016.

3. Keeping Track Of Acceptance Rates And Consumer Satisfaction (Facts 5 And 14)

That Postmates "kept track" of the acceptance rates of Delivery Providers and customer satisfaction also has nothing to do with any supposed exercise of control. "The requirement that the work be done properly is a condition just as readily required of an independent contractor as of an employee and not conclusive as to either." *Id.* (quotation marks omitted); *see also, e.g.*, *Hertz Corp.*, 2 N.Y.3d at 735. Accordingly, "that [the business] received feedback about the instructors from the students does not support the Board's conclusion" that they were employees. *Yoga Vida*, 28 N.Y.3d at 1016. The Commissioner ignores this clear language in *Yoga Vida* and *Hertz*, and the Third Department cases the Commissioner cites (Comm'r Br. at 14) all concerned situations where the delivery person was required to accept deliveries (among other exercises of control not present here). Absent this key factor, the Third Department has recognized that keeping track of quality does not indicate that the claimant is an employee. *See Werner*, 210 A.D.2d at 528; *Chan*, 128 A.D.3d at 1126.

4. Replacement of Delivery Providers (Fact 6) And Liability For Incorrect Or Damaged Deliveries (Fact 13)

The Commissioner does not rely upon the Board's sixth supposed fact—that Postmates supposedly replaces Delivery Providers. And for good reason: The record is clear and undisputed that if no Delivery Providers accept a delivery request, the request is unfulfilled. A24:2-14. Regardless, this Court has held that providing a replacement is something businesses would do equally for independent contractors as for employees. *Yoga Vida*, 28 N.Y.3d at 1016; *see also TMR*, 145 A.D.3d at 1403.

Similarly, the Board stated that Postmates retained liability for incorrect or damaged deliveries, but the Commissioner recognizes and the record establishes that liability is determined on a case-by-case basis. *See* Comm'r Br. at 6 (Postmates "assumes liability in at least certain cases"); A61:16-24; A74:24-75:5. And there is no legal or logical basis for treating a case-by-case assessment of liability as an exercise of control.

5. Estimated Time Of Delivery (Fact 7)

Postmates' providing an estimated time of delivery, and thereby giving customers an idea as to when a delivery might arrive, is irrelevant in showing that Postmates *controls* the deliveries. The Commissioner's only argument is that the estimates were effectively binding, *see* Comm'r Br. at 13, but the Board made no such finding and it has no support in the record, *see supra* at 11.

6. Postmates' Payment Arrangements (Facts 9, 10, 11, And 12)

That Postmates provides Delivery Providers with prepaid expense cards (PEX cards) is inconsequential. As the Commissioner recognizes, the Delivery Provider had the choice of whether to use the PEX card or pay with his own money and get reimbursed later. Comm'r Br. at 6. And the Commissioner provides no argument as to why the PEX cards indicate control. An independent contractor, as much as an employee, can be provided with a means to perform the task more efficiently, which is all that the PEX cards do. *See Hertz Corp.*, 2 N.Y.3d at 735; *Shapiro*, 63 N.Y.2d at 898.

Postmates' determining Delivery Providers' rate of pay also does not support an employment relationship. Since Delivery Providers have complete discretion in

determining whether to accept any particular delivery request, they can reject the fee arrangement if they desire. In any event, having the rate of pay determined by the business does not render the provider an employee. *Yoga Vida*, 28 N.Y.3d at 1016 ("[T]hat Yoga Vida generally determines what fee is charged and collects the fee directly from the students … does not supply sufficient indicia of control over the instructors."); *see also Chan*, 128 A.D.3d at 1126; *Matter of Best (Lusignan—Comm'r of Labor)*, 95 A.D.3d 1536, 1537 (3d Dep't 2012).

As for the Board finding that Postmates "pays couriers on a regular basis," as noted *supra* at 10, this means only that Delivery Providers are paid based on the particular deliveries they choose to undertake. And the Commissioner does not defend this finding as evidence of control.

Similarly, that Postmates "handle[s] collections" is irrelevant because the exact same form of collection took place in *Yoga Vida*. 28 N.Y.3d at 1016; *see also Zeng Ji Liu*, 145 A.D.3d at 559. And while the Commissioner mentions this finding (Comm'r Br. at 12), she provides no argument or case law to show why it indicates control.

Finally, it is irrelevant to the question of control that there is a $50 monetary referral incentive to encourage other delivery people to engage the Postmates Platform. A85:20-25. The Commissioner does not even attempt to defend the relevance of this finding.

CONCLUSION

The decision of the Third Department should be affirmed.

Date: February 1, 2019

Respectfully submitted,

By: _____

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals, 22 N.Y.C.R.R. § 500.11(m), Rollo C. Baker, attorney for respondent Postmates Inc., hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,981 words, which complies with the limitations stated in § 500.11(m).

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AFFIDAVIT OF SERVICE

I am over 18 years of age and not a party to this action. Pursuant to the Rules of Practice of the New York Court of Appeals, 22 N.Y.C.R.R. § 500.11(k), I hereby affirm that on February 1, 2019, I caused a copy of this letter to be sent by Federal Express to the following:

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ADDENDUM

WORKERS' COMPENSATION BOARD
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Clarissa M. Rodriguez
Chair

State of New York - Workers' Compensation Board

In regard to Ramazan Dissimbayev, WCB Case #G191 7469

MANDATORY FULL BOARD REVIEW
FULL BOARD MEMORANDUM OF DECISION

keep for your records

The Full Board, at its meeting on January 15, 2019, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed September 26, 2018.

ISSUE

The issue presented for Mandatory Full Board Review is whether an employer-employee relationship existed between the claimant and the alleged employer.

The Workers' Compensation Law Judge (WCLJ) found that the claimant was an independent contractor and disallowed the claim.

The Board Panel majority affirmed the WCLJ decision in its entirety.

The dissenting Board Panel member would find that an employer-employee relationship existed.

The claimant filed an application for Mandatory Full Board Review on October 19, 2018, arguing that based on the totality of the relevant factors, the relative nature of the work and services performed, and for policy reasons, delivery persons such as the claimant are employees for purposes of the Workers' Compensation Law (WCL).

The carrier filed a rebuttal on November 19, 2018, arguing that the claimant was properly found to be an independent contractor and requests that the decision of the Board Panel majority be affirmed.

**** *Continued on next page* ***

Claimant -	Ramazan Dissimbayev	Employer -	POSTMATES INC
Social Security No. -		Carrier -	New Hampshire Insurance Co
WCB Case No. -	G191 7469	Carrier ID No. -	W154009
Date of Accident -	06/03/2017	Carrier Case No. -	555243535
District Office -	NYC	Date of Filing of this Decision– 01/31/2019	

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

The claimant filed a C-3 (Employee Claim) on July 25, 2017, reporting that he sustained injuries to his left knee and body stemming from a work-related accident on June 3, 2017. The claimant, a bike messenger, alleged that he was injured when he collided with an open car door while riding his delivery bicycle. The claimant indicated that his employer was "Postmates."

In a SROI-04 (Subsequent Report of Injury- Denial) form filed on August 3, 2017, the carrier objected to the claim, citing no causal relationship and no coverage.

In a PH-16.2 (Pre-Hearing Conference Statement) filed on October 17, 2017, the carrier asserted that the claimant was not an employee of Postmates Inc., but rather an independent contractor/self-employed "gig economy" worker. Attached was a copy of Postmates' Fleet Agreement, which set forth that delivery couriers who agreed to the terms of the agreement were independent contractors and were required to have their own equipment to facilitate deliveries. The agreement further specified that "Postmates shall have no right to, and, shall not supervise, direct or control Contractor, or control the manner or prescribe the method Contractor uses to perform Deliveries."

At a hearing held on December 1, 2017, the claimant testified that he worked for Postmates as a bicycle messenger delivering food. The claimant was paid a minimum of $4.00 per delivery plus tip. The claimant explained that he was notified of potential deliveries through Postmates on an application on his phone, which instructed him where to go and what food to pick up and deliver. The phone application would provide the restaurant name, and that he had the choice of either skipping the delivery or accepting the job. The claimant would ride his bicycle to the restaurant, pick up the food, and deliver it. Postmates provided the claimant with an insulated hot and cold bag, but the claimant used his own bicycle and phone for the delivery jobs. On the date of the accident, the claimant was riding his bicycle in the bike lane and was on his way to pick up a delivery. There was a car parked halfway in the lane. As he was about to pass the car, the back door opened and he collided with the door, which caused him to fall off his bicycle.

On cross-examination, the claimant testified that he was also employed full-time by Paris Baguette as a barista on the date of the accident. He worked 37 to 40 hours per week at Paris Baguette, and that Postmates did not require him to limit his work hours there. He was able to log-in and log-out of the Postmates phone application as he saw fit. There were no set hours or

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shifts for deliveries and no minimum number of deliveries required to be made through the application. The claimant was free to pick and choose what deliveries he wanted to make. Postmates did not provide any equipment except the insulated hot and cold bag. He was free to work for other delivery companies while he worked for Postmates.

At a hearing on January 10, 2018, an employer witness testified that she was the general manager of a Postmates office in Los Angeles, California. The witness testified that claimant accepted the terms of the Fleet Agreement prior to accepting delivery jobs. The witness described Postmates as being a technology platform that uses an online application that connects customers looking to buy goods or food with merchants that are local that sell items requested by the customer. The phone application also connects the customer and the merchant with the independently contracted delivery professionals. The delivery couriers can choose the method in which they make their deliveries, which could be by bicycle, car, or foot. There is no minimum number or maximum number of delivery offers that couriers must accept in order to use the Postmates phone application. Once a courier creates a profile, the courier can choose whether or not to accept a job and make the delivery. Couriers may also contract to perform services for other delivery companies. The witness testified that employees of Postmates receive W-2 tax forms and are paid biweekly in accordance with their salary whereas delivery couriers receive independent contractor 1099 tax forms and are paid on a per delivery basis. The witness further testified that Postmates does not give feedback to the delivery couriers about their deliveries, but that clients can rate the couriers. Couriers who do not adhere to the terms of the Fleet Agreement, which includes maintaining a certain rating level, will not be allowed to make deliveries.

In a reserved decision filed on January 16, 2018, the WCLJ found that the claimant was an independent contractor and disallowed the claim.

The claimant's attorney filed an application for administrative review on February 15, 2018, arguing that the claimant was an employee who was mischaracterized by Postmates as an independent contractor. Counsel asserted that Postmates assigns delivery tasks, sets the fee for each delivery, and pays their delivery couriers weekly based on deliveries. As such, the record reflected that Postmates exhibited sufficient control over the claimant that would support the finding of an employer-employee relationship. Counsel also argued that there was nothing in the record to suggest that the claimant as a courier had any bargaining power typically found with independent contractors.

The carrier filed a rebuttal on March 15, 2018, arguing that the claim was properly disallowed as the claimant was an independent contractor and not an employee of Postmates.

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LEGAL ANALYSIS

In resolving questions of employer-employee relationship, it is within the province of the Board to evaluate the credibility of witnesses and to draw any reasonable inferences from the evidence presented (*see Matter of Topper v Al Cohen's Bakery*, 295 AD2d 872 [2002]).

"Whether an employer-employee relationship exists is a factual issue for the Board... The relevant factors in making 'such a finding include the right to control the work and set the work schedule, the method of payment, the furnishing of equipment, the right to discharge and the relative nature of the work at issue' (*Matter of Bugaj v Great Am. Transp., Inc.*, 20 AD3d 612 [2005]). No one factor is dispositive, however, including the fact that the contract between claimant and the [employer] designates claimant as an independent contractor" (*Matter of Brown v City of Rome*, 66 AD3d 1092 [2009] [additional citations omitted].

In *Matter of Brown*, the claimant entered an agreement with the City of Rome to provide guidance to community organizations and implement urban renewal initiatives. The City contended that the claimant was an independent contractor, but the Court affirmed the Board's finding of employer-employee relationship, noting the following relevant factors: "The record reflects that claimant was supervised by City employees and that the City had authority to discharge him. He was required by those supervisors to work certain hours and attend City department meetings, he received directives from the City's mayor and other City officials, and he supervised City employees that were assigned to him. Claimant was paid by the City on a monthly basis, needed preapproval from the City for his expenses and used office equipment and supplies provided by it" (*id.*).

In *Matter of Saratoga Skydiving Adventures v Workers' Compensation Bd.*, 145 AD3d 1333 (2016), the Appellate Division affirmed the Board's finding of an employer-employee relationship where the employer, a skydiving company, supplied all of the equipment, including the planes and parachutes, exercised sufficient control over the work by selecting the instructor and pilot to hire for each jump, and determined whether the instructors and pilots were sufficiently efficient to be paid or should be discharged.

Here, the preponderance of the evidence in the record supports that the claimant was an independent contractor and not an employee of Postmates. Both the claimant and the employer witness testified that the claimant did not have a set working schedule. Instead, the claimant was free to choose what days and hours to work. In addition, the claimant was free to turn down delivery jobs, was able to work for other companies, and was not required to sign into Postmates

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software application. With the exception of the insulated bag, Postmates provided no equipment and did not instruct the claimant on how to complete his delivery jobs. Moreover, the claimant was not directly supervised and not given feedback on his performance from Postmates nor was he restricted from working his full-time job. As such, the preponderance of the evidence in the record supports the finding that the claimant was an independent contractor who controlled his own work and hours rather than an employee of Postmates.

In several recent cases with almost identical facts, the Board has determined in each case that claimants who delivered food by bicycle through a digital platform were independent contractors rather than employees (*see* Matter of RJ Square Inc., 2017 NY Wrk Comp G1524445; Matter of Relay Delivery Inc., 2018 NY Wrk Comp G1775559; Matter of Relay Delivery Inc., 2018 NY Wrk Comp G1911011; Matter of Relay Delivery Inc., 2018 NY Wrk Comp G1657755).

Therefore, the Full Board finds that the claimant was an independent contractor.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed January 16, 2018, is AFFIRMED. The claim is disallowed and closed.

The above reflects the opinion of the Board by a vote of 10 to 1.

FOR THE WORKERS' COMPENSATION BOARD,

Clarissa M. Rodriguez

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