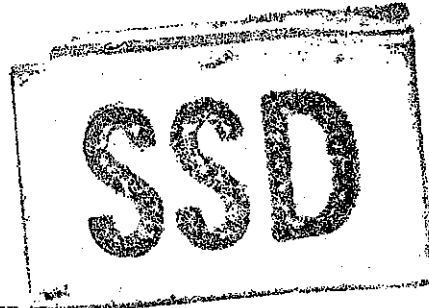




STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL



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DIVISION OF APPEALS & OPINIONS
ALBANY BUREAU

September 10, 2018

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

RECEIVED

SEP 10 2018

NEW YORK STATE
COURT OF APPEALS

Re: *Matter of Vega (Postmates)*,
Third Dep't No. 525233

Dear Mr. Asiello:

Please accept this letter as the submission of the appellant Commissioner of Labor (the "Commissioner") in response to this Court's letter of August 21, 2018. The Court should retain jurisdiction over this appeal because the appealed order is final. While the Third Department remitted the matter to the Unemployment Insurance Appeal Board (the "Board"), the only action that remains is ministerial.

BACKGROUND

At issue in this appeal is whether substantial evidence supports the Board's decision that claimant Luis A. Vega's work as a courier for respondent Postmates Inc. ("Postmates") constituted an employment relationship for unemployment insurance purposes.

In its initial determination (Appellant's Appendix ["A"] 118-119), the Commissioner found that Mr. Vega was an employee and that Postmates was therefore liable for additional unemployment insurance contributions, effective the third quarter of 2014, on remuneration paid to Mr. Vega and other individuals similarly employed. The Commissioner also credited Mr. Vega with remuneration from Postmates in connection with his claim for unemployment benefits. Postmates objected that Mr. Vega was an independent contractor and requested a hearing before an Administrative Law Judge ("ALJ"). The ALJ sustained Postmates' objections and overruled the Commissioner's determination. (Respondent's Appendix ["RA"] 9-14.) The Commissioner then appealed to the Board, which reversed the ALJ's decision and sustained the Commissioner's initial determination that Mr. Vega was an employee and that Postmates was therefore liable for additional unemployment insurance contributions. (RA1-8.)

Postmates appealed the Board's decision to the Third Department. In a 3-2 decision entered on June 21, 2018, the Third Department reversed, holding that substantial evidence did not support the Board's finding of an employment relationship, and remitted the matter to the Board "for further proceedings not inconsistent with this Court's decision." (Memorandum and Order at 6.)

THE APPEALED ORDER IS FINAL

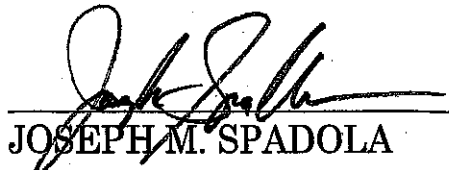
An Appellate Division order remitting a matter to an administrative agency is final where the court's remittal contemplates only further action in accordance with its opinion and nothing remains to be done but to give effect to the court's order. *See generally* Karger, Powers of the New York Court of Appeals § 4.10 at 73-76 (3d ed. Rev. 2005). Under these circumstances, the Appellate Division order is final because "nothing more than purely ministerial action is required of [the Board]." *Colonial Liq. Distribs., Inc. v. O'Connell*, 295 N.Y. 129, 134 (1946). This rule applies, even where the Appellate Division remittal does not specify what action should be taken by the agency. *Id.*; *see also Matter of Park East Corp. v. Whalen*, 38 N.Y.2d 559, 561 (1976).

In holding that substantial evidence does not support the Board's finding that Mr. Vega was an employee for unemployment insurance purposes, the Third Department adjudicated the dispositive issue in the case and left no further steps for the Board to take except to give effect to the court's decision. The Third Department reversed the Board's ruling that Postmates is liable for additional unemployment insurance contributions on remuneration paid to Mr. Vega and other similarly situated couriers. Accordingly, on remittal, the Board need not address the amount of such contributions nor resolve any related issues, such as whether other couriers are similarly situated to Mr. Vega. Likewise, the Board on remittal need not address or resolve any other pending claims involving couriers other than Mr. Vega because those claims will be resolved in separate proceedings that do not arise from this proceeding. *See* Labor Law § 620(1)(b) (decision on whether a person is or was an employer is deemed a general determination for all those employed but is conclusive and binding only on the employer and the particular claimant involved in the case). Nor will there be further administrative action to recover any unemployment benefits paid to Mr. Vega as a result of the Commissioner's initial determination, because there is no allegation of fraud or bad faith on Mr. Vega's part. *See* Labor Law § 597(4) (a court decision overturning a Board determination "shall not affect the rights to any benefits already paid under the authority of the prior determination" absent fraud or bad faith). Instead, the only action remaining for the Board is to give effect to the court's order by cancelling any additional unemployment insurance contributions found owing on account of Mr. Vega's remuneration from Postmates. Because such action is ministerial, the appealed order is final, and this Court has subject matter jurisdiction over the appeal.

Respectfully submitted,

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