

BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

1
2
3 BARBARA ANN BERWICK,)

4)
5 Plaintiff,)

6 vs.)

7 UBER TECHNOLOGIES, INC., a Delaware)
8 corporation, and RASIER - CA LLC, a)
9 Delaware limited liability company,)

10 Defendants)
11)

CASE NO. 11-46739 EK

ORDER, DECISION OR AWARD
OF THE LABOR COMMISSIONER

12 BACKGROUND

13 Plaintiff filed an initial claim with the Labor Commissioner's office on
14 September 16, 2014. The complaint alleges Plaintiff is owed the following:

- 15 • Wages earned and unpaid during the period from July 25, 2014 to
16 September 15, 2014;
- 17 • Reimbursement of expenses pursuant to Labor Code § 2802;
- 18 • Liquidated damages pursuant to Labor Code § 1194.2; and
- 19 • Waiting time penalties for violation of Labor Code §§ 202 and 203.

20 A hearing was conducted in San Francisco, California, on March 10, 2015, before
21 the undersigned hearing officer designated by the Labor Commissioner to hear this
22 matter. Plaintiff appeared in pro per. Andrew Michael Spurchise and Dalene Bramer,
23 Attorneys at Law, represented Defendants. Product Manager Brian Tolkin appeared as a
24 witness for Defendants.

25 Due consideration having been given to the testimony, documentary evidence, and
26 arguments presented, the Labor Commissioner hereby adopts the following Order,
27 Decision or Award.

FINDINGS OF FACT

1
2 Defendants Uber Technologies, Inc., a Delaware corporation, and Rasier-CA LLC,
3 a Delaware limited liability company (collectively referred to herein as "Defendants"),
4 employed Plaintiff as a driver under the terms of a written agreement¹ in San Francisco,
5 California, from approximately July 23, 2014, until Plaintiff resigned without advance
6 notice on September 18, 2014.

7 The agreement between Defendant Rasier and Plaintiff provides, in relevant part:

8 [Defendant] Rasier is engaged in the business of providing lead generation
9 to the Transportation Provider comprised of requests for transportation
10 service made by individuals using Uber Technologies, Inc.'s mobile
11 application ("Users").... Through its license of the mobile application...,
12 [Defendant] Rasier provides a platform for Users to connect with
independent Transportation Providers."

* * *

13 You shall be entitled to accept, reject, and select among the Requests
14 received via the Service. You shall have no obligation to [Defendant Rasier]
15 to accept any Request. Following acceptance of a Request, however, you
16 must perform the Request in accordance with the User's specifications.
17 Failure to provide promised services on an accepted Request shall constitute
a material breach of this Agreement, and may subject you to damages.

* * *

18 You understand that for liability reasons, Users may prohibit the transport
19 of individuals other than themselves during the performance of a Request.
20 If you accept a Request subject to such a prohibition, you agree to allow only
21 the User, and any individuals authorized by User inside your vehicle during
22 performance of a Request.

* * *

23 You agree to faithfully and diligently devote your best efforts, skills and
24 abilities to comply with the job parameters and User specifications relating
25 to any Request accepted by you.

* * *

26
27 ¹ Plaintiff and Defendant Rasier-CA LLC were the named parties of the "Software Sublicense & Online Services Agreement."

1 You agree that you shall maintain a vehicle that is a model approved by the
2 Company. Any such vehicle shall be no more than ten (10) model years old,
3 and shall be in good operating condition. Prior to execution of this
4 Agreement, you shall provide to the Company a description of each vehicle
5 and a copy of the vehicle registration for each vehicle(s) you intend to use to
6 provide service under this Agreement. You agree to notify the Company of
7 any change in your fleet by submitting to the Company an updated
8 description and vehicle registration for any previously unidentified vehicle
9 to perform services under this Agreement. The purpose of this provision is
10 to enable the Company to determine whether your equipment meets
11 industry standards.

12 ***

13 In exchange for accepting and fully performing on a Request, you shall be
14 paid an agreed upon Service Fee for your completion of that Request....

15 ***

16 You acknowledge that there is no tipping for any transportation services
17 that you provide pursuant to the receipt of a Request.... You understand
18 that the aim of advertising and marketing to the effect that there is no need
19 to leave a tip is ultimately to increase the number of Requests you receive
20 through the Service and Software. You agree that the existence of any such
21 advertising or marketing does not entitle you to any payment beyond the
22 payment of Service Fees as provided in this Agreement.

23 The Company shall electronically remit payment of Service Fees to you
24 consistent with Company's practices, as set forth in the Service Fee
25 Schedule.

26 In the event the User cancels a Request after you arrive at the designated
27 pick-up location or does not show after you have waited at least 10 minutes,
the User is subject to a cancellation fee. The amount of the cancellation fee
will be as specified in the Service Fee Schedule. Notwithstanding the
foregoing, you acknowledge and agree that, in the Company's sole
discretion, a User's cancellation fee may be waived, in which case you will
have no entitlement to any such fee.

You shall not allow any other person, including any employee, agent, or
subcontractor, to access the Service to accept transportation request using
the Device or the Driver ID. You acknowledge and agree that this

1 Agreement only enables you, not any other person, to access the Services
2 and Software, and to use the Device and the Driver ID to receive requests for
3 transportation services.

4 ***

5 Company will also issue identification and password keys (each, a "Driver
6 ID") to the Transportation Provider to enable you to access the Service. You
7 will ensure the security and confidentiality of each Driver ID. ONLY YOU
8 may use the Driver ID. Sharing your Driver ID with someone else
9 constitutes a material breach of this Agreement. ONLY YOU may use the
10 Device to accept requests for transportation services. Allowing someone
11 else to use the Device to accept requests for transportation services
12 constitutes a material breach of this Agreement.

13 ***

14 The Company's approval and authorization of a Driver may be conditioned
15 upon terms and conditions including, without limitation, a requirement that
16 such Driver, at his own cost and expense, undergo the Company's screening
17 process and attend the Company's informational session regarding the use
18 of Uber's mobile application. The Company reserves the right to withhold
19 or revoke its approval of this Agreement, whether by default or otherwise,
20 the Device, to which you acknowledge is and at all times will remain the
21 property of the Company, must be returned to the Company.

22 Shortly after Defendants hired her (on or about July 25, 2014), Plaintiff requested
23 that Defendants pay the money Plaintiff earned to Berwick Enterprises, a California
24 corporation that Plaintiff created in 1988. Defendants complied and remitted all
25 payments to Berwick Enterprises. Plaintiff claimed that, while she did give Defendants
26 sufficient information to effect remittance to Berwick Enterprises, she was actually just
27 introducing Defendants to the entity. While Plaintiff denied she had any control over the
corporation she created, according to the Secretary of State, Plaintiff is the corporate agent
of Berwick Enterprises.

Product Manager Brian Tolkin testified that Defendant Uber is a technological
platform, a smart phone application that private vehicle drivers ("Transportation
Providers") and passengers use to facilitate private transactions. Defendant Uber

1 provides administrative support to the two parties: the passengers and the
2 Transportation Providers. The Transportation Provider uses the application whenever
3 she² wishes to notify passengers that she is available to transport them. The passenger
4 signs on to the application and requests a ride. When the Transportation Provider
5 accepts the request, the model of her car and picture of the Transportation Provider
6 appears on the passenger's device, so that the passenger can identify her ride.

7 Defendants argued that they do not exert any control over the hours Plaintiff
8 worked. There is no minimum number of required trips. However, if a Transportation
9 Provider is inactive for 180 days, the smart phone application expires and will remain
10 inactive until the Transportation Provider applies in person or by email to reactivate it. A
11 Transportation Provider is required to obtain a permit to carry passengers for a fee from
12 the California Public Utilities Commission. The Transportation Provider must have
13 liability insurance coverage in the amount of \$1,000,000.00.

14 Defendants provide the Transportation Provider with an iPhone, which is required
15 to access the application. Defendants charge a refundable deposit for the phone, but if
16 the Transportation Provider already has a compatible phone, there is no requirement that
17 the Transportation Provider use one provided by Defendants. A Transportation Provider
18 is not geographically restricted. She can opt to work only during "surge pricing" to
19 maximize her earnings.

20 Defendants perform background and DMV checks on prospective Transportation
21 Providers. Defendants require that the Transportation Provider submit a California
22 Drivers License, a Social Security Number, personal address, bank information, and proof
23 of insurance.

24 Defendants maintain quality control procedures for both the Transportation
25 Provider and the passenger. Both parties are encouraged to rate each other with stars,
26

27

² The feminine gender applies to both genders.

1 with one star being a bad experience and five being the best experience. A
2 Transportation Provider must maintain a star rating of 4.6 or greater. If the rating falls
3 below that level, Defendants will turn the application off for that Transportation
4 Provider. The same is true for passengers.

5 Defendants do not reimburse Transportation Providers for expenses related to
6 operating their personal vehicles. Plaintiff estimated she drove 132 hours per day for 49
7 days and paid bridge tolls in the amount of \$256.00. Defendants did not dispute
8 Plaintiff's estimate.

9 On September 25, 2014, Plaintiff received a parking citation for stopping in a lane
10 of traffic when she dropped off a passenger. The ticket and the legal fees Plaintiff
11 incurred equaled \$160.00. Plaintiff provided no evidence that Defendants required that
12 Plaintiff stop in traffic to effect the drop off.

13 Plaintiff is claiming compensation for 470.70 hours, but Plaintiff also acknowledges
14 that Defendants paid her for the hours she worked. Plaintiff simply objects to Defendants
15 paying Berwick Enterprises and not her directly.

16 LEGAL ANALYSIS

17 Defendants assert that Plaintiff was an independent contractor, and, therefore, she
18 was not entitled to recover any claimed wages or to be reimbursed for her expenses.

19 Labor Code § 95 authorizes the Labor Commissioner to enforce all labor laws of
20 the state, the enforcement of which is not specifically vested in any other officer, board or
21 commission. Where the question arises as to whether an independent contractor or
22 employment relationship exists, there is an inference of "employment" if personal
23 services are performed as opposed to business services. In making such a determination,
24 the California Supreme Court in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*
25 (1989) 48 Cal. 3d 341, established the following factors- for consideration:

- 26 • Whether the person performing services is engaged in an occupation or
27 business distinct from that of the principal;

- 1 • Whether or not the work is a part of the regular business of the principal
- 2 or alleged employer;
- 3 • Whether the principal or the worker supplies the instrumentalities, tools,
- 4 and the place for the person doing the work;
- 5 • The alleged employee's investment in the equipment or materials
- 6 required by his or her task or his or her employment of helpers;
- 7 • Whether the service rendered requires a special skill;
- 8 • The kind of occupation, with reference to whether, in the locality, the
- 9 work is usually done under the direction of the principal or by a specialist
- 10 without supervision;
- 11 • The alleged employee's opportunity for profit or loss depending on his or
- 12 her managerial skill;
- 13 • The length of time for which the services are to be performed;
- 14 • The degree of permanence of the working relationship;
- 15 • The method of payment, whether by time or by the job; and
- 16 • Whether or not the parties believe they are creating an employer-
- 17 employee relationship may have some bearing on the question, but is not
- 18 determinative since this is a question of law based on objective tests.

19 In *Yellow Cab Cooperative v. Workers Compensation Appeals Board* (1991) 226
20 Cal.App.3d 1288, the Court found that workers were employees based on circumstances
21 very similar to those of the instant matter. The Court held:

22 "Although some of the factors in this case can be indicative of the workers being
23 independent contractors, the overriding factor is that the persons performing
24 the work are not engaged in occupations or businesses distinct from that of
25 [Defendants]. Rather, their work is the basis for [Defendants'] business.
26 [Defendants] obtain the clients who are in need of delivery services and
27 provides the workers who conduct the service on behalf of [Defendants]. In
addition, even though there is an absence of control over the details, an
employee employer relationship will be found if the [Defendants] retain
pervasive control over the operation as a whole, the worker's duties are an

1 integral part of the operation, and the nature of the work makes detailed control
unnecessary."

2 Defendants argued that they exercised very little control over Plaintiff's activities.
3 However, the *Borello* court found that it was not necessary that a principal exercise
4 complete control over a worker's activities in order for that worker to be an employee.
5 "The minimal degree of control that the employer exercised over the details of the work
6 was not considered dispositive because the work did not require a high degree of skill and
7 it was an integral part of the employer's business. The employer was thus determined to
8 be exercising all necessary control over the operation as a whole." (*Borello, supra*, 48 Cal.3d
9 at pp. 355-360.)

10 By obtaining the clients in need of the service and providing the workers to conduct
11 it, Defendants retained all necessary control over the operation as a whole. The party
12 seeking to avoid liability has the burden of proving that persons whose services he has
13 retained are independent contractors rather than employees. In other words, there is a
14 presumption of employment. (Labor Code § 3357; *Borello, supra*, at pp. 349, 354.)

15 Ownership of the vehicle used to perform the work may be a much less important
16 factor in industries other than transportation. Even under the traditional, pre-*Borello*
17 common law standard, a person making pizza deliveries was held to be an employee of
18 the pizzeria, notwithstanding the fact that the delivery person was required to provide his
19 own car and pay for gasoline and insurance. (*Toyota Motor Sales v. Superior Court* (1990) 220
20 Cal.App.3d 864, 876.)

21 "The modern tendency is to find employment when the work being done is an
22 integral part of the regular business of the employer, and when the worker, relative to the
23 employer, does not furnish an independent business or professional service." (*Borello,*
24 *supra*, at p. 357.) Plaintiff's work was integral to Defendants' business. Defendants are in
25 business to provide transportation services to passengers. Plaintiff did the actual
26 transporting of those passengers. Without drivers such as Plaintiff, Defendants' business
27 would not exist.

1 Defendants hold themselves out as nothing more than a neutral technological
2 platform, designed simply to enable drivers and passengers to transact the business of
3 transportation. The reality, however, is that Defendants are involved in every aspect of
4 the operation. Defendants vet prospective drivers, who must provide to Defendants their
5 personal banking and residence information, as well as their Social Security Number.
6 Drivers cannot use Defendants' application unless they pass Defendants' background and
7 DMV checks.

8 Defendants control the tools the drivers use; for example, drivers must register
9 their cars with Defendants, and none of their cars can be more than ten years old.
10 Defendants refer to "industry standards" with respect to drivers' cars, however, it is
11 unclear to what industry, other than the "taxi" industry, Defendants are referring.
12 Defendants monitor the Transportation Drivers' approval ratings and terminate their
13 access to the application if the rating falls below a specific level (4.6 stars).

14 While Defendants *permit* their drivers to hire people, no one other than Defendants'
15 approved and registered drivers are allowed to use Defendants' intellectual property.
16 Drivers do not pay Defendants to use their intellectual property.

17 The passengers pay Defendants a set price for the trip, and Defendants, in turn, pay
18 their drivers a non-negotiable service fee. If a passenger cancels a trip request after the
19 driver has accepted it, and the driver has appeared at the pick-up location, the driver is not
20 guaranteed a cancellation fee. Defendants alone have the discretion to negotiate this fee
21 with the passenger. Defendants discourage drivers from accepting tips because it would
22 be counterproductive to Defendants' advertising and marketing strategy.

23 Plaintiff's car and her labor were her only assets. Plaintiff's work did not entail any
24 "managerial" skills that could affect profit or loss. Aside from her car, Plaintiff had no
25 investment in the business. Defendants provided the iPhone application, which was
26 essential to the work. But for Defendants' intellectual property, Plaintiff would not have
27 been able to perform the work.

1 In light of the above, Plaintiff was Defendants' employee. Therefore, the Labor
2 Commissioner has jurisdiction to adjudicate the instant matter.

3 Labor Code § 2802 requires an employer to indemnify an employee for all that the
4 employee necessarily expends in the discharge of the employee's duties. Use of the
5 Internal Revenue Service mileage allowance will satisfy the expenses incurred in use of
6 an employee's car in the absence of evidence to the contrary. Plaintiff asserted without
7 dispute that she drove 6,468 miles payable at the 2014 IRS mileage rate of \$0.56 per mile
8 (\$3,622.08). Plaintiff also incurred toll charges in the amount of \$256.00. Plaintiff did not
9 establish that she incurred cell phone or parking violation tickets at the behest of
10 Defendants. Defendants shall, therefore, reimburse Plaintiff's expenses in the amount of
11 \$3,878.08.

12 Labor Code § 2802(b), provides that all awards granted pursuant to this hearing
13 shall accrue interest on all due and unpaid expenses, from the date that said expenses
14 became due until they are paid. Therefore, Plaintiff is entitled to \$274.12 in interest
15 accrued to date on the unpaid balance of expenses.

16 Plaintiff claims unpaid wages and liquidated damages for 470.70 hours worked.
17 Defendants' business was subject to the requirements of the State Industrial Welfare
18 Commission Order 9-2001 and Labor Code § 510, which require the following:

- 19 • Payment of the regular hourly pay rate for all hours worked during a
20 workday or workweek;
- 21 • Payment of overtime (one and one-half times the regular hourly rate) for
22 hours worked in excess of eight hours per day or 40 hours per week or
23 the first eight hours of the seventh consecutive workday of the
24 workweek; and
- 25 • Payment of double the regular hourly rate for hours worked in excess of
26 twelve hours per workday or eight hours on the seventh consecutive
27 workday of the workweek.

26 "[W]here the employer's records are inaccurate or inadequate and the employee
27 cannot offer convincing substitutes a... difficult problem arises. The solution, however, is

1 not to penalize the employee by denying him any recovery on the ground that he is unable
2 to prove the precise extent of uncompensated work. Such a result would place a premium
3 on an employer's failure to keep proper records in conformity with his statutory duty; it
4 would allow the employer to keep the benefits of an employee's labors without paying
5 due compensation.... In such a situation we hold that an employee has carried out his
6 burden if he proves that he has in fact performed work for which he was improperly
7 compensated and if he produces sufficient evidence to show the amount and extent of that
8 work as a matter of just and reasonable inference. The burden then shifts to the employer
9 to come forward with evidence of the precise amount of work performed or with evidence
10 to negative the reasonableness of the inference to be drawn from the employee's evidence.
11 If the employer fails to produce such evidence, the court may then award damages to the
12 employee, even though the result be only approximate." (*Hernandez v. Mendoza*, 199 Cal.
13 App. 3d 721, 727.)

14 Plaintiff does not dispute that Defendants paid her. While Defendants did not
15 provide any payment information, Plaintiff refused to provide any record of payment,
16 arguing that she did not have access to the information because her corporation retained it.
17 Plaintiff, as the party asserting the affirmative, has the burden of proof including the initial
18 burden of going forward and the burden of persuasion by a preponderance of the
19 evidence. Plaintiff has presented no evidence of sufficient substantiality to support her
20 claim for additional wages or minimum wage. Therefore, Plaintiff's claim for wages,
21 liquidated damages pursuant to Labor Code § 1194.2, and penalties pursuant to Labor
22 Code § 203 is dismissed.

23 CONCLUSION

24 For all of the reasons set forth above, IT IS HEREBY ORDERED that Defendants
25 pay Plaintiff the sum of \$4,152.20, calculated as follows:

- 26 1. \$3,878.08 in reimbursable expenses pursuant to Labor Code § 2802; and
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2. \$274.12 in interest pursuant to Labor Code § 2802(b).

Dated: June 3, 2015



Stephanie Barrett, Hearing Officer