



# HEARINGS BEFORE UNEMPLOYMENT INSURANCE ADMINISTRATIVE LAW JUDGES

QUESTIONS AND ANSWERS

APRIL 2014

Employers and claimants have a right to a hearing under the Unemployment Insurance (UI) Law to contest determinations made by the Department of Labor. The rules of the hearing process apply equally to all parties. The following are questions and answers designed to acquaint employers with the process and answer the most commonly asked questions about these hearings.

## Why Have a Hearing?

Unemployment insurance benefits are intended to be paid to workers who lose employment through no fault of their own. You may not agree with the Department of Labor's determination. Under the law you have a right to request a hearing before an impartial Administrative Law Judge (ALJ) at no cost to you if you are dissatisfied with any determination made by the Department of Labor as to the eligibility for benefits of a claimant who is or was your employee, or your business' liability for contributions under the Unemployment Insurance Law. This may include whether an individual is an employee or an independent contractor.

## What Are the Appropriate Bases for Challenging a UI Determination

There are several bases upon which an employer can challenge a Department of Labor determination that a claimant is entitled to benefits.

1. The claimant lost the employment through misconduct in connection with the employment
2. The claimant voluntarily separated from the employment without good cause.
3. The claimant without good cause refused an offer of new employment for which s/he is reasonably fitted by training and experience.
4. The claimant is not totally unemployed.
5. The claimant is not ready, willing and able to work.
6. The claimant is not capable of employment.

## What Impact Does This Have on My UI Account?

Employers are responsible for paying for the costs of UI benefits made to their former employees through employer contributions. Your participation in the process is critical in determining whether a claimant qualifies for benefits. An employer's failure to provide timely and sufficiently detailed information about a former employee's eligibility can result in an improper overpayment. This can impact your contribution rate the following year as well as additional costs for other employers. You can do the most to reduce your costs by actively providing information **at the time a claim is filed**. If you feel that a determination is incorrect, you can request a hearing. If the ALJ rules in your favor after a hearing, benefits paid to the claimant (your former employee) will be discontinued and you may be relieved of charges. You will not, however, be relieved of charges if you failed to respond timely or adequately to the Department's initial notice of potential charges or later requests for information.

For hearing-related questions, please contact the Unemployment Insurance Appeal Board at **1-877-880-3322** or visit: **[www.labor.ny.gov/ui-appeal/](http://www.labor.ny.gov/ui-appeal/)**

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## **How Do I Request a Hearing?**

If you disagree with the determination, you may request a hearing by sending a letter to NYS Department of Labor, P.O. Box 5131, Albany, NY 12212-5131. Your request must be postmarked within 30 days of the date on the Notice of Determination.

If the determination found a claimant eligible, in your request you must describe the specific facts or events which are the grounds for denying benefits to the claimant, including dates. If you fail to provide specific grounds or later wish to raise a different basis for your hearing, you must demonstrate a good cause reason before you will be permitted to present evidence on those new issues.

The claimant can also request a hearing to object to any determination of the Department of Labor to deny him/her benefits or based on the fact that s/he was determined to be an independent contractor.

## **Who is the Administrative Law Judge (ALJ)?**

The ALJ is an impartial (fair) decision-maker whose judgment is independent of the Department of Labor. The ALJ will conduct the hearing, obtain sworn testimony under oath and admit documents into evidence, carefully review all the facts, apply the law and make a decision in writing about whether the claimant is entitled to UI benefits or, if the case involves liability for contributions, whether your business is liable for contributions.

## **Where is the Hearing Held?**

### ***Hearings Related to a Claimant's Eligibility for Benefits***

In the metropolitan New York City area, hearings relating to a claimant's eligibility for benefits are generally held at the UIAB hearing site that is closest to the location where the claimant regularly went to work. In upstate New York, hearings are generally held at the UIAB hearing site that is closest to the claimant's address. If you are located more than 60 minutes from an assigned hearing location in upstate New York or more than 90 minutes from an assigned hearing location in Metropolitan New York City, then a telephone hearing will be scheduled for you. Since the UIAB is required to schedule and decide cases within prescribed time periods, some cases that would normally be scheduled as in-person hearings may be scheduled as telephone hearings.

### ***Hearings Related to an Employer's Liability for Contributions***

Hearings relating to an employer's liability for contributions are generally held at the UIAB hearing location that is closest to the employer's business address. If you are located more than 60 minutes from an assigned hearing location in upstate New York or more than 90 minutes from an assigned hearing location in Metropolitan New York City, then a telephone hearing will be scheduled for you. Since the UIAB is required to schedule and decide cases within prescribed time periods, some cases that would normally be scheduled as in-person hearings may be scheduled as telephone hearings.

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## Who Can Attend the Hearing?

You have the right to produce witnesses, and all witnesses should attend the hearing.

The employer can represent itself or have an attorney or representative also present. An attorney or other representative is not required. However, if you want an attorney or other representative to assist you in presenting the case, you must make those arrangements. The UIAB does not recommend or assign attorneys to cases. The claimant can attend and may also either represent him/herself or have an attorney or representative at the hearing. The Department of Labor is a party to all hearings whether or not it actually has a representative present at the hearing.

## What Type of Witnesses May Testify?

Firsthand witnesses, in other words **witnesses who actually saw or heard the events that are alleged to be grounds for denying benefits to the claimant**, are more important in presenting your case than witnesses who only were told by someone else about what happened (hearsay). Firsthand witnesses should be made available to participate in the hearing. Although both firsthand and hearsay witness testimony are permitted at the hearing and will be considered by ALJs, firsthand testimony is generally given more weight than hearsay testimony. If you do not produce a firsthand witness, the firsthand evidence presented by the opposing party may be given greater consideration than your evidence. If the hearing is scheduled to be held in person and there is a compelling business reason why your first hand witness is not available to attend the hearing you can either ask for an adjournment or offer to have the witness participate by telephone. The person you send to the hearing should inform the ALJ of your witness' unavailability at the beginning of the hearing. If you have a compelling business reason why the firsthand witness cannot attend in person, the judge will permit him/her to testify by telephone.

Example 1: The Human Resources Director terminates an employee as a result of an oral report by the plant foreperson. **The plant foreperson is the firsthand witness.** The Human Resources Director can only give hearsay testimony because his/her knowledge comes only from what the plant foreperson told him/her.

Example 2: Same facts as Example 1, and the business has a deadline to produce a certain amount of goods for a customer by close of business on the day of the hearing and the plant foreperson is the only one who can oversee that project. Since the witness is available by telephone and an adjournment is not necessary to obtain his/her testimony, the ALJ will permit the plant foreperson to testify over the telephone.

## How Can I Prepare for the Hearing?

You should gather and bring to the hearing all documentation relevant to the claims at issue in the hearing. You will be given an opportunity to present these documents at the hearing and offer them to the ALJ for admission into evidence. See the section below titled ***Who or What Should I Bring to the Hearing for further information.***

You have the right to review the case file prior to the hearing. For further information on how to do this and for any other hearing-related questions, contact the UIAB's ALJ section at **1-877-880-3322**.

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You can also visit our website <http://uiab.ny.gov> to review Article 18 of the Labor Law, which contains the Unemployment Insurance Law, to read the Rules of the UIAB and to use the Searchable Decision feature to find and review Appeal Board decisions that may be similar to your case.

You can also find information for businesses on the New York State Department of Labor website <http://labor.ny.gov>.

## **Can I Delay or Miss the Hearing?**

Federal regulations require that unemployment insurance cases are completed within strict time periods. For this reason, whether you or the claimant requested the hearing, it is very important that you attend the first scheduled hearing date. The first scheduled hearing date can be adjourned (postponed) only if you or your representative have a previously scheduled legal proceeding that must be attended, and you notify the hearing office of this obligation in advance.

Once the initial hearing is completed, any subsequent scheduled hearing date may be adjourned by the judge upon a party's showing of good cause.

If you cannot attend a hearing, notify the ALJ Section as soon as possible, and provide an explanation of why you cannot attend. The address, telephone and fax numbers appear on the Notice of Hearing. Any correspondence related to your case should include the ALJ case number that is listed on the Notice of Hearing.

### ***Party Requesting a Hearing Fails to Appear***

If a party requests a hearing and fails to appear for that hearing (e.g., a claimant requests a hearing to dispute the denial of benefits), the underlying determination will be adopted by the ALJ by default decision. To the extent that the defaulting party wishes to challenge the decision by reopening the case, the defaulting party must make a request to "reopen". A request to reopen will not be granted absent a showing of good cause for the defaulting party's non-appearance. A hearing will be scheduled to decide whether the request will be granted. The party responding to a request to reopen has the right to appear and offer evidence on whether there is good cause to reopen the case. .

### ***Party Fails to Appear in Response to an Adversary's Request for a Hearing***

If a party fails to appear for a hearing requested by an adversary, the moving party will be afforded an opportunity to prove its case in the non-appearing party's absence. A favorable decision for the moving party will only be issued if that party proves its case. To the extent that the moving party obtains a favorable ruling, and the non-appearing party wishes to challenge the decision by requesting to reopen the case, the non-appearing party must make a request to "reopen". A hearing will be scheduled to decide whether the request will be granted. A request to reopen will not be granted absent a showing of good cause for the non-appearing party's absence. The party responding to a request to reopen has the right to appear and offer evidence on the issue of good cause to reopen the proceeding.

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### ***Instructions on How to Make an Application to Re-Open***

Instructions on how to make a request to reopen are on the back of the decision. In your request, you must provide the hearing office with the dates that you are not available to attend a hearing during the next 45 days. The hearing officer will make every effort to avoid scheduling the hearing on the dates identified. Upon receipt of your request, a hearing will be scheduled. In order to protect your rights, you should produce a firsthand witness who can testify under oath about the reason why you did not appear at the prior hearing. A request to reopen will be granted only if the ALJ finds there was good cause to miss the prior hearing. Some examples of good cause are:

1. An emergency or some other compelling reason beyond your control prevented you from attending the hearing.
2. You want but have been unable to obtain an attorney despite reasonable attempts to get one.
3. You, your witness or necessary documents were unavailable for reasons beyond your control.
4. The scheduled hearing fell on a day of religious observance
5. Severe weather conditions.

If the ALJ finds there was good cause for your failure to appear, s/he will reopen the case and decide all issues pertinent to the prior hearing.

### ***Limitation on Requests to Reopen***

Whether or not you asked for a hearing, it is very important that you attend the hearing when scheduled in order to protect your rights. If you fail to attend a scheduled hearing, and you subsequently request a hearing to re-open the case, a hearing will be scheduled. If you fail to appear at the hearing to re-open, and make another request for a hearing, the case will not be automatically scheduled. Rather, your request to re-open will be referred to the Appeal Board, who will review the application on the papers and grant another hearing (a) upon a showing of good cause for the failing to appear or proceed at the prior hearings, or (b) if in the Board's discretion, a hearing on the issue of good cause for failure to appear is warranted.

### **Must I Appear in Person?**

If a hearing is scheduled to be held in person, you should attend in person and it is in your best interest to do so. If you have a substantial hardship that prevents you from appearing in person at a scheduled hearing, such as a documented health reason for inability to travel to the hearing site or a last-minute unforeseen and compelling reason preventing you from attending in person, notify the ALJ Section as soon as you are aware of the problem. You will be notified as to whether you will be allowed to participate by telephone or if the hearing will be rescheduled to a later date. Also, see the section listed titled **Where is the Hearing Held** for more information.

For hearing-related questions, please contact the Unemployment Insurance Appeal Board at **1-877-880-3322** or visit: **[www.labor.ny.gov/ui-appeal/](http://www.labor.ny.gov/ui-appeal/)**

## **Who or What Should I Bring to the Hearing?**

You should bring any firsthand witnesses, as well as any papers you have received from the Department of Labor and any papers or other evidence that will support your position such as written work rules or policies, contracts, letters, emails, pay stubs, arbitration decisions, warnings, and investigative reports relating to the case. If you receive instructions in the hearing notice about specific evidence needed for the hearing, you should produce that evidence at the hearing.

You will need to bring additional copies for the other parties at the hearing or, in the case of a telephone hearing, provide copies to the parties by alternative means in advance of the hearing (e.g., mail, fax or email). You can request that the ALJ enter such documents into the record. You can also request that the ALJ enter into the record a document that is already in the case file. Documents in the case file are not part of the record unless the ALJ makes them part of the record. The documents that you submit for the record must be relevant to the issue to be decided, and the ALJ will decide questions of relevancy. See example below.

Example: The issue in the case is the claimant's alleged insubordination - failure to start machinery at 11 a.m. on January 15, 2014, as instructed, so that an order could be filled on time. A written record of the daily order sheet posted in the employer's office is relevant to the issue. A memorandum from the general manager to the claimant citing the claimant's failure to check the quality of an order four months earlier would not be relevant to the issue. The foreperson who could testify that the claimant failed to start a machine six months ago and an order was spoiled would not be a relevant witness because the earlier incident involved poor work performance, not the insubordination at issue in the hearing.

## **What if I Can't Get the Evidence or Witnesses I Need?**

While, as stated above, the first scheduled hearing date can be adjourned only if you or your representative have a previously scheduled legal proceeding that must be attended and notice of this obligation is provided to the hearing officer in advance, other justifications for adjournments are available for all subsequent hearings. For example, if you need but do not have enough time to obtain a witness, document, or other evidence that will help you prove your case, contact the hearing office in advance of the hearing to explain why the witness or other evidence is necessary and cannot be produced on the scheduled day for the hearing. The ALJ has the authority to adjourn the case in advance and will inform you if the hearing is to be postponed. To the extent that you appear at a hearing (initial hearing or a subsequent hearing) and seek an adjournment at that time, the ALJ may issue a decision granting you leave to apply to reopen the case when the witness or evidence is available.

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### ***Subpoenas***

If you know that a witness, document, or other evidence is needed for the hearing but is not under your control, appear at the hearing and ask the ALJ for a subpoena which is a legal document that orders the production of the evidence. The hearing may still proceed and the ALJ may receive the testimony and evidence that can be taken that day. If the ALJ grants the request for a subpoena, the ALJ will then continue the hearing to another date so that the evidence can be produced. You should be prepared to provide the name and address of the witness or the location of the document(s).

If you have a witness who is willing to testify but cannot for good reason, come to the hearing in person and request that the ALJ permit the witness to testify by telephone.

Employers and claimants have the same rights.

### **Can I Request a Language Interpreter?**

Yes. If you have difficulty reading, speaking or understanding English, notify the ALJ Section to request a language interpreter. The UIAB will provide one for you. You should request an interpreter in advance of the hearing.

### **Can I Request a Reasonable Accommodation?**

If you or your witnesses have a disability, a reasonable accommodation will be made to allow you to participate in the hearing. You should request a reasonable accommodation in advance of the hearing by contacting the Principal or Senior ALJ at the office at which the hearing is scheduled to be held. The name will appear at the top of the Notice of Hearing.

### **How Will the ALJ Conduct the Hearing and What Are My Rights at the Hearing?**

During the hearing, the ALJ will:

- a. Make an opening statement identifying all persons present, describing how the hearing will proceed and outlining the issues and the rights of the parties;
- b. Take testimony from all parties under oath or affirmation;
- c. Question parties and witnesses to obtain the necessary facts;
- d. Allow cross-examination and assist parties who have difficulty in asking questions of witnesses;
- e. Rule on which documents or testimony may be admitted into evidence;
- f. Rule on any requests to issue subpoenas for relevant records and for persons to appear to testify;
- g. Permit parties to use documents from the case file in presenting their case;
- h. Give parties the opportunity to review and comment on documents that may be made part of the record; and
- i. Give parties an opportunity to make a statement at the end of the testimony.

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All testimony is recorded.

During the hearing, the ALJ may decide to consider new facts that were not mentioned in the Notice of Determination or your written objection. However, before new facts are considered, the ALJ must find good cause for considering them and will explain that to you. If you are not prepared to discuss new facts at the hearing, you have a right to request an adjournment to prepare.

At the hearing, you have the right to:

- a. Testify and produce witnesses who testify to the terms of employment and the key events in the case;
- b. Bring an attorney or other person with you to represent you;
- c. Offer documents, records and other evidence into the record, or ask the ALJ to accept documents from the case file into the record;
- d. Ask the ALJ to subpoena documents or witnesses that you are not able to obtain on your own;
- e. Ask questions of (or “cross examine”) the claimant and his/her witnesses and any witnesses presented on behalf of the Department of Labor;
- f. Ask the ALJ to assist you if you are having trouble asking questions;
- g. Request an explanation of any question that you do not understand;
- h. Explain or rebut any evidence against you;
- i. Request a delay (or “adjournment”) to a later date for a good reason; and
- j. Make a statement at the end of the hearing to explain why you believe the evidence shows that the claimant is not entitled to UI benefits or to explain points which were not raised or clarified during the hearing. If the matter involves liability for UI contributions, you may make a statement to explain why you believe the evidence demonstrates that you are not liable for the UI contributions.

If you offer a document for the record, the ALJ will decide if the document is relevant to the case. Only relevant documents are accepted for the record.

You can also ask the ALJ to require the claimant or the Department of Labor to produce documents to support statements made at the hearing.

Employers and claimants have the same rights.

## **What Happens After the Hearing?**

The ALJ will mail to you a written decision informing you of the outcome as soon as possible after the hearing. In the decision, the ALJ will state the facts found based on the evidence. If you do not receive a decision within two weeks, please feel free to follow up by calling the ALJ office in which your hearing was conducted.

If you cannot understand the impact of the decision, you may call the Department of Labor’s Telephone Claims Center (TCC) and request an explanation at **1-888-209-8124** or visit the Department of Labor website at **[www.labor.ny.gov](http://www.labor.ny.gov)**.

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Employers who have a general UI question can sign in at <https://applications.labor.ny.gov> with their NY.GOV ID and click on “Messages” to send a secure electronic message to the Department of Labor.

*If the ALJ or the Appeal Board determines that the claimant was overpaid benefits, you may be relieved of charges. Please read carefully all notices that are sent to you.*

### **What if I Disagree with the ALJ’s Decision?**

If you appeared at the hearing, you can appeal the ALJ’s decision to the Unemployment Insurance Appeal Board. Instructions as to how to appeal are contained on the back of the ALJ decision. Your request must be postmarked within 20 days of the date stamped on the ALJ’s decision. The claimant and the Department of Labor may also appeal.

If you did not appear at the hearing, you may request that the ALJ re-open your case. The request to re-open should be made as soon as possible after the missed hearing and submitted in writing to the hearing office. See information on requests to re-open in the section above titled ***Can I Delay or Miss the Hearing?***

### **What Happens When a Decision is Appealed?**

After you submit your request for an appeal, you will receive instructions regarding the appeal process, including how to review the transcript and submit a written statement to the Appeal Board which explains why you believe the ALJ’s decision is wrong. An attorney or someone else can help you prepare your statement but this is not required. The claimant and the Department of Labor will also be allowed to submit a statement.

The Appeal Board will independently review whether the ALJ’s decision is correct. The Appeal Board usually issues a written decision based on all of the evidence contained in the record of the hearing, but it may order a further hearing. You should attend any further hearings to protect your rights.

*If the Appeal Board overturns an ALJ’s decision which had ruled in the claimant’s favor, you may be relieved of charges. Please read carefully all notices that are sent to you.*

### **If the ALJ Decision is in My Favor, Can Someone Else Appeal to the Board?**

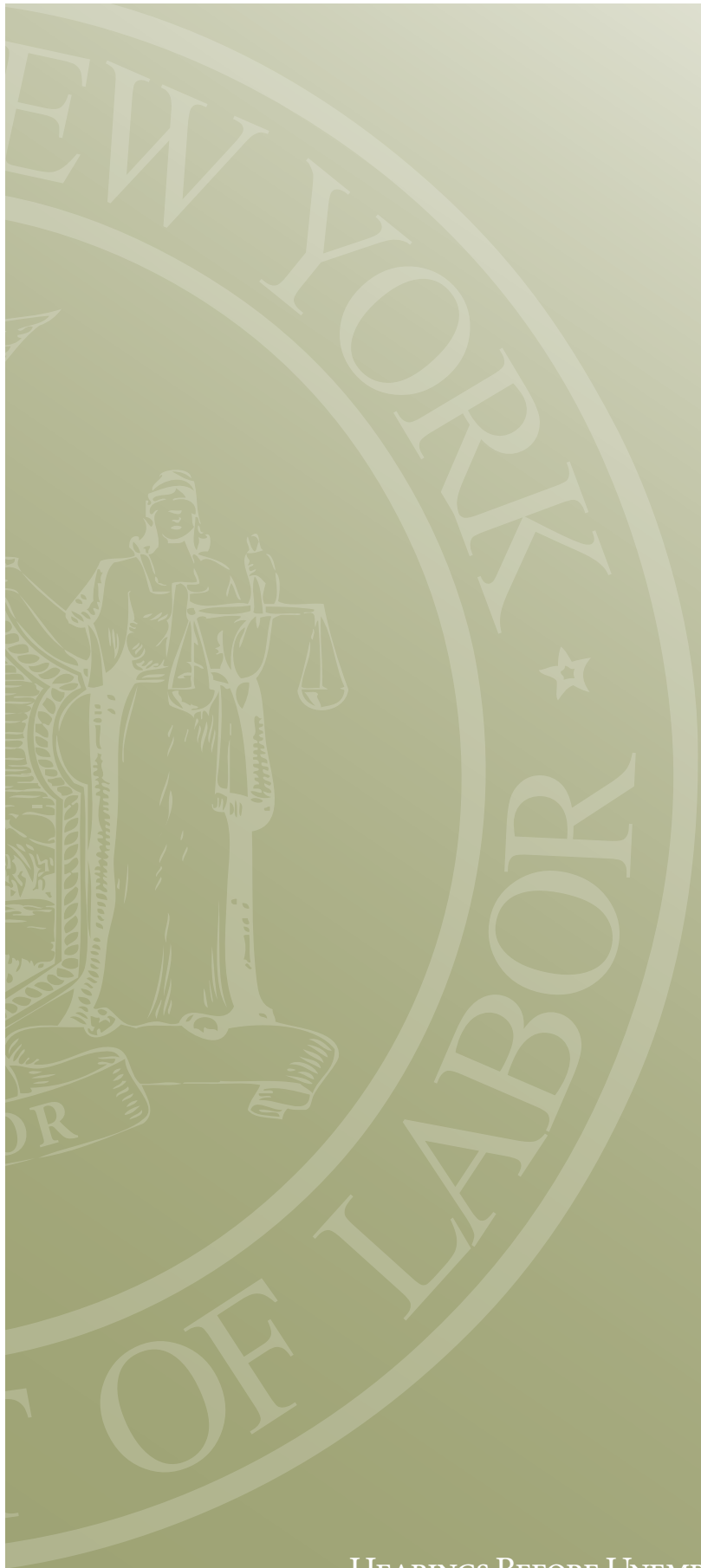
The claimant may appeal a decision decided in your favor. The Department of Labor may also appeal if it disagrees with the ALJ’s decision. You would be allowed to review the transcript and to submit a written statement.

### **Is Another Appeal Available after the Board makes its Decision?**

If the Board issues a decision that is unfavorable to you, you may file an appeal to the New York Supreme Court, Appellate Division, Third Department. Instructions for filing this appeal will appear on the Appeal Board’s decision.

Further information is available at our website <http://uiab.ny.gov>.

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