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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-942**

Benco Delivery Service Inc.,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

**Filed April 27, 2010
Reversed
Minge, Judge**

Department of Employment and Economic Development
File No. 21239868

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Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Relator business challenges the determination of the unemployment law judge (ULJ) that its delivery drivers are employees under unemployment-benefits statutes. We reverse.

FACTS

The facts in this case are uncontested. Relator Benco Delivery Service Inc. is a courier business located in St. Paul with approximately 40 delivery drivers. The drivers' hours and years of service vary. They own and insure their delivery vehicles and pay for fuel, maintenance, and repair. Prospective drivers sign an "independent contractor agreement" with Benco. Under the agreement, drivers must lease their vehicles to Benco, pass a physical, purchase a Benco uniform, and affix Benco decals on their vehicles. Although the vehicle is exclusively used by its owner, trucking regulations require and the lease accordingly provides that Benco has possession and control of the driver's vehicles.

When a Benco client needs a delivery, Benco dispatchers offer work orders to drivers, some with delivery deadlines. Drivers may accept or decline work orders, and Benco may stop giving jobs to drivers at any time. Drivers determine their schedule and route of travel, cover all their expenses, and assume liability for and agree to indemnify Benco for all liability associated with completing jobs. As compensation, drivers receive 63% of the fee obtained for each job. Drivers do not receive fringe benefits.

Either Benco or a driver may terminate the agreement without cause with two weeks' notice. Once the contract is terminated, a limited noncompete agreement prohibits the drivers from soliciting Benco customers or recruiting other Benco drivers or employees to establish a competing courier business in the Twin Cities area.

In 2008, the Department of Employment and Economic Development (DEED) audited Benco's 2006 records and determined that Benco's drivers are covered

employees. On appeal, a ULJ found Benco's drivers to be employees under the unemployment-benefits statutes. Benco requested reconsideration and the ULJ affirmed the order. This certiorari appeal followed.

D E C I S I O N

Whether an employee-employer relationship exists is a mixed question of law and fact. *Wise v. Denesen Insulation Co.*, 387 N.W.2d 477, 479 (Minn. App. 1986). If relevant facts are undisputed, the issue is a question of law that we review de novo. *Id.*; *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

Employers must contribute to the unemployment trust fund based on wages paid to employees. Minn. Stat. § 268.035, subd. 25 (2006). Payments to independent contractors are not wages subject to such assessment. *Nicollet Hotel Co. v. Christgau*, 230 Minn. 67, 68, 40 N.W.2d 622, 622-23 (1950). An employee is an "individual who is performing or has performed services for an employer in employment." Minn. Stat. § 268.035, subd. 13(1). Employment is service performed by "an individual who is considered an employee under the common law of employer-employee and not considered an independent contractor." *Id.*, subd. 15(1).¹

Five factors are balanced in distinguishing independent contractors from employees: "(1) The right to control the means and manner of performance; (2) the mode

¹ We note that the legislature recently enacted a new law clarifying when delivery or courier drivers are employees under unemployment benefits and workers' compensation laws. 2009 Minn. L. ch. 89, § 3, at 1308-09 (codified at Minn. Stat. § 268.035, subd. 25b (Supp. 2009)). This legislation, however, became effective after the ULJ made his ruling. See Minn. Stat. § 645.02 (2008) (providing that, unless otherwise specified, act takes effect on next August 1 following its enactment). Our analysis, therefore, does not consider the new statute.

of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge.” *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964), *codified in* Minn. R. 3315.0555, subp. 1 (2009).² Of these, the most important factors are the rights to control performance and to discharge the worker without incurring liability. Minn. R. 3315.0555, subp. 1(A), (B). We next consider these factors.

Right to Control Means and Manner of Performance

The primary circumstance relied on by the ULJ in finding control was the lease of the vehicles to Benco. We do not credit this factor as strongly as the ULJ did because the drivers exercise control of the vehicles by acquiring, owning, maintaining and exclusively using them. The de jure control ceded in the lease is required by Minnesota Department of Transportation regulations. Minn. R. 7800.2500-.2600. In relevant part, the regulation provides that it is not to “be construed to require that such a driver be an employee of the motor carrier lessee.” Minn. R. 7800.2500 (2009). DEED’s regulation further provides that a business’s compliance with regulations “does not evince control.” Minn. R. 3315.0555, subp. 3M.

Several other facts indicate that Benco does not control the means and manner of performance: (1) Benco may not require drivers to make deliveries; (2) Benco has no discretion over the means of travel, including the type of vehicle used or the route taken;

² We also note that the state regulation adds eight more factors that are to be considered in distinguishing between employees and independent contractors, as well as 13 “criteria” or “circumstances” and six procedures to be used to determine the single factor of control. Minn. R. 3315.0555, subps. 2, 3 4. Neither the parties, the ULJ, nor this opinion attempt to analyze the dispute before us in terms of the 32 points listed in the regulations.

(3) except for delivery deadlines, the contract does not establish hours; (4) drivers can assign their contract duties; and (5) drivers pay all expenses and purchase all materials. We recognize that some facts point to control—wearing badges and purchasing uniforms. But because drivers maintain basic discretion in deciding if and how they make deliveries, we conclude that the ULJ erred in concluding that Benco had the right to control the means and manner of employment.

Right to Discharge

In finding Benco had a right to discharge, the ULJ stated that “the right to stop giving work . . . is the same as the right to discharge.” Benco disagrees and argues that its ability to cease giving work does not amount to a right to discharge because it has no contractual obligation to provide work in the first place. This argument conflicts with the reality that the power to unilaterally end the economic benefit of an arrangement is the functional equivalent of a right to discharge.

We conclude that the right-to-discharge factor favors employment status. Because the two prominent factors in our analysis split, we consider the remainder of the five-factor test.

Control of Premises where Work is Done

The lease provides that Benco has control of the vehicle. The actual driving, however, does not occur on Benco premises and Benco has a notable lack of supervision over drivers’ vehicles. And, as stated above, the drivers exercise independence and decision-making authority in furnishing and operating their vehicles. This factor therefore favors independent-contractor status. *See Carey v. Coty Constr.*, 392 N.W.2d

746, 749 (Minn. App. 1986) (noting that company's lack of control over work premises supported existence of independent-contractor relationship).

Mode of Payment

Benco's drivers are compensated with a set commission of 63% of the fee obtained by Benco for each job. They are not paid by the hour, salaried, reimbursed for costs, or given fringe benefits. This factor favors independent-contractor status.

Furnishing of Material/Tools

If workers furnish their own tools and materials, it tends to show independent-contractor status. In this case, the agreement specifically requires the drivers to provide the vehicle and all materials, tools, and supplies necessary to accomplish the work. Although Benco requires that drivers obtain and use certain phones and purchase a uniform, the fact of such purchase means that the drivers furnish these discrete items. We conclude that this factor also favors independent-contractor status.

Other Factors

The Minnesota Rules provide for eight other minor factors that further tip the scale towards independent-contractor status. Nothing precludes the drivers from also working for other courier companies. The drivers risk suffering a loss based on incurred expenses and gained commissions. In purchasing their vehicles, drivers make a substantial investment. The drivers are responsible for liabilities arising from their work.

This case is similar to a prior decision of this court. *Neve v. Austin Daily Herald*, 552 N.W.2d 45, 47-48 (Minn. App. 1996). There we held that newspaper couriers were independent contractors because they (1) had no set hours; (2) used their own vehicles;

(3) could vary the time and order of delivery; (4) could hire substitutes; (5) were not subject to at-will discharge; (6) received a flat fee for deliveries; and (7) assumed sole responsibility for tax obligations. *Id.* at 48. Many of the factors evident in *Neve* exist here.

Based on the uncontested facts, we conclude that the factors supporting independent-contractor status outweigh those to the contrary and reverse the ULJ's determination that Benco drivers are employees under unemployment-benefits laws.

Reversed.

Dated: