STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1194

Lisa M. Williams,
Relator,

vs.

Advanced Auto Transport, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 23, 2012
Affirmed
Kalitowski, Judge

Department of Employment and Economic Development
File No. 27301982-2

Lisa M. Williams, St. Paul, Minnesota (pro se relator)

Bryan T. Symes, Ruder Ware, L.L.S.C., Eau Claire, Wisconsin (for respondent Advanced Auto Transport)

Lee B. Nelson, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent Department of Employment and Economic Development)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Relator Lisa Williams challenges the decision by the unemployment-law judge (ULJ) that she is ineligible for unemployment benefits because her work as a driver for respondent Advanced Auto Transport Inc. (AAT) was as an independent contractor and not an employee. We affirm.

D E C I S I O N

AAT is a "drive away" company that transports commercial vehicles from the vehicles' manufacturers to customers who have purchased the vehicles. Williams began driving for AAT in November 2008, and was discharged on May 15, 2009, after Williams allegedly disobeyed a dispatcher's instruction not to drive after 9:00 p.m. and then failed to take a 34-hour rest period as AAT believed was required by federal hours-of-service regulations under the Federal Motor Carrier Safety Administration (FMCSA) regulations.

Williams applied for unemployment benefits on May 22, 2009, and was determined eligible in July 2009 after respondent Minnesota Department of Employment and Economic Development (DEED) found that Williams was not terminated for employment misconduct. AAT appealed, contesting Williams's status as an employee. The ULJ upheld DEED's determination, but this court reversed and remanded because the ULJ applied Minn. Stat. § 268.035, subd. 25 (Supp. 2009), which had not yet become effective, rather than the common law. *Williams v. Advanced Auto Transp., Inc.*, No. A10-144, 2009 WL 7075963, at *3 (Minn. App. Nov. 9, 2009).

On remand, the ULJ applied the appropriate common-law factors and determined that Williams was an independent contractor and was not discharged for employment misconduct. Williams requested reconsideration of the ULJ's conclusion that she was an independent contractor, and the ULJ affirmed.

In this certiorari appeal, Williams challenges several of the ULJ's factual findings as well as the conclusion that she was an independent contractor and not an employee of AAT because "AAT exercises more control over relator than would be acceptable for an independent contractor."

This court may affirm a decision of the ULJ, or it may remand, reverse, or modify a decision if the substantial rights of the petitioner are prejudiced because the findings, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008). This court reviews a ULJ's factual findings in the light most favorable to the decision and will not disturb them if they are sustained by substantial evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We defer to the ULJ's credibility determinations but review de novo questions of law. *Id.* Whether a person is considered an employee or an independent contractor presents a mixed question of law and fact. *Nelson v. Levy*, 796 N.W.2d 336, 339 (Minn. App. 2011).

Employers in Minnesota must contribute to the unemployment trust fund when wages are paid to employees. Minn. Stat. § 268.035, subd. 25 (2008). But compensation paid to independent contractors does not constitute wages. *Nicollet Hotel Co. v. Christgau*, 230 Minn. 67, 68, 40 N.W.2d 622, 622-23 (1950). An "employee" performs

"services for an employer in employment." Minn. Stat. § 268.035, subd. 13(1) (2008). Employment includes services 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(a)(1) (2008). The parties' contract terms do not determine whether an employer-employee relationship exists; rather, this court examines the actual arrangements and conduct of the parties to decide this issue. *St. Croix Sensory Inc. v. Dep't of Emp't & Econ. Dev.*, 785 N.W.2d 796, 800 (Minn. App. 2010). "[E]ach case will depend in large part upon its own particular facts." *Id*.

Five essential factors are considered in determining whether a person is an employee or an independent contractor: "(1) [t]he right to control the means and manner of performance; (2) the mode 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). The two most important of these factors are "the right or the lack of the right to control the means and manner of performance" and the right "to discharge the worker without incurring liability." Minn. R. 3315.0555, subp. 1(A), (B). The right to control performance is determined under the totality of the circumstances. *Id.*, subp. 3 (2009).

Right to control the means and manner of performance

It is the right to control the means and manner of performance, and not the actual exercise of that right, that is determinative. *Moore Assocs., LLC v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 393 (Minn. App. 1996); *see also St. Croix Sensory Inc.*, 785

N.W.2d at 801 ("The retained right to instruct or direct the method of work, even if not exercised, is a factor indicating control."). "The determinative right of control is not merely over what is to be done, but primarily over how it is to be done." *Neve v. Austin Daily Herald*, 552 N.W.2d 45, 48 (Minn. App. 1996) (emphasis omitted).

Minn. R. 3315.0555, subp. 3 lists 13 factors to be considered when determining whether an employer "has control over the method of performing or executing services." Not all of these factors are relevant here, and some are duplicative of the five essential factors. Although our independent application of the ULJ's findings to the control factors reveals that AAT controlled narrow aspects of Williams's work, the totality of the circumstances indicates that Williams was largely free to determine the means and manner of her performance.

Factors favoring control

"Control is indicated when an individual is required to comply with detailed instructions about when, where, and how to work . . . ." Minn. R. 3315.0555, subp. 3(B). The ULJ found that although AAT imposed "numerous responsibilities regarding operation of the vehicles" on its drivers, these instructions "reflected federal or state laws or client requirements" rather than AAT's internal policies. *See id.* (stating that control is indicated when an individual "is required to comply with detailed instructions about when, where, and how to work"), subp. 3(M) ("If an employer is required to enforce standards or restrictions imposed by regulatory or licensing agencies, such action does not evince control."), subp. 3(B) ("[G]eneral instructions passed on by the employer from a client or customer . . . generally do[] not evince control.").

Williams argues that this finding is unsupported by the record because AAT instructs its drivers, on the vehicles' bills of lading, to keep 100 yards' distance between AAT-driven vehicles and to wash the vehicles before delivery. The record does not reveal whether these instructions are prompted by customer demands or are AAT policy. Assuming they are prompted solely by AAT policy, the instructions evince some control, contrary to the ULJ's finding. But the level of control is slight given the narrow scope of the drivers' duties affected by these instructions and the lack of evidence of their enforcement.

Williams also argues that control is indicated by AAT's requirement that its drivers take predetermined routes and wear AAT shirts during deliveries. But AAT's CEO, Debra Samuelson, testified that route sheets are only provided for deliveries involving overweight vehicles or international deliveries and are meant to ensure compliance with weight and point-of-entry regulations. And Samuelson also testified that AAT requires its drivers to wear uniforms at their customers' request because of security concerns, and that the shirts are only required during pickup and drop-off when drivers interact with customers. Therefore, the ULJ correctly determined that these requirements do not evince control.

Williams also claims that, because she was reprimanded for allegedly falsifying hours-of-service logs in a light-weight vehicle not subject to the FMCSA hours-of-service regulations, AAT's driver-log policy exceeds federal requirements and indicates control. But AAT's safety manager testified that she believed federal regulations required her to intervene when she discovered the alleged falsification. This testimony

supports the ULJ's finding that the safety manager's actions represent a good-faith attempt to comply with federal law rather than employer control. Williams further contends that AAT prohibited night driving, but the ULJ found that no such policy existed and the evidence supports the ULJ's finding. Thus, we conclude that the ULJ's finding is supported by substantial evidence with respect to the driver-log policy.

Control is also indicated "if regular oral or written reports relating to the method in which the services are performed must be submitted to the employer." *Id.*, subp. 3(C). Here, AAT clients required drivers to complete breakdown or tire-cooldown reports. The ULJ found that the reports Williams was required to complete were "relatively minor in scope," and therefore this factor slightly favors control.

Williams also argues that AAT requires its drivers to make additional oral and written reports that indicate more significant control, including twice-daily phone calls to AAT dispatchers and written fuel reports, and driver logs. But the testimony indicated that the phone calls are AAT's method of ensuring compliance with the FMCSA hours-of-service regulations and the written reports are required by federal law. *See id.* ("Completion of receipts, invoices, and other forms customarily used in the particular type of business activity or required by law does not constitute written reports."). Therefore, these reports do not evince control.

The existence of a continuing relationship between a worker and an employer indicates control. *Id.*, subp. 3(F). Although Williams testified that she was not receiving assignments from AAT weekly, the record establishes that Williams completed assignments from November 2008 until May 2009. Therefore, her assignments were

"performed at frequently recurring, though somewhat irregular intervals," *id.*, which indicates control.

Factors indicating lack of control

The remaining five relevant factors demonstrate that AAT lacked control over Williams. An individual's right to hire a substitute worker without the employer's knowledge or consent is indicative of a lack of control. *Id.*, subp. 3(E). Here, the ULJ found that Williams had the right to hire a substitute provided that she ensure the substitute's compliance with FMCSA regulations. Williams argues that the ULJ's finding is unsupported by the record because the FMCSA imposes significant barriers to gaining driver authorization and AAT reserves the right to reject substitute drivers. But Samuelson testified that AAT welcomes substitute drivers as long as the primary driver "make[s] sure that the driver [is] qualified per [FMCSA] and provide[s] a copy of that work comp for [the substitute driver]." As an effort to comply with federal regulations, AAT's actions do not evince control. And Williams introduced no evidence that she either attempted to hire a substitute or was denied permission by AAT. Therefore, the record supports the ULJ's finding, and the finding supports the conclusion that AAT did not exercise control over Williams's work.

Absence of required attendance at meetings or training suggests lack of control. *Id.*, subp. 3(I). Here, the ULJ found that AAT did not require Williams to attend training or other regular meetings. Williams challenges the ULJ's finding, contending that she was required to watch a training video about federal hours-of-service regulations. But the record indicates Williams was shown the training video as part of a meeting to reprimand

her for allegedly falsifying her driver logs, and the ULJ found that the meeting and video represent a good-faith attempt by AAT to ensure compliance with federal regulations. Williams also claims that a letter she received in her orientation packet, written by another AAT driver and dated 2006, discusses additional AAT-sponsored training and demonstrates that AAT provided additional training. But Williams did not testify that she was required to attend any additional training, and the letter does not prove otherwise because it predates Williams's work for the company by at least two years. Moreover, when Samuelson was questioned whether "[AAT] provide[d] any training to Ms. Williams to perform her services," she replied, "No." Therefore, the record supports the ULJ's finding that Williams attended little or no training or meetings, and this finding favors a lack of control.

A lack of control is also indicated when the worker is paid on a per-job basis and is responsible for all incidental expenses. *Id.*, subp. 3(L). Here, the ULJ found that Williams was primarily paid on a per-job basis and was required to pay for travel expenses getting to pick-up sites and home from drop-off sites. The record also reflects that Williams paid for all en-route travel expenses, such as hotels, food, and personal expenses. Williams argues that AAT reimbursed her for fuel, tolls, and vehicle fluids, but the record indicates that reimbursement for these items came from AAT customers, not AAT. Therefore, this factor indicates a lack of control.

In addition, because Williams set her own hours within the parameters set by AAT's customers and federal hours-of-service regulations, *see id.*, subp. 3(H), and AAT regularly failed to provide Williams with full-time work, *see id.*, subp. 3(J), these factors

also support the conclusion that Williams controlled the means and manner of her performance.

Finally, Williams contends that AAT's dispatchers were her "assistants," and that AAT's freedom to hire, fire, and supervise its dispatchers indicates control over Williams. *Id.*, subp. 3(A). Although it is undisputed that dispatchers are AAT employees and are controlled by AAT, and Williams introduced some evidence that dispatchers assist drivers in making travel arrangements or arranging vehicle repairs, there was no evidence that Williams or other AAT drivers have control or authority over dispatchers. *See The American Heritage Dictionary of the English Language* 112 (3d ed. 1992) (defining "assistant" as "[o]ne that assists; a helper" and "[h]olding an auxiliary position; subordinate"). On this record, we conclude that AAT dispatchers do not qualify as assistants and the control AAT exercised over dispatchers does not indicate AAT's control over Williams. Because there was no other evidence regarding assistants, we conclude that this factor neither weighs in favor or against control.

In sum, although some factors favor control, we conclude that Williams's work for AAT is generally marked by a lack of control, which supports a determination of independent-contractor status.

Right to discharge the worker without incurring liability

The second essential factor concerns whether the employer has the right "to discharge the worker without incurring liability." *Id.*, subp. 1(B). The ULJ found that because AAT discharged Williams without notice, "AAT had the right to terminate Williams without incurring liability." Thus, this factor supports employee status.

Mode of payment

The third essential factor concerns the mode of payment for the individual's work. *See id.* The ULJ found that Williams was primarily "paid by the job, except that AAT paid $10 per hour for 'downtime' if she was detained for reasons beyond her control." Williams contends that because she was sometimes paid by the hour for downtime, "[the ULJ's] finding that all pay was on a per[-]job basis is not entirely supported by substantial evidence." But the ULJ's finding appropriately acknowledged that Williams was compensated hourly for downtime. Moreover, the record shows that AAT customers reimbursed Williams for downtime through AAT. Therefore, downtime pay is not part of her compensation from AAT.

In addition to being paid by the job, the record indicates that AAT did not provide Williams with benefits or withhold taxes. And as discussed above, Williams was not reimbursed by AAT for ordinary business expenses. Therefore, this factor favors independent-contractor status.

Materials or tools

Under the fourth essential factor, the furnishing of tools, materials, and supplies by the employer is indicative of an employer-employee relationship. *Id.*, subps. 1(B), 3(K). Williams challenges the ULJ's finding that "[n]either party furnished a substantial amount of materials or tools," arguing that AAT supplied (1) fuel, (2) transportation for pickups and drop-offs, and (3) log books, tire chains, and safety reflectors. We disagree. Samuelson's testimony established that AAT customers paid for fuel, and that AAT merely passed through fuel reimbursement. And the shuttle AAT provided to nearby

pick-up sites was a convenience that does not fall within the common definition of materials or tools. *See The American Heritage Dictionary of the English Language* 1887 (3d ed. 1992) (defining "tool" as "[a] device, such as a saw, used to perform or facilitate manual or mechanical work"); *id.* at 1109 (defining "materials" as "[t]ools or apparatus for the performance of a given task").

In addition, Samuelson's testimony established that the log books AAT provided are required by FMCSA regulations, and therefore were appropriately excluded from the ULJ's control analysis. *See* Minn. R. 3315.0555, subp. 3(M). Finally, the remaining tools—tire chains and safety reflectors—are minor, and the record demonstrates that Williams was also expected to provide a small number of tools or materials, including a cell phone and a basic tool kit. We conclude that the ULJ's finding that neither party provided "a substantial amount of materials or tools" is supported by the record, and that this factor does not support either employee or independent-contractor status.

Control of the premises

The final essential factor concerns "control over the premises where the services are performed." *Id.*, subp. 1(B). Performing work on the employer's premises implies control and is indicative of an employer-employee relationship. *Id.*, subp. 3(D). But "in some occupations, the services are necessarily performed away from the premises of the employer and are still considered to be in employment." *Id.* Neither Williams nor AAT owned or controlled the customer vehicles Williams drove and Williams's services were necessarily performed in customer vehicles away from AAT's offices. Therefore, this factor is neutral.

To sum up, our review indicates that two of the essential factors favor independent-contractor status, two are neutral, and one favors employee status. And the two most important factors, the right to control and discharge, support opposite conclusions. Therefore, we conclude that the essential factors are not determinative and we proceed to consider the additional factors listed in Minn. R. 3315.0555, subp. 2. *See id.*, subp. 1 ("Other factors . . . may be considered if a determination is inconclusive when applying the essential factors . . . .").

Additional factors

There are eight additional factors listed in subpart 2. Not all of these factors are relevant here, but we conclude that the relevant additional factors strongly support the conclusion that Williams was an independent contractor.

Most significantly, Williams was free to hold herself out to the public or work for other trucking companies under the independent-contractor agreement she signed. *See id.*, subp. 2(A), 2(F). And the record indicates that Williams took advantage of those opportunities; she held her own operating authority, Outbound Transportation Services, through which she advertised and provided trucking service to the public while she was driving for AAT, and she worked for another trucking company in January 2009 while driving for AAT. Moreover, Samuelson testified that Williams's experience at AAT is consistent with other AAT drivers in that a large percentage of AAT drivers work for AAT's competitors while driving for AAT.

In addition, Williams was in a position to realize a profit or suffer a loss. *See id.*, subp. 2(C). She testified that she calculated her likelihood of making a profit for each job

by considering the per-mile pay AAT offered, the number of nights on the road, and the costs of transportation to and from the delivery locations. Based on her calculations, Williams testified that she was free to accept or reject any job offered to her. Moreover, the likelihood that Williams could suffer a loss was increased by the fact that the independent-contractor agreement Williams signed made Williams responsible for her own negligence and required her to indemnify AAT against loss caused by her actions. *Id.*, subp. 2(G).

Conclusion

The additional factors, as well as certain of the five essential factors, lead us to conclude that the ULJ properly determined that Williams was an independent contractor. Williams was largely free to determine when, where, and how she worked. She was compensated as an independent contractor and was in a position to realize a profit or loss. And she held herself out to the public and performed services for other companies. We thus conclude that the ULJ did not err in determining that Williams was an independent contractor.

Affirmed.