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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-0327**

Don Robinson Motors, Inc.,  
Relator,

vs.

Department of Employment and Economic Development,  
Respondent.

**Filed December 16, 2013  
Reversed  
Kirk, Judge**

Department of Employment and Economic Development  
File No. 30329156-2

Edward F. Kautzer, Ruvelson and Kautzer, Ltd., St. Paul, Minnesota (for relator)

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

Considered and decided by Kirk, Presiding Judge; Kalitowski, Judge; and Chutich,  
Judge.

**UNPUBLISHED OPINION**

**KIRK**, Judge

Relator Don Robinson Motors, Inc. (DRM), challenges the determination by the  
unemployment-law judge (ULJ) that drivers who transport used vehicles from auctions to

DRM's lot are employees rather than independent contractors. Because the record lacks substantial evidence to support the ULJ's determination, we reverse.

### **FACTS**

DRM, based in St. Cloud, sells and repairs used motor vehicles purchased at auctions. Donald Robinson is president and owner of DRM. In 2012, respondent Minnesota Department of Employment and Economic Development (DEED) initiated a field audit of DRM for the 2011 tax year. The field auditor concluded that drivers who transport used vehicles purchased at auction back to DRM's lot are employees and DRM owed unemployment taxes on the drivers' wages. DRM appealed, and after a hearing the ULJ determined that the drivers are employees, not independent contractors. DRM requested reconsideration, and the ULJ affirmed its determination. This certiorari appeal followed.

### **DECISION**

“When reviewing a ULJ's decision, we may affirm the decision, remand for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced.” *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 29 (Minn. App. 2012) (citing Minn. Stat. § 268.105, subd. 7(d) (2012)). A relator's substantial rights “may have been prejudiced” if “the findings, inferences, conclusion, or decision” are affected by an error of law, are “unsupported by substantial evidence in view of the entire record as submitted,” or are “arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d). “Substantial evidence is (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a

scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 539 (Minn. App. 2011) (quoting *Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002)) (quotation marks omitted).

“Whether an individual is an employee or an independent contractor is a mixed question of law and fact. We review factual findings in the light most favorable to the decision. But where the facts are not disputed, a legal question is presented. We review questions of law de novo.” *St. Croix Sensory Inc. v. Dep’t of Emp’t & Econ. Dev.*, 785 N.W.2d 796, 799 (Minn. App. 2010) (citations omitted).

An employee is an “individual who is performing or has performed services for an employer in employment.” Minn. Stat. § 268.035, subd. 13(1) (2012). 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) (2012). Taxes are “money payments required by the Minnesota Unemployment Insurance Law to be paid into the trust fund by an employer on account of paying wages to employees in covered employment.” *Id.*, subd. 25 (2012). Compensation paid to independent contractors is not taxable under the unemployment-benefits law. *Nicollet Hotel Co. v. Christgau*, 230 Minn. 67, 68, 40 N.W.2d 622, 622-23 (1950). “In employment-status cases, there is no general rule that covers all situations, and each case will depend in large part upon its own particular facts.” *St. Croix Sensory Inc.*, 785 N.W.2d at 800.

When determining whether an individual is an employee or an independent contractor, five essential factors must be considered and weighed within a particular set of circumstances. Of the five essential factors to be considered, the two most important are those:

- A. that indicate the right or the lack of the right to control the means and manner of performance; and
- B. to discharge the worker without incurring liability.

Other essential factors to be considered and weighed within the overall relationship are the mode of payment; furnishing of materials and tools; and control over the premises where the services are performed.

Minn. R. 3315.0555, subp. 1. These factors should be considered under the totality of the circumstances. *Moore Assocs., LLC v. Comm’r of Econ. Sec.*, 545 N.W.2d 389, 393 (Minn. App. 1996).

**1. Right to control the means and manner of performance.**

“The determinative right of control is not merely over *what* is to be done, but primarily over *how* it is to be done.” *Frankle v. Twedt*, 234 Minn. 42, 47, 47 N.W.2d 482, 487 (1951). “Basically, it is the distinction between a person who is subject to orders as to *how* he does his work and one who agrees only to do the work in his own way.” *Id.*

A review of the record indicates that DRM contacts the drivers from an on-call list and the drivers are free to accept or reject any offer of work. Many of the drivers work sporadically throughout the year for DRM, and are permitted to work for DRM’s competitors. DRM selects drivers with good driving records and gives them general instructions on how to complete the work. DRM does not conduct periodic evaluations

of a driver's performance. Drivers who agree to work arrive at DRM at a specified time and leave in a company shuttle to the auction site. Drivers punch in on a time clock once they arrive at DRM, and clock out after they have delivered the vehicle to DRM's lot. The drivers are free to choose their own route back to DRM's lot, although they tend to drive back together as a group. The record also indicates that when drivers encounter a problem with a vehicle such as a flat tire, they choose how to handle the situation, and DRM reimburses them for any incurred costs.

The parties dispute whether or not DRM allows the drivers to perform personal errands while on the job. The ULJ found that, based on Robinson's testimony, DRM would only allow very brief personal errands, indicating an employer-employee relationship. But the record shows that no driver had ever asked Robinson for permission to conduct personal business while transporting a vehicle. Further, Robinson testified that a driver could conduct a personal errand on the job so long as it did not take more than a couple of hours. In light of Robinson's testimony, we conclude that the record does not support the ULJ's finding.

The ULJ found it relevant to the control factor that DRM instructed the drivers to use a gate pass to enter the auction and to attach a dealer plate to the vehicle. But these instructions relate to the definition of the driver's task, not the means of accomplishing it. *See Neve v. Austin Daily Herald*, 552 N.W.2d 45, 48 (Minn. App. 1996) (holding newspaper carrier was an independent contractor despite the fact that newspaper instructed her as to whom she was to deliver papers, whether papers were to be put in

plastic tubes or left on doorsteps, the deadline for delivering, and how to bag papers in poor weather).

Under the totality of the circumstances, our review of the right to control factor indicates that DRM lacked control over the drivers' means and manner of performance. Although there is limited evidence that DRM chose drivers with good driving records and controlled when the drivers would arrive to begin work, the weight of the evidence indicates that the drivers exercise significant autonomy in how they complete their work.

## **2. The right to discharge without incurring liability.**

The ULJ determined that DRM's ability to discharge a driver without incurring significant liability indicated an employer-employee relationship. The ULJ inferred from the record that if DRM was unsatisfied with a driver's performance, it could remove the driver from its on-call list. However, the record is bereft of any evidence that DRM had ever discharged any driver in the past for poor performance. The evidence shows that instead of discharging a driver for unsatisfactory performance, DRM would simply remove the driver from its on-call list. Moreover, the driver could easily stop working for DRM by turning down any offer of work. We conclude that substantial evidence does not support the ULJ's finding of an employer-employee relationship.

## **3. Other factors.**

Our review of additional factors leads us to conclude that the drivers are independent contractors. The ULJ found that the fact DRM paid the drivers by the hour instead of by the job indicated an employer-employee relationship. However, the ULJ failed to consider the unique hazards faced by the drivers as they complete their tasks.

DRM contracted with local, part-time drivers to travel considerable distances to retrieve used vehicles at auctions located across the state. The drivers may experience extended traffic jams, vehicle problems, or hazardous weather, which can substantially lengthen the amount of time the drivers are on the road. The parties agreed that an hourly wage is a more equitable method to allocate the risk associated with this type of job because the drivers are financially compensated for the total time it takes to return the vehicles to DRM, including any unanticipated delays.

The parties dispute whether or not DRM furnishes tools to the drivers. The ULJ noted in its affirmation order that DRM furnishes all necessary tools, with the exception of a valid driver's license, indicating an employer-employee relationship. The record supports the ULJ's finding that DRM would supply an ice scraper and screwdriver if the driver did not bring these tools. Although the independent contractor agreements signed by the drivers state that they must provide their own ice scrapers and screwdrivers, Robinson testified that the drivers could bring these tools, or DRM would furnish them at the drivers' convenience.

The ULJ incorrectly found that the fact that DRM furnishes the drivers with dealer plates and provides blanket insurance on the vehicles is evidence of an employer-employee relationship. But instructions required by laws or regulations generally are not evidence of an employer-employee relationship. *St. Croix Sensory Inc.*, 785 N.W.2d at 802. Here, the insurance and dealer plate are tools the drivers need to comply with laws and regulations established by third parties. Moreover, the auction requires the drivers to provide a gate pass to enter the auction, and the State of Minnesota requires the vehicles

to be insured in order to lawfully drive on state highways, and DRM is the owner of the vehicles. We conclude that there is limited evidence supporting the ULJ's finding that DRM furnished all of the tools, indicating an employer-employee relationship.

The ULJ also found that the drivers are on or in DRM-owned property for a substantial period of time while working, indicating an employer-employee relationship. But the record indicates that the drivers are on DRM's premises for only a brief period of time when they board the company shuttle to go to the auction and when they deliver the vehicle to DRM's lot. The fact that the drivers take a company-owned shuttle to the auction site and then drive a vehicle owned by DRM back to DRM's lot is an example of a time, place, and manner restriction that is generally not dispositive of an employment relationship because it relates to the definition of the task, not to the task performance itself. *Neve*, 552 N.W.2d at 48.

For these reasons, we conclude under the totality of the circumstances that there is not substantial evidence supporting the ULJ's finding of an employer-employee relationship.

**Reversed.**