



A10-996

State of Minnesota
In Court of Appeals

Robert Levy, Majestic Tile & Stone, and Majestic Tile & Stone, LLC,

Relator,

vs.

Department of Employment and Economic Development,

Respondent,

Cary Nelson,

Respondent.

RELATOR'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES1

STATEMENT OF THE CASE2

STATEMENT OF FACTS3

 1. Cary Nelson Was The Sole Proprietor of Nelson Tile & Stone in 2008.3

 2. In January of 2009 Cary Nelson and Robert Levy Reorganized Their
 Business Entities.6

 3. The Tile Installation Business Delineates Between Tile Sales and
 Installation Services.6

STANDARD OF REVIEW7

ARGUMENT8

 I. THE COURT SHOULD REVERSE BECAUSE THE ULJ’S FINDINGS
 OF FACT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.9

 A. Nelson Had a Separate Business with Office Equipment and Materials.10

 B. Nelson Holds FEIN Numbers.....11

 C. Nelson Controlled His Own Means and Methods and It Was Error For
 the ULJ to Conclude Otherwise.12

 D. Nelson Incurred the Main Expenses Related to the Tile Installation
 Services That He Was Under Contract to Perform and the ULJ Erred.....15

 E. Nelson was Responsible for the Satisfactory Completion of Each
 Installation Job.....16

 F. Nelson Received Compensation On a Per Job Basis, Realized Profit on
 Specific Contracts and Had Continuing Business Liabilities.....16

 G. The ULJ Erred By Finding that Majestic Had the Right to Discharge
 Nelson Without Incurring Liability.18

 II. THE COURT SHOULD REVERSE THE ULJ’S DECISION THAT
 NELSON PERFORMED SERVICES FOR MAJESTIC IN 2007.....19

III. THE COURT SHOULD REVERSE BECAUSE THE ULJ
ERRONEOUSLY APPLIED MINN. STAT. § 181.723 (2009).20

A. C. Nelson Tile Installation, LLC Is Not An *Employee* Within the
Meaning of Minn. Stat. § 268.035, subd. 25.20

CONCLUSION21

TABLE OF AUTHORITIES

Cases

Carey v. Coty Const., 392 N.W.2d 746 (Minn. Ct. App. 1986).....1, 12

Lakeland Tool & Eng’g, Inc. v. Engle, 450 N.W.2d 349, 352 (Minn. App. 1990).....8

Markel v. City of Circle Pines, 479 N.W.2d 382 (Minn. 1992).....8

Meyering v. Wessels, 383 N.W.2d 670 (Minn. 1986).....8

Neve v. Austin Daily Herald, 552 N.W.2d 45 (Minn. App. 1996).....8

Nicollet Hotel Co. v. Christgau, 230 Minn. 67, 68, 40 N.W.2d 622 (1950).....8

Wichmann v. Travalia & U.S. Directives, Inc., 729 N.W.2d 23 (Minn. App. 2007).....14, 16

Ywswf v. Teleplan Wireless Servs., Inc., 726 N.W.2d 525 (Minn. App. 2007)7

Statutes

Minn. Stat. § 181.7231, 20, 21

Minn. Stat. § 268.035 1, 7, 9, 10, 11, 15, 16, 17, 18, 20, 21

Minn. Stat. § 268.0517

Minn. Stat. § 268.105 1, 2, 7, 14, 16

Rules

Minn. R. 3315.0555.....10, 12

Minn. R. App. P. 1152

Minnesota Administrative Rule 3315.055518

Unpublished Cases

Benco Delivery Servs., Inc. v. Dep’t. Employment and Econ. Dev., No. A09-942, 2010 WL 1657294 (Minn. App. Apr. 27, 2010)7, 20

Geringer v. S-M Enterprises Inc., A09-1098, 2010 WL 772956 (Minn. App.
Mar. 9, 2010)14, 16

STATEMENT OF THE ISSUES

1. Employers must pay unemployment insurance taxes only on the taxable wages paid to employees. Payments to independent contractors are not wages subject to assessment. An Unemployment Law Judge found that Nelson was Majestic's employee and therefore required Majestic to contribute to the unemployment trust fund. Did the ULJ erroneously conclude that Nelson was Majestic's employee?
 - Yes, Nelson was an independent contractor. He maintained a business office, held federal employment identification numbers, controlled his means and methods for performing subcontract work, incurred all of the expenses for the contracts that he bid and performed, was responsible for the satisfactory completion of each job, was paid on a per job basis, and had recurring business liabilities. The ULJ erred by concluding that Nelson was Majestic's employee.

Apposite Authorities

Minn. Stat. § 268.035, subd. 9 (2008)

Minn. Stat. § 268.105 (1)(c)

Carey v. Coty Const., 392 N.W.2d 746, 748 (Minn. Ct. App. 1986)

2. Nelson began performing services for Majestic in June of 2008. The ULJ issued an order requiring Majestic to contribute to the unemployment trust fund from December of 2007-present day. Is there any basis to sustain the ULJ's Order?
 - No, there is no evidence that Nelson, or any other person performed any services for Majestic from December 2007-June of 2008.
3. The statute governing independent contractor classification—Minn. Stat. § 268.035 subd. 9—was repealed on January 1, 2009 and Minn. Stat. § 181.723 was enacted to take its place. Did the ULJ err by applying a repealed statute and by finding that the statute that was enacted to take its place is not applicable?
 - Yes, the ULJ erred by applying a repealed statute and by concluding that Minn. Stat. § 181.723 (2009) has no application to this case.

Apposite Authorities

Minn. Stat. § 268.035, subd. 9(a) (2009)

Minn. Stat. § 181.723 (2009)

STATEMENT OF THE CASE

This is a review by certiorari of the decision of Unemployment Law Judge Richard Croft, which affirmed the determination by a Department of Employment and Economic Development (“DEED”) Field Auditor that services performed for Relator Majestic Tile and Stone by Cary Nelson’s businesses were covered employment for purposes of unemployment insurance.

On October 13, 2009, DEED issued a letter to Robert L. Levy, President of Majestic Tile and Stone n/k/a Majestic Tile and Stone, LLC (“Majestic”) with a determination that services performed by two of Mr. Nelson’s businesses, Nelson Tile and Stone and C. Nelson Tile Installation, LLC (“Nelson”), were covered employment for purposes of unemployment insurance. (App. 53-55.)¹ Majestic appealed DEED’s determination and ULJ Croft conducted an evidentiary hearing. On February 16, 2010, the ULJ issued a decision affirming the Field Auditor’s determination. (Add. 2-4.)

Majestic filed a Request for Reconsideration with the ULJ asking that the original decision be reversed, or alternatively, that an additional evidentiary hearing be conducted. (App. 79-91.) The ULJ affirmed his initial decision, although on grounds unrelated to his original ruling. (Add. 6-9.) He also rejected Majestic’s request for an additional evidentiary hearing. (*Id.*) Majestic timely petitioned for a Writ of Certiorari seeking review of the ULJ’s decision pursuant to Minn. Stat. § 268.105, subd. 7 and Minn. R. App. P. 115.

¹ References to the Appendix to Relator’s Brief are cited as “App.,” followed by the page number. References to the Addendum to Relator’s Brief are cited as “Add.” References to the Transcript of Testimony are cited as “T.”

STATEMENT OF FACTS

1. Cary Nelson Was The Sole Proprietor of Nelson Tile & Stone in 2008.

From 2002-2008 Mr. Nelson worked for a company called Mendota Flooring Installation, Inc. (T. 15.) Mr. Nelson testified that when he worked for Mendota Flooring: (1) he was paid by the hour; (2) taxes were withheld from his earnings; (3) he received an annual W-2; (4) he had a supervisor that directed his work; and (5) he had no input as to how much Mendota Flooring charged for a given job. (T. 15-16.) In sum, he was Mendota's employee. Mendota Flooring went out of business in 2008. (T. 16.)

After Mendota Flooring went out of business Nelson began operating a company called Nelson Tile and Stone. (T. 16; 18.) As part of its start up, Nelson purchased certain tools, including "laser levels, different size straight edges (anywhere from eight feet down to two feet), a wet saw, tile cutter, different size levels..., trowels, rough floats, two wheel dollies, cordless grinders, a corded grinder, a truck, cam saw, cordless drill, mixing drill, band saw, extension cords and shop vacs." (T. 17.) Nelson purchased these tools so that his company could perform subcontract work. (T. 17-18.)

Nelson also prepared a "Bid Sheet" for Nelson Tile and Stone. (T. 17; App. 63.) Nelson set the prices in the Bid Sheet on his own. (T. 17.) Those prices were designed "to cover any expenses that occur...." (*Id.*) Specifically, they were figured to cover the expenses associated with all of his tools, equipment, materials, and company truck. (T. 17-18.)

Nelson Tile and Stone had its own federal tax identification number. (T. 18.) It was also free to contract with companies other than Majestic if the opportunity arose. (T.

18.) Similarly, Nelson Tile and Stone controlled its own means and methods:

Q: And when you were out on a specific job site, who controlled the area where you were working?

A: ***I controlled the area I worked in.

Q: Did you have the opportunity to go out and hire an assistant if you needed to?

A: If need be, yes.

Q: And if you did that, who would have been responsible for that assistant?

A: That would be me.

(T. 19.)

Nelson Tile and Stone had its own office with office equipment including a “desk, fax machine, printer, laptop, phone service and cell phone with [a] business number.”

(*Id.*) Mr. Nelson worked in Nelson Tile and Stone’s office to prepare his bid sheet and prepare the invoices for the subcontract work that Nelson Tile and Stone performed. (T. 19-20.) Mr. Nelson’s 2008 tax return included a schedule C where he claimed deductions for business expenses, including expenses for Nelson Tile and Stone’s office equipment and the company truck. (T. 13, 20; App. 56-62.) Nelson also had its own commercial general liability (“CGL”) policy. (App. 64-65.)

Nelson Tile and Stone began performing subcontract work for Majestic Tile and Stone “somewhere in the middle of 2009 or 2008....” (T. 8.) For the typical job, Majestic Tile and Stone would send Nelson Tile and Stone a “Work Order.” (T. 22-23;

see, e.g., App. 8-49 (compilation of subcontract work orders/invoices).) It would then be up to Nelson when he would perform the work. (T. 22-23.) Sometimes his schedule would be dictated by a general contractor; other times he would schedule his work around other trades. (*Id.*) Majestic Tile and Stone never set Nelson Tile and Stone's hours, never prepared the schedule that Nelson followed, and never set policies for Nelson to follow. (T. 22-23.)

Nelson did not have a "rate of pay" while performing work for Majestic. (T. 9.) Rather, it got paid per job. (*Id.*) After each job, Mr. Nelson would invoice Majestic for the specific job that his company had completed. (T. 9-10; *see, e.g.*, App. 8-49 (compilation of subcontract work orders/invoices).) The invoices calculated from the Bid Sheet that Mr. Nelson had prepared. (T. 9-10.) The number of days and number of hours per day/week that Nelson Tile and Stone worked varied every week. (T. 10.) From time to time Mr. Nelson would adjust his Bid Sheet to "be more competitive." (T. 24.)

Mr. Nelson never received any warnings from Majestic. (T. 11.) Nobody at Majestic ever acted as his supervisor. (T. 11.) Majestic did not have the right to discharge Nelson. (T. 12.) Nobody at Majestic ever told Mr. Nelson how to do his job. (T. 12.) He never received training from Majestic. (T. 13.) He never filed a report to/for Majestic. (*Id.*) Majestic never paid for any of Mr. Nelson's materials or expenses. (*Id.*) Mr. Nelson testified that Nelson Tile & Stone incurred all of the expenses for the work it performed under contracts with Majestic. (App. 77-78.) Majestic never took taxes out of any of Mr. Nelson's payments. (T. 13.) Mr. Nelson did not receive fringe benefits from Majestic. (T. 13.)

On his final direct question from the ULJ:

Q: Anything else that you want to say at this time, Mr. Nelson?

A: ...I do not wish to be an employee. I would like to be my own company, but that's about it.

(T. 14.)

2. In January of 2009 Cary Nelson and Robert Levy Reorganized Their Business Entities.

In 2009 Cary Nelson registered C. Nelson Tile Installation, LLC with the Minnesota Secretary of State. (T. 20-21; App. 3.) Majestic's President, Robert Levy, also registered an LLC, becoming Majestic Tile & Stone, LLC. (App. 2.)

The two companies then executed an Independent Contractor Agreement. (T. 21; 25-26; App. 5-7.) The preamble explains that "This Agreement is entered into between Majestic Tile & Stone, LLC ('the Company') and C. Nelson Tile Installation, LLC ('the Independent Contractor')." All of the work performed by Nelson from January 2009-present day for Majestic Tile & Stone, LLC was performed in Nelson's capacity as an LLC. (Add. 6.)

3. The Tile Installation Business Delineates Between Tile Sales and Installation Services.

The tile business delineates between tile sales and installation services. For the typical residential project a customer visits her local retail establishment (such as Home Value, Lowe's, CLT Floorings, Home Depot, etc...) and purchases the flooring materials they want. (App. 67, 68.) These retail establishments "have a greater purchasing power whereby they can buy supplies a lot cheaper than an independent tile setter." (T. 30;

App. 67, 68, 70-72.) The retailer then provides the owner with a list of contractors who perform the installation. (App. 67, 68, 70-72.)

Similarly, for commercial projects, a general contractor would provide all of the required tile and setting materials for a specific job. (App. 67, 68, 70-72.) The general contractor would then subcontract the installation work to a tile installation company such as Majestic Tile & Stone, L.L.C. or Nelson Tile and Stone. (App. 67, 68, 70-72.) In other words, in the flooring industry, independent contractors are hired to perform an installation service only. (T. 29-30.)

STANDARD OF REVIEW

On Certiorari appeal, this Court may remand, reverse, or modify the decision of the Unemployment Law Judge (ULJ) if the substantial rights of the Relator have been prejudiced because the findings, inferences, conclusion or decision are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon lawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary and capricious.” Minn. Stat. § 268.105, subd. 7 (d) (2008); *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

An employer must pay unemployment insurance taxes only on the taxable wages paid to “employees in covered employment.” Minn. Stat. § 268.051, subd. 1 (2008); *Benco Delivery Servs., Inc. v. Dep’t. Employment and Econ. Dev.*, No. A09-942, 2010 WL 1657294 (Minn. App. Apr. 27, 2010) (citing Minn. Stat. § 268.035, subd. 25 (2006)). “Payments to independent contractors are not wages subject to assessment.” *Benco*, 2010

WL 1657294 (citing *Nicollet Hotel Co. v. Christgau*, 230 Minn. 67, 68, 40 N.W.2d 622, 622-23 (1950)).

Whether a worker is an employee or an independent contractor is a mixed question of law and fact. *Neve v. Austin Daily Herald*, 552 N.W.2d 45, 47-48 (Minn. App. 1996); *Lakeland Tool & Eng'g, Inc. v. Engle*, 450 N.W.2d 349, 352 (Minn. App. 1990). This Court applies a two-step analysis when reviewing an agency's determination of a worker's employment status. *Neve*, 552 N.W.2d at 47. First, if the facts are disputed, the Court asks if the evidence reasonably tends to support the agency's finding of fact. *Id.* Next, the Court applies the law to determine whether an employment relationship exists. *Id.* at 48. Whether an employment relationship exists is a legal issue. *Id.* On questions of law and mixed questions of law and fact, this Court's review is *de novo*; it is not bound by the ULJ's conclusions and exercises its own independent judgment. *Id.* at 47; *Markel v. City of Circle Pines*, 479 N.W.2d 382, 384 (Minn. 1992); *Meyering v. Wessels*, 383 N.W.2d 670, 672 (Minn. 1986).

ARGUMENT

The ULJ erroneously concluded that Cary Nelson was Majestic's employee. Mr. Nelson performed services as an independent contractor—first as the sole proprietor of Nelson Tile and Stone and then as the President of C. Nelson Tile Installation, LLC. Because Nelson was an independent contractor the Court should reverse the ULJ's conclusion that Nelson enjoyed an employment relationship with Majestic.

I. THE COURT SHOULD REVERSE BECAUSE THE ULJ'S FINDINGS OF FACT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

It is undisputed that Nelson performed subcontract services for Majestic “from about June-December of 2008.” (Add. 2, 6.) The critical question is whether Nelson performed those services as an independent contractor, or, as Majestic’s employee. Viewing the record on the whole demonstrates that Nelson was acting in an independent contractor capacity and not as an employee. The ULJ’s decision to the contrary is arbitrary, capricious and must be reversed.

In 2008 the framework for classifying independent contractors—at least for construction professionals—was found in a 9-factor test embodied in Minn. Stat. 268.035, subd. 9 (2008). That statute, provides:

Subd. 9. Construction/independent contractor. A worker doing commercial or residential building construction or improvement, in the public or private sector, performing services in the course of the trade, business, profession, or occupation of the employer, is considered an employee and not an “independent contractor” unless the worker meets all the following conditions:

- (1) Maintains a separate business with the independent contractor’s own office, equipment, materials and other facilities;
- (2) holds or has applied for a federal employer identification number;
- (3) operates under contracts to perform specific services under which the independent contractor controls the means of performing the services of work;
- (4) incurs the main expenses related to the service or work that the independent contractor performs under the contract;
- (5) is responsible for the satisfactory completion of work or services that the independent contractor contracts to perform and is liable for a failure to complete the work or service;

- (6) receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis;
- (7) may realize a profit or suffer a loss under contracts to perform work or service;
- (8) has continuing or recurring business liabilities or obligations; and
- (9) the success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

(Add. 11-12, Minn. Stat. § 268.035 subd. 9 (2007)). In addition to these nine statutory factors, administrative rules explained how the test should be applied. (Add. 39-43, Minn. R. 3315.0555 (stating that essential factors include control of means and methods of performance, and the right to discharge.)). Nelson satisfies the test for independent contractor classification and the ULJ erred by holding otherwise.

A. Nelson Had a Separate Business with Office Equipment and Materials.

The first factor required Nelson to maintain a separate business office with equipment and materials. Minn. Stat. § 268.035, subd. 9(1) (2008). This factor is easily met. After losing his job at Mendota Flooring, Nelson started Nelson Tile and Stone. (T. 16; 18.) As part of his start-up he purchased certain tools, including “laser levels, different size straight edges (anywhere from eight feet down to two feet), a wet saw, tile cutter, different size levels..., trowels, rough floats, two wheel dollies, cordless grinders, a corded grinder, a truck, cam saw, cordless drill, mixing drill, band saw, extension cords and shop vacs.” (T. 17.)

Nelson also had its own office with a “desk, fax machine, printer, laptop, phone service and cell phone with [a] business number.” (T. 19.) Mr. Nelson worked in his

office to prepare a bid sheet and the invoices for the subcontract work that was performed for Majestic. (T. 19-20.) Mr. Nelson's 2008 tax return included a schedule C where he claimed deductions for business expenses, including office equipment and the company truck. (T. 13, 20; App. 56-62.) Nelson also had its own CGL policy. (App. 64-65.)

In 2009 Nelson Tile and Stone was changed to C. Nelson Tile Installation, LLC. (T. 20-21; App. 3.) Robert Levy also registered an LLC, becoming Majestic Tile & Stone, LLC. (App. 2.) The two companies then executed an Independent Contractor Agreement. (T. 21; 25-26; App. 5-7.) The preamble explains that "This Agreement is entered into between Majestic Tile & Stone, LLC ('the Company') and C. Nelson Tile Installation, LLC ('the Independent Contractor')." The Recitals section explains that C. Nelson Tile Installation, LLC is being engaged to perform one service only—"installation of ceramic tile and stone products." (App. 5-7.) It further states that "the Independent Contractor shall have an independent contractor status and not be an employee for any purpose." (*Id.*)

Nelson clearly maintained a separate business and clearly held himself out as an independent contractor. The first of the nine factors is easily satisfied.

B. Nelson Holds FEIN Numbers.

The second factor required Nelson to hold or have applied for FEINs. Minn. Stat. § 268.035, subd. 9(2). Nelson Tile and Stone had its own federal tax identification number. (T. 18.) Similarly, after he registered C. Nelson Tile Installation, LLC, that entity had its own FEIN. (T. 11.) This factor is also met.

C. Nelson Controlled His Own Means and Methods and It Was Error For the ULJ to Conclude Otherwise.

The most significant factor in the independent contractor/employee analysis is the right of the purported employer to direct and control the method and manner of performance. *Carey v. Coty Const.*, 392 N.W.2d 746, 749 (Minn. App. 1986); *see also* Minn. R. 3315.0555, Subp. 1 (explaining that of the five essential factors that must be considered, the “two most important are...the right or the lack of right to control the means and manner of performance.” (Add. 39)

As the transcript shows, Nelson controlled his own means and methods:

Q: And when you were out on a specific job site, who controlled the area where you were working?

A: ***I controlled the area I worked in.

Q: Did you have the opportunity to go out and hire an assistant if you needed to?

A: If need be, yes.

Q: And if you did that, who would have been responsible for that assistant?

A: That would be me.

(T. 19.)

Mr. Nelson never received any warnings from Majestic. (T. 11.) Nobody at Majestic ever acted as his supervisor. (T. 11.) Majestic did not have the right to discharge Nelson. (T. 12.) Nobody at Majestic ever told Mr. Nelson how to do his job. (T. 12.) He never received training from Majestic. (T. 13.) He never filed a report to/for Majestic. (T. 13.)

Against Nelson's sworn testimony the ULJ made the following finding:

"Majestic had the right to determine when Nelson's work was to be done; where Nelson's work was to be done; methods for completing the work; and the policies to be followed."

(Add. 6.) There is no indication as to how the ULJ arrived at this conclusion. (*See id.*)

The ULJ's finding is arbitrary and capricious. It ignored the testimony cited above and it also ignored additional testimony given by Mr. Nelson on cross examination:

Q: So...can you tell me exactly how a specific job or work order came to be?

A: He would come to me with a job from, I don't know, another company, one of the big ones, and he would tell me what kind of job...and then he'd send me a work order explaining all that.

Q: And after he sent you the work order, would you then, would it be up to you as to how and when you completed the work?

A: It would be up to me. Or...the other company that Rob Levy gets the job from, they might be on a schedule and need it done at a certain time.

Q: After the work was performed would you provide Majestic with an invoice?

A: Yes.

Q: And did you have an understanding that the Subcontract Work Orders and the Invoice were part of the larger Independent Contractor Agreement?

A: Yes.

Q: And the Independent Contractor Agreement leaves the means and methods of how you set or lay your tile to you, right?

A: Right.

Q: You were talking a moment ago about the schedule. Are most of the jobs that you work on commercial jobs?

A: Mostly.

Q: And frequently there are other trades out there doing work with you?

A: Yes.

Q: So is it important for you to schedule your work around those other trades?

A: Yes.

Q: Does Majestic set the schedule for that work?

A: No.

Q: Does Majestic ever establish policies that it requires you to follow?

A: No.

(T. 22-23.) There is nothing in the record to support the ULJ's finding. Mr. Nelson provided truthful testimony and the ULJ committed reversible error by ignoring it.

Minn. Stat. § 268.105, subd. 1(c) required the ULJ to "set out the reason for discrediting" this testimony and Minnesota appellate decisions have repeatedly explained that, "This court must remand cases where credibility was central to the ULJ's determination but the ULJ did not make express findings as to the witnesses' credibility." *Geringer v. S-M Enterprises Inc.*, A09-1098, 2010 WL 772956 (Minn. App. Mar. 9, 2010); *see also Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007) (reversing ULJ decision where the ULJ failed to make credibility determinations as required by Minn. Stat. § 268.105.)

The ULJ failed to make any findings that would allow him to discredit Nelson's testimony. This is reversible error under controlling law.

D. Nelson Incurred the Main Expenses Related to the Tile Installation Services That He Was Under Contract to Perform and the ULJ Erred By Finding Otherwise.

Another requirement for independent contractor classification is that the worker “incur the main expenses related to the service or work that the independent contractor performs.” Minn. Stat. § 268.035, subd. 9(4) (2008). Nelson performed one service—tile installation and he incurred the main expenses for this service.

Nelson purchased all of his tools, including “laser levels, different size straight edges (anywhere from eight feet down to two feet), a wet saw, tile cutter, different size levels..., trowels, rough floats, two wheel dollies, cordless grinders, a corded grinder, a truck, cam saw, cordless drill, mixing drill, band saw, extension cords and shop vacs.” He bought a company truck, which was necessary to get him to/from his jobs. He had a home office with all of the typical office expenses. Nothing more is required for Nelson to perform tile installation services.

Mr. Nelson testified that Majestic never paid for any of Mr. Nelson’s materials or expenses. (T. 13.) He further explained that Nelson Tile and Stone incurred all of the expenses for the services that he performed while it was a contractor for Majestic. (App. 77-78.) Finally, Mr. Nelson testified that he prepared a “Bid Sheet” for Nelson Tile and Stone which was designed “to cover any expenses that occur....” and still return a sustainable profit. (T. 17-18.)

Again, like its previous shortcomings, the ULJ’s decisions never made findings as to why he discredited this testimony. (*See* Add. 2-3, 6-8.) Rather, the decision simply states, “Nelson does not incur the main expenses related to the work that he performs for

Majestic Tile & Stone.” (Add. 2, 6.) This again constitutes reversible error. If the ULJ was going to discredit Nelson’s testimony, then he was obligated to make findings explaining why. Minn. Stat. § 268.105, subd. 1(c). He failed to do so and this Court must reverse. *See Geringer v. S-M Enterprises Inc.*, A09-1098, 2010 WL 772956 (Minn. App. Mar. 9, 2010) and *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007).

E. Nelson was Responsible for the Satisfactory Completion of Each Installation Job.

The fifth requirement for independent contractor classification required Nelson to be responsible for the satisfactory completion of each installation job. *See* Minn. Stat. § 268.035, subd. 9(5). This factor is also met. For each subcontract, Majestic would send Nelson a “Work Order.” (T. 22-23; *see, e.g.*, App. 8-49 (compilation of subcontract work orders/invoices).) After each job was completed, Mr. Nelson would invoice Majestic for the specific work that his company performed. (T. 9-10.) If Nelson did not complete the job he would not get paid. Mr. Levy testified that if Nelson did not satisfactorily complete the job he would backcharge Nelson for his failure to complete the work. (T. 28.) This evidence also supports a conclusion that Nelson was performing services as an independent contractor.

F. Nelson Received Compensation On a Per Job Basis, Realized Profit on Specific Contracts and Had Continuing Business Liabilities.

The final four factors of Minn. Stat. § 268.035, subd. 9 require independent contractors to receive compensation for work on a per job basis; realize a profit or suffer a loss under specific contracts; have recurring business liabilities; and succeed or fail

based on business expenditures to receipts. Minn. Stat. § 268.035, subd. 9(6-9) (2008). (Add. 11-12.) These factors are squarely met.

Nelson was paid on a per job basis. After each job he would invoice Majestic for the specific subcontract that his company had performed. (T. 9-10; *see, e.g.*, App. 8-49 (compilation of subcontract work orders/invoices).) The invoices were based on the Bid Sheet that Mr. Nelson had prepared. (T. 9-10.) From time to time Mr. Nelson would adjust his Bid Sheet to “be more competitive.” (T. 24.)

Nelson realized a profit or suffered a loss for each contract that he performed. He got paid the same whether it took him five hours to complete a job or 100 hours to complete a job. (T. 23.) According to Nelson, his profitability depended on how accurate his bid sheet was, and how efficient his production was. (*Id.*) Obviously, if it took him 100 hours to complete a \$500 subcontract he would not realize a profit after factoring in all of the expenses associated with his tools, company truck, office expenses, etc....

Finally, Nelson also has recurring business liabilities. He has a CGL Insurance policy with a semi-annual premium. He also has recurring office expenses, truck expenses, tool maintenance and hired help. He has monthly phone expenses for his business line and laptop. (T. 19.) All of these are continuing business obligations demonstrating that he is an independent contractor. There is no evidence to the contrary and this Court should reverse the ULJ’s erroneous conclusion that Nelson was Majestic’s employee.

G. The ULJ Erred By Finding that Majestic Had the Right to Discharge Nelson Without Incurring Liability.

In its final “finding” the ULJ suggested that Majestic had the right to discharge Nelson without incurring liability. (Add. 6.) Although this is not part of Minn. Stat. § 268.035, subd 9, it is one of the “most important” “essential factors” found in Minnesota Administrative Rule 3315.0555. (See Add. 39.) The ULJ’s finding, however, is not supported by any evidence.

It directly contradicts Mr. Nelson’s sworn testimony:

ULJ: Did Majestic have the right to discharge you?

Nelson: Not really. He doesn’t get to do that.

(T. 12.) It also contradicts Mr. Levy’s sworn testimony—the only other witness that testified—where he explained that Majestic had the right to terminate Nelson’s contract “for cause” under the Independent Contractor Agreement executed between C. Nelson Tile Installation, LLC and Majestic Tile & Stone, LLC. (T. 27.) There is simply no evidence that Majestic had, as the ULJ concluded, the right to discharge Nelson without incurring liability.

The ULJ’s findings of fact are not supported by substantial evidence and must be reversed. The ULJ failed to make statutorily required credibility determinations and simply rubber stamped the Field Auditor’s conclusion that Nelson was Majestic’s employee. Both Majestic and Nelson believed that they were independent contractors engaged in arms’ length commercial transactions. The ULJ’s decision to the contrary is arbitrary, capricious and must be reversed.

II. THE COURT SHOULD REVERSE THE ULJ'S DECISION THAT NELSON PERFORMED SERVICES FOR MAJESTIC IN 2007.

Even if this Court affirms the ULJ's decision that Nelson was at some point Majestic's employee, it still must reverse for an accurate decision as to when that relationship arose. The ULJ issued two Orders stating that Nelson had "an employment relationship with Majestic Tile & Stone since December 2007." (Add. 4, 7.) Like most of the other shortcomings, however, the evidence does not support the conclusion.

Cary Nelson did not begin performing subcontract work for Majestic Tile and Stone "somewhere in the middle of 2009 or 2008...." (T. 8.) The ULJ's Orders confirm this testimony expressly stating that "Cary Nelson has performed services for Majestic Tile & Stone from about June 2008 through present." (Add. 2, 6.)

Despite this factual predicate, the ULJ rubber stamped DEED's original erroneous conclusion that Nelson had performed services for Majestic in December of 2007 and ordered Majestic to contribute to the unemployment trust fund from that date.² There is no evidence to support the ULJ's Order. The Court should, at minimum, remand this case so that the decision may be modified to accurately reflect when the relationship arose.

² The date that the employment relationship allegedly began is critically important to Majestic because the State has attempted to levy fines against Majestic for failure to pay into the unemployment trust fund from the date established by the ULJ's Order.

III. THE COURT SHOULD REVERSE BECAUSE THE ULJ ERRONEOUSLY APPLIED MINN. STAT. § 181.723 (2009).

The irregularities below are not limited to “finding facts” where no evidence exists. They also extend to misapplication of the law, including application of a repealed statute and the misapplication of Minn. Stat. § 181.723 (2009).

Minn. Stat. § 268.035, subd. 9 (2008) was repealed and replaced with Minn. Stat. § 268.035, subd. 9(a). (Add. 49.) The new statute became effective January 1, 2009³ and provides:

Subd. 9(a) Construction; independent contractor. For purposes of this chapter, section 181.723 determines whether a worker is an independent contractor or an employee performing public or private sector commercial or residential building construction or improvement services.

(Add. 49.) Strangely, despite Minn. Stat. § 268.035, subd. 9(a)’s express incorporation of Minn. Stat. § 181.723 (2009), the ULJ concluded that Minn. Stat. § 181.723 “is not applicable to this case.” (Add. 7.) In reaching this conclusion, the ULJ ignored the plain language of Minn. Stat. § 268.035, subd. 9(a) and failed to interpret Minn. Stat. § 181.723 in its appropriate context.

A. C. Nelson Tile Installation, LLC Is Not An *Employee* Within the Meaning of Minn. Stat. § 268.035, subd. 25.

“Employers must contribute to the unemployment trust fund based on wages paid to employees.” *Benco Delivery Servs., Inc. v. Dep’t. Employment and Econ. Dev.*, No. A09-942, 2010 WL 1657294 (Minn. App. Apr. 27, 2010) (citing Minn. Stat. § 268.035,

³ The ULJ’s original decision erroneously applied the repealed statute to conclude that Nelson and Majestic had an employer/employee relationship from December 2007-present day. (See Add. 2-3 (applying Minn. Stat. § 268.035, subd. 9 (2008).) Majestic’s request for consideration pointed out, among other things, that it was error for the ULJ to apply a repealed statute to the parties’ relationship in 2009.

subd. 25 (2006). *Employee* is defined by statute as an “*individual*” who is performing or has performed services for an employer in employment.” *Id.* (citing Minn. Stat. § 268.035, subd. 13(1). “*Individual*” in the construction industry is further defined by statute as a “human being.” Minn. Stat. § 181.723 1(d) (2009).

Majestic did not pay wages to any “human beings” in 2009. Even the ULJ found that in 2009 all payments were made to C. Nelson Tile Installation, LLC. (Add. 6.) Because Majestic did not make payments to a “human being” in 2009, it could not have had any “employees” as defined by the statute. *See* Minn. Stat. § 268.035, subd. 13(1); Minn. Stat. § 181.723 (1)(d).

In sum, even if Nelson was Majestic’s “employee” in 2008, that relationship ended when Nelson registered C. Nelson Tile Installation, LLC, executed the Master Independent Contractor Agreement and performed subcontract work through that entity. Majestic made all payments to C. Nelson Tile Installation, LLC in 2009 and it was error for the ULJ to conclude that Nelson continues to be Majestic’s employee. This Court must, at the very least, reverse that portion of the ULJ’s decision holding that Nelson continues to be Majestic’s employee.

CONCLUSION

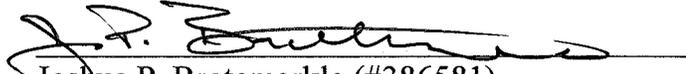
For the reasons argued herein, Relator respectfully requests that this Court issue an order reversing the decision of the ULJ and enter an order determining that Nelson is not Majestic’s employee. Alternatively, the Court should remand the decision with express instructions that Nelson is not Majestic’s employee from December 2007-May of 2008,

and further, that the “employment relationship,” to the extent there was one, ended on January 1, 2009.

Respectfully submitted,

Dated: 8.26.2010

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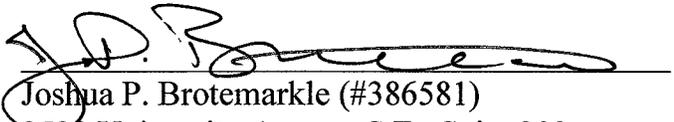
CERTIFICATE OF COMPLIANCE

The undersigned counsel for Relator Majestic Tile and Stone, LLC and Robert Levy certifies that this Brief complies with the requirements of Minn. R. App. P. 132.01 for a brief produced with a proportional font. The length of this brief is 5,664 words, excluding the Table of Contents, Table of Authorities, Addendum, and Appendix. This brief was prepared using Microsoft Word 2003.

Respectfully submitted,

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