

No. A11-1307

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State of Minnesota  
**In Court of Appeals**

**BUILDERS COMMONWEALTH, INC.,**

*Relator,*

vs.

**DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,**

*Respondent.*

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**RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX**

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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

<b>LEGAL ISSUE.....</b>	<b>2</b>
<b>STATEMENT OF THE CASE .....</b>	<b>2</b>
<b>STATEMENT OF FACTS .....</b>	<b>3</b>
<b>STANDARD OF REVIEW.....</b>	<b>6</b>
<b>PUBLIC POLICY AND STATUTORY CONSTRUCTION .....</b>	<b>7</b>
<b>ARGUMENT .....</b>	<b>9</b>
<b>1. BUILDERS COMMONWEALTH IS AN EMPLOYER. ....</b>	<b>10</b>
<b>2. THE MEMBERS WORKED IN EMPLOYMENT FOR BUILDERS COMMONWEALTH FROM JANUARY OF 2006 TO JANUARY 1, 2009 .....</b>	<b>15</b>
<b>3. THE MEMBERS WORKED IN EMPLOYMENT FOR BUILDERS COMMONWEALTH AFTER JANUARY 1, 2009, AND CONTINUE TO DO SO . ....</b>	<b>17</b>
<b>4. THERE IS NO COLLATERAL ESTOPPEL IN UNEMPLOYMENT BENEFITS DETERMINATIONS. ....</b>	<b>20</b>
<b>CONCLUSION .....</b>	<b>22</b>
<b>APPENDIX.....</b>	<b>24</b>

## TABLE OF AUTHORITIES

### CASES

<i>Associated Reforestation Contractors, Inc. v. State Workers' Compensation Bd.</i> , 650 P.2d 1068, 1072 (Or. App. 1982)-----	11, 12
<i>Employment Div. v. Surata Soy Foods, Inc.</i> , 662 P.2d 810, 812 (Or. App. 1983)	12
<i>Goldberg v. Whitaker House Co-op., Inc.</i> 366 U.S. 28, 33 (1961)-----	10, 11
<i>Isthmus Engineering &amp; M'fing Coop.</i> , Hearing No. S9600250MD (Mar. 26, 1998) -----	11
<i>Jenkins v. Am. Express</i> , 721 N.W.2d 286 (Minn. 2006)-----	7
<i>Lakeland Tool &amp; Eng'g v. Engle</i> , 450 N.W.2d 349 (Minn. App. 1990)-----	7
<i>Moore Assocs., LLC v. Comm'r of Econ. Sec.</i> , 545 N.W.2d 389 (Minn. App. 1996) -----	7
<i>Pichler v. Alter Co.</i> , 240 N.W.2d 328 (Minn. 1976)-----	21
<i>Ress v. Abbott Northwestern Hosp., Inc.</i> , 448 N.W.2d 519 (Minn. 1989) -----	7
<i>Scheeler v. Sartell Water Controls, Inc.</i> , 730 N.W.2d 285 (Minn. App. 2007) ---	14
<i>Schuler v. Meschke</i> , 435 N.W.2d 156 (Minn. App. 1989), citing 18 Am.Jur.2d Cooperative Associations, § 3 -----	10
<i>Stagg v. Vintage Place</i> , 796 N.W.2d 312 (Minn. 2011) -----	7
<i>State v. Industrial Tool and Die Works</i> , 220 Minn. 594, 21 N.W. 2d 31 (1946)----	9
<i>Tisdell v. ValAdCo</i> , 2002 WL 31368336, at *1, *6, *11 (Minn. App. Oct. 16, 2002)-----	11

### STATUTES

1997 Laws, ch. 66, § 4 -----	21
2007 Laws Ch. 135, Art. 3, Sec. 42 -----	17
Minn. Stat. § 181.723 (2010)-----	17, 18, 19, 20, 22

Minn. Stat. § 181.723, subd. 1(a) (2010)	18
Minn. Stat. § 181.723, subd. 2 (2010)	18
Minn. Stat. § 181.723, subd. 3 (2010)	17, 18
Minn. Stat. § 181.723, subd. 4 (2010)	20
Minn. Stat. § 268.035 (2010)	22
Minn. Stat. § 268.035, subd. 9 (2010)	15, 16, 17
Minn. Stat. § 268.035, subd. 15(a) (2010)	12
Minn. Stat. § 268.035, subd. 29 (2010)	13, 14
Minn. Stat. § 268.035, subd. 30(a) (2010)	14
Minn. Stat. § 268.035, subd. 9a (2010)	18
Minn. Stat. § 268.04, subd. 12a (2010)	21
Minn. Stat. § 268.057 (2010)	8
Minn. Stat. § 268.069, subd. 2 (2010)	8
Minn. Stat. § 268.105, subd. 5a (2010)	20
Minn. Stat. § 268.105, subd. 7 (2010)	3, 7
Minn. Stat. § 308A (2010)	11, 18
Minn. Stat. § 308A.001 (2010)	11
Minn. Stat. § 308A.205, subd. 7 (2010)	11
Minn. Stat. § 308A.945 (2010)	11
Minn. Stat. § 645.17(5) (2010)	9
<b><u>RULES</u></b>	
Minn. R. Civ. App. P. 115	3

## **Legal Issue**

Minnesota law lays out the test for determining whether, for purposes of unemployment insurance, an individual performed building construction or improvement services in employment or as an independent contractor. The law provides that such individuals are employees, unless they obtain an independent contractor certificate. Builders Commonwealth, Inc. is a workers cooperative comprised of approximately 30 member workers, all of whom perform building construction or improvement services. None have obtained independent contractor certificates. Are these members employees of Builders Commonwealth?

Unemployment Law Judge (“ULJ”) Richard Croft found that these individuals are performing services in employment under the Minnesota Unemployment Insurance Law, and have been since January of 2006.

## **Statement of the Case**

This case involves the question of whether the cooperative members of Builders Commonwealth are employees or independent contractors. The Department of Employment and Economic Development (the “Department”) conducted an audit that resulted in a determination of employment status for the workers at Builders Commonwealth. The audit found that Builders Commonwealth had an employer-employee relationship with the members, and

must pay taxes on the wages they earned.<sup>1</sup> Builders Commonwealth appealed the determination,<sup>2</sup> and ULJ Croft held a de novo hearing in which Builders Commonwealth participated, with Builders Commonwealth represented by counsel. The ULJ issued a decision holding that the services the members performed for Builders Commonwealth were in employment.<sup>3</sup> Builders Commonwealth filed a request for reconsideration with the ULJ, who affirmed.<sup>4</sup>

This matter is before the Minnesota Court of Appeals on a writ of certiorari obtained by the Builders Commonwealth under Minn. Stat. § 268.105, subd. 7(a) (2010) and Minn. R. Civ. App. P. 115.

### **Statement of Facts**

The Builders Commonwealth Cooperative incorporated under Minnesota Cooperative Law on August 2, 1978.<sup>5</sup> Its purpose is to give its members an opportunity to offer their work on a cooperative basis in projects involving the construction, maintenance, renovation, and repair of buildings and other structures.<sup>6</sup> The cooperative is composed of approximately 30 owner members, each owning an equal share of the cooperative.<sup>7</sup> Members perform work both at

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<sup>1</sup> Return-2, E-1, E-7.

<sup>2</sup> E-2.

<sup>3</sup> Return-3; Appendix to Department's Brief, A6-A11.

<sup>4</sup> Return-6; Appendix, A1-A5.

<sup>5</sup> T. 29, E-23.

<sup>6</sup> E-6 (fax p. 192, entitled "Membership Agreement).

<sup>7</sup> T. 32-34.

the cooperative's fabrication site and at customers' job sites.<sup>8</sup> Each job has a project coordinator, who is responsible for ensuring that the Builders Commonwealth fulfills its contractual obligation to customers, and that the work is done in a workman-like fashion.<sup>9</sup> The Builders Commonwealth scheduler sets up crews and designates site coordinators for off-site jobs, while a shop manager sets up crews and designates project leaders for shop projects.<sup>10</sup> The manual lays out a detailed process for accepting work and signing contracts.<sup>11</sup>

The cooperative's Personnel Committee assigns each member an hourly rate of pay, and members are paid that rate.<sup>12</sup> Members fill out and submit time cards each week, using a separate time card for each job and listing the tasks performed.<sup>13</sup> Members are also reimbursed for job-related expenses, including lodging, traveling food allowance, and pre-negotiated per diems.<sup>14</sup> Members are paid every other week, and those payments are considered an advance.<sup>15</sup>

At the end of each fiscal year the cooperative determines its profits or losses, and adjusts member pay accordingly.<sup>16</sup> In profitable years, the members receive the additional profit, but in unprofitable years the losses are deducted from

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<sup>8</sup> T. 38, 46.

<sup>9</sup> T. 38.

<sup>10</sup> E-6 (fax p. 150, § 32.00); T. 45-46.

<sup>11</sup> E-6 (fax p. 151, §§ 33.00-34.00).

<sup>12</sup> T. 37-38.

<sup>13</sup> E-6 (fax p. 154, § 36.40).

<sup>14</sup> E-6 (fax p. 154, § 36.30); T. 36-37.

<sup>15</sup> E-6 (fax p. 158, § 39.00); T. 30, 50-52, 57, 64.

<sup>16</sup> E-10, pp.23-24.

member pay.<sup>17</sup> In those unprofitable years, members must arrange a payback schedule with the Builder Commonwealth financial manager or Management Committee.<sup>18</sup>

Members must comply with the Builders Commonwealth Policies and Guidelines Manual.<sup>19</sup> All new members are in an orientation period for 90 days, and have two evaluations during that time.<sup>20</sup> All employees have a yearly evaluation by the Builders Commonwealth Personnel Committee.<sup>21</sup> Members must request time off from a manager at least two weeks in advance.<sup>22</sup>

Members must abide by the Builders Commonwealth bylaws, as well as the non-compete section of the manual, which prohibits members from soliciting or accepting employment from any other person or similar organization, except family members, within a 75-mile radius.<sup>23</sup> Members may not own, manage, operate, consult, or be an employee of a business similar to or competitive with the Builders Commonwealth.<sup>24</sup>

Members are expected to perform their duties with skill and care, avoid engaging in excessive conflict with others, respect partners and clients, protect the safety of the member and others, and abstain from drug and alcohol use on the job

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<sup>17</sup> E-6 (fax pp. 156-57, §§ 37.50, 37.70); T. 50-51, 53-54.

<sup>18</sup> E-6 (fax p. 159, § 40.30); T. 51.

<sup>19</sup> E-6 (fax pp. 145-190, §§ 27.00-54.30); T. 43.

<sup>20</sup> E-6 (fax p. 147, § 28.20).

<sup>21</sup> *Id.*

<sup>22</sup> E-6 (fax p. 149, § 30.00).

<sup>23</sup> E-10, pp. 19-20.

<sup>24</sup> *Id.*

site.<sup>25</sup> Builders Commonwealth site project coordinators can expel members from work sites and report that expulsion to the Personnel Committee; the Personnel Committee can then take action which can include placing a member on probation and suspending him from work for three days.<sup>26</sup>

During their first 12 months of membership, members can be expelled from the cooperative by a unanimous vote of the Personnel Committee.<sup>27</sup> The manual also requires managers to give “as much notice as possible” before laying off members.<sup>28</sup> Members can be removed from the cooperative without cause by a two-thirds majority vote, and Builders Commonwealth incurs no liability for such removal.<sup>29</sup> The manual requires members to attend quarterly meetings.<sup>30</sup> There are additionally two carpentry meetings every month.<sup>31</sup> Members are also allowed to participate in a site coordinator training program.<sup>32</sup>

### **Standard of Review**

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the decision, remand for further proceeding, reverse or modify the decision if Builders Commonwealth’s substantial rights were prejudiced because

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<sup>25</sup> E-6 (fax p. 148, § 28.31).

<sup>26</sup> E-6 (fax p. 148, § 28.32-28.36).

<sup>27</sup> E-6 (fax p. 147, § 28.22).

<sup>28</sup> E-6 (fax p. 150, § 31.00).

<sup>29</sup> E-6 (fax p. 136, § 20.04); T. 42.

<sup>30</sup> E-6 (fax p.145, § 27.11); T. 60.

<sup>31</sup> T. 41.

<sup>32</sup> E-6 (fax pp. 166-67, §§ 50.10-50.20).

the decision of the ULJ violated the constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious.<sup>33</sup>

Whether an individual performed services as an employee or an independent contractor is a mixed question of law and fact.<sup>34</sup> The Supreme Court also held in *Stagg v. Vintage Place* that it views the ULJ's "factual findings in the light most favorable to the decision," and that it will not disturb the findings when the evidence substantially sustains them.<sup>35</sup> "Substantial evidence" is the relevant evidence that "a reasonable mind might accept as adequate to support a conclusion."<sup>36</sup> In *Ress v. Abbott Northwestern Hosp., Inc.*, the Supreme Court stated that the appellate courts exercise independent judgment on issues of law.<sup>37</sup>

### **Public Policy and Statutory Construction**

Contrary to Builders Commonwealth's assertion that the unemployment insurance system is penal as to employers and must be strictly construed in favor of taxpayers<sup>38</sup>, the Minnesota unemployment insurance program uses a preponderance of the evidence standard, and generally assigns no burdens of

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<sup>33</sup> Minn. Stat. § 268.105, subd. 7(d)(1)-(6) (2010).

<sup>34</sup> *Lakeland Tool & Eng'g v. Engle*, 450 N.W.2d 349, 352 (Minn. App. 1990).

<sup>35</sup> 796 N.W.2d 312, 315 (Minn. 2011) (citing *Jenkins v. Am. Express*, 721 N.W.2d 286, 289 (Minn. 2006)).

<sup>36</sup> *Moore Assoc. v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. App. 1996).

<sup>37</sup> 448 N.W.2d 519, 523 (Minn. 1989).

<sup>38</sup> Relator's brief, pp. 19-20.

proof. Where the statute does name a burden in considering tax questions, it places the burden on the employer. For example, Minn. Stat. § 268.057 places the burden on the employer in showing that a tax computation is incorrect. But unemployment insurance taxes are not penal, but are instead simply part of the cost of doing business in the state.

Minnesota unemployment insurance law recognizes that someone must pay for the benefits that unemployed workers receive. Unemployment benefits are paid from state funds, the unemployment insurance trust fund, not by an employer or employer funds.<sup>39</sup> There is widely-held yet erroneous view that employers pay the cost of benefits, despite the fact that all benefits are paid from the public fund, and even in the best of years only 60% of benefits are charged back to the employers whose former employees collected benefits. The other 40% collected from the public fund is borne by taxpaying employers as a whole.

Contrary to popular belief, an employer does not prepay the state unemployment insurance trust fund for benefits paid out. Indeed, the opposite occurs. When the state trust fund pays benefits to an unemployed worker, the employer's experience rating increases and the trust fund recoups the amount of unemployment benefits paid out, usually over a four-year period following the benefit payout. The base tax rate assigned to all employers covers the costs of 7,000 businesses that cease operation annually, as those businesses obviously do

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<sup>39</sup> Minn. Stat. § 268.069, subd. 2.

not repay the unemployment trust fund for the benefits their former employees receive. Similarly, for those employers at the maximum rate, the trust fund cannot recoup the cost of benefits paid to its unemployed workers. In fact, the trust fund pays out over \$100 million more each year to the unemployed workers of maximum-rate employers than those employers pay in taxes. The cost of benefits must then be borne by the remaining Minnesota employers, who suffer a higher base tax rate.

The system only functions when employers are uniformly required to pay their fair share of unemployment insurance taxes. As the Minnesota Supreme Court described in *State v. Industrial Tool and Die Works*, the unemployment tax is an excise tax, or a tax on the right to employ labor.<sup>40</sup> Every employer would, of course, prefer to have a smaller tax bill. Employers who are successful in evading their obligations do not do so in a vacuum; their evasion is funded by other businesses throughout the state. The public interest prevails over any private interest,<sup>41</sup> and the public has a strong interest in the proper payment of benefits.

### Argument

The statute governing independent contractors in the building and construction industries was amended in early 2009, and so the Department analyzes the members' employment status both before and after January 1, 2009.

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<sup>40</sup> 21 N.W. 2d 31 (Minn. 1946).

<sup>41</sup> Minn. Stat. § 645.17(5) (2010).

Under both statutes, the members were employees of Builders Commonwealth.

### **1. Builders Commonwealth is an employer.**

Much of the Builders Commonwealth position rests on its argument that members of a worker collective are not employees, and in support of this position cites various law review articles and cases concerning joint ventures.<sup>42</sup> Various state and federal courts have long recognized that worker collectives are more than the sum of their parts. Minnesota courts have long held that “An incorporated cooperative is a legal entity, separate and apart from its members.”<sup>43</sup> The United States Supreme Court held in its 1961 decision of *Goldberg v. Whitaker House Co-op., Inc.* that:

There is no reason in logic why these members may not be employees. There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. If members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of this Act. For the corporation would ‘suffer or permit’ them to work whether or not they owned one share of stock or none or many. We fail to see why a member of a cooperative may not also be an employee of the cooperative. In this case the members seem to us to be both ‘members’ and ‘employees.’ It is the cooperative that is affording them ‘the opportunity to work, and paying them for it,’ to use the words of Judge Aldrich, dissenting below. However immediate or remote their right to ‘excess receipts’ may be, they work in the same way as they would if they had an individual proprietor as their employer. The members are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one

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<sup>42</sup> Relator’s brief, pp. 20-22.

<sup>43</sup> *Schuler v. Meschke*, 435 N.W.2d 156, 162 (Minn. App. 1989), citing 18 Am.Jur.2d Cooperative Associations, § 3.

organization, manufacturing what the organization desires and receiving the compensation the organization dictates.<sup>44</sup>

Indeed, Minnesota law acknowledges that cooperatives can have employees. Minn. Stat. § 308A.001 et seq. makes several references to potential cooperative employees.<sup>45</sup>

While no Minnesota Court has specifically considered the question of whether worker cooperatives incorporated under Minn. Stat. § 308A can have employees, at least one Minnesota case makes reference to cooperative employees. For example, in *Tisdell v. ValAdCo*, this Court made multiple references to the employees of the respondent cooperative, which was incorporated under § 308A.<sup>46</sup> Courts and administrative bodies in those states that have explicitly considered the employment question have also found that cooperatives can and do act as employers.

In *Isthmus Engineering & M'fing Coop.*, the Wisconsin Labor and Industry Review Commission, found that workers of a cooperative were employees for purposes of its unemployment compensation program, and relied heavily on the analysis of two Oregon appellate court decisions.<sup>47</sup> In *Associated Reforestation Contractors, Inc. v. State Workers' Compensation Bd.*, the Oregon Court of

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<sup>44</sup> 366 U.S. 28, 33 (1961).

<sup>45</sup> See Minn. Stat. § 308A.205, subd. 7; § 308A.945.

<sup>46</sup> 2002 WL 31368336, at \*1, \*6, \*11 (Minn. App. Oct. 16, 2002), Appendix, A12-A22).

<sup>47</sup> Hearing No. S9600250MD (Mar. 26, 1998), <http://dwd.wisconsin.gov/lirc/ucdecsns/201.htm>.

Appeals founds that cooperative members were employees for workers' compensation purposes, noting that "They may be thought of as having a proprietary interest in the cooperative, for the period in which they are members, but this is not inconsistent with what remains in essence an employer-employee relationship."<sup>48</sup>

And in *Employment Div. v. Surata Soy Foods, Inc.*, the Oregon Court of Appeals found that cooperative members were employees for unemployment compensation purposes, noting that "Although the members of Surata performed services in return for patronage dividends, which are a share of profits in proportion to the amount of work performed, and in the absence of profits might not receive any compensation, we hold they were receiving "remuneration" within the meaning of ORS 657.015."<sup>49</sup>

Minnesota unemployment insurance law defines "employment" as "service performed by...an individual who is considered an employee under the common law of employer-employee and not considered an independent contractor."<sup>50</sup> It does not limit the definition to those performing work for certain types of corporations, nor does it exclude arrangements like cooperatives. As discussed below, the laws specifically governing work done in the building construction and improvement sector similarly contain no such restrictions, and define potentially

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<sup>48</sup> 650 P.2d 1068, 1072 (Or. App. 1982).

<sup>49</sup> 662 P.2d 810, 812 (Or. App. 1983).

<sup>50</sup> Minn. Stat. § 268.035, subd. 15(a) (2010).

employing entities broadly. Minnesota, and many other states, have found that cooperative members can also be employees of their cooperative. And under the common law test required by the Minnesota unemployment insurance statute, the Builders Commonwealth members are independent contractors.

Relator's brief also argues generally that the Builders Commonwealth members cannot be considered employees because they were given advances, which were designated as a loan.<sup>51</sup> First, this is unrelated to the question of whether the members were employees or independent contractors. The test for determining employment makes no reference to wages, but instead specifically refers to "performing services" for an employer. The tests do not require that wages be paid for such a relationship to exist.

Secondly, and more importantly, relator's brief badly misconstrues the plain language of the statute. It is true that Minn. Stat. § 268.035, subd. 29(e) states that "Wages includes advances or draws against future earnings, when paid, as the payments are designated as a loan or return of capital on the books of employer at the time of payment." This language is clear: if an advance or payment is designated as a loan, then it is not a wage when it is paid. This is intuitive. Even a \$1,000 advance, but the construction industry has a poor record of repayment. A member is only entitled to \$500 under the terms of the cooperative's bylaws. The member must repay the remaining \$500. But just as he has not earned

\$1,000 in wages, he has also not earned \$0.

Relator takes a great logical leap in concluding that those payments can never become wages. Minn. Stat. § 268.035, subd. 30(a) defines “Wages paid” as “the amount of wages that have been actually paid or that have been credited to or set apart so that payment and disposition is under the control of the employee.” Where a statute is unambiguous, the words in the statute are applied according to their plain meaning and the Court engages in no further construction.<sup>52</sup> Those advances that members receive do not remain loans indefinitely. At the end of each fiscal year, members learn how much they are entitled to keep, and those funds are no longer loans. The members worked for these wages. The workers pay taxes on them.<sup>53</sup> Even relator’s brief acknowledges that the agreement states that the advances are “set-off against my share of the association earnings.”<sup>54</sup> Those advances that workers keep, and do not repay, are no longer outstanding debt. They are, under Minn. Stat. § 268.035, subd. 29(a), wages, which “means all compensation for services.”

Moreover, relator’s brief seeks to distinguish a number of cases, including those discussed above, from the case at hand, by highlighting the fact that all states have different definitions of wages.<sup>55</sup> First, this does not change the fact that these

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<sup>52</sup> *Scheeler v. Sartell Water Controls, Inc.*, 730 N.W.2d 285, 288 (Minn. App. 2007).

<sup>53</sup> T. 66.

<sup>54</sup> Relator’s brief, p. 22.

<sup>55</sup> Relator’s brief, pp. 25-31.

cases serve to demonstrate that worker collectives can, and do, function as employers. That is the only question in determining whether a worker is an employer or an independent contractor. Second, Minnesota, like all of these states, define wages broadly. None of relator's arguments counter the fundamental point that those payments that workers ultimately keep, and do not return to the collective, are wages. That the collective does not know the precise amount of wages that a member has earned until after the fiscal year has ended does not change the fact that those workers have earned wages.

**2. The members worked in employment for Builders Commonwealth from January of 2006 to January 1, 2009.**

Prior to January 1, 2009, Minn. Stat. § 268.035, subd. 9, read:

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 or has filed business or self-employment income tax returns with the federal Internal Revenue Service based on that work or service in the previous year;
- (3) operates under contracts to perform specific services or work for specific amounts of money under which the independent contractor controls the means of performing the services or work;
- (4) incurs the main expenses related to the service or work that the independent contractor performs under 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.

Thus, unlike the classification of workers in other industries, the classification of workers in the building construction and improvement trades under this statute is an all-or-nothing enterprise. The law prior to 2009 did not allow building construction and improvement workers to be classified as independent contractors unless they met all of nine criteria.

Here, the workers did not. Relator makes only a brief argument,<sup>56</sup> and does not dispute that the workers do not meet all nine of the criteria. There is nothing in the record to indicate that the members maintained a separate business, and indeed the workers' member agreement specifically forbids members from establishing their own competitive businesses. The ULJ's findings that the members were controlled on the job site by various project and site supervisors are entirely supported by the member agreement and the testimony at hearing, and show that the workers did not "control the means of performing the services or work," as required by the third criterion. They did not incur the main expenses relating to the work performed, nor were they liable for failure to complete the work. The workers received an advance draw by the hour; they were not paid on a

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<sup>56</sup> Relator's brief, p. 41.

commission, per job, or competitive bid basis, as required by the sixth criterion. The members do not come close to meeting all nine criteria.

Relators argue that the Department improperly determined the employment status for the members from 2006 through 2010, complaining that Minn. Stat. § 268.043(b) limits the temporal scope of the Department's review.<sup>57</sup> It is true that the statute prohibits the Department from issuing determinations concerning worker status in non-fraud cases "for periods more than four years before the year in which the determination is made..." The Department followed this requirement. The Department issued the determinations in 2010. It was allowed, under the law, to look back "four years before" that year, and it did so. The four years preceding 2010 were 2009, 2008, 2007, and 2006, and the Department issued properly issued determinations concerning all four of those years.

**3. The members worked in employment for Builders Commonwealth after January 1, 2009, and continue to do so.**

The law governing independent contractors in the construction industry changed in 2009. Minn. Stat. § 268.035, subd. 9, was repealed effective January 1, 2009, by 2007 Laws Ch. 135, Art. 3, Sec. 42. In its place, the legislature adopted Minn. Stat. § 181.723, subd. 3, which explains that "...for purposes of chapter[] ...268, as of January 1, 2009, an individual who performs services for a person that are in the course of the person's trade, business, profession, or

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<sup>57</sup> Relator's brief, p. 39.

occupation is an employee of that person and that person is an employer of the individual.” The amended unemployment insurance statute now contains a cross-reference, under Minn. Stat. § 268.035, subd. 9a, explaining that “[f]or purposes of this chapter, section 181.723 determines whether a worker is an independent contractor or an employee when performing public or private sector commercial or residential building construction or improvement services.”

The law applies to “individuals performing public or private sector commercial or residential building construction or improvement services.”<sup>58</sup> Minn. Stat. § 181.723, subd. 3, makes a presumption that individuals such as the members are employees. It explains that “an individual who performs services for a person that are in the course of the person's trade, business, profession, or occupation is an employee of that person and that person is an employer of the individual.”

The statute also defines “person” broadly, under Minn. Stat. § 181.723, subd. 1(a), as “any individual, limited liability corporation, corporation, partnership, incorporated or unincorporated association, sole proprietorship, joint stock company, or any other legal or commercial entity.” Builders Commonwealth does not deny that it is a legal entity, incorporated under Minn. Stat. § 308A.

Relator’s brief argues only that its members did not earn wages, and that

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<sup>58</sup> Minn. Stat. § 181.723, subd. 2 (2010).

certain members did not actually perform building construction and improvement work.<sup>59</sup> First, § 181.723 makes no reference to wages; the test for employment does not hinge on this issue. Second, as discussed above, the members earn wages, though they are not considered paid until after they are received, and are no longer loans. Relator's brief thus essentially concedes that most members are employees under this statute. Its sole argument to the contrary is that it has a handful of members who do not do manual labor, including a salesperson, an architect, and a finance manager.<sup>60</sup>

At hearing, Builders Commonwealth presented testimony from a former member who had only worked as a finance manager,<sup>61</sup> one who worked as both a project manager and a salesperson,<sup>62</sup> and made reference to a project architect.<sup>63</sup> These members were "performing public or private sector commercial or residential building construction or improvement services" as the law requires. The law does not cover only those engaged in manual labor, but instead covers all of those performing "services." An architect who draws up plans for construction or improvement, a project manager who also engages in sales of some kind, and a finance manager who solely worked on financial matters for construction and improvement projects, are still performing such services. They are as integral to

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<sup>59</sup> Relator's brief, p. 34.

<sup>60</sup> Relator's brief, pp. 34-35.

<sup>61</sup> T. 50-51.

<sup>62</sup> T. 29.

<sup>63</sup> T. 38.

the entirety of the projects as those who are laying brick, pouring concrete, or installing cabinets.

But the ULJ made no specific findings as to what tasks these members took on, nor what their relationship to the cooperative was. Should this Court find that the ULJ failed to develop the record or make adequate factual findings on the question of who these members were or what they actually did, the Department would not oppose a remand on that narrow question.

Otherwise, relator's brief does not argue that the remaining members somehow fall under any exception to the law. It does not claim that members have procured independent contractor exemption certificates that would classify them as independent contractors under Minn. Stat. § 181.723, subd. 4. It does not deny that its remaining members perform public or private sector commercial or residential building construction or improvement services, nor that they do this in the course of Builders Commonwealth's business. The members of Builders Commonwealth are employees under Minn. Stat. § 181.723.

**4. There is no collateral estoppel in unemployment benefits determinations.**

Relator's brief argues the collateral estoppels should have precluded the ULJ from hearing and deciding the case.<sup>64</sup> But under the law, there is no collateral estoppel for ULJ decisions.<sup>65</sup> The law is clear that:

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<sup>64</sup> Relator's brief, pp. 42-43.

<sup>65</sup> Minn. Stat. § 268.105, subd. 5a.

No findings of fact or decision or order issued by an unemployment law judge may be held conclusive or binding or used as evidence in any separate or subsequent action in any other forum, be it contractual, administrative, or judicial, except proceedings provided for under this chapter, regardless of whether the action involves the same or related parties or involves the same facts.

Given the fact-specific nature of departmental appeals, as well as the short duration of the hearings and the ULJ's reliance on the parties to submit all necessary documents and give complete and truthful testimony, no two appeals are the same, and it is impossible to ascertain who may be similarly situated. The Minnesota Supreme Court recognized this fact in *Pichler v. Alter Co.*, when it held that "we cannot say as a matter of law that in the absence of any statutory directive the department was obliged to exercise its discretion in every case with inflexible consistency."<sup>66</sup>

This is particularly true where, as here, the statute has changed over the years. At the time the Department's Commissioner's Representative determined the employment status of the 1991 case, the statute was very different. The specific statutory provision governing employment status in the building and construction fields was not added to the statute until 1997, when the legislature passed 1997 Laws, ch. 66, § 4, and added subd. 12a to Minn. Stat. 268.04. Prior to that time, the law governing employment did not specifically address building and construction workers. There is no collateral estoppel here.

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<sup>66</sup> 240 N.W.2d 328, 329 (Minn. 1976).

## **Conclusion**

Unemployment Law Judge Richard Croft properly found in this case that the services the members provided to Builders Commonwealth were provided in employment. Under Minn. Stat. §§ 268.035 and 181.723, the members are employees of Builders Commonwealth. The Department requests that the Court affirm the decision of the Unemployment Law Judge.