STATE OF MINNESOTA
IN COURT OF APPEALS
A10-815

Jeffery Anderson,
Respondent,

vs.

Holly Littrell,
Relator,

Department of Employment and Economic Development,
Respondent.

Filed January 25, 2011
Affirmed
Halbrooks, Judge

Department of Employment and Economic Development
File No. 23712514-2

Jeffery Anderson, Winona, Minnesota (pro se respondent)

John C. Beatty, Dunlap & Seeger, P.A., Rochester, Minnesota (for relator)

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

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Connolly, Judge.

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

HALBROOKS, Judge

In this certiorari appeal, relator Holly Littrell, owner of FHR Farms, challenges the unemployment-law judge's (ULJ) decision that respondent Jeffery Anderson was an employee rather than an independent contractor. Because we conclude that substantial evidence supports the ULJ's determination and the decision is not based on a procedural or any other error of law, we affirm.

FACTS

Anderson worked as a truck driver delivering liquid fertilizer for FHR Farms between April 2008 and May 2009. Anderson testified at the hearing that he came into contact with FHR Farms when a friend of his, Al Sorem, called and asked him if he wanted a job there. Anderson drove the same truck that Al Sorem had been using for FHR Farms—a truck owned by Moeller Trucking. While the record is not clear what the arrangements governing Anderson's use of the truck were, it is undisputed that he did not supply the truck or pay for its fuel or insurance. Jeff Littrell, manager of FHR Farms, testified that Moeller provided the truck free of charge but stated that he did not know why. Jeff Littrell stated, "there's never been an agreement between [Moeller and FHR Farms]. We've never paid [Moeller] anything for it."

In addition to hauling fertilizer for FHR Farms, Anderson also hauled fertilizer for other companies. But he was always paid by FHR Farms. Anderson testified that in order to determine when he was going to haul fertilizer, he "called BRT, which is a partner of Jeff Littrell's." He testified that he "was working mainly . . . for [BRT, the

company co-owned by Jeff Littrell]. And I'd have to call [Jeff Parish from BRT] and he'd give me load numbers and where to go pick them up. Then he would give me the person's name and number of where to deliver them and tell them when I'd be there." According to Anderson, calling for jobs "went both ways. [Jeff Littrell would] tell me to call in a couple days, you know, wait, call back next week or three days and we'll see. And then sometimes he would call me and tell me he'd have a load to go."

In contrast to Anderson, Jeff Littrell testified that there was no arrangement between FHR Farms and BRT or any other company that Anderson hauled for. Littrell stated, "It's just work had, work needed to be done. That's how it works in farming." When the ULJ asked, "So you're saying that [Anderson] performed work that you were completely unaware of and you just paid it because he presented you the invoice and you didn't look into it, you didn't question it, you just paid it?", Jeff Littrell answered, "That's correct."

FHR Farms did not always have work available for Anderson, and Anderson testified that there were times when he had no work, including the middle of June until July and in August 2008, and from November 2008 to January 2009. When asked if he worked full-time for FHR Farms, Anderson testified, "Well, like I said, it'd be a week or two, six weeks, I think, was my break from 2008 to 2009." The ULJ tried several times to clarify if Anderson worked full-time when there was work available, but Anderson never provided a clear answer. The length of Anderson's work day depended on the delivery location for a load; it ranged from three to eleven hours.

With respect to compensation, FHR Farms paid Anderson $.40 per mile and a total of approximately $26,000 during the employment period. Anderson testified that he would submit his mileage reports "[e]very two weeks, if [he] worked two weeks." He did not receive any benefits, vacation, or sick time, and no deductions were withheld from these checks. Jeff Littrell testified that Anderson received no training from FHR Farms, was not required to attend any meetings, and was not reimbursed for expenses. But there was also evidence that Anderson was reimbursed for some expenses, such as road tolls and a motel room.

Anderson testified that FHR Farms could stop using him as a driver at any time without penalty, and FHR Farms did terminate Anderson in May 2009. When Anderson applied for unemployment benefits, he listed the wages that he had received from FHR Farms on his application. Respondent Minnesota Department of Employment and Economic Development (DEED) conducted a field audit to determine Anderson's status and determined that Anderson was an employee of FHR Farms.

FHR Farms appealed, and the ULJ conducted a telephone hearing. After hearing testimony from a DEED representative about the results of the field audit and soliciting testimony from Anderson and Holly and Jeff Littrell, the ULJ concluded that Anderson was FHR Farms' employee rather than an independent contractor. The ULJ determined that although Anderson did not continually work for FHR Farms, when there was work available he was working on a full-time basis and that "[f]rom April 2008 through May 8, 2009, Anderson worked on a frequently recurring basis." The ULJ found that Anderson was delivering a product offered by FHR Farms in the course of its regular business and

that he was doing so pursuant to Jeff Littrell's instructions. FHR Farms requested reconsideration, and the ULJ affirmed. This appeal follows.

D E C I S I O N

I.

FHR Farms argues that the ULJ erred by determining that Anderson was an employee for whom unemployment taxes are owed. Unemployment taxes are "to be paid into the trust fund by an employer on account of paying wages to employees in covered employment." Minn. Stat. § 268.035, subd. 25 (2008). FHR Farms contends that Anderson was an independent contractor. 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).

Whether an individual is an employee or an independent contractor is a mixed question of law and fact. *Lakeland Tool & Eng'g, Inc. v. Engle*, 450 N.W.2d 349, 352 (Minn. App. 1990). This court reviews factual findings in the light most favorable to the decision. *Skarhus v. Davanni's Inc*., 721 N.W.2d 340, 344 (Minn. App. 2006). Questions of law are reviewed de novo. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). This court may reverse a decision that is not supported by substantial evidence or is affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2008).

An "employee" is statutorily defined as an "individual who is performing or has performed services for an employer in employment." Minn. Stat. § 268.035, subd. 13(1) (2008). "Employment," in turn, involves 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).

> Traditionally, five factors are used to determine whether a worker is an employee or an independent contractor: (1) The 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. Of these five factors, the two most important are the right or the lack of the right to control the means and manner of performance, and the right or the lack of the right to discharge the worker without incurring liability.

St. Croix Sensory Inc. v. Dep't of Employment & Econ. Dev., 785 N.W.2d 796, 800 (Minn. App. 2010) (quotations omitted). These factors are also listed in Minn. R. 3315.0555, subp. 1 (2009), and are referred to as the "essential" factors to consider. The application of these factors in any given case is fact-specific. *Id.*

The right to control an employee's means and manner of performance

Whether or not an employer has the right to control the means and manner of performance is one of the two most important essential factors. *Id.* Control is determined by the totality of the circumstances but is guided by 13 criteria listed in the Minnesota Rules. Minn. R. 3315.0555, subp. 3 (2009). None of the 13 criteria is dispositive; they must be evaluated in context. *See, e.g., St. Croix Sensory Inc.*, 785 N.W.2d at 803 (concluding that the employer did not control the means and manner of performance despite the fact that at least four criteria indicated control). Based on the 13 criteria, an employer's control over an individual is indicated when, among others things, "an individual is required to comply with detailed instructions about when, where, and

how to work" (Minn. R. 3315.0555, subp. 3B); there is a continuing relationship, which may include "work performed at frequently recurring, though somewhat irregular intervals, either on call of the employer or whenever work is available" (*id.*, subp. 3F); full-time work is required (*id.*, subp. 3J); the employer furnishes the tools and materials required to perform the work (*id.*, subp. 3K); and the employer reimburses the individual for approved business or travel expenses (*id.*, subp. 3L). Our evaluation of Anderson's position in the context of these criteria suggests that FHR Farms controlled the means and manner of Anderson's performance.

Anderson picked up and delivered loads to customers based on instructions from Jeff Littrell or others at Jeff Littrell's direction. Anderson was told when, where, and for whom to make deliveries. He was paid exclusively by FHR Farms, earning approximately $26,000 during the time that he worked for FHR Farms. Even though there were some intervals when work was not available, the overall pattern of work demonstrates a continuing relationship. Anderson testified that, when work was available, he might work up to 11-hour days, indicating that full-time work was required.

It is undisputed that neither Anderson nor FHR Farms owned the truck that Anderson used to make the deliveries. But regardless of ownership, the ULJ concluded that FHR Farms must have "furnished" the truck for Anderson's use. We agree. In addition, FHR Farms gave Anderson a credit card to use for gasoline and on-the-road repairs and reimbursed Anderson for tolls and at least one night in a motel. Based on this record, we conclude that FHR Farms had control over the means and manner of Anderson's performance.

The right to discharge without incurring liability

The second important factor in the independent-contractor analysis is whether an employer can discharge an individual without regard to his or her performance on a project and without incurring liability for doing so. *St. Croix Sensory Inc.*, 785 N.W.2d at 803. If so, this suggests an employer-employee relationship. FHR Farms terminated its relationship with Anderson in May 2009, for a reason not clear from the record, without incurring any liability for his discharge. This factor too suggests that Anderson was an employee of FHR Farms.

Although the Minnesota Rules outline additional factors that can be considered in an independent-contractor analysis, we do not consider them here because the two most important factors both favor a finding that Anderson was FHR Farms' employee. We therefore conclude that the ULJ's conclusion that Anderson was FHR Farms' employee is supported by substantial evidence and is not affected by any other error of law. *Cf. Neve v. Austin Daily Herald*, 552 N.W.2d 45, 48 (Minn. App. 1996) (concluding that driver was an independent contractor when she used her own vehicle, hired substitutes, was not subject to immediate discharge, and received a flat fee based on the number of newspaper deliveries).

II.

FHR Farms argues, in the alternative, that the ULJ failed to make statutorily required credibility determinations and made a procedural error requiring remand. The ULJ discredited testimony from Jeff Littrell that (1) Al Sorem, rather than FHR Farms, furnished the truck, (2) he was unaware Anderson was driving for other companies, and

(3) Anderson held himself out to the public as a qualified truck driver. "When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the [ULJ] must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (Supp. 2009).

FHR Farms contends that the ULJ failed to set out her reasons for discrediting Jeff Littrell's testimony. We disagree. The ULJ addressed her basis for discounting the testimony about the source of the truck Anderson used. She stated that "it seems unlikely that a company would agree to allow its truck and trailer to be used without any compensation and without any agreement as to its use." In addition, the ULJ commented on Jeff Littrell's testimony regarding Anderson's work for other companies, concluding that

> Anderson called Parish and the other owners because he was instructed to do so by [Jeff] Littrell. The work he performed for those other companies was paid for by FHR Farms and done on behalf of FHR Farms. Anderson did not have any outside agreement with any other company to provide delivery/driving services. The fact that [Jeff] Littrell assigned others to give Anderson direction rather than requiring that they give him the information to give to Anderson does not change the essential fact that Anderson performed delivery services based on instructions given by [Jeff] Littrell or other company owners [Jeff] Littrell authorized to give Anderson assignments.

Whether or not Anderson held himself out to the public as a qualified truck driver is only one of eight "additional" factors used to determine an individual's status; it is not one of the five "essential" factors. *See* Minn. R. 3315.0555, subp. 2 (2009). Therefore,

we disagree with FHR Farms that this testimony significantly affected the outcome of the case.

FHR Farms contends that this case should be remanded for an additional evidentiary hearing because the ULJ failed to accept as an exhibit a questionnaire that Holly Littrell completed as part of DEED's field audit. This court can remand a decision that is based upon unlawful procedure. Minn. Stat. § 268.105, subd. 7(d). The ULJ "must ensure that all relevant facts are clearly and fully developed," but there is no requirement that a ULJ accept all proffered exhibits. Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009). The ULJ did not accept the questionnaire as an exhibit because Anderson indicated at the outset of the hearing that he had not received a copy of it. The ULJ stated that the document was unnecessary because Holly and Jeff Littrell were both present to "give testimony regarding the information that's on that questionnaire." Counsel for FHR Farms and the Littrells was also present at the hearing and had the opportunity to ask questions of the Littrells in order to solicit the information included in the questionnaire. We therefore conclude that the ULJ ensured that the facts were clearly and fully developed and did not make a procedural error by not accepting the proffered exhibit.

FHR Farms also claims that, in part because this questionnaire was not in evidence, the testimony from DEED's representative was not credible and should have been stricken or severely discounted in the ULJ's decision. FHR Farms seems to assume that because the ULJ ultimately reached the same conclusion as did DEED's field auditor, the ULJ must have found the DEED representative's testimony to be particularly

credible and that this testimony must have had a significant effect on the outcome of the decision. We find nothing in the record to support either of these assertions. The ULJ's decision is supported by substantial evidence in the record and is not affected by a procedural or any other error of law.

Affirmed.