STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0657

Avtandil Baindurashvili,
Respondent,

Vyacheslav Kirkov,
Respondent,

vs.

Helpful Hands Transportation, Inc.,
Relator,

Department of Employment
and Economic Development,
Respondent.

Filed November 13, 2012
Affirmed
Cleary, Judge
Stauber, Judge, dissenting

Department of Employment
and Economic Development
File Nos. 25886858-7, 26006922-8

Avtandil Baindurashvili, Crystal, Minnesota (pro se respondent)

Vyacheslav Kirkov, Burnsville, Minnesota (pro se respondent)

Jon R. Schindel, Kyle D. Moen, Jennifer Nixon, SeilerSchindel, PLLC, Minneapolis, Minnesota (for relator)

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

Considered and decided by Chutich, Presiding Judge; Stauber, Judge; and Cleary, Judge.

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

CLEARY, Judge

Relator employer challenges the decision of an unemployment-law judge (ULJ) dismissing relator's request for reconsideration as untimely and affirming the decision that respondent individuals were employees of relator and not independent contractors. Relator and respondent department agree that, under the circumstances of this case, relator's request for reconsideration was timely. We affirm the ULJ's determination that respondents were employees of relator.

FACTS

Relator Helpful Hands Transportation, Inc., is a non-emergency medical transportation company that arranges for drivers to transport patients to and from appointments at hospital and clinics. Respondent Avtandil Baindurashvili started driving for relator in 2003, and respondent Vyacheslav Kirkov began driving for relator in 2007. Until April 2009, relator treated respondents as employees. In April 2009, relator required all of its drivers, including respondents, to form limited liability companies (LLCs). Relator signed contracts with the drivers and began to treat the drivers as independent contractors. To keep working, the drivers were forced to comply with this mandate imposed by relator. The parties' contract stated that it could be terminated at any time by either party.

In order to arrange for transportation, an insurance company contacts relator to schedule a service for a patient, and relator's dispatcher directs a specific driver to complete the assignment. The driver does not have to accept the assignment, and if the driver declines, the dispatcher will contact another available driver. Relator does not dictate the route that the driver must take to complete the assignment, but it must be completed at a specific time. Drivers are not required to work a minimum amount of hours, but are required to let the dispatcher know when they will be unavailable. Other than times when they are unavailable, drivers accept most assignments during the normal workday, ending around 5:00 – 6:00 p.m. Kirkov testified that when the dispatcher decides the drivers are no longer needed for the day, they are dismissed. Kirkov also testified that the dispatcher decides when drivers are on call or expected to drive later than the normal ending time. Drivers are required to report to the dispatcher after they complete a service so the dispatcher knows the availability and location of the drivers.

Drivers are paid for each assignment that they complete. Insurance companies pay relator a loading fee and mileage rate for each assignment completed. Relator calculates the route mileage by entering the pick-up and drop-off addresses into a computer program; the driver's actual mileage is not calculated or reported. Once a month, relator compiles all of the assignments that each driver has completed and pays the driver 70% of the amount relator receives for those assignments from the insurance companies.

Drivers provide, maintain, and insure their own vehicles. Drivers are required by law to equip their vehicles with certain safety items, including blankets, flashlights, a first-aid kit, and a car seat, which the drivers pay for and supply. Relator provides a two-

way radio for drivers to communicate with the dispatcher. In addition to these items, relator requires that drivers display its logo on their vehicles. Drivers are also responsible for paying for their government-required training. Drivers obtain and pay for their own liability insurance, but they are specifically instructed by relator as to what liability insurance they are expected to purchase. Although relator claims that drivers are free to work for other companies, respondents here did not advertise their services or attempt to get other business.

In June 2010, Baindurashvili was discharged by relator because he had a previous conviction for spousal abuse, which prohibited him from driving for relator. Kirkov also separated from relator in June 2010. Following their separation from relator, both respondents applied for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development (DEED) conducted an audit, which resulted in determinations that respondents were employees of relator, not independent contractors. Relator appealed the determinations and the appeals were consolidated for a telephone hearing before a ULJ, which took place on September 30 and October 11, 2010. The ULJ, basing his considerations on the factors set forth in Minn. R. 3315.0555 (2009), confirmed that respondents were employees rather than independent contractors. Relator requested reconsideration of the ULJ's decision, and the ULJ affirmed upon reconsideration.

In January 2011, relator filed a certiorari appeal with this court, arguing that the evidence did not support a determination that respondents were employees; that the ULJ's analysis was contrary to the framework set forth in Minn. R. 3315.0555; and that

the ULJ's decision was arbitrary and capricious. In November 2011, this court reversed and remanded the case to the ULJ, noting that the ULJ's analysis did not follow the framework established in Minn. R. 3315.0555 and that his findings of fact were not fully explained, preventing this court from reviewing whether his decision was supported by substantial evidence. *Baindurashvili v. Helpful Hands Transp., Inc.*, No. A11-0060, 2011 WL 5829101, at *2–3 (Minn. App. Nov. 21, 2011). This court also held that the ULJ's decision was not arbitrary and capricious. *Id.* at *3.

In January 2012, the ULJ issued a decision affirming his previous decision as factually and legally correct. The decision included an addendum which set forth his findings of fact and reasons for decision. Relator had difficulty navigating DEED's website when attempting to file a request for reconsideration, but eventually filed the request by facsimile, express mail, and online.

In March 2012, the ULJ issued a decision dismissing relator's request for reconsideration as untimely and affirming the decision filed in January. Relator filed this certiorari appeal in April 2012. In June 2012, this court issued a special-term order holding that "[j]udicial economy will be served by allowing the reviewing panel to address the merits [of this case], if the panel determines that the ULJ erred in concluding that relator's request for reconsideration was untimely," and ordered that the parties' briefs address both issues. DEED agrees that, under the circumstances of this case, relator's request for reconsideration was timely filed. We therefore review the merits of the ULJ's decision that respondents were employees of relator.

D E C I S I O N

"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) (2010)).

"Whether a worker is an employee or an independent contractor involves a mixed question of law and fact." *Lakeland Tool & Eng'g, Inc. v. Engle*, 450 N.W.2d 349, 352 (Minn. App. 1990). We review a ULJ's factual findings in the light most favorable to the decision and will not disturb them if they are sustained by substantial evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). "We 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).

An employee is an "individual who is performing or has performed services for an employer in employment." Minn. Stat. § 268.035, subd. 13(1) (2010). 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) (2010). Unemployment taxes are those money payments "to be paid into the trust fund by an employer on account of paying wages to employees in covered employment." *Id*., subd. 25 (2010). "The remuneration of independent contractors does not constitute taxable wages covered by the unemployment-benefits law." *St. Croix Sensory*, 785 N.W.2d at 799.

The nature of the relationship of the parties is not determined by the contract terms, but by the actual arrangements and conduct of the parties. *Id.* at 800. "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." *Id.*

Minn. R. 3315.0555, subp. 1 (2011), states:

> 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.
>
> Other factors, including some not specifically identified in this part, may be considered if a determination is inconclusive when applying the essential factors, and the degree of their importance may vary depending upon the occupation or work situation being considered and why the factor is present in the particular situation.

Minn. R. 3315.0555, subp. 3 (2011), establishing 13 criteria for determining control of the means and manner of performance, was repealed during the 2012 legislative session. *See* 2012 Minn. Laws ch. 201, art. 3, § 16 (repealing subparts 2 through 4). The repealer "applies retroactively to all pending cases." *Id.* The parties were able to consider this change when writing their briefs. Because we review issues of law de novo, we analyze the present case under the new version of the rule. As noted by DEED, however, the factors for determining control still exist in common law. Although

none of the criteria are dispositive, *see, e.g.*, *St. Croix Sensory*, 785 N.W.2d at 800–03, they are useful guidance in determining control.

Right to Control the Means and Manner of Performance

DEED argues that relator exercised significant control over the manner in which respondents performed their work. "The determinative right of control is not merely over *what* is to be done, but primarily over *how* it is to be done." *Id.* at 800 (quotation omitted). Some factors to be considered when determining the right to control include whether a continuing relationship exists between the parties, whether set working hours are established, and whether individuals have the right to direct the method of performing work or whether they must comply with detailed instructions from the employer. *Id.* at 800–01.

Relator here instructed respondents where and when to pick up and drop off patients. Relator required respondents to check in with the dispatcher when they completed an assignment. Respondents and relator had a long-term relationship; Baindurashvili worked for relator for over six years and Kirkov worked for relator for three years before they separated from employment with relator. During the time they worked for relator, respondents did not advertise their services to other companies and did not provide transportation for any other companies. Additionally, after years of being treated as employees, respondents were *required* to form LLCs to continue working for relator.

Respondents had control over the routes that they took to transport patients. They also controlled whether they accepted an assignment from the dispatcher, but as

Baindurashvili testified, he never refused an assignment, and Kirkov testified that he did not refuse assignments and that he did not know what would happen if he refused an assignment while on-call. Respondents were not required to work set hours, but were required to let the dispatcher know when they would be unavailable. Assignments were available primarily during the normal workday, and respondents were told when they would be working past 5:00 p.m. or if they were released for the day. Based on these facts, this factor weighs in favor of the existence of an employer-employee relationship.

Ability to Discharge Respondents Without Incurring Liability

Generally, if an independent contractor is performing the terms of the contract, the individual cannot be discharged without the other party incurring liability. *St. Croix Sensory*, 785 N.W.2d at 803. An employment relationship may exist if the individual can be terminated with little notice and without cause. *Id.*

In *St. Croix Sensory*, individuals worked for the company as sensory assessors, performing odor evaluations. *Id.* at 798. They worked for the company for one or more test sessions, but the contract was not a fixed, long-term contract. *Id.* at 803–04. This court, when addressing whether the company could terminate the relationship without incurring liability, noted that there was liability if the company terminated the assessors during a test session. *Id.* at 804. In that case, the company would still be required to pay the assessor for the partially-completed session. *Id.* The court found that, even though the company could discharge its assessors with little notice, it would still incur some liability, so the relationship between the parties looked more like an independent-contractor relationship than an employer-employee relationship. *Id.*

Here, either party could terminate the relationship at any time and for any reason, and relator was not required to continue providing assignments to respondents. In contrast to *St. Croix Sensory*, where the assessors usually only signed up for one test or one test session at a time, respondents here contracted their services on an ongoing basis. *See id.* at 803–04. Despite the theoretical liability that relator would incur for terminating a single assignment, relator would not incur liability if it completely stopped offering assignments to respondents. Even though respondents had been working for relator for years, relator had no obligation to continue contacting them for services. This factor also supports the existence of an employer-employee relationship.

Mode of Payment

Payment on a per-job basis is customary when the worker is an independent contractor. *St. Croix Sensory*, 785 N.W.2d at 804.

The ULJ found that respondents did not submit bills or invoices to relator and that the actual mileage that they drove is irrelevant. They were paid for each assignment that they completed based on what the insurance company paid relator. This factor indicates existence of an independent-contractor relationship.

Furnishing of Materials and Tools

With the exception of the two-way radio, respondents provided and maintained all of the tools necessary to perform the service. Respondents provided the vehicle and safety equipment, maintained the vehicle, and provided the insurance necessary to operate the vehicle. This factor weighs in favor of classifying respondents as independent contractors.

Control over the Premises Where the Services are Performed

The ULJ found that the only requirement that relator demanded of respondents was that they display relator's logo on their vehicles. The ULJ also noted that it was "common for drivers to use their own personal/family vehicles as work vehicles." These findings are substantially supported by the record and indicate that relator had very little control over the premises, or vehicles, where the services were performed.

In conclusion, relator controlled the means and manner of performance and had the ability to discharge respondents without incurring liability. These two factors indicate that an employer-employee relationship existed. Although the other three factors indicate an independent-contractor status, the first two factors are the most important when determining employment status, *see* Minn. R. 3315.0555, subp. 1, and both weigh in favor of the existence of an employer-employee relationship. Based on the totality of the circumstances, we agree with the ULJ's decision that respondents were employees of relator, not independent contractors.

Affirmed.

STAUBER, Judge, dissenting

I respectfully dissent.

After respondent drivers converted to independent-contractor status, DEED determined that they were still employees for unemployment-compensation purposes when they subsequently terminated their business relationships with relator.

In the process of the converting from employees to independent-contractors, the parties agreed that the independent-contractor drivers would own, maintain, insure, and license their own medical transport vehicles; establish their own limited-liability companies (LLCs); obtain their own insurance; comply with regulatory and licensing requirements; maintain required training; and pay their own taxes. Either party could sever the relationship with little or no notice and some, but little, liability.

The majority states that relator "instructed respondents where and when to pick up and drop off customers." But this is no different than most independent transports such as taxis, ambulances, and independent truckers who are often dispatched and are paid on a "per-job" basis.

The facts here could easily result in a different conclusion.