

LEONA GAUTHIER by FREDERICK GAUTHIER, Petitioner, v. JML ENTERS., Uninsured Employer, and SPECIAL COMPENSATION FUND.

WORKERS' COMPENSATION COURT OF APPEALS  
DECEMBER 19, 2001

No. [REDACTED SSN]

HEADNOTES

**EVIDENCE - BURDEN OF PROOF; EMPLOYMENT RELATIONSHIP - INDEPENDENT CONTRACTOR.** An employee's entitlement to workers' compensation benefits depends on an employment relationship, and the burden of proving that relationship does not shift to a purported employer simply by virtue of the fact that independent contractor status may have been pleaded by the purported employer as an affirmative defense.

**EMPLOYMENT RELATIONSHIP - INDEPENDENT CONTRACTOR; RULES CONSTRUED - MINNESOTA RULES 5224.0292, SUBPART 2.** Where there was evidence that the decedent messenger/courier had voiced a preference for leasing a vehicle from the purported employer rather than driving her own, where she signed an Independent Contractor Agreement referencing such a lease, where her pay checks indicated deduction of money corresponding to terms of the lease document that she examined, and where the decedent was driving a vehicle named in that lease document at the time of her death, the compensation judge's implicit conclusion that the decedent was subject to a bona fide lease agreement with the purported employer sufficient to satisfy the first criteria of Minnesota Rules 5224.0292, subpart 2, was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that the lease document remained unsigned by the decedent.

**EMPLOYMENT RELATIONSHIP - INDEPENDENT CONTRACTOR.** Where it was not unreasonable for the compensation judge to conclude that the decedent was subject to a bona fide lease agreement with the purported employer and was solely in control of her profit acquisition, and because the decedent's relationship with the purported employer was reasonably shown therefore to satisfy all of the "safe harbor" criteria provided for in Minnesota Rules 5224.0292, subpart 2, for establishing independent contractor status for a messenger/courier, the compensation judge's conclusion that the decedent was an independent contractor and not an employee of the purported employer was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Johnson, J. and Wilson, J.  
Compensation Judge: Gregory A. Bonovetz

## OPINION

WILLIAM R. PEDERSON, Judge

The petitioner appeals from the compensation judge's determination that his deceased wife was an independent contractor and not an employee of JML Enterprises at the time of her fatal injury. We affirm.

### BACKGROUND

In about March or April of 1999, Leona Gauthier began working as a courier through JML Enterprises, a two-person company that provided delivery services to various enterprises, including, primarily, Corporate Express, an express delivery company, and True Colors, a photo processor. At that time, Ms. Gauthier's husband, Frederick Gauthier [the petitioner], had already been performing courier work through JML Enterprises [JML] for at least several months. Apparently in early April 1999, Ms. Gauthier was given a document prepared by JML entitled "Independent Contractor's Agreement." Under terms of the Independent Contractor's Agreement, a signer acknowledged that she was an independent contractor and not an "employee" of JML. Also among terms of this agreement was the provision that the "[c]ontractor owns or holds a vehicle under a bona fide lease or leases a vehicle and provides driver services in local or interstate transportation. Contractor provides the means for the transportation of property." At the same time as she was provided with this document, Ms. Gauthier was provided with a document entitled "Permanent Lease Agreement," designed as an instrument for conveying to a signer lease privileges to either or both of two vehicles owned by JML. Under terms of the lease agreement, the signer agreed to be responsible for costs generally associated with maintaining a vehicle, including insurance, gasoline, general maintenance, etc., and these costs were to be deducted from amounts paid to the signer by JML. Before signing either of these agreements, Ms. Gauthier evidently took both the Independent Contractor's Agreement and the Permanent Lease Agreement home to study them. On April 3, 1999, she signed the Independent Contractor's Agreement and returned both agreements to JML, the Permanent Lease Agreement remaining unsigned without comment.

JML was organized to service about eight delivery routes for its customers, ranging from North Dakota through northern and central Minnesota and into northwestern Wisconsin. Although JML provided assistance to Ms. Gauthier in determining the quickest and most efficient highways to use on these routes, Ms. Gauthier was free to use whatever highways or other roads were available. Where Ms. Gauthier should stop along any given route was determined by arrangement between Ms. Gauthier and the parties to whom or for whom she was making delivery, not by JML, and Ms. Gauthier was personally responsible to these parties for rectification of any error in delivery. Ms. Gauthier picked up goods to be delivered for Corporate Express at that business's own facility, although, due to True Colors' relatively late hour of opening each morning, she picked up goods to be delivered for True Colors at JML's place of business. In her work through JML, Ms. Gauthier was free to accept and to perform other courier jobs for other businesses and even to integrate those jobs into the delivery routes that she happened to be driving by arrangement with JML. Ms. Gauthier was entitled to keep all earnings from this extra work

without sharing any of them with JML, even when her delivery routes were thus integrated. JML had no right to control either the means or the manner of Ms. Gauthier's work, and at no time was Ms. Gauthier required to work a specified number of hours or any assigned shift. Ms. Gauthier was free to select the routes that she wanted to drive and to decline those that she did not, and if something arose unexpectedly to preclude her performing her scheduled deliveries she was personally responsible for finding a substitute driver. JML paid Ms. Gauthier, as it did any driver with whom it worked, a flat rate based on the delivery routes that she drove. As it was for drivers who normally leased their vehicles from JML, this rate was reduced in most of Ms. Gauthier's pay checks by an amount apparently corresponding to the number of miles Ms. Gauthier had driven in JML vehicles during the pay period, the cost of gasoline expended in driving those vehicles, and other costs of operating those vehicles.

On September 4, 1999, Ms. Gauthier was fatally injured in the course of the delivery work that she was performing through JML, while driving a vehicle named on the lease agreement that she had left unsigned. JML was uninsured against worker's compensation liability at the time of the accident. On November 24, 1999, the petitioner filed a claim petition on behalf of Ms. Gauthier, alleging entitlement to workers' compensation dependency benefits consequent to Ms. Gauthier's fatal injury on September 4, 1999.

The matter came on for hearing on March 27, 2001, when the sole issue was whether or not Ms. Gauthier had been an "employee" of JML on September 4, 1999, for workers' compensation purposes. Much of the evidence presented at hearing was in the form of either deposition testimony or live testimony from several witnesses: Linda Malewski, a co-owner of JML; the petitioner; Lynn Differding, another messenger/courier working with JML at the time of Ms. Gauthier's death; and Jonathan Malewski, a co-owner of JML. Ms. Differding's testimony included testimony that her own vehicle lease agreement with JML was in writing for the first year and after that oral. The petitioner's testimony included testimony that he didn't recall signing an automobile lease agreement with JML himself and was unaware whether Ms. Gauthier had ever signed one but that he did know that Ms. Gauthier had used JML vehicles for personal purposes on occasion, though he didn't recall how frequently that occurred.

By findings and order filed April 10, 2001, the compensation judge concluded in part that, prior to April 3, 1999, when she signed the "Independent Contractor's Agreement" with JML, Ms. Gauthier had "advised JML that rather than using her own vehicle for deliveries she preferred to lease a vehicle from JML Enterprises." The judge concluded further that Ms. Gauthier "was solely in control of her profit acquisition" at the time of her fatal injury and that "[a]t no time between her start of work as a courier in early 1999 and the fatal injury of September 4, 1999 was Ms. Gauthier an 'employee' of JML Enterprises." The judge concluded his accompanying memorandum by stating,

When viewed in their totality, the facts of the present case inexorably leads the Court to conclude that all of the "independent contractor" criteria of Rule 5224.0292[, subpart 2,] are substantially met. Similarly a preponderance of the evidence establishes the

“employee” criteria of Rule 5224.0292[, subpart 3,] are not substantially met.

The petitioner appeals.

## STANDARD OF REVIEW

In reviewing cases on appeal, the Workers’ Compensation Court of Appeals must determine whether “the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, “they are supported by evidence that a reasonable mind might accept as adequate.” Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, “[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.” Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, “unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” Id.

## DECISION

The compensation judge concluded that, within the meaning of the Minnesota Rules 5224.0292, subparts 2 and 3, the “safe harbor” rules regarding the employment status of a messenger/courier,<sup>1</sup> Ms. Gauthier was an independent contractor and not an “employee” of JML at the time of her fatal injury in September of 1999. Therefore, the judge concluded, the petitioner was entitled to no dependency benefits under Minnesota workers’ compensation law. The petitioner contends that the judge erred in this decision, arguing (1) that the judge “mistakenly applied a burden of proof analysis to the undisputed facts,” (2) that “[t]here was no bona fide lease between Leona Gauthier and JML” such as is required to satisfy Minnesota Rules 5224.0292, subpart 2, and (3) that “[t]he substance of decedent’s relationship with [JML] was employment, not independent contractor,” pursuant to Minnesota Rules 5224.0340, on which, the petitioner argues, the judge should have relied, in that “the criteria set forth in the specific regulation (5224.0292, relied upon by the trial court) are not satisfied.”

### Burden of Proof

In his memorandum, the compensation judge indicated that the burden of proof had been on the petitioner to establish Ms. Gauthier’s status as an employee and that the petitioner had failed in that burden. The petitioner contends that, because JML had pled Ms. Gauthier’s status as an independent contractor as an affirmative defense, the burden of proof had been on JML to prove that status rather than on the petitioner to prove employee status. At any rate, the petitioner argues, because

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<sup>1</sup> See Minnesota Rule 5224.0010.

“there are no significant factual disputes,” the “[b]urden of proof is not in question” and the matter is strictly a legal issue, for this court’s de novo review. We are not persuaded.

An employee’s entitlement to workers’ compensation benefits depends on an employment relationship, and we can contemplate no situation in which that employment relationship is to be simply presumed, notwithstanding independent contractor status as an affirmative defense. Had Ms. Gauthier in this case lived through her accident, had benefits been initially commenced on the presumption that Ms. Gauthier was an employee, and had JML then alleged independent contractor status, on perhaps a discontinuance action or in defense of a permanency claim, the burden of proof as to employment status might shift, at least initially, to JML.<sup>2</sup> That, however, is not here the case.

We are also unpersuaded by the petitioner’s argument that, because most of the relevant evidence may be contained in three transcripts of testimony,<sup>3</sup> “there are no significant factual disputes” and Ms. Gauthier’s employment status is therefore simply a legal issue. In Hunter v. Crawford Door Sales, 501 N.W.2d 623, 48 W.C.D. 637 (Minn. 1993), the supreme court indicated that “the determination of employment status is, ultimately, a legal one.” Hunter v. Crawford Door Sales, 501 N.W.2d 623, 624, 48 W.C.D. 637, 639 (Minn. 1993) (emphasis added). However, as implied in that decision, the facts upon which that ultimately legal determination might be based—i.e., the facts to be legally “measured against standards set out by rule and prior case law”—may well be “facts as found by the compensation judge.” Id. at 625, 48 W.C.D. at 639; see also Oelrich v. Schlagels, Inc., 426 N.W.2d 430, 41 W.C.D. 84 (Minn. 1988) (although the question becomes one of law where the evidence is free from conflict as to the controlling facts, the question of whether a person is an employee is a question of fact in certain cases), citing Hagberg v. Colonial & Pacific Frigidways, Inc., 279 Minn. 396, 403, 1567 N.W.2d 33, 39 (1968). In this case, where the profession of the worker at issue is apparently one of those professions for which “safe harbor” criteria are provided by the rules, the controlling facts leading to the ultimately legal determination are those separate factors listed in Minnesota Rules 5224.0292. Those facts were clearly in dispute before the compensation judge, and, indeed, at least two of them—the existence of a bona fide vehicle lease and Ms. Gauthier’s control over her profit acquisition, remain still in dispute here on appeal. However ultimately legal the issue, Ms. Gauthier’s employment status at the time of her death remains directly dependent on our factual standard of review to the extent that those threshold facts remained unresolved and unconceded by the appellant. And the burden of proving those facts remains in this case on the employee, transferred in this case to the petitioner.

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<sup>2</sup> See Violette v. Midwest Printing, 415 N.W.2d 318, 322, 40 W.C.D. 445, 453 (Minn. 1987) (the employer and insurer have the burden of proving by a preponderance of the evidence that a discontinuance of benefits is warranted); Larson v. Hauenstein and Burmeister, No. [REDACTED SSN] (W.C.C.A. Jun. 24, 1992) (after employer and insurer had sustained their initial burden of establishing sufficient evidence to support a discontinuance of benefits based on evidence that the employee’s injury was a temporary aggravation, the compensation judge properly shifted the burden of proof to the employee to show entitlement to ongoing benefits).

<sup>3</sup> The transcript of the deposition of Jonathan Malewski (Petitioner’s Exhibit B), the transcript of the deposition of Linda Malewski (Petitioner’s Exhibit C), and the transcript of the hearing.

## Bona Fide Lease Agreement

Minnesota Rules 5224.0292, subpart 2, provides that a messenger/courier is by definition an “independent contractor” if all of eight specified criteria are met, one of which is the following: “[t]he messenger/courier owns or holds a vehicle under a bona fide lease or leases a vehicle and provides driver services in local or intrastate transportation and in interstate commerce the messenger/courier provides the means for the transportation of the property.” At Finding 4, the compensation judge found that Ms. Gauthier had “advised” JML that she “preferred to lease a vehicle from JML” and that “[u]nder that lease agreement the decedent agreed to” various obligations regarding use of a JML-owned vehicle. The petitioner contends that “[t]here was no bona fide lease between Leona Gauthier and JML” such as would satisfy the bona fide lease criterion of Minnesota Rules 5224.0292, subpart 2, in that JML’s lease “document was never signed by [Ms. Gauthier] and its terms were ignored by JML.” He argues that “[t]here is no definition found in Minnesota law for the term ‘bona fide lease’ and that ‘[t]here is no conduct evidencing good faith.’” He contends further that “[w]hether the arrangement between Ms. Gauthier and [JML] constitutes a ‘bona fide lease’ is important to the resolution of this claim, because the trial court applied [Minnesota Rules] 5224.0292, Subp. 2 to the facts in this case to find Ms. Gauthier was an independent contractor.” We acknowledge that a lease agreement between Ms. Gauthier and JML was evidently never signed, but we conclude that the judge’s implicit conclusion that one nevertheless existed in a bona fide sense is not unsupported by the evidence.

Under terms of the Independent Contractor’s Agreement that she signed on April 3, 1999, Ms. Gauthier certified that she “owns or holds a vehicle under a bona fide lease or leases a vehicle and provides driver services in local or interstate transportation.” At the same time as she was provided with this document, Ms. Gauthier was provided with a document entitled “Permanent Lease Agreement,” which was evidently designed as an instrument for conveying, to a messenger/courier for JML, lease privileges to either or both of two vehicles owned by JML. Under terms of this lease agreement, the signer agreed to be responsible for costs generally associated with maintaining a vehicle, including insurance, gasoline, general maintenance, etc., and these costs were to be deducted from amounts paid to the signer by JML. Ms. Malewski testified that Ms. Gauthier took this agreement home with her overnight to study its terms. Although Ms. Gauthier ultimately signed only the Independent Contractor’s Agreement and not the Permanent Lease Agreement, it is evident from testimony that Ms. Gauthier, subsequent to her signing the Independent Contractor’s Agreement, frequently drove one of the vehicles listed on the Lease Agreement and that, indeed, she was driving one of them when she died. Moreover, there is also both testimonial and pay-record evidence that the costs of that operation were deducted, without complaint from Ms. Gauthier, from amounts that JML would have paid Ms. Gauthier absent a lease agreement. Finally, contrary to what would probably have been the case had Ms. Gauthier not been operating the vehicle under a lease arrangement, there is also evidence that Ms. Gauthier used that same JML-owned vehicle for personal errands and for personal business, including delivery work for agencies other than JML.

Although Ms. Gauthier did not actually sign the Permanent Lease Agreement itself, and although the reporting of vehicle operational costs and the deduction of those costs from Ms. Gauthier’s pay appear to have been rather informal and in some ways inconsistent, we cannot conclude that there wasn’t at least a tacit “bona fide” vehicle lease agreement in place between Ms. Gauthier and JML at the time of Ms. Gauthier’s death.

## The “Substance” of the Work Relationship

Minnesota Rule 5224.0010 provides in part that, “[f]or those occupations specifically discussed in [Minnesota Rules] 5224.0020 to 5224.0312,” which include the occupation of messenger/courier, discussed in Minnesota Rules 5224.0292,

this chapter establishes a “safe harbor” for assuring either independent contractor or employee status in those occupations. Where a worker is within the scope of the definition of a part, but does not meet the safe harbor criteria for either independent contractor or employee status, the determination shall be made as described in part 5224.0320.

Minnesota Rules 5224.0320, which introduces “General Criteria for Nonspecified Occupations,” provides in part that Minnesota Rules 5224.0330 and 5224.0340 should be used to

provide interpretative guidance where the occupation is defined but the safe harbor criteria for that occupation are not all substantially met. Where some but not all of the safe harbor criteria are substantially met, those criteria which are substantially met shall be considered evidence of that status, and shall control where a conflicting result for that criterion is indicated by parts 5224.0330 to 5224.0340.

(Underscoring added). Minnesota Rules 5224.0330 provides that “the degree of control which the purported employer exerts over the manner and method of performing the work contracted” is the single “most important factor in determining whether a person is an independent contractor.” Minnesota Rules 5224.0340 addresses factors to be considered “in addition to factors of control” in determining whether a worker is an employee or an independent contractor.

At Finding 12, the compensation judge concluded that “[a]t no time . . . was the decedent an ‘employee’ of JML.” In his Memorandum, the judge concluded further that Ms. Gauthier “was in fact an independent contractor” under Minnesota Rules 5224.0292, subpart 2, having substantially met all of that rule’s criteria.<sup>4</sup> On appeal, the petitioner contends that “[t]he most significant legal point

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<sup>4</sup> Minnesota Rules 5224.0292, subpart 2, provides specifically that “[a] messenger/courier is an independent contractor if all of the following criteria are substantially met”:

A. The messenger/courier owns or holds a vehicle under a bona fide lease or leases a vehicle and provides driver services in local or intrastate transportation and in interstate commerce the messenger/courier provides the means for the transportation of the property.

B. The messenger/courier is free to accept or reject jobs from a carrier and there is no control over when the individual works.

demonstrating the existence of an employment relationship in Ms. Gauthier's case . . . is [Minnesota Rules] 5224.0340, to which resort should be had when (as in this instance) the criteria set forth in the specific regulation (5224.0292, relied upon by the trial court) are not satisfied." The petitioner then goes on to argue that Ms. Gauthier was an employee based on the several noncontrol factors addressed in Minnesota Rules 5224.0340. We are not persuaded.

Aside from the judge's general conclusion in Finding 12 that Ms. Gauthier was never an employee of JML, the only findings of the compensation judge from which the petitioner appealed were the judge's implicit conclusion in Finding 4 that Ms. Gauthier held a bona fide vehicle lease with JML, which corresponds with Items A and E of the "safe harbor" criteria for messenger/courier "independent contractors" as set forth in Minnesota Rules 5224.0292, and the judge's conclusion in Finding 8 that Ms. Gauthier was solely in control of her profit acquisition,<sup>5</sup> which corresponds with Item D of those same criteria. Most of the judge's other findings clearly were made in contemplation of the other of those "safe harbor" criteria.<sup>6</sup> Moreover, we have already affirmed as reasonable the judge's implicit conclusion that Ms. Gauthier was apparently subject to a bona fide lease agreement with JML, if only an oral one. Thus, only the judge's finding that Ms. Gauthier was solely in control of her profit acquisition remains, in a threshold sense, at issue here; pursuant to Minnesota Rules

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C. The messenger/courier's compensation is based on factors related to the work performed including (1) a percentage of any schedule of rates, or (2) a percentage of a lawfully published tariff or (3) is compensated per delivery.

D. All expenses are paid by the messenger/courier and the opportunity for profit or loss rests with him or her.

E. The messenger/courier is responsible for the operating costs, including fuel, repairs, supplies, and vehicle insurance.

F. The messenger/courier determines the details and means of performing the services, such as the selection of routes and the order of deliveries.

G. The messenger/courier is responsible for the completion of a specific job and is liable for failure to complete the job.

H. The messenger/courier enters into a contract that specifies the relationship to be that of an independent contractor and not that of an employee.

Minnesota Rules 5224.0292, subpart 3, provides a comparable list of criteria for determining whether a messenger/courier is an employee for workers' compensation purposes.

<sup>5</sup> Other elements of Finding 8 are essentially uncontested in the petitioner's brief.

<sup>6</sup> E.g., criterion B is addressed in uncontested elements of Finding 8, criterion C is addressed in Finding 6, criterion F is addressed in Findings 9 and 10, criterion G is addressed in Finding 9 and uncontested elements of Finding 8, and criterion H is addressed in Finding 3.

5224.0010, if that finding was not unreasonable, Minnesota Rules 5224.0340 does not come into play. We conclude that the judge's finding in that regard was not unreasonable.

Ample testimony was presented at hearing to the effect that Ms. Gauthier was free to either accept or reject delivery routes offered her on any given day. She could accept as many of them as she thought she could complete, or she could reject all of them. Moreover, Ms. Gauthier had not only the option but the encouragement of JML to contract with non-JML clients to make deliveries in addition to deliveries offered her by JML. Indeed, she was permitted to make such deliveries even using the JML vehicle that she drove under her informal lease agreement with JML. Further, she had the option of driving either her own vehicle or a JML lease vehicle, to the extent that her profits might be affected on that account. Very substantial testimony was taken from various witnesses regarding these and related profit options available to Ms. Gauthier, and we cannot conclude that it was unreasonable for the compensation judge to find Ms. Gauthier solely in control of her profit acquisition.

Because it was not unreasonable for the compensation judge to conclude that Ms. Gauthier was subject to a bona fide lease agreement with JML and was solely in control of her profit acquisition, and because Ms. Gauthier's relationship with JML was reasonably shown to satisfy all of the "safe harbor" criteria provided for in Minnesota Rules 5224.0292, subpart 2, for establishing independent contractor status, we affirm the compensation judge's conclusion that Ms. Gauthier was an independent contractor and not an employee of JML. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.