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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-60**

Avtandil Baidurashvili,
Respondent,

Vyacheslav Kirkov,
Respondent,

vs.

Helpful Hands Transportation, Inc.,
Relator,

Department of Employment and Economic Development,
Respondent.

**Filed November 21, 2011
Reversed and remanded
Kalitowski, Judge**

Department of Employment and Economic Development
File Nos. 25886858-3, 26006922-4

Avtandil Baidurashvili, Crystal, Minnesota (pro se respondent)

Vyacheslav Kirkov, Burnsville, Minnesota (pro se respondent)

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Economic Development)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and
Peterson, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

In this certiorari appeal, relator transportation company challenges the determination by an unemployment-law judge (ULJ) that respondents, drivers who transported patients for relator, were employees rather than independent contractors and accordingly were eligible for benefits under the unemployment-benefits laws. Relator argues: (1) the ULJ's findings do not support a determination that respondents were employees; (2) the ULJ erred by failing to follow the structural framework set forth in Minn. R. 3315.0555 (2009); and (3) the ULJ's decision was arbitrary and capricious. Because the ULJ made findings that are inconsistent with a determination of employee status and failed to follow the analytic structure of Minn. R. 3315.0555, we reverse and remand.

DECISION

Respondents Avtandil Baidurashvili and Vyacheslav Kirkov worked as drivers for relator Helpful Hands Transportation, Inc. (Helpful Hands) from 2003 and 2007, respectively, until June 2010. Helpful Hands contracts with insurance companies to provide nonemergency medical transportation and hires drivers to transport patients. Prior to 2009, Helpful Hands classified drivers as employees. In April 2009, Helpful Hands began to treat drivers as independent contractors.

Baidurashvili and Kirkov applied for unemployment benefits after their separations from Helpful Hands. Respondent Department of Employment and Economic Development (DEED) conducted an audit and determined that the drivers were

employees for purposes of unemployment-benefits law. Helpful Hands appealed the determinations and the matters were consolidated for a telephone hearing before the ULJ. The ULJ determined that Baidurashvili and Kirkov were employees of Helpful Hands.

Employers must contribute to the unemployment trust fund based on wages paid to employees. *See* Minn. Stat. § 268.035, subd. 25 (2010). But payments to independent contractors do not constitute wages under Minnesota unemployment 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. *Nelson v. Levy*, 796 N.W.2d 336, 339 (Minn. App. 2011). This court reviews a ULJ's factual findings in the light most favorable to the decision and will not disturb them if sustained by substantial evidence. *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).

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.” *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964) (codified at Minn. R. 3315.0555, subp. 1). 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.” Minn. R. 3315.0555, subp. 1. Subpart 3 sets forth criteria to be considered when evaluating

whether the right to control the means and manner of performance exists. Minn. R. 3315.0555, subp. 3. Subpart 2 provides additional factors that may be considered if analysis of the five essential factors is inconclusive. Minn. R. 3315.0555, subp. 2.

Helpful Hands argues that the ULJ's findings of fact as to the issue of control are contradictory and inconsistent with his ultimate conclusion that the drivers are employees. We agree. The ULJ found,

A driver, usually the driver in the most convenient location who is available, is contacted the day the service is needed and asked if he is able and willing to accept the assignment. If the driver declines, another driver is contacted. . . . [Helpful Hands] does not dictate how a driver does his job or what route is driven and it does not require drivers to work specific hours.

The ULJ concluded, "ultimately there is little if any control to be had over how the actual transport is conducted." These findings suggest that Helpful Hands did not retain the right to control the drivers' means and manner of performance and tend to support independent-contractor status.

The ULJ did make other findings of fact that weigh in favor of employee status. But if the ULJ determined that other factors in the Minn. R. 3315.0555 analysis outweighed these findings on the issue of control, explanation was necessary. Because the ULJ failed to set forth such analysis, we are unable to review the decision to determine whether it is supported by substantial evidence. *See* Minn. Stat. § 268.105, subd. 7(d) (2010) (providing that this court may reverse or modify the decision of a ULJ if a party has been prejudiced by findings, inferences, conclusions or decisions that are unsupported by substantial evidence in view of the entire record as submitted).

We do not suggest that all factual findings relating to the factors in Minn. R. 3315.0555 must support the final determination of worker status. Indeed, the various factors may tend to support either determination and may be inconsistent with one another. *See St. Croix Sensory, Inc. v. Dep't of Emp't & Econ. Dev.*, 785 N.W.2d 796, 800-04 (Minn. App. 2010) (finding that some factors indicated control and an employment relationship, while others indicated a lack of control and an independent-contractor relationship, and holding that on the totality of the circumstances the workers were independent contractors). But there must be a logical link between the findings on the important factor of the right to control the means and manner of performance and the ultimate conclusion.

Helpful Hands next argues that the ULJ failed to follow the analytic framework set forth in Minn. R. 3315.0555. We agree. The ULJ determined that analysis of two of the essential factors—the right to control the means and manner of performance and the right to discharge without incurring liability—was inconclusive but did not make a finding as to whether analysis of all five essential factors was inconclusive before addressing the additional factors. *See* Minn. R. 3315.0555, subp. 1 (providing that if the five essential factors of subpart 1 are inconclusive, the additional factors of subpart 2 should be considered). The ULJ also considered certain subpart 3 criteria as stand-alone factors and thus did not properly weigh them in his analysis of control of the means and manner of performance. *See id.* at subp. 3 (setting forth “criteria for determining if the employer has control over the method of performing or executing services”).

Finally, Helpful Hands contends that the ULJ's decision is arbitrary and capricious because the ULJ relied on a factor—the importance of the worker to the company—that is not included in Minn. R. 3315.0555. We disagree. An agency ruling is arbitrary and capricious if the agency relied on factors not intended by the legislature. *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006). The ULJ's discussion of the importance of the drivers to Helpful Hands's business informed the ULJ's analysis of whether the workers' activity was performed in the course of the employer's business. Minn. R. 3315.0555, subp. 2H includes whether services are performed in the course of the employer's business as an additional factor in the worker-status analysis, and provides, "services which are a part or process of the employer's trade or business are generally performed by individuals in employment. . . . Process refers to those services which directly carry out the fundamental purposes for which the organization, trade, or business exists" The ULJ's consideration of the importance of the drivers to the company did not depart from the rule and was not arbitrary and capricious.

In conclusion, we reverse and remand for findings of fact and conclusions of law consistent with this opinion in such proceedings as the ULJ deems appropriate.

Reversed and remanded.