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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1281**

Robert Black,
Respondent,

vs.

Cab Service, Inc.,
Relator,

Department of Employment and Economic Development,
Respondent.

**Filed April 26, 2011
Reversed
Worke, Judge**

Department of Employment and Economic Development
File No. 23881361-2

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Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and
Shumaker, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Relator taxicab-dispatch service challenges the decision by the unemployment-law judge (ULJ) that it is the employer of respondent cab driver, arguing that respondent is an independent contractor. We agree and reverse.

DECISION

Following an audit conducted by respondent Minnesota Department of Employment and Economic Development (DEED), the ULJ determined that an employment relationship exists between respondent cab driver Robert Black and relator dispatch service Cab Service, Inc. Relator challenges the determination, arguing that Black is an independent contractor.

The distinction between “employee” and “independent contractor” is significant in the unemployment-benefits context because employers must contribute to the unemployment trust fund based on wages paid to employees. *See* Minn. Stat. § 268.035, subd. 25 (2008) (stating that employers are taxed by the unemployment wages paid to employees). Payments to independent contractors, however, 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 employment relationship exists for purposes of unemployment benefits is a mixed question of fact and law. *Neve v. Austin Daily Herald*, 552 N.W.2d 45, 47 (Minn. App. 1996). We review factual findings in the light most favorable to the decision, *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006), and will affirm a ULJ’s findings if they are supported by substantial

evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2008). When the facts are not disputed, employment status is a question of law. *Neve*, 552 N.W.2d at 48. We review questions of law de novo. *Ywsyf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

An employee is an “individual who is performing or has performed services for an employer in employment.” Minn. Stat. § 268.035, subd. 13(1) (2008). Employment means 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). Here, the parties had a lease agreement that describes Black as “a self-employed independent taxi operator.” But the parties’ contractual terms alone do not decide the type of relationship created. *St. Croix Sensory Inc. v. Dep’t of Emp’t & Econ. Dev.*, 785 N.W.2d 796, 800 (Minn. App. 2010). We look instead to the actual nature of the relationship of the parties. *Id.*

The ULJ considered the five factors that are traditionally considered in deciding whether an individual is an employee or an independent contractor: “(1) [t]he 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); *see* Minn. R. 3315.0555, subp. 1 (2007). The most important factors are the right to control performance and the right to discharge without incurring liability. Minn. R. 3315.0555, subp. 1(A), (B) (2007); *see also id.*, subp. 2, 3 (2007) (additional factors and considerations). In finding the existence of an

employment relationship, the ULJ determined that relator controls Black's performance because: dispatches are given to drivers in accordance with relator's policies; relator disciplines drivers; relator arranged for Black's training; the vehicles and equipment Black leases are owned by four individuals who also own relator; Black does not make his services available to the general public; and relator may end the relationship with little or no notice. However, in applying the factors to the uncontested facts, we determine that Black is an independent contractor.

Control

Whether an employer has the right to control the means and manner of performance is one of the two most important essential factors. *Id.*, subp. 1(A). “‘Control’ is the power to instruct, direct, or regulate the activities of an individual whether or not the power is exercised.” Minn. R. 3315.0501, subp. 2 (2007). The right of control concerns not merely what is to be done, but how it is to be done. *Frankle v. Twedt*, 234 Minn. 42, 47, 47 N.W.2d 482, 487 (1951). 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 (2007). None of the 13 criteria are dispositive; they are evaluated in context. *See, e.g., St. Croix Sensory Inc.*, 785 N.W.2d at 801-02 (concluding that the employer did not control performance despite the fact that several criteria indicated control). The control factors include: compliance with instructions; place of work; personal performance; existence of a continuing relationship; right to discharge; set hours of work; training; amount of time the worker must devote full time to the activity; and furnishing of tools and materials. Minn. R. 3315.0555, subp. 3.

The evidence here shows that Black complies with relator's instructions, such as priority order for dispatch and pick-ups, but also that relator is subject to policy dictated by the City of Minneapolis. *See* Minneapolis, Minn., Code of Ordinances §§ 341.480 to .700 (2011). And although relator's general manager arranged for Black to be trained by another driver, this training consisted of an explanation of the order for dispatch runs, which is, again, controlled by the city code. Additional training included how to use the cab radio and the cab safe; basic safety issues; and how to fill out trip sheets. This training was not specific or particular to Black driving a cab for relator, but rather was general cab-driving information. Black is also free to come and go wherever he wants within the area in which he is licensed, and he works whenever he wants within a 12-hour lease period; he is not required to work any certain times. There is only a continuing relationship because Black continues to lease a vehicle at \$75 per night, but Black is not obligated to return for another lease. Further, the vehicles and equipment that Black leases are owned by individuals who pay relator a fee for access to the driver pool. The vehicle owners insure the vehicles, own the meters and radios, decide which vehicle Black leases during his lease period, and set the hours and rates and determine how the drivers work. Black's only contact with relator is through a dispatcher. Finally, the ULJ found it relevant to the control factor that relator's general manager disciplined drivers. But the evidence shows that relator does not supervise performance and generally refers customer complaints to the City of Minneapolis. Relator's general manager occasionally disciplined drivers by not renewing a lease for several days following an accident, but

this was done to address safety concerns. Thus, our review of the right-to-control factor indicates that relator lacked control over Black's performance.

The right to discharge

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. The ULJ determined that relator's ability to discharge respondent without incurring significant liability showed that this was an employee-employer relationship. But the record shows that the lease agreement here could be terminated by either party with relative ease. Relator was not obligated to give Black another lease and Black was not obligated to return to relator for another lease. Therefore, this factor does not indicate the existence of an employment relationship and is not determinative in our analysis.

Other factors

Our review of additional factors also leads to the conclusion that this is an independent-contractor situation. The evidence shows that: (1) Black did not receive a wage, did not receive pay on a regular basis, and did not receive a 1099 or a W2 from relator; (2) Black signed the lease agreement acknowledging that he was an independent contractor; (3) Black's only contact with relator was through a dispatcher; (4) Black was responsible for ensuring that he did his job correctly; (5) Black had no investment in the dispatch service; and (6) Black had no set schedule.

Reversed.