STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0134

Ride Auto Co.,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

Filed November 25, 2013
Reversed
Hooten, Judge

Department of Employment and Economic Development
File No. 30351255-2

Robert J. Bruno, Robert J. Bruno, Ltd., Burnsville, Minnesota (for relator)

Lee B. Nelson, Christine Hinrichs, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

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

HOOTEN, Judge

Relator-employer challenges the determination of an unemployment law judge (ULJ) that certain workers are employees rather than independent contractors. Because the totality of the circumstances demonstrates that the workers are independent contractors as a matter of law, we reverse.

FACTS

Relator Ride Auto Co., is a used-car dealership based in Burnsville, Minnesota, and owned by Reza Shakibi. Relator hired five individuals, described by the ULJ as "marketers," to prepare used vehicles and advertise them for sale. Respondent Minnesota Department of Employment and Economic Development (DEED) audited relator's records for the years 2008 to 2012, determined that the marketers were misclassified as independent contractors, and computed that relator owed $1,169 in taxes. Relator appealed, and the ULJ held a hearing. Reza Shakibi and his son Arash Shakibi, who participates in the business, appeared with counsel for relator and were the only witnesses.

Reza testified that he purchases used vehicles from auctions across the country. In selecting vehicles for his inventory, he studies the online condition reports and estimates the repair costs, revenues, and profit margins. After purchasing vehicles from an auction, Reza sends the condition reports to the marketers, who then, using their own laptops and cell phones, order repair parts, procure mechanics, and arrange for transportation of the vehicles from the auction site to the mechanic. The marketers determine among themselves who handles a particular vehicle and use their own judgment in deciding which mechanic to hire. After repairs, the vehicles are transported to relator's office, and the marketers, using their own cameras and laptops, take pictures and videos of the reconditioned vehicles and post them on relator's website and Craigslist.com. Because Reza lacks the computer skills to design and code the online ads, he does not direct the marketers how to take pictures or set up the ads. Once the vehicles are advertised, Reza

alone communicates and negotiates with potential buyers. After he sells the vehicles, the marketers are paid $50 or $65 per vehicle.

Relator finds the marketers on Craigslist.com. The marketers work for relator under an "Independent Contractor Agreement," in which the parties agree that the marketer "is an independent contractor, and not an employee." The agreement provides that the marketers "will have the exclusive right to determine the method, details, and means of performing the [s]ervices." Arash testified that Reza can choose not to give any more jobs to the marketers at any time. He further testified that the marketers, as a result of their experience in working for relator, may open up their own dealerships.

The marketers do not have set hours and are not required to work at relator's office. Each marketer rents a desk at relator's office under a "Monthly Rental Agreement" for $40 per month. The marketers each have a key for their own desk and can work for other dealerships while using their rented desks. They are not required to rent a desk, but they all do. Reza testified that he does not track when the marketers work in the office and does not know when they will be at the office because he attends auctions during most of the week. Arash testified that he works at the office about 20 hours per week and that "most of [the marketers] come and go at their own time."

Following the hearing, the ULJ determined that the marketers are employees rather than independent contractors, and that the remuneration of the marketers is considered wages for the purposes of taxation and unemployment insurance benefits. The ULJ affirmed the decision upon relator's motion for reconsideration. This matter is before us based upon relator's writ for certiorari.

D E C I S I O N

"Whether a worker is an employee or an independent contractor involves a mixed question of law and fact. Once the controlling facts are determined, the question [of] whether a person is an employee becomes one of law." *Lakeland Tool & Eng'g, Inc. v. Engle*, 450 N.W.2d 349, 352 (Minn. App. 1990) (citation omitted). For questions of law, "we are free to exercise our independent judgment." *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). We may reverse the ULJ's decision that workers are employees rather than independent contractors if relator's substantial rights have been prejudiced by an error of law or by findings or conclusions that are unsupported by substantial evidence in view of the record as a whole. Minn. Stat. § 268.105, subd. 7(d) (2012); *St. Croix Sensory Inc. v. Dep't of Emp't & Econ. Dev.*, 785 N.W.2d 796, 804 (Minn. App. 2010) (reversing determination that workers were employees).

An employee is an "individual who is performing or has performed services for an employer in employment." Minn. Stat. § 268.035, subd. 13(1) (2012). "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) (2012). "The remuneration of independent contractors does not constitute taxable wages covered by the unemployment-benefits law." *St. Croix Sensory Inc.*, 785 N.W.2d at 799. "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.* at 800.

> 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
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> 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.

Minn. R. 3315.0555, subp. 1 (2011).[1]

The ULJ found that "the more heavily weighted factors weigh in favor of an employment relationship," including the right to control the means and manner of performance and the right to discharge without incurring liability. The ULJ also found that the control-over-the-premises factor weighs in favor of an employment relationship. These factors, according to the ULJ, outweigh findings that "the marketers are paid on a per-car basis and provide their own phones and computers." We disagree.

Right to control the means and manner of performance

"The right of control is the most important factor for determining whether a worker is an employee." *St. Croix Sensory Inc.*, 785 N.W.2d at 800. "The determinative right of control is not merely over *what* is to be done, but primarily over *how* it is to be

[1] This rule formerly contained a list of additional factors for determining worker status and additional criteria for evaluating the factor of the right to control the means and manner of performance. Minn. R. 3315.0555, subps. 2–4 (2011). These provisions were repealed during the 2012 legislative session. *See* 2012 Minn. Laws ch. 201, art. 3, § 16. The repealer was effective April 21, 2012, and "applies retroactively to all pending cases." *Id.* Relator argues that taxes for the years 2008 through April 20, 2012, must be determined under the repealed provisions. We do not address this argument because we conclude that relator prevails under the current rule.

done." *Id.* (quotation omitted). Thus, "[f]actors that relate to the definition of a task, rather than the means of accomplishing it, are not relevant to the employment-status inquiry and do not support a finding of an employment relationship," because a "worker may be an independent contractor and still remain subject to control over the end product." *Id.* at 801 (alteration and quotation omitted). And "it is well settled that the nature of the relationship of the parties is to be determined from the consequences which the law attaches to their arrangements and conduct rather than the label they might place upon it." *Id.* at 800 (quotation omitted). But contract provisions can be probative of the parties' arrangements. *See id.* at 801 ("[W]hen reading the two contract provisions together, it appears that the [workers] control the manner in which they perform.").

The ULJ found that the right-to-control factor favors employee status because "it is inconceivable that [relator] could not direct the means and manner of performance of those he has given the responsibility of preparing and marketing his vehicles, when the vehicles are kept, and the workers work, on his property." The ULJ pointed out that Reza "places the responsibility of preparing his inventory, his property worth thousands of dollars, into the hands of these marketers."

But the mere fact that the marketers work at relator's office where the inventory is kept, or that the inventory has value, does not make it "inconceivable" that relator does not have the right to control the means and manner of the marketers' performance. Indeed, it is undisputed that the marketers can work anywhere but may choose to rent desks and work at relator's office. The location of the inventory is simply irrelevant to relator's right of control. The vehicles are transported to relator's dealership only after

they are repaired. Under these circumstances, it is reasonable that the marketers would choose to take pictures and videos of the vehicles at the dealership because that is where they will be located until they are sold. Relator's entrustment of property over to the marketers for work to be performed speaks in no way to relator's right to direct "*how* [the work] is to be done." *See St. Croix Sensory Inc.*, 785 N.W.2d at 800.

The ULJ also found that relator retained the right of control because "some marketers hold the position to learn the car sales business[, which] would seem to indicate they take some sort of direction or learn from doing what is expected of them." But one's status as an independent contractor does not preclude personal advancement of skill sets. Like employees, independent contractors can learn from work experiences. So the fact that the marketers "take some sort of direction" from relator does not automatically evidence the right of control. The decisive question is whether the direction given is related to "the means of accomplishing" a task or to "the definition of a task." *Id.* at 801. When, as here, the direction given relates merely to the definition of a task, it does not evidence the right of control because even independent contractors such as the marketers must be given "some sort of direction" in order to understand the responsibilities required of them.

As final support that relator retained the right of control, the ULJ found:

> [E]ach marketer pays rent every month for space in [relator]'s office. Reza Shakibi testified they do not have to, but choose to do this. However, he could not answer the question of why anyone would simply give [relator] $40 every month for no reason. The two most likely answers are 1) they believe it is expected of them, which is evidence they believe they are expected to listen to [relator]'s direction, or 2) it is part of a

> facade to make it appear [relator] can operate without having actual employees.

However, in reviewing the record regarding the ULJ's "likely answers" to the question, we find nothing that would support these findings. To the extent that the ULJ was making findings of fact, the marketers' personal beliefs are not only sheer speculation on the ULJ's part but also contrary to the evidence in the record. Indeed, the marketers did not testify, and relator's undisputed testimony is that the marketers are not required to rent the desks. To the extent that the analysis hinged on Reza's credibility, the ULJ was statutorily required to "set out the reason for crediting or discrediting that testimony." *See* Minn. Stat. § 268.105, subd. 1(c) (2012); *see also Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (remanding after ULJ failed to make statutorily required credibility findings). But the ULJ set forth no reason for rejecting Reza's testimony, and there is no evidence supporting the ULJ's conclusion that having a "facade" of employees was somehow advantageous to relator's business.

Contrary to the ULJ's determination, we conclude that the record demonstrates that the marketers have a significant degree of independence in determining the means and manner of their performance. Indeed, the evidence shows that once relator informs the marketers that a vehicle purchased from auction is ready for repair, it is then completely entrusted to the marketers. In fact, relator does not even assign specific vehicles to the marketers. Rather, the marketers themselves divide up the jobs and collaborate to achieve the end goal of preparing vehicles ready for sale.

Both the means and manner of accomplishing this goal are left up to the marketers because they use their own computers and cell phones to arrange for transportation of the vehicles, procure mechanics, take pictures and videos of the vehicles with their own equipment, write the advertisements, and post the advertisements online with the pictures and videos. Also, as Reza testified, the marketers exercise independent judgment in deciding which mechanics to use, how to best showcase the vehicles in pictures and videos, and what content to include in the advertisements. Significantly, the marketers perform their tasks at the time and at the place of their choosing. This grant of autonomy demonstrates that relator does not have the right to control the means and manner of the marketers' performance. Finally, this conclusion is bolstered by the "Independent Contractor Agreement," in which relator relinquished to the marketers the "exclusive right to determine the method, details, and means of performing the [s]ervices." The right-of-control factor, therefore, favors a finding of independent-contractor status.

Respondent argues that relator retained the right of control because relator "would likely stop giving work" to a marketer using an expensive mechanic and receiving a kickback in the process. But relator's freedom to stop giving work to dishonest marketers is simply irrelevant to the right to control the means and manner of performance while the work is in progress.

Right to discharge the worker without incurring liability

"The right to discharge a worker without incurring liability is the other most important factor in determining whether a worker is an employee or independent contractor." *St. Croix Sensory Inc.*, 785 N.W.2d at 803 (citing Minn. R. 3315.0555, subp.

1). The ULJ found that this factor favors employee status. We determine, however, that this factor is inconclusive.

The ULJ found that relator "does not dispute [it] has the right to discharge without incurring liability *outside of payment for services rendered*." (Emphasis added.) This finding, therefore, relates to relator's liability only after a marketer completes a job. But under *St. Croix Sensory Inc.*, we must determine not only whether the employer can discharge a worker without incurring liability after a job is complete, but also whether the employer can discharge a worker without incurring liability while the job is in progress. *Id.* at 804 (concluding that "while control may be indicated because the assessors can be fired . . . during a test session . . . , relator would nevertheless incur some liability upon discharge of an assessor" because "*if an assessor was discharged during a session*, that assessor would still be paid for the session" (emphasis added)). The record, in fact, is devoid of evidence as to whether relator would be liable to pay a marketer who was discharged during a job. Accordingly, we find this factor inconclusive.

Mode of payment

The mode-of-payment factor indicates independent-contractor status if workers are paid on a per-job basis and are responsible for their own tax obligations. *Id.* The parties do not dispute that the marketers are paid on a per-job basis, and the "Independent Contractor Agreement" imposes tax obligations on the marketers. Accordingly, as the ULJ found, this factor supports independent-contractor status.

Furnishing of materials and tools

The furnishing of materials and tools indicate employee status. Minn. R. 3315.0555, subp. 1. The parties do not dispute that the marketers use their own cell phones, computers, and cameras to perform their work. The ULJ was correct that this factor supports independent-contractor status.

Control over the premises where the services are performed

The final traditional factor for determining worker status is control over the premises where services are performed. *Id.* The ULJ found that this factor favors employee status because it is "more likely than not a significant amount of work is performed on [relator's] property." But the ULJ disregarded undisputed evidence that the marketers also work offsite, where relator has no control over the premises. Even if the marketers perform "a significant amount" of their work at relator's office, the evidence shows that they have keys to their own rented desks and can work for other dealerships while at relator's office. This factor, therefore, favors independent-contractor status.

Balancing of the factors

All but one of the five traditional factors favor independent-contractor status, including the factors addressing the right to control the means and manner of performance, the mode of payment, the furnishing of materials and tools, and control over the premises where the services are performed. The factor concerning the right to discharge without incurring liability is inconclusive. Based on the totality of the circumstances, we conclude that the marketers are independent contractors. Because we agree that the ULJ erred as a matter of law in finding that the marketers are employees

for the purposes of taxation and unemployment insurance benefits, we do not address relator's additional arguments regarding the sufficiency of the ULJ's factual findings.

Reversed.