

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0067**

Sean Roulo,
Relator,

vs.

Key Lakes, Inc., et al.,
Respondents,

Department of Employment and Economic Development,
Respondent.

**Filed September 5, 2017
Affirmed
Halbrooks, Judge**

Department of Employment and Economic Development
File Nos. 34665377, 34665533, 34665536, 34665924, 34665925, 34665929

Sean Roulo, Duluth, Minnesota (pro se relator)

Marilyn Clark, Jillian Kornblatt, Dorsey & Whitney LLP, Minneapolis, Minnesota (for
respondents Key Lakes, Inc., et al.)

Lee B. Nelson, Craig M. Gustafson, Minnesota Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was an independent contractor and not an employee. He contends that the ULJ made legal errors, ignored the allegedly inconsistent testimony of respondent-employer's witnesses, and unfairly conducted the evidentiary hearing. We affirm.

FACTS

In 2004, relator Sean Roulo agreed to provide IT services to the Key Lakes companies¹ at an hourly rate. They agreed that either party could terminate the relationship without incurring any liability, except that the Key Lakes companies must pay Roulo for any owed services. The Key Lakes companies provide services to Canadian National Railway (CNR), which owns nine vessels that operate on the Great Lakes. Key Lakes companies conduct repairs, maintenance, and upgrades to these vessels, which dock at various ports throughout the Great Lakes during the winter months. As an IT consultant, Roulo provided several different services, including creating software to facilitate computer systems and networks on the vessels.

For several years, Roulo's services typically followed the same procedure. When he received a request for services from the end-users on the vessels, Roulo would seek

¹ Respondent employer and subsidiaries include: Key Lakes Inc.; Key Lakes I, Inc.; Key Lakes II, Inc.; Key Lakes III, Inc.; Key Lakes IV, Inc.; and Keystone Tankship, Corp. (collectively, the Key Lakes companies).

approval from the Key Lakes companies' management before starting a project. Roulo also needed approval from management before purchasing equipment for the project. Management did not provide Roulo with detailed instruction regarding how he was to perform each project, instead deferring to Roulo's expertise. After Roulo completed a project, he created an invoice that stated the hours worked and work performed. He then submitted the invoice to management. The Key Lakes companies paid Roulo by check with no deductions and reimbursed him for any travel expenses. Management did not provide him with feedback and did not evaluate his work performance.

During his last year of providing services to the Key Lakes companies, Roulo estimated that he worked 45% of the time at his home, 45% on the vessels themselves, and 10% at the office. He did not reject any projects, believing that the Key Lakes companies would hire a different contractor were he to do so. But Roulo also occasionally worked on other small projects for different companies. In May 2015, he negotiated a pay raise with the Key Lakes companies that increased his hourly rate by 44%.

Around the same time, the Key Lakes companies underwent changes in management. The new management implemented a new purchase-order system and also hired another IT company to assist in providing services to some of the vessels. Roulo became frustrated with the new management and proposed a new contract with several requirements. The Key Lakes companies did not agree to his proposal. Roulo subsequently stopped providing services for the Key Lakes companies in March 2016.

In May 2016, a field auditor for respondent Minnesota Department of Employment and Economic Development (DEED) determined that the Key Lakes companies had an

employer-employee relationship with Roulo and that Roulo could establish an unemployment-benefits account. The Key Lakes companies appealed this determination to the ULJ. The ULJ held an evidentiary hearing in which several witnesses, including Roulo, testified. The ULJ determined that the Key Lakes companies had an independent-contractor arrangement with Roulo, and therefore Roulo was not an employee who could be eligible for unemployment benefits. Roulo requested reconsideration of the ULJ's decision, and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

Roulo raises several contentions alleging that the ULJ erred in deciding that he was not entitled to unemployment benefits. We may reverse, remand, or modify the ULJ's decision if the decision was affected by an error of law, unsupported by substantial evidence, or was arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2016).

I.

Roulo argues that the ULJ erred in determining that he was an independent contractor and asks us to modify several of the ULJ's findings. For unemployment-insurance purposes, "employment" is defined as services performed by "an individual who is considered an employee under the common law of employer-employee and not considered an independent contractor." Minn. Stat. § 268.035, subd. 15(a)(1) (2016). "Whether an individual is an employee or an independent contractor is a mixed question of law and fact." *St. Croix Sensory Inc. v. Dep't of Emp't & Econ. Dev.*, 785 N.W.2d 796, 799 (Minn. App. 2010). In unemployment-benefits cases, we review factual findings in a light most favorable to the decision and shall not disturb those findings if the evidence in

the record supports them. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). And if the relevant facts are determined, the question of whether an employment relationship existed presents a question of law that we review de novo. *Nelson v. Levy*, 796 N.W.2d 336, 339 (Minn. App. 2011).

There is no general rule that covers every situation in employment-status cases, and each case depends significantly on its own facts. *St. Croix Sensory*, 785 N.W.2d at 800. We utilize five factors in determining 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 materials or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge.” *Id.* (quoting *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964)); *see also* Minn. R. 3315.0555, subp. 1 (2015) (listing the five factors). The employer’s right to control the means and manner of performance and the employer’s right to discharge are considered the most important factors. Minn. R. 3315.0555, subp. 1; *St. Croix Sensory*, 785 N.W.2d at 800.

A. Right to Control

Roulo contends that the ULJ relied too heavily on the control factor in determining that he was an independent contractor. He also asserts that there is no caselaw that states that the control factor is weighed more heavily than the right-to-discharge factor. But control is “the most important factor” in deciding whether a worker is an employee or an independent contractor. *St. Croix Sensory*, 785 N.W.2d at 800. 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 (2015). “The determinative right of control is not merely over *what* is to be done, but primarily over *how* it is to be done.” *Neve v. Austin Daily Herald*, 552 N.W.2d 45, 48 (Minn. App. 1996) (quotation omitted).

The ULJ determined that the Key Lakes companies did not control the means and manner of Roulo’s performance. Roulo testified that management made the ultimate decision on “everything that [Roulo] did.” But members of the Key Lakes companies management testified that they relied on Roulo’s expertise and did not direct him on how he should perform the projects. Roulo makes repeated claims that these witnesses lied during their testimony. But the ULJ explicitly found that the company witnesses were more credible than Roulo. And we defer to the ULJ’s credibility determinations. See *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

The ULJ found that Roulo conducted 45% of his work at his home, 45% on the vessels, and 10% in the office. Management did not provide him with detailed instructions for his services, but rather Roulo described it as “more of a back and forth kind of collaboration.” After Roulo completed a project, the only feedback he received came from end-users who worked on the vessels themselves, not from the Key Lakes companies’ management staff. His IT manager testified that she did not evaluate Roulo’s work to ensure that it was done properly. Roulo also testified that he was never subject to any definitive form of discipline from management.²

² Roulo implies that the hiring of another IT company in November 2015 amounted to a form of discipline, but the evidence shows that the Key Lakes companies hired this company for business-related reasons.

Roulo asserts that the Key Lakes companies required him to be on-call each hour of each day. But the evidence in the record indicates otherwise. Representatives from management testified that Roulo did not need to be available 24/7. And Roulo's own testimony suggests that he was not required to be on-call but rather he wanted to be available out of a concern that the Key Lakes companies would hire another contractor. During Roulo's time providing services to the Key Lakes companies, he also performed services for other businesses unrelated to the Key Lakes companies. We conclude that the evidence demonstrates that the Key Lakes companies did not control how Roulo performed his services. The ULJ did not err by determining that the right-to-control factor weighed in favor of an independent-contractor arrangement.

B. Right to Discharge

Minnesota caselaw and agency rules establish that the right to discharge is the other important factor in the analysis. Minn. R. 3315.0555, subp. 1; *St. Croix Sensory*, 785 N.W.2d at 800. Generally, an employer-employee relationship is at-will, meaning that the employer may terminate the employee for any reason or no reason at all. *Kratzer v. Welsh Cos.*, 771 N.W.2d 14, 19 n.7 (Minn. 2009). An independent contractor, however, cannot typically be terminated without the hiring party being liable for damages if the contractor is fulfilling the terms of the contract. *St. Croix Sensory*, 785 N.W.2d at 803.

The ULJ determined that this factor weighed in favor of finding an employer-employee relationship between the Key Lakes companies and Roulo. This finding is consistent with the evidence in the record. The fact that the Key Lakes companies could

end its relationship with Roulo without incurring liability supports a decision that Roulo was an employee.

Roulo contends that the ULJ failed to properly apply the relevant rules, specifically that the right-to-control and the right-to-discharge factors are the two most important factors in the analysis. The ULJ expressly recognized the importance of these two factors and acknowledged that the right-to-discharge factor weighed in favor of an employment relationship. We conclude that the ULJ did not err in her application of these two most important factors.

C. Other Relevant Factors

The Key Lakes companies used a purchase-order system and invoice process to determine how much to pay Roulo. The ULJ determined that this system of payment on a per-job basis reflected Roulo's status as an independent contractor. *See id.* at 804. The Key Lakes companies paid Roulo by check and issued him a 1099 tax-form each year. The Key Lakes companies did not take any deductions out of Roulo's paychecks. "Evidence that an individual is responsible for his own tax obligations is indicative of independent-contractor status." *Id.* And the former general manager testified that he explained to Roulo that Roulo could receive health insurance through the Key Lakes companies if Roulo became an employee. But Roulo declined and instead chose to maintain an arrangement that gave him more flexibility. We agree with the ULJ that the mode-of-payment factor weighs in favor of an independent-contractor arrangement.

The ULJ determined that the factor regarding furnishing tools and materials indicated an employer-employee relationship because the Key Lakes companies provided

Roulo with all the necessary tools for his projects. Roulo often worked on his projects while using a personal computer, which the Key Lakes companies gave him money to purchase. Members of management testified that Roulo had “great latitude” in selecting the equipment he needed to perform his projects on the vessels. But Roulo asserted that management reserved the right to approve all IT equipment he used and would purchase the equipment through its vendor. There is some evidence that suggests that this factor supports finding an independent-contractor status. For instance, Roulo’s primary form of communication with management was his personal e-mail account. And the ULJ found that when Roulo worked from his home, he used his own internet service. But ultimately, the evidence supports the ULJ’s decision that this factor weighs in favor of an employment relationship.

The final factor focuses on whether Roulo had control of the premises where he performed the services. The ULJ found that Roulo conducted 45% of his work at his home, 45% on the vessels, and 10% at the office. The Key Lakes companies controlled the premises at the office, but the vessels were owned by CNR. And Roulo clearly had control over the premises while working at his home. Indeed, when management suggested that Roulo become an employee with benefits, he rejected that arrangement because he did not want to be restricted to working at the office. Because nearly one-half of Roulo’s work was conducted at his own home and he had at least some flexibility in choosing where to perform the services, we conclude that this factor is indicative of an independent-contractor relationship.

D. Balancing the Factors

In reviewing the factors together, the ULJ concluded that Roulo was an independent contractor and not an employee. The ULJ determined that the circumstances of the relationship between the Key Lakes companies and Roulo emphasized the significance of the right-to-control factor. The ULJ found no compelling examples of management directing Roulo concerning how to perform the IT projects. And Roulo was able to and did negotiate his hourly rate and other terms of the arrangement. For example, he initiated a pay raise that increased his hourly rate by 44%. We conclude that substantial evidence in the record supports the ULJ's findings that the relevant factors indicate an independent-contractor arrangement. Therefore, the ULJ did not err by determining that Roulo worked as an independent contractor for the Key Lakes companies.

II.

Roulo also contends that the ULJ did not conduct a fair hearing, claiming that he was not allowed to fully present his testimony, introduce evidence, or rebut opposing witnesses' allegedly false testimony. Minnesota rules require the ULJ to "assist all parties in the presentation of evidence" and "ensure that all relevant facts are clearly and fully developed." Minn. R. 3310.2921 (2015). Generally, a hearing is fair if the parties are given the opportunity to make statements, cross-examine witnesses, and offer and object to exhibits. See *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529-30 (Minn. App. 2007).

The record of the hearing does not offer any indication that the ULJ improperly favored the Key Lakes companies over Roulo. The hearing lasted about eight hours with

several agreed-upon breaks. All parties were eager to finish the hearing within one day. Roulo provided testimony for approximately three hours of the hearing.³ The ULJ did not restrict his testimony, asking him open-ended questions, such as “anything else you’d like to add,” throughout the hearing. When the witnesses for the Key Lakes companies testified, the ULJ permitted Roulo to ask questions of each witness. The ULJ also allowed Roulo to submit additional documents during the hearing and considered each of Roulo’s objections to exhibits and testimony. We conclude that the evidence does not support Roulo’s contention that he received an unfair hearing.

III.

In addition to asking us to reverse the ULJ’s decision on the independent-contractor issue, Roulo makes several other requests for relief. He asks that we determine that he was justified in his separation from employment at the Key Lakes companies. While the issue of separation was addressed in the hearing, the ULJ did not reach this issue because she determined that Roulo was an independent contractor. Because we conclude that the ULJ did not err by determining that Roulo was an independent contractor, there is no basis to remand the case for the ULJ to decide whether Roulo is eligible for unemployment benefits based on a separation from employment.

³ Roulo asserts that he was not able to present his case until late in the hearing and that the ULJ allowed the Key Lakes companies’ attorney to interrupt him. This assertion does not accurately reflect the record of the hearing. After the ULJ received basic information about the Key Lake companies’ business structure, Roulo was the first witness to testify. He was rarely interrupted during his testimony and none of the interruptions prevented him from presenting his case to the ULJ.

Roulo also requests that we (1) hold five of the witnesses for the Key Lakes companies in contempt of court for “obvious perjury”; (2) refer the Key Lakes companies to the Minnesota Commissioner of Labor and Industry, pursuant to Minn. Stat. § 181.722 (2016); (3) refer the ULJ and the Key Lakes companies’ attorney to the Minnesota Lawyers Professional Responsibility Board; and (4) award him with punitive damages. But Roulo does not provide any authority to support these requests for relief. As previously stated, we defer to the ULJ on determinations regarding credibility, and the ULJ found the testimony of the Key Lakes companies’ witnesses to be credible. *See Skarhus*, 721 N.W.2d at 344. Minn. Stat. § 181.722 prohibits an employer from misrepresenting the nature of the employment relationship, but the statute is not applicable in an unemployment-benefits proceeding. *See* Minn. Stat. § 268.069, subd. 3 (2016) (“There is no equitable or common law denial or allowance of unemployment benefits.”). Indeed, there is evidence in the record that suggests that Roulo understood his role as an independent contractor and not an employee. Roulo’s requests that we refer the ULJ and the Key Lakes companies’ attorney to the Minnesota Lawyers Professional Responsibility Board are unfounded and without merit; he provides no evidence of ethical misconduct. And a person is not entitled to unemployment benefits on the basis of punitive damages. *See id.* Roulo is not entitled to any of the relief that he requests.

Affirmed.