

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1573**

Daniel Loftus, et al.,
Relators,

vs.

Jeffery Manning,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 2, 2021
Affirmed
Hooten, Judge**

Department of Employment and Economic Development
File No. 38031942-3

Sarah E. Bushnell, Jeffrey M. Markowitz, Arthur, Chapman, Kettering, Smetak & Pikala,
P.A., Minneapolis, Minnesota (for relators)

Jeffrey Manning, South St. Paul, Minnesota (pro se respondent employee)

Keri A. Phillips, Anne B. Froelich, Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Bratvold, Presiding Judge; Connolly, Judge; and
Hooten, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

Relator-employer challenges a decision made by an unemployment law judge (ULJ) that respondent was employed by relator and thus eligible for unemployment benefits. Relator argues that respondent was an independent contractor under the relevant factors in Minn. R. 3315.0555, subp. 1 (2020). We affirm.

FACTS

Relator Daniel Loftus is the sole owner of Professional Billiard Services, LLC, (PBS), which contracts with moving companies to provide relocation support services. PBS disassembles, reassembles, and custom crates specialty items such as billiard tables.

Respondent Jeffrey Manning performed moving services for PBS for at least seven years, with one interruption during an unspecified period between 2017 and 2018. During this timeframe, Manning stopped working for PBS and worked for a different moving company after he and Loftus had a disagreement about Loftus “overbooking jobs” to a point where the movers “were working until . . . late at night every night.” Manning eventually returned to work at PBS, but following another disagreement with Loftus, Manning again stopped working for PBS in December 2019.

After Manning filed an application for unemployment benefits, respondent Department of Employment and Economic Development (DEED) issued a determination in February 2020 that PBS had an employer-employee relationship with Manning.¹ PBS

¹ Manning was separately determined ineligible for unemployment benefits on other grounds, i.e., because he quit his employment. That determination does not moot this

appealed this determination. A ULJ held a de novo evidentiary hearing and heard testimony from both Loftus and Manning.

Manning testified that he started working for PBS after Loftus hired him for one day. He testified that after that day, he asked if Loftus needed full-time help, and Loftus said that he did. Both Manning and Loftus testified that they did not have a written contract.

Loftus testified that Manning received no formal training from PBS. Manning testified that he did not know how to take apart or move billiard tables before he started working with PBS, explaining that Loftus taught him over “a long span of time.” However, Manning testified that Loftus would show up at customers’ residences to put the billiard tables back together because Manning never received training to reassemble them. Manning also exercised his own judgment to perform his job, using “[c]ommon sense,” researching tasks online, and working through trial and error.

PBS movers generally work Monday through Friday, starting between 7:00 a.m. and 8:00 a.m. and working until all the jobs for that day are done. Manning testified that Loftus would tell him his start time the day before any given workday and that Loftus chose the start time, while Loftus testified that the start time was “suggested” and that Manning was not expected to show up at PBS each day. When asked how his start time was communicated to him, Manning testified that he would “discuss it” with Loftus the day

appeal, however, because respondent’s status as an employee impacts taxes owed by relator and could impact respondent’s future tax rate. *See generally* Minn. Stat. § 268.051 (2020).

before each work day and that Loftus would say, for example, ““Oh, tomorrow is busy, I need you here at 7. Tomorrow is not so busy, you can come in at 8.””

Manning testified that he would arrive at the PBS shop each morning, and Loftus would give him his work assignments for the day. Specifically, Manning testified that Loftus would “pull up the paperwork either on his phone or he’d have it printed out and [would] just basically show [Manning] what . . . the rundown for the day was, the route, and what [Manning] needed to do.” Loftus testified that while moving jobs were dispatched to the movers, the movers “figure how they’re gonna team up and satisfy the day . . . for their dispatch job[s].” Loftus explained that it was up to the movers to develop and maintain their schedules in order to accomplish the jobs they decided to accept each day. Additionally, Loftus testified that PBS did not provide movers with directions to job sites, and Manning testified that he used GPS to navigate.

Manning testified that he did not have any control or input over his schedule for each day, any changes to his schedule had to be approved by Loftus, and he did not have the ability to accept or decline particular jobs.² Manning further testified that Loftus “probably would have fired [him]” if he declined a job but that Loftus was “fine” with his decision to take a break between 2017 and 2018 “because [Loftus] had hired another guy to drive.” Manning identified by name someone whom Loftus fired for declining a job, but Loftus denied terminating a person with that name. Manning also testified that he called customers directly when he was running late, but that he would also call Loftus to

² Manning admitted that he declined two jobs on December 27 and 30, 2019, but these were after his last day of work at PBS.

discuss any delays. Manning further testified that while he sometimes disagreed with the scheduling or instructions that he received from Loftus, he ultimately did what Loftus told him to do because Loftus was “the boss” and “if something was damaged, [Loftus] was the one that had to pay the claim.” Manning testified that he sometimes disagreed with Loftus regarding the amount of work he received, believing that “it was just too much, and it just wasn’t even feasible.”

Loftus testified that PBS had no requirement that any mover do any particular number of jobs and that movers did not need to do jobs if they did not want to do them. Loftus explained that, for example, movers are free to join a moving pool on one day and then work for PBS the next, although there is no evidence in the record that Manning ever did so. Loftus also explained that even if a customer tacked on a moving job to the end of a day, PBS had no power to require anyone to do the job. Loftus testified that if no mover accepted a particular job, he might decide to do it himself or dispatch it back to the customer. The ULJ probed into this topic with Loftus:

ULJ: Could Mr. Manning pick and choose what jobs he wanted to perform?

LOFTUS: Yes.

ULJ: So, for example if on a Wednesday he didn’t want to work, wanted to take the day off, that he could just tell you the night before I’m not coming in tomorrow or

. . . .

LOFTUS: Absolutely.

ULJ: Okay. And that decision was up to him?

LOFTUS: Yes.

ULJ: Was there any time Mr. Manning told you he, he didn't want to work or couldn't work, ah, and you took issue with that?

LOFTUS: No, Your Honor.

Manning testified that, to perform his job duties, he drove a truck owned by Loftus, which had an "American flag . . . emblem on the door that said Professional Billiard Services" and included Loftus's contact information. Although Manning used some of his own tools, he used other tools provided by Loftus, including a dolly, dolly straps, and packaging materials. Although PBS provided him with complimentary uniforms, he was not required to wear them or any other uniforms. Additionally, Manning noted that he handed out Loftus's business cards because he did not have his own.

Manning was paid an hourly rate of \$25 which he received weekly by check, but he did not receive medical insurance, worker's compensation coverage, or any other benefits from PBS besides a paid day off for his birthday. Loftus testified that at some point in the past, PBS paid movers "a flat rate," but this changed after movers requested to be paid hourly. PBS did not withhold taxes from Manning's checks and provided him with 1099 forms annually so that he could fill out his own tax forms. Manning testified that he was not required to provide notice before he stopped working for PBS. PBS could terminate Manning at any time without notice and without owing him anything except pay for the hours he had worked before termination.

Manning testified that while Loftus was present on job sites with him about 40 percent of the time, he drove a truck and ran jobs when Loftus was not present. Loftus

testified that he was only on jobsites about 20 percent of the time, he did not supervise the movers, and the movers did not look to him for instruction. Manning stated that there was another full-time mover who rode along with him in the truck and assisted him in the moves. That assistant continued to work for PBS after Manning left, and there is no evidence in the record that this assistant was ever paid by Manning. Loftus acknowledged that Manning could not hire additional assistants unless each assistant completed a required background check and claimed that Manning would be responsible for paying any assistants that he hired, presumably out of his own hourly wages. There is no evidence in the record that Manning ever hired or paid an assistant mover during the time that he worked for PBS.

PBS did not have a handbook or written policies, and Manning testified that he made most of his own decisions based on “spoken guidelines” articulating Loftus’s expectations and “what needed to be done.” However, Manning explained that he still ran his decisions by Loftus because Loftus had told Manning that “everything had to be approved by him.” PBS never disciplined Manning, and Loftus testified that PBS did not complete performance reviews of the movers. Loftus testified that PBS classifies the people who do its moving jobs as independent contractors. He further testified that movers can and sometimes do advertise their own personal moving services, wear apparel with logos from other moving companies, and work for other moving companies, although there is no evidence in the record that Manning did any of this.

Following the de novo evidentiary hearing, a ULJ issued a decision concluding that PBS employed Manning and other movers that did similar work for PBS. After granting

PBS's request for reconsideration, the ULJ affirmed his previous decision that Manning was an employee of PBS but did not conclude whether other movers were employees of PBS. Additionally, the ULJ deleted his previous credibility finding that Manning's testimony was "more credible" than Loftus's testimony on unspecified "facts in dispute." This review by certiorari follows.

DECISION

PBS challenges the ULJ's determination that Manning was an employee of PBS rather than an independent contractor. "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). We review a ULJ's factual findings in the light most favorable to the decision, and we will not disturb those findings if there is "evidence in the record that reasonably tends to sustain them." *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016) (quotation omitted). 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).

On review, we may reverse or modify a ULJ's decision if the substantial rights of the relator have been prejudiced by findings or conclusions that are unsupported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d)(5) (2020). Minnesota courts have defined substantial evidence as: "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence

considered in its entirety.” *Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

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. However, “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.* (quotation omitted). “Therefore, whether the parties have entered into a contract defining their relationship is not determinative.” *Id.* (quotation omitted).

We consider five factors to decide whether an individual is an employee or an independent contractor: (1) “the right or the lack of the right to control the means and manner of performance”; (2) “the right to discharge the worker without incurring liability for damages”; (3) “the mode of payment”; (4) the “furnishing of materials and tools”; and (5) the “control over the premises where the services are performed.” Minn. R. 3315.0555, subp. 1 (2020). Of these five factors, the employer’s right to control the means and manner of performance and the employer’s right to discharge the worker without incurring liability for damages are considered the most important factors. *Id.*; *St. Croix Sensory*, 785 N.W.2d at 800. These essential factors should be considered under the totality of the circumstances. *Moore Assocs., LLC v. Comm’r of Econ. Sec.*, 545 N.W.2d 389, 393 (Minn. App. 1996). Additional factors “may be considered if the outcome is inconclusive when applying the [five essential] factors” in subpart 1. Minn. R. 3315.0555, subp. 1. “The degree of their

importance may vary depending upon the occupation or work situation being considered and why the factor is present in the particular situation.” *Id.*

PBS argues that the five factors weigh in favor of a determination that Manning was an independent contractor of PBS. The ULJ made express findings concerning four factors and briefly touched on the fifth. We address each factor in turn.

Right to control

PBS argues that it had no control over *how* Manning did his work because it did not even exercise control over *what* work he performed. 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 (2020). “The determinative right of control is not merely over what is to be done, but primarily over how it is to be done.” *St. Croix Sensory*, 785 N.W.2d at 800 (quotation omitted).

Some factors to be considered when determining the right to control include whether a continuing relationship exists between the parties, whether set working hours are established, and whether individuals have the right to direct the method of performing work or whether they must comply with detailed instructions from the employer. *Id.* at 800–01. “Factors 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 (quotation omitted).

But the “decisive character” of the right of control “in practical application fades into a twilight of uncertainty by reason of the fundamental differences in the nature of various occupations, by the varying arrangements of the parties and the circumstances of each particular case, and by such variable factors as the force of custom.” *Frankle v. Twedt*, 234 Minn. 42, 48, 47 N.W.2d 482, 487 (1951). The right to control may be found even when the employee is far more skilled at the occupation than the employer, when the relationship is between geographically separated parties, or when the nature of the work requires or allows little supervision. *Id.*

The ULJ concluded that PBS “had the right to exercise control over the means and manner that Manning performed his work even if the company did not always elect to do so.” To support its conclusion, the ULJ made the following findings: (1) “Loftus largely controlled [Manning’s] daily routes and scheduling including [Manning’s] reporting to the PBS shop at the start of each workday”; (2) “Loftus largely set the start time for each day”; (3) “There were other individuals performing the same services as Manning that were coordinated by Loftus. Some of the jobs could not be performed by Manning alone and he had to work with other individuals coordinated by Loftus”; (4) “Manning received some training from Loftus on how to complete work on PBS jobs” and “how to properly complete tasks related to moving items for clients”; (5) Manning was unable “to hire replacements or subcontractors without PBS consent”; and (6) Manning maintained “for the most part . . . a continuous relationship with a typical work schedule.”

PBS asserts that it did not have control over Manning's performance, arguing that the ULJ's findings were not based on substantial evidence in the record. However, the record reveals that the ULJ's findings were supported by substantial evidence.

First, PBS argues that Manning set his own routes because (1) Manning testified that he used GPS to navigate to customers' homes, and (2) Loftus testified that movers could run personal errands during the work day without consulting him as long as they arrived at customers' homes within a specified timeframe. However, Manning testified that when he arrived at the PBS shop every morning, Loftus would pull up paperwork on his phone or print out a hard copy in order to show Manning his "route" and give him a "rundown for the day." Manning testified that he did not have any control or input over his schedule for each day, that any changes to his schedule had to be approved by Loftus, and that he did not have the ability to accept or decline particular jobs.³ Manning also testified that Loftus "probably would have fired him" if he declined a job. Although Loftus testified that the movers team up to figure out how to complete their jobs for the day, those moving jobs were dispatched to the movers; they were not setting their own routes by scheduling their own jobs. Also, it is customary for most drivers to use GPS to navigate when they do not know the directions to a specific location; it would be unusual and outdated for PBS to provide Manning with a hard copy of directions. This evidence

³ Loftus pointed out that Manning did in fact decline two jobs on December 27 and 30, 2019, but the record indicates these jobs were declined by Manning after he had already quit PBS because of a disagreement with Loftus.

supports the ULJ's finding that PBS largely controlled Manning's daily routes and scheduling.

Second, PBS argues that Loftus did not set the start time for Manning's work days; rather Manning's schedule was dictated by customer expectations. Although Loftus testified that the start time was "suggested" and that Manning was not expected to show up at PBS each day, he did not dispute that Manning worked full-time, Monday through Friday, starting at 7:00 a.m. or 8:00 a.m., for seven years (with the exception of the period when he stopped working during an unspecified period between 2017 and 2018). Additionally, Manning testified that Loftus would tell him his start time the day before any given workday and that Loftus chose the start time. This evidence supports the ULJ's finding that Loftus largely set the start time for each day.

Third, although PBS concedes that Manning worked with other individuals from PBS to complete his jobs, PBS disputes the ULJ's finding that Loftus coordinated Manning's work with those individuals. However, Manning testified that although he worked with another mover who was employed full-time, that mover continued to work for PBS after Manning left, indicating that Manning did not coordinate his work for PBS. Additionally, Manning testified that any authority he had over any movers working with him was subject to Loftus's approval, indicating Loftus's control over the other movers. *See St. Croix Sensory*, 785 N.W.2d at 801 (explaining that authority over a worker's assistants indicates control). This evidence in the record supports the ULJ's finding that "[s]ome of the jobs could not be performed by Manning alone and he had to work with other individuals coordinated by Loftus."

Fourth, PBS argues that Manning received no training from PBS or Loftus. However, in the next sentence of its brief, PBS concedes that Loftus provided limited instruction to Manning about how to disassemble pool tables. This is supported by Manning’s testimony that although he received no “formal” training from PBS, Loftus provided him informal training such as teaching him how to disassemble billiard tables. Manning also testified that he was expected to follow “the protocol . . . in which [Loftus] wanted things done,” which “was all basically taught through . . . hands-on work with [Loftus].” Manning explained that “[w]hen [he] first started, [he] worked with [Loftus] every day,” but that after Loftus began to trust him, he would “go out and do it on [his] own.” Although Manning sometimes exercised his own judgment to perform his job, using “[c]ommon sense,” researching tasks online, and working through trial and error, additional substantial evidence in the record supports the ULJ’s finding that Manning received “some training from Loftus on how to complete work on PBS jobs” and “how to properly complete tasks related to moving items for clients.”

Fifth, PBS asserts that the ULJ’s finding that Manning was unable to hire replacements or contractors without its consent is merely hypothetical. However, in a prehearing checkbox questionnaire, PBS checked “NO,” in response to a question asking if a PBS worker could “hire a substitute without the firm’s knowledge or consent.” Loftus testified that Manning was unable to hire additional assistants unless each assistant completed a required background check. This evidence supports the ULJ’s finding that Manning was unable to hire replacements or contractors without its consent—regardless of whether or not Manning ever attempted to hire an additional assistant.

Sixth, PBS challenges the ULJ’s finding that Manning maintained “for the most part . . . a continuous relationship with a typical work schedule,” arguing that Manning stopped working for Loftus for a period between 2017 and 2018—and again in 2019. However, as stated above, Manning worked full-time, Monday through Friday, starting at 7:00 a.m. or 8:00 a.m., for seven years—with the exception of the period when he stopped working at some point between 2017 and 2018. Additionally, Manning permanently quit working for PBS in 2019. Manning’s one extended break from working for PBS and his decision to ultimately end his work relationship with PBS do not undermine the ULJ’s finding that Manning maintained “for the most part . . . a continuous relationship with a typical work schedule” over a seven-year period.

Because substantial evidence in the record supports the ULJ’s finding that PBS had the right to control the means and manner of Manning’s performance, this factor overall weighs in favor of an employment relationship between Manning and PBS.

Right to discharge

Minnesota caselaw and agency rules establish the right to discharge as the other important factor in our analysis. Minn. R. 3315.0555, subp. 1; *St. Croix Sensory*, 785 N.W.2d at 800. Generally, “an employer may terminate an employee for any reason or for no reason.” *Kratzer v. Welsh Cos., LLC*, 771 N.W.2d 14, 18 n.7 (Minn. 2009). On the other hand, an agreement with an independent contractor typically cannot be terminated without liability if the contractor is fulfilling the terms of the contract. *St. Croix Sensory*, 785 N.W.2d at 803. Right to discharge may be indicated if an individual “may be

terminated with little notice, without cause, or for failure to follow specified rules or methods.” *Id.* at 803.

The ULJ found that “PBS could terminate Manning without being subject to any liability” and that “Manning could end the work relationship without liability to PBS.” The record supports these findings.

The parties agree that, in the event PBS wanted to end the relationship with Manning, it would not owe Manning anything other than what Manning had already earned for moving services provided. PBS was not required to give Manning any type or length of notice to end the relationship. Likewise, Manning was not required to provide any type or length of notice to stop providing services. Because the evidence supports the ULJ’s finding that PBS had the right to discharge Manning without incurring liability, this factor weighs in favor of an employment relationship.

Mode of payment

When an entity pays the worker hourly wages rather than a per-job fee, this factor favors finding an employer-employee relationship. *St. Croix Sensory*, 785 N.W.2d at 804. How the entity treats the compensation for income-tax purposes is also relevant: if individuals are responsible for their own tax obligations, this factor favors independent-contractor status, while an entity’s practice of withholding wages to cover income taxes favors an employment finding. *Id.* The ability to realize a profit or a loss is also indicative of an independent-contractor relationship. *See Moore*, 545 N.W.2d at 394.

PBS did not deduct taxes from Manning’s earnings and issued 1099 forms each year, favoring a finding of an independent-contractor relationship. However, PBS paid

Manning an hourly wage of \$25 for full-time work and gave him a paid day off for his birthday, indicating an employer-employee relationship. Further, Manning could not hire an assistant without the assistant being subject to a required background check, indicating that he did not have the ability to realize a profit by independently hiring an assistant. Manning's hourly pay also indicates that he did not have the ability to realize a profit or a loss. Loftus testified that he did not pay workers by the job because it created a risk that the drivers would not get paid for time invested. Because Manning was paid hourly, each week, and could not suffer a loss, this factor overall weighs in favor of an employment relationship.

Furnishing of materials or tools

The ULJ found that this factor favored an employer-employee relationship because PBS provided "necessary equipment for Manning to complete work." The record supports this finding. Manning drove a truck, which was owned and maintained by PBS and which featured the company's contact information. Manning also used a dolly and other tools provided by PBS. Additionally, Manning gave out PBS business cards. Although Manning used some of his own tools on the job, he could not have performed the job at all without PBS's vehicle and equipment. This factor weighs in favor of an employment relationship.

Control of premises

The ULJ noted this factor, but did not directly address it other than to make a finding that "Manning would begin his workday by reporting to the PBS shop to obtain the company truck." But this factor should be analyzed within the context of the industry

involved. *See St. Croix Sensory*, 785 N.W.2d at 802. Because Manning was expected to travel to the customer to provide moving services, the location of the work is inherently controlled by the customer rather than the employee or the employer. Moving cannot take place at the PBS shop; instead industry standards require that moving services be performed at locations designated by customers. That is true regardless of Manning's employment status. As a result, the ULJ did not err by placing lesser importance on this factor than the others.

Balancing the factors

The ULJ concluded that the five traditional factors, considered in totality, favored the conclusion that Manning was employed by PBS. While the ULJ admitted that “some factors . . . may support an independent contractor relationship,” he determined that the balance of the factors “leans towards employment,” emphasizing the significance of PBS's right to control Manning's duties as a mover and its ability to discharge him without liability—the two most important statutory factors. Because substantial evidence in the record supports the ULJ's finding that the relevant factors, considered in their totality, indicate an employer-employee arrangement, the ULJ did not err by determining that Manning was an employee of PBS.

Affirmed.