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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1182**

Thomas Frahs,  
Respondent,

vs.

Bill's Automotive, Inc.,  
Relator,

Department of Employment & Economic Development,  
Respondent.

**Filed May 7, 2012  
Affirmed; motion denied  
Huspeni, Judge\***

Department of Employment and Economic Development  
File No. 25424768-3

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Considered and decided by Schellhas, Presiding Judge; Bjorkman, Judge; and  
Huspeni, Judge.

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**HUSPENI**, Judge

Relator Bill's Automotive Inc. (BAI) challenges the decision by the unemployment-law judge (ULJ) that respondent Thomas Frahs was an employee of the company rather than an independent contractor, arguing that (1) administrative remedies have not been exhausted; (2) respondent Minnesota Department of Employment and Economic Development (DEED) should be estopped from asserting that Frahs was an employee because of a 2006 audit determining otherwise; and (3) the ULJ erred in concluding that Frahs was an employee. We affirm.

### FACTS

BAI is a company that purchases cars at auctions, fixes, cleans, and details them, and then sells the cars at retail or wholesale for a profit. Frahs worked as a car buyer for BAI from February 2005 until February 2010. His primary duty was to attend car auctions for the purpose of purchasing vehicles and transporting them to BAI's place of business for maintenance and sale. When not attending auctions, Frahs was also responsible for servicing the vehicles and driving BAI's tow truck. The parties' relationship was not governed by an employment contract.

In 2006, DEED conducted an audit of BAI for the years 2005 and 2006. DEED made certain determinations from the audit, but did not specifically mention Frahs's employment status.

In February 2010, BAI terminated Frahs's employment because he was no longer needed. Frahs applied for unemployment-insurance benefits, and because BAI had not

reported wages for Frahs, DEED conducted a field audit for the base period of October 1, 2008 to June 30, 2009. As a result of the audit, DEED determined that Frahs was an employee and is eligible for benefits. BAI appealed, and the ULJ determined that Frahs was an employee and is eligible for benefits. BAI requested reconsideration, and the ULJ affirmed. This certiorari appeal followed.

## D E C I S I O N

This court may affirm a decision of the ULJ, or it may remand, reverse, or modify a decision if the substantial rights of the petitioner were prejudiced because the findings, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008). This court reviews a ULJ's factual findings in the light most favorable to the decision and will not disturb them when they are sustained by substantial evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court reviews questions of law de novo. *Id.* Whether a person is considered an employee or an independent contractor presents a mixed question of law and fact. *Nelson v. Levy*, 796 N.W.2d 336, 339 (Minn. App. 2011).

Employers in Minnesota must contribute to the unemployment trust fund when wages are paid to employees. Minn. Stat. § 268.035, subd. 25 (2008). But compensation paid to independent contractors does not constitute wages. *Nicollet Hotel Co. v. Christgau*, 230 Minn. 67, 68, 40 N.W.2d 622, 622-23 (1950). An "employee" performs "services for an employer in employment." Minn. Stat. § 268.035, subd. 13(1) (2008). "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) (2008). The parties’ contract terms do not determine whether an employer-employee relationship exists; rather, this court examines the actual arrangements and conduct of the parties to decide this issue. *St. Croix Sensory Inc. v. Dep’t of Emp’t & Econ. Dev.*, 785 N.W.2d 796, 800 (Minn. App. 2010). “[E]ach case will depend in large part upon its own particular facts.” *Id.*

## I.

As a threshold matter, BAI argues in a motion filed after oral argument that the ULJ’s decision must be reversed and remanded because DEED did not exhaust all available administrative remedies before this appeal was commenced. BAI contends that a January 13, 2012 notice it received from DEED, stating that DEED intends to audit BAI’s records, demonstrates that “DEED has not completed its audit” regarding Frahs’s status and that it must do so before this court can hear this appeal. This argument is without merit.<sup>1</sup>

After DEED audited BAI and issued its determination of eligibility in 2010, BAI appealed the determination and the ULJ issued his findings and order on the employee-independent contractor issue. The ULJ then issued an order on reconsideration. The ULJ’s order on reconsideration constitutes exhaustion of administrative remedies because the order “is the final department decision on the matter and is final and binding on the involved applicant and involved employer unless judicial review is sought under subdivision 7.” Minn. Stat. § 268.105, subd. 2(f) (2008).

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<sup>1</sup> We note also that the appealing party is required to exhaust administrative remedies. DEED is the respondent and therefore not subject to this burden.

Contrary to BAI's argument, the notice of anticipated audit it received in 2012 does not demonstrate that DEED's 2010 audit of Frahs's employment status remains unsettled. The notice specifies that the audit covers the years 2010 and 2011. Frahs was discharged on February 1, 2010, and according to the 2010 field audit review, the base period for Frahs's benefits account at issue is from October 1, 2008 to June 30, 2009.<sup>2</sup> Therefore, the 2012 audit concerns a time period that is separate and distinct from the matter at issue in this appeal, and any DEED determination flowing from the new audit will not impact Frahs's benefit payments or BAI's unemployment-insurance taxes prior to 2010. The ULJ's decision on reconsideration that Frahs was an employee and is eligible for unemployment benefits remains a final agency decision that is ripe for appellate review. We therefore deny BAI's motion to reverse and remand.

## II.

BAI also argues that a 2006 DEED audit determined that Frahs was an independent contractor, and therefore DEED is equitably estopped from asserting that Frahs was BAI's employee. Again, there is no merit to this argument.

The facts of this case are similar to one in which the Minnesota Supreme Court held that an unemployment-tax audit had no precedential effect. *Boily v. Comm'r of Econ. Sec.*, 544 N.W.2d 295, 296-97 (Minn. 1996). In *Boily*, a dental clinic treated three dentists with whom it contracted as independent contractors, and an audit by the

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<sup>2</sup> DEED identifies a different base period in its brief. DEED states that, by law, Frahs's base period runs from January 1, 2009 to December 31, 2009. *See* Minn. Stat. § 268.035, subd. 4(a) (2008). We need not determine which base period applies, because the 2012 audit concerns a time period that is separate and distinct from either base period.

department of economic security raised no issue with respect to this classification. *Id.* at 296. When the commissioner of economic security later determined that the dentists were the clinic's employees, the clinic appealed, arguing that the determination was arbitrary and capricious in light of the department's earlier audit. *Id.* This court agreed and the supreme court affirmed our reversal of the commissioner's decision on other grounds. *Id.* at 296-97. In doing so, the supreme court held that our reliance on the audit was improper because the record did not indicate that the dentists' employment status was considered during the audit and the audit "did not amount to a 'determination.'" *Id.* at 297. In addition, the court noted, "Although federal law provides that a worker may be treated as an independent contractor if the employer's status as the employer of an independent contractor was based on an audit conducted by the Internal Revenue Service, there is no similar statutory provision in Minnesota." *Id.* (citing Revenue Act of 1978, Pub. L. No. 95-600, § 530, 92 Stat. 2763, 2885).

Like *Boily*, the prior field audit in this case was not a "determination" of Frahs's status because the audit documents reveal no evidence that the field auditor considered Frahs's status as part of the audit. Moreover, the 2006 audit of BAI covered the years 2005 and 2006, while the 2010 audit that led DEED to determine that Frahs was an employee covered a base period from October 1, 2008 to June 30, 2009. Thus, even if we concluded that the 2006 audit constituted a determination that Frahs was an independent contractor during the years 2005 and 2006, that determination would not preclude DEED from concluding that Frahs was an employee during a later time period.

A field audit is necessarily a fact-specific inquiry concerning a discrete time period because the nature and circumstances of an employment relationship may change over time. The facts of this case are illustrative of the importance of discrete time periods for which field audits are conducted. According to William Conley, BAI's owner, Frahs began work in 2005 under a profit-sharing agreement. But Conley also testified that between 2008 and 2010, Frahs "kind of retired" and that BAI began paying Frahs a flat rate for every car BAI sold that Frahs had purchased. Mindful of the credibility judgments unique to the ULJ, we recognize that this shift in the mode of Frahs's payment could directly impact the employee-independent contractor analysis and diminish the predictive value of the 2006 audit.

For these reasons, we reject BAI's argument that the 2006 field audit precluded DEED from determining in 2010 that Frahs was an employee rather than an independent contractor.

### **III.**

#### **Judicial notice**

In addressing the primary issue on appeal—Frahs's status as an employee or independent contractor—we note initially that BAI asks this court to take judicial notice of documents attached to its brief but not included in the record or considered by the ULJ. These documents consist of a civil complaint for money damages filed against Frahs and Tom's Automotive, a register of actions documenting that case, and an affidavit of William Conley. It appears that these documents are intended to show that

Tom's Automotive is an existing business entity, and that BAI paid Frahs through Tom's Automotive.

With the exception of the register of actions, the facts contained in BAI's documents are not the kinds of facts that may be judicially noticed because they are subject to reasonable dispute. *See* Minn. R. Evid. 201(b) ("A judicially[-]noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). Specifically, allegations in a civil complaint and averments in an affidavit are not assumed as true.

To the extent any of these facts *may* be judicially noticed, we do not find them to be relevant to our analysis of the common-law factors. Therefore, BAI's request that we take judicial notice of the proffered documents is denied.

### **Employee-independent contractor factors**

Five essential factors are considered in determining whether a person 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 (2009) (same). The two most important of these factors are "the right to control the means and manner of performance" and the right "to discharge the worker without incurring liability." Minn. R. 3315.0555, subp. 1(A), (B).

The right to control performance is determined under the total circumstances. *Id.*, subp. 3 (2009).<sup>3</sup>

The ULJ made thorough and specific findings of fact relating to the five essential factors, and determined that some factors favored independent-contractor status and others favored employee status. The ULJ also considered the additional factors provided under Minn. R. 3315.0555, subp. 2 (2009), and concluded that under the totality of the circumstances, Frahs was an employee.

Here, the record supports the ULJ's findings that BAI generally controlled where, when, and how Frahs completed his work. A significant portion of Frahs's work involved attending auto auctions to buy and sell vehicles on behalf of BAI. The ULJ found that although Frahs had some discretion over which vehicles to purchase, BAI retained the ultimate authority over whether and how much to bid and BAI required Frahs to attend certain auctions. In addition, the ULJ found that Frahs used BAI's dealership license to gain entry to auctions, and BAI reimbursed Frahs for all travel expenses to out-of-state auctions.

Aside from attending auctions, Frahs also performed vehicle maintenance work for BAI. This work was done at BAI's direction, in BAI's shop, using BAI's tools. Frahs also performed towing services using a tow truck owned by BAI. Thus, Frahs's

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<sup>3</sup> Minn. R. 3315.0555, subp. 3 establishing "criteria for determining if the employer has control over the method of performing or executing services" was repealed during the 2012 legislative session after this case was briefed and argued. 2012 Minn. Laws ch. 201, art. 3, § 16 (repealing subparts 2 through 4). The repealer "applies retroactively to all pending cases." *Id.* Because the ULJ applied the control factors in his decision and the parties briefed this case in contemplation of these factors, we treat them as useful guidance in our review of the ULJ's decision under the common law.

work was directed by BAI, generally occurred on premises controlled by BAI, and involved the use of tools and materials owned by BAI, all indications of control.

The continuous and consistent nature of Frahs's relationship with BAI and the manner of his discharge also demonstrate that BAI controlled Frahs's work as an employer would. Frahs worked for BAI continuously for five years, and he generally worked 40 to 45 hours per week for BAI. When BAI no longer needed Frahs in February 2010, it terminated his employment without prior notice and without incurring contractual liability. Applying these factors, we conclude, as did the ULJ, that Frahs's relationship with BAI was marked by control, and supports the conclusion that he was BAI's employee.

In addition to indicating control, the fact that BAI had the right to discharge Frahs without notice and without liability is also indicative of employee status under the second essential factor of Minn. R. 3315.0555, subp. 1(B). The third essential factor is the mode of payment. *Id.* Evidence on this factor was conflicting. Frahs testified that he was paid a monthly salary of \$2,000 regardless of the number of hours he worked, which indicates employee status. Conversely, Conley testified that BAI paid Frahs by the vehicle, which favors independent-contractor status. Because the ULJ did not resolve this factual dispute, we do not address the impact of this factor. The fourth and fifth essential factors—furnishing of materials and tools and control over the premises where the services are performed—as noted above, both favor employee status. Thus, four of the five essential factors, including the two most important, support the ULJ's conclusion that Frahs was an employee rather than an independent contractor.

Minn. R. 3315.0555, subp. 2 lists “[o]ther factors, . . . [which] may be considered if a determination is inconclusive when applying the essential factors.”<sup>4</sup> *Id.*, subp. 1. Although our analysis of the five essential factors is arguably conclusive, our consideration of those other factors additionally support the conclusion that Frahs was an employee.

An individual’s ability to realize a profit or loss indicates an independent-contractor relationship. Minn. R. 3315.0555, subp. 2(c). Here, the ULJ found that “Frahs was not liable for any losses related to the services he provided for [BAI],” and Conley testified that Frahs’s compensation structure over the last several years of his employment at BAI did not permit realization of profit or loss.

The “absence of an independent status” is indicated when an employer furnishes “all necessary facilities” to an individual. Minn. R. 3315.0555, subp. 2(E). BAI furnished the work premises where Frahs performed many of his services, the tow truck he drove, the tools he used, and the dealer’s license he used for bidding on vehicles. This too, supports employee status.

Finally, “[i]f an individual works for a number of persons or firms at the same time, it indicates an independent status because the worker is usually free from control by any of the firms.” Minn. R. 3315.055, subp. 2(F). Here, testimony conflicted as to whether and how often Frahs performed services for other companies and the ULJ found

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<sup>4</sup> 2012 Minn. Laws ch. 201, art. 3, § 16 also repealed the additional factors contained in subpart 2, and this repealer “applies retroactively to all pending cases.” Therefore, we consider the additional factors here merely as guidance in our review of the ULJ’s decision under the common law.

that Frahs performed services for Tom's Automotive while working at BAI. Therefore, this factor favors independent-contractor status. Thus, the other factors are mixed, but generally favor employee status.

Our analysis would be incomplete without addressing two issues raised and relied upon by BAI in urging that Frahs was not an employee, but rather was an independent contractor.

### **Payment to Tom's Automotive, not Frahs**

BAI contends that because it paid Frahs through the bank account of Frahs's company, Tom's Automotive, Frahs cannot be considered an employee of BAI. In support of this argument, BAI cites *Nelson*, in which this court held that a construction industry LLC cannot be considered an employee. 796 N.W.2d at 342. *Nelson* is inapposite. First, because BAI concedes that Tom's Automotive is not an LLC; second, because in *Nelson* we were interpreting the unique statutory language under Minn. Stat. § 268.035, subd. 9a (Supp. 2009), and Minn. Stat. § 181.723 (2008), setting forth the employee-independent contractor factors specifically applicable to the construction industry. *Id.* at 339-42. Because BAI is not a construction-industry company, our analysis here is not governed by section 268.035, subd. 9a. Instead, we look to the common-law factors and the general definition of "employment" under Minn. Stat. § 268.035, subd. 15(a) (2008). That definition includes services performed by "a member of a limited liability company who is considered an employee under the common law of employer-employee." *Id.* subd. 15(a)(3). Therefore the fact that Frahs received

payment in the name of Tom's Automotive because it was a convenient checking account to use does not compel a particular result.

### **BAI's subjective state of mind**

BAI also argues that its owner "had a state of mind that Frahs was an independent contractor," and that our decision should turn on this subjective belief. In support of this argument, BAI relies in part on the dissenting opinion from a case interpreting the Hatch Act. *See Minn. Dep't of Jobs & Training v. Merit Sys. Prot. Bd.*, 875 F.2d 179, 184 (8th Cir. 1989) (Arnold, J., dissenting). In that case, the issue was whether an employee "knowingly or willfully" violated the Hatch Act. *Id.* at 182. Therefore, the court was required to examine the employee's subjective state of mind to determine whether his actions violated the Hatch Act. *Id.* at 183-84. BAI argues that we should apply the same subjective state-of-mind test here.

But our decision in this case is governed by the common-law factors codified in Minn. R. 3315.0555, subps. 1-3 (2009), which do not include a "knowingly or willfully" standard or any standard involving the parties' subjective state of mind. In any dispute regarding employee status under the unemployment-benefits laws, the parties generally have divergent views on how the relationship should be characterized. Relying on the parties' subjective interpretation of their relationship would beg the question. Indeed, courts do not rely even on the parties' mutually-agreed-upon categorization of their relationship. *St. Croix Sensory Inc.*, 785 N.W.2d at 800. Therefore, we conclude that BAI's subjective state of mind is irrelevant, and that the common-law factors are properly

applied. Those factors require us to examine the actual arrangements and conduct of the parties. *Id.*

Because our examination of the relationship between Frahs and BAI, considering the ULJ's findings and application of the common-law factors, reveals that Frahs was an employee rather than an independent contractor, and because the determination is not constrained by previous and subsequent DEED audits of BAI, we conclude that the ULJ did not err in determining that Frahs was an employee and, as such, is eligible for benefits.

**Affirmed; motion denied.**