

IOWA DEPARTMENT OF INSPECTIONS AND
APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS
Wallace State Office Building
DES MOINES IOWA 50319

Appeal Number: 10IWD070

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**T & D CORPORATION D/B/A ARCHER
TV & APPLIANCE
618 GREEN STREET
ADEL, IA 50003**

**IOWA WORKFORCE DEVELOPMENT
DEB MICKLES, INVESTIGATOR
1000 EAST GRAND AVENUE
DES MOINES, IA 50319**

JOE BERVID, IWD
EMILY CHAFA, IWD
JASON TRYON, IWD

**This Decision Shall Become Final, as of the date of
mailing stated below unless:**

1. Either party files a WRITTEN application for a rehearing WITHIN TWENTY (20) DAYS AFTER the date below. The written application must state the specific reasons for the rehearing and the relief sought. If the request for a rehearing is denied or if the rehearing decision is not satisfactory, either party may petition the District Court WITHIN THIRTY (30) DAYS of either action;
OR
2. Either party may petition the District Court WITHIN THIRTY (30) DAYS after the date below.

YOU DO HAVE THE RIGHT TO HIRE A LAWYER at your own expense to represent you in these proceedings.

(Administrative Law Judge)

November 4, 2010
(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

STATEMENT OF THE CASE

The misclassification unit for Respondent Iowa Workforce Development (“IWD”) initiated an investigation of the relationship between Appellant T & D Corporation d/b/a Archer TV & Appliance (“Archer TV”) and Jeff Krider. IWD determined an employee-employer relationship existed between Archer TV and Krider. IWD issued a decision on January 27, 2010 finding Archer TV was liable for unemployment insurance contributions for Krider between March 2009 and October 2009. Archer TV timely appealed.

IWD transferred the case to the Iowa Department of Inspections and Appeals, Division of Administrative Hearings to schedule a contested case hearing. A contested case hearing was held on October 26, 2010. David and Teresa Moyer appeared and testified on behalf of Archer TV. Deb Mickles appeared on behalf of IWD. Exhibit A with documents 1 through 48 was admitted into the record. Archer TV requested the opportunity to submit an exhibit at the conclusion of the hearing. I left the record open for the receipt of Exhibit 1, which was admitted into the record.

ISSUE

Whether an employer-employee relationship existed between T & D Corporation d/b/a Archer TV & Appliance and Jeff Krider for the period from March 2009 to October 2009.

FINDINGS OF FACT

Archer TV employed Krider from May 20, 2005 through March 6, 2009, when it terminated Krider for using his cellular telephone during business hours. Krider installed ceramic tile, hardwood flooring, and vinyl flooring for Archer TV.

Krider applied for unemployment insurance. In response to the unemployment claim, Ms. Moyer reported:

He was discharged on 3/6/09 for conduct. He had a tendency to abuse his cell phone use on business time and there were other times when he would be on the clock but he wouldn't be working – we do have a record of his cell phone use – close to 60 hours of use during a 2-3 month period – we tracked the phone numbers and they were not related to business they were to his wife and personal buddies. Is girlfriend would show up at the jobsite and we were told that by the customers she would stay sometimes for an hour but it wasn't during a break time. There were times when he would leave the jobsite while on the clock and we wouldn't know where he was going – this information was told to us by customers and another co-worker. He does very good work but we couldn't afford to pay him when he wasn't working. He was warned verbally about these issues by Dave Moyer. Effective around 3/16/09 we made him a sub-contractor hoping this would alleviate the issues of paying him for hours that he wasn't working.

(Exhibit A at 26). Ms. Moyer completed the Notice of Claim form for IWD. In the Employer Statement of Protest section, she checked that Krider was still employed and stated he was working as a subcontractor.

Krider contacted the misclassification unit for IWD and reported he had been employed by Archer TV and was terminated and then was rehired as a subcontractor. Mickles commenced an investigation on behalf of IWD.

Mickles sent Archer TV Questionnaires for Determining Status of Workers. Archer TV returned three cover sheets for Jeff Brinks, Krider, and Charles McIntire. Archer TV submitted one set of answers for all three men. Archer TV reported that the men worked varied hours and that if a worker was absent, Archer TV would assign the work to another contractor. Archer TV noted that the workers are free to do other jobs, and hire assistants. According to Archer TV, the workers are paid based on a piece work basis, and supply their own supplies, tools, and vehicles. Archer TV supplies the

flooring. Archer TV stated it checks with the customer for satisfaction and may discharge a worker for lack of work or unsatisfactory work.

Mickles spoke with Krider who reported Archer TV paid him on an hourly basis. Krider told Mickles Archer TV deducted a telephone bill relating to the alleged misconduct from his wages earned as a subcontractor. Krider also reported that he had to pay Archer TV for the vehicle he drove. Krider told Mickles he requested an accounting from Archer TV because he did not know what Archer TV was deducting from his earnings.

Mr. Moyer testified that a few hours after he terminated Krider, he drove to Krider's home and told Krider that he did good work, but he needed to be accountable for his work. Mr. Moyer reported Krider agreed to work as a subcontractor and to pay back Archer TV for the hours Archer TV paid him when he was using the cellular telephone for personal calls and was unproductive.

Mr. Moyer reported that during Krider's employment and during his work as a subcontractor, Krider supplied his own hand tools. Mr. Moyer stated that Krider did not have a van, so he offered to sell a van to Krider and to bill him for the payments. Mr. Moyer also loaned Krider a saw and other tools from time to time when he worked as a subcontractor.

Mr. Moyer noted Krider billed by the square foot, but also charged for labor by the hour. Mr. Moyer reported that when a customer purchased flooring, the customer would tell him when the customer was available to have the flooring installed. Mr. Moyer would then contact Krider or one of the other subcontractors to ask if they were available. According to Mr. Moyer, Archer TV would supply the flooring and materials and the subcontractor would supply the labor. Mr. Moyer testified he did not dictate when Krider commenced work, took breaks, or ended his work day.

Mickles determined Archer TV never severed the employment relationship with Krider because there was no break in his service, and he continued to be paid on an hourly basis, rather than by the project. Mickles further found Archer TV provided the van Krider used, Archer TV made deductions for Krider's misconduct during his employment, Mr. Moyer directed and controlled his work, and Archer TV continued to pay Krider on a weekly basis.¹

Mr. and Mrs. Moyer testified that during Krider's work as a subcontractor, Archer TV deducted his child support, pursuant to a garnishment. In addition, Archer TV deducted \$50 or more for the back telephone expense, van, and other items Krider purchased from Archer TV while he was an employee. Archer TV submitted estimates prepared by Krider on Krider Flooring stationary from April, May and October 2009. Archer TV did not submit this information to IWD during its investigation.

¹ Mickles testified concerning a prior workers' compensation claim Krider filed. Mickles reported Krider stated that Archer TV deducted Krider's medical expenses from his wages during his employment. While the deductions may be been improper, it is unclear to me how this information is relevant to this proceeding.

REASONING AND CONCLUSIONS OF LAW

IWD oversees the unemployment compensation fund in Iowa, which is governed by Iowa Code chapter 96.² IWD's Director administers Iowa Code chapter 96 and is charged with adopting administrative rules.³

IWD initially determines all issues related to liability of an employing unit or employer, including the amount of contribution, the contribution rate, and successorship.⁴ An employer is defined as "any employing unit which in any calendar quarter in either the current or preceding calendar year paid for service in employment wages of one thousand five hundred dollars or more."⁵ An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it within Iowa.⁶ The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."⁷ Employment includes service performed by "[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."⁸

In the unemployment compensation context, the right of control is the principal test for determining whether a worker is an employee or independent contractor, as developed through the common law.⁹ Whether an employer-employee relationship exists under the usual common law rules is determined based upon an analysis of the individual facts in each case.¹⁰ IWD has also adopted rules with factors to consider in determining whether a worker is an independent contractor or employee.¹¹

Under IWD's rules,

The relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. An employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.¹²

² Iowa Code § 96.9(1).

³ *Id.* § 96.11(1).

⁴ *Id.* § 96.7(4).

⁵ *Id.* § 96.19(16) a.

⁶ *Id.* § 96.19(17).

⁷ *Id.* § 96.19(18) a.

⁸ *Id.* § 96.19(18) a(2).

⁹ *Gaffney v. Dep't of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).

¹⁰ 871 IAC 23.19(6).

¹¹ *Id.* 23.19.

¹² *Id.* 23.19(1).

The right to discharge or terminate a relationship is “an important factor indicating that the person possessing that right is an employer.”¹³ If the discharging party may be liable for damages for breach of contract, the circumstances are indicative of an independent contractor relationship.¹⁴

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service is characteristic of an employer.¹⁵ “In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, that individual is an independent contractor.”¹⁶

One factor includes the nature of the worker’s contract for the performance of a certain type, kind or piece of work at a fixed price.¹⁷ Generally an employee performs the work continuously and his or her labor is primarily purchased, whereas an independent contractor undertakes the performance of a specific job.¹⁸

An independent contractor follows a distinct trade, occupation, business or profession in which the worker offers his or her services to the public to be performed without the control of those seeking the benefit of the worker’s training or experience.¹⁹ Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, occupation, business, or profession, in which they offer services to the public, are independent contractors and not employees.²⁰ Professional employees who perform services for another individual or business are covered employees.²¹

An employee is typically paid a fixed wage on a weekly or hourly basis, whereas an independent contractor is typically paid one sum for the entire work, whether it is paid in a lump sum or installments.²² Independent contractors have the right to employ assistants with the exclusive right to supervise their activity and completely delegate work.²³

Independent contractors can make a profit or loss and are more likely to have unreimbursed expenses than employees and to have fixed, ongoing costs regardless of whether work is currently being performed.²⁴ Independent contractors often have

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* 23.19(2).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* 23.19(1).

²¹ *Id.*

²² *Id.* 23.19(4).

²³ *Id.* 23.19(5).

²⁴ *Id.* 23.19(3).

significant investment in real or personal property that they use in performing services for others.²⁵

Services performed by an individual for remuneration are presumed to be employment, unless proven otherwise.²⁶ An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.²⁷ If an employer-employee relationship exists, the designation or description of the relationship by the parties as anything other than an employer-employee relationship is immaterial.²⁸

Archer TV is in the flooring business and bears the burden of proof in this case. Mickles relied heavily on statements Krider made to her. It would have been helpful to hear testimony from Krider. The records supporting her findings are scant. Mickles did not report Archer TV failed to produce documents she requested.

What is clear is that Krider was an employee of Archer TV for nearly four years, until Archer TV terminated his employment because he excessively used his cellular telephone during working hours. It is unusual for an employer to rehire an employee immediately following the employee's termination. Yet, Krider was free to perform work for other contractors or businesses. Mr. Moyer testified Krider operated a side business during his employment with Archer TV.

Before and after his termination, Krider performed the same work for Archer TV. According to Mr. Moyer, Krider performed less work after his termination.

Mickles testified she did not find a separate business presence for Krider or Krider Flooring. Jeff Krider and Krider Flooring were not registered contractors in Iowa. However, Archer TV produced estimates prepared by Krider on Krider Flooring stationary, which were prepared and signed by Krider. The estimates reveal that Krider charged for his services by both the square foot and by the hour, depending on the task involved. The estimates are for the homeowner customers.

Archer TV provided the materials used for the projects Krider completed during his employment and while he worked as a subcontractor. Mr. Moyer testified this is common in the flooring industry. Mr. Moyer reported that with the exception of carpet tack strips, which carpet installers supply, flooring materials are typically supplied by the store or vendor where the customer purchases the flooring.

Mr. Moyer testified that Krider could employ assistants and determine his working hours for each project. While there is no evidence anyone from Archer TV was on the job site supervising and directing his work, there is no evidence that Krider was directly supervised on the job site during his employment with Archer TV.

²⁵ *Id.*

²⁶ *Id.* 23.19(6).

²⁷ Iowa Code § 96.19(18)*f*, *Id.* 22.7(3).

²⁸ 871 IAC 22.19(7).

Mr. Moyer testified that Krider was paid by the project following his termination. Before his termination, Krider was paid an hourly wage. The estimates found in Exhibit 1 and the payment records in Exhibit A show that Krider was paid varying amounts for his work. It is odd that Mr. Moyer deducted alleged expenses and overpayments Krider purportedly received during his employment from the payments he received for work as a subcontractor. The mixing of the two is confusing and supports a finding of a continuing relationship.

There was no break in Krider's service to Archer TV. Mr. Moyer testified that he approached Krider with the idea of working as a subcontractor the day he terminated his employment. The evidence reveals Archer TV maintained the right to control the final product during Krider's employment and during the time he allegedly worked as a subcontractor. Archer TV has not met its burden of proof in this case.

DECISION

Iowa Workforce Development correctly determined that an employer-employee relationship existed between Archer TV and Krider from March through October 2009. Iowa Workforce Development shall take any steps necessary to implement this decision.

hlp