

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

Appeal Number: 10IWD071

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**STEVEN HURD d/b/a RESIDENTIAL
WORKS
3710 FLEUR DRIVE
DES MOINES, IA 50321-2218**

**IOWA WORKFORCE DEVELOPMENT
RYAN DOSTAL, INVESTIGATOR
1000 EAST GRAND AVENUE
DES MOINES, IA 50319**

JOSEPH WALSH, IWD
JOE BERVID, IWD
JASON TRYON, IWD
JAMES GILLIAM
BRIAN DREVS

**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)

February 3, 2011

(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination
Iowa Code section 96.7-2c(1) – New Employer Determination

STATEMENT OF THE CASE

The misclassification unit for Respondent Iowa Workforce Development (“IWD”) initiated an investigation of the relationship between Appellant Steven Hurd d/b/a Residential Works (“Residential Works”) and its workers. IWD issued a decision on March 4, 2010 finding an employer-employee relationship existed between Residential Works and its workers and finding that Residential Works was liable for unemployment insurance contributions for 2005 through 2009. Because Residential Works had not previously paid unemployment insurance contributions, IWD assigned the rate for newly covered construction employers. Residential Works timely appealed.

IWD transferred the case to the Iowa Department of Inspections and Appeals, Division of Administrative Hearings to schedule a contested case hearing. The matter was continued twice pursuant to requests from the parties. A contested case hearing was held on January 5, 2011. Attorney James Gilliam represented Residential Works. Accountant Brian Dreves and Stephen Hurd appeared and testified on behalf of Residential Works. Attorney Joseph Walsh represented IWD. IWD Misclassification Investigator Ryan Dostal appeared and testified on behalf of IWD. Exhibits A and B were admitted into the record.

ISSUES

Was Residential Works properly classified as a newly covered employer in the construction industry?

Whether Iowa Workforce Development correctly determined that an employer-employee relationship existed between Residential Works and the individuals performing services for the business from 2005 through 2009.

FINDINGS OF FACT

Hurd operates Residential Works, a construction framing and siding business. Hurd contracts with several builders in the Des Moines area. He does not have any ownership interest in the job sites owned by the developers or builders. Hurd operates his business out of his home office.

On October 26, 2009, Dostal visited a construction site at [REDACTED] NE 8th Street in Grimes, Iowa. Upon approaching the site, Dostal observed four males framing a new home. Dostal asked who was in charge and he was directed to a man who introduced himself as Victor Paucar. Victor Paucar confirmed he was in charge. Dostal explained who he was and what he was doing at the site. Dostal stated he needed to verify whether the workers on the site were registered contractors or employees of a registered contractor. When asked, Victor Paucar told Dostal he could not say whether or not he was a registered contractor. Dostal believed Victor Paucar was suggesting he did not understand the question. Victor Paucar told Dostal he and one other individual spoke English.

Victor Paucar stated Dostal needed to call Steve. Victor Paucar explained he had worked for Steve for the past six years. Dostal reported Victor Paucar told him that Steve provided most of the tools and materials he used to complete projects. Victor Paucar stated all of his work came from Steve.

After further questioning Victor Paucar told Dostal to talk to his wife. Victor Paucar called his wife and handed the telephone to Dostal. Dostal introduced himself. Victor Paucar's wife became angry and told him that he should not be speaking with her husband and should be speaking with Steve. Dostal reported that due to combative nature of the conversation, he ended the conversation.

Dostal was only able to secure the name of one other individual on the site. He made note of the license plates of the cars parked at the site for later identification and left the area.

On October 28, 2009, Hurd called Dostal and asked what IWD needed from him and why Dostal was at his worksite. Dostal explained t he was an investigator for IWD and that IWD had concerns about possible worker misclassification. Dostal told Hurd it was possible some of the workers on the site should be classified as employees. Dostal noted

that Hurd's nature became acrimonious and that he stated "I know all about that" and told Dostal the workers were not his employees. Dostal replied that none of the workers found on site were registered contractors with the state of Iowa and the one person who spoke with him indicated he had worked for Hurd full-time for a number of years. Hurd told Dostal he did not know the workers needed to be registered. Dostal asked Hurd how he knew about possible worker misclassification, but did not know about contractor registration. Dostal reported Hurd's voice rose in anger, he threatened to hang up and chastised Dostal for hanging up on Victor Paucar's wife.

Dostal told Hurd he sent him a contractor registration application, questionnaire for determining status of workers, and a report to determine liability. Dostal stated that IWD would be requesting tax and financial information. Hurd asked Dostal what would happen if he chose not to respond. Dostal explained the procedure for a notice to produce followed by a subpoena to obtain records.

Dostal sent Hurd a notice to produce to obtain his financial and tax information on November 10, 2009. On November 23, 2009, Residential Works' accountant, Drevs, arrived at IWD with a portion of the requested tax and financial information. Dostal sent Hurd a letter on January 4, 2010, asking for the remainder of the documents previously requested.

On January 19, 2010, IWD received a large binder containing copies of checks written by Residential Works for the past five years. Dostal reviewed the checks. He determined 51 people had performed services for Residential Works. Dostal found a distinct pattern of employment with weekly payments made to employees and continuing relationships over five years with the same groups of individuals. Dostal looked at the Secretary of State's website to see if any of the individuals had a separate business presence. Dostal could not find a separate business presence for the individuals.

Dostal noted the financial records indicated Residential Works spent significant amounts of money at tool or supply stores for products in the industry, which he surmised would not be expected if the workers were independent contractors. Dostal noted payments totaling \$55,504.14 to Bradley's Tools, \$6,584.84 to Menard's, \$2,889.03 to Acme Tools, \$2,223.88 to ABC Supply, and \$1,850.19 to Lowes. Dostal also noted payments under \$1,000 each to Home Depot, Puckett Tools, Bob's Tools, Sears, Des Moines Iron, and 3E.

Dostal mailed a letter with a questionnaire for determining status of workers to each individual identified by Residential Works as having received a 1099 in the past five years. A number of the letters were returned to IWD as undeliverable. Dostal only received one response from an individual who indicated he completed some welding for Hurd and was not Hurd's employee. Dostal took the individual at his word and took the individual off the list.

Dostal determined Victor Paucar, Cosme Paucar, Juan Valdivieso, Marcello Puma, Alex Villejo, Segundo Coello, Roberto Cisneros, Geovanny Gonzales, Roberto Delatorre, Miguel Perulda, Cliff Benson, Riumas Soto, John Bohling, Zach Hurd, Wilson Lata,

Larry McPherson, Juan Antonio De Los Angeles, Jorge Paucar, Miguel Pillcorema, Pat Ross, Geovanny Vasquez, Chris Eggers, Pablo Lopez, Bosco Coello, Jay Davis, JC Mace, Mario Silva, Shane Nielsen, Pablo Lara, Arnesto Jurado, James Shipley, Daniel Hernandez, Idelfonso Bernal, Gambino Morales, Angelo Romero, Caesar Vanda, Justin Davis, Edison Jara, Antonio Ortiz, Orlando Ziamabrano, Serafin Cabral, Carlos Lata, Matt Minium, Suphup Phann, Javier Lata, Marty Robey, Jake Bohannon, Salvador Sandoval, Francisco Paucar, Todd Elverson, and Mario Carpio were employees of Residential Works.

Dostal concluded Residential Works made regularly occurring, weekly payments to the workers. He also found Residential Works supplied building materials and tools for the projects. Between 2005 and 2008, only one individual was a registered contractor and a few others registered in late 2009. Dostal was only able to identify one truly independent business that was created after the individual ceased performing services for Residential Works.

Dostal found a continuous relationship existed between Residential Works and the workers. Dostal made the following conclusions: (1) in 2005 Residential Works paid seventeen workers weekly on Friday; (2) in 2006 Residential Works paid twenty-one workers weekly on Friday; (3) in 2007 Residential Works paid twenty-one workers weekly on Friday; (4) in 2008 Residential Works paid thirteen workers weekly on Friday; and (5) in 2009 Residential Works paid ten workers weekly. Dostal noted the payments were made to some of the same people from year to year. Victor Paucar also told Dostal he had worked for Hurd for six years. Dostal reported that at that time he could not determine whether the workers were paid by the job or hour because the business records did not provide detail regarding the work performed. Dostal concluded that the payments were made on a regular basis, over the course of several years.

Hurd did not produce any contracts, bids, invoices, or other evidence supporting a separate business presence for the workers. Dostal only found a separate business presence for one worker that was created after the worker no longer received payments from Residential Works. Dostal examined the Secretary of State's website and contractor database. He also looked in the telephone book and bidding websites, but he could not find a separate business presence for the workers.

According to Hurd's questionnaire for determining status of workers, Hurd reported he had the right to terminate a worker if his or her performance were unsatisfactory.

Hurd testified he contracts with builders to frame and/or side buildings. When a builder has a new project, the builder contacts Hurd. Hurd obtains a blueprint and provides a bid to the builder for the framing. The builder supplies the wood, hard drive nails and penny nails. For some builders Hurd only provides framing services. For others, he provides framing and siding services.

Hurd testified he does not have any employees, but rather hires subcontractors to complete the work. He stated that he finds most of the workers from Bradley's Tools and through word of mouth. Hurd does not use the internet to find subcontractors and

reported he does not know any framing subcontractors who use the internet or telephone book to advertise.

Hurd testified it took him approximately one year to learn the framing and siding trade. He stated that to frame a building correctly, a worker needs to be a skilled carpenter. Hurd only hires experienced framers to work on projects. He stated that he provides no training.

When Hurd initiates a new project, he meets with the subcontractor and discusses what Hurd is going to do and what the subcontractor is going to do. Hurd works on site with the subcontractors and focuses on the precision work, including cutting in the stairs, framing the arches, and framing tray ceilings. Hurd testified he negotiates a verbal agreement with each subcontractor and pays the subcontractor a percentage of the project. According to Hurd, the agreement is not for a specific period, but until the project is completed. A typical 2,000 square foot home takes approximately two weeks to complete. Hurd testified he pays the workers two draws where the worker receives the final 50 percent of the payment at the conclusion of the project, but writes checks every week. Hurd denied paying workers on an hourly basis.

Hurd testified the workers determine when they will start and end working each day and when they will take breaks. Hurd may hire three or four workers to work on a given project and might have multiple projects going on at the same time.

Hurd reported the subcontractors are free to advertise and perform work for others. Hurd stated he is aware that some of the subcontractors have other jobs. Hurd does not require that the workers work on his projects full-time. Hurd did not provide any examples of other projects or individuals the workers worked for.

Hurd noted the workers are free to hire their own employees. If a worker were to hire their own employee, Hurd would not pay the worker's employee directly.

Hurd testified the workers are required to provide their own transportation. Hurd does not pay for transportation. The workers supply their own tool bags, which include a hammer, square, pencil tape, knife, hand tools, power tools, and pneumatic air hoses. Hurd he has a trailer with tools on the site when pneumatic saws and a compressor. Hurd testified he provided nails, fasteners, and some pneumatics to the workers. Hurd stated he is typically the only person who uses the tools in his trailer.

Hurd discussed terminating an employee, Chris Eggers, before a project was completed. Hurd reported Eggers called him on a pay date and stated he had finished an exterior deck. Hurd paid Eggers the full amount for the project, and later found the project was not completed. Hurd testified he had to find another worker to complete the job and attempted to collect from Eggers. Hurd reported that after the incident with Eggers he started inspecting projects to determine each project was completed before paying the worker the following Monday.

Hurd testified that several of the individuals identified by IWD do not perform work for his business. Hurd reported Zach Hurd is his nephew and did some cleaning for him. He stated he hired Pat Ross, James Shipley, Marty Robey and Jake Bohannon did personal work for him unrelated to the business. Hurd hired Ross to haul trash for a personal project. Shipley hauled away dirt from his personal residence. Robey provided plumbing services at his home and for other properties he owns. Bohannon performed electrical work at Hurd's home.

Hurd reported JC Mace worked for Cliff Benson. Hurd paid Mace for a remodeling project he completed.

Hurd stated he does not know who Shane Nielsen is.

According to Hurd, Todd Elverson is an attorney Hurd hired when a builder did not pay him for work he performed in Pleasant Hill.

Hurd reported he wrote checks to individuals who were not subcontractors as loans. At hearing Hurd could not provide a specific example of a loan he provided.

In July 2010 Dostal visited another job site and ran into Bosco Coello. Dostal recalled Bosco Coello's name from the investigation. Bosco Coello told Dostal he worked for Hurd. Dostal asked Bosco Coello to fill out a questionnaire for determining status of workers. Bosco Coello reported he did not feel comfortable filling out the form. Dostal proceeded to ask him the questions and Dostal wrote down Bosco Coello's answers to the questions.

Bosco Coello told Dostal he earned \$9 per hour and Hurd paid him on a weekly basis. Bosco Coello reported that Hurd dropped off a trailer with tools each day because Hurd's trailer had been broken into at a job site a few years ago.

Dostal looked for a police report regarding the theft and found a report with the City of Ankeny. The report indicates Hurd had one suspect, "a former employee named Chris Eggers, who once was his lead supervisor of a framing crew in Clive, Iowa." (Exhibit B at 15). According to the report Eggers did not show up for work on October 12 through 13, 2006 "which caused Hurd to spend extra money on equipment to work on the scheduled job." (Exhibit B at 15). Dostal did not interview the police officer who prepared the report. Dostal did not interview Hurd regarding the report. At hearing Hurd argued that the report was inaccurate.

REASONING AND CONCLUSIONS OF LAW

IWD oversees the unemployment compensation fund in Iowa, which is governed by Iowa Code chapter 96.¹ IWD's Director administers Iowa Code chapter 96 and is charged with adopting administrative rules.²

IWD initially determines all issues related to liability of an employing unit or employer, including the amount of contribution, the contribution rate, and successorship.³ 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."⁴ An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it in Iowa.⁵ The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."⁶ 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."⁷

In the unemployment compensation context, the right of control, as developed through the common law, is the principal test for determining whether a worker is an employee or independent contractor.⁸ 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.⁹ IWD has also adopted rules with factors to consider in determining whether a worker is an independent contractor or employee.¹⁰

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.¹¹

¹ Iowa Code § 96.9(1).

² *Id.* § 96.11(1).

³ *Id.* § 96.7(4).

⁴ *Id.* § 96.19(16)a.

⁵ *Id.* § 96.19(17).

⁶ *Id.* § 96.19(18)a.

⁷ *Id.* § 96.19(18)a(2).

⁸ *Gaffney v. Dep't of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).

⁹ 871 IAC 23.19(6).

¹⁰ *Id.* 23.19.

¹¹ *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.”¹² If the discharging party may be liable for damages for breach of contract, the circumstances are indicative of an independent contractor relationship.¹³

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service are characteristic of an employer.¹⁴ “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.”¹⁵

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.¹⁶ 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.¹⁷

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.¹⁸ 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.¹⁹ Professional employees who perform services for another individual or business are covered employees.²⁰

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.²¹ Independent contractors have the right to employ assistants with the exclusive right to supervise their activity and completely delegate work.²²

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.²³ Independent contractors often have

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* 23.19(2).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* 23.19(1).

²⁰ *Id.*

²¹ *Id.* 23.19(4).

²² *Id.* 23.19(5).

²³ *Id.* 23.19(3).

significant investment in real or personal property that they use in performing services for others.²⁴

Services performed by an individual for remuneration are presumed to be employment, unless proven otherwise.²⁵ An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.²⁶ 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.²⁷

Residential Works is in the construction business. While Residential Works criticizes IWD's investigation and points to Dostal's purported failure to ask additional questions and for additional information, Residential Works bears the burden of proof in this case, not IWD. During the investigation Residential Works was aware that IWD was investigating whether its workers were properly classified as independent contractors. Residential Works had all of the business records and had the assistance of an accountant and attorney in preparing its submissions to IWD.

Hurd's testimony is inconsistent with Dostal's testimony, raising credibility concerns. There are many factors used when considering the credibility of witness testimony. Some of the most common standards are as follows:

1. Whether the testimony is reasonable and consistent with other evidence you believe.
2. Whether a witness has made inconsistent statements.
3. The witness' appearance, conduct, age, intelligence, memory and knowledge of facts
4. The witness' interest in the trial, their motive, candor, bias and prejudice.²⁸

Hurd testified he contracts with each worker based on a percentage of each project. Hurd reported he pays the workers two draws where the worker receives the final 50 percent payment at the conclusion of the project, but writes checks every week. Dostal testified Bosco Coello reported he earned \$9 per hour and Hurd paid him on a weekly basis. The business records support a finding of an ongoing relationship between Residential Works and its workers. From 2005 through 2009, workers were paid on a weekly basis from month-to-month and from year-to-year.

Hurd testified he orally contracts with the workers. Hurd did not produce any bids or invoices from any of the workers. He did not call any of the workers as witnesses at hearing or produce any affidavits or other statements supporting the existence of oral contracts for each specific project.

²⁴ *Id.*

²⁵ *Id.* 23.19(6).

²⁶ Iowa Code § 96.19(18)*f*; *Id.* 22.7(3).

²⁷ 871 IAC 22.19(7).

²⁸ *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996).

Hurd stated the workers were responsible for providing the tools for the projects. Victor Paucar told Dostal Hurd provided most of the tools and materials he used to complete projects. Bosco Coello also discussed a trailer that Hurd had with tools in it for the workers to use.

Hurd was not forthcoming with information during the investigation. He has a definite interest in establishing the workers identified by IWD were independent contractors. At hearing Hurd testified Pat Ross, James Shipley, Marty Robey, Jake Bohannon, and JC Mace did personal work for him unrelated to the business. Hurd testified that Zach Hurd did some cleaning for him. He also reported Todd Elverson performed legal work for him. Hurd supplied the 1099s and check registers to IWD. It is unclear why he did not identify these individuals as performing work unrelated to the business before the hearing. During the hearing he did not submit any evidence supporting his bare assertions. Certainly if Elverson provided legal services to Hurd, he should have received a billing statement and copies of any demand letters sent to the builder.

IWD did not find the workers were registered contractors with the state of Iowa or that they had a separate business presence during the time they worked with Residential Works. At hearing Residential Works did not produce any witnesses or documentary evidence showing the individuals had a separate business presence from Residential Works. Hurd provided the work assignments to the workers, by informing them which projects he would complete personally. Hurd worked side-by-side with the workers on the projects. He could terminate the workers if he was dissatisfied with their performance.

Residential Works seems to believe IWD bears the burden of proving these individuals are employees. It is Residential Works who bears the burden of proof in this case. I conclude Residential Works has failed to prove an independent contractor relationship existed between Residential Works and Victor Paucar, Cosme Paucar, Juan Valdivieso, Marcello Puma, Alex Villejo, Segundo Coello, Roberto Cisneros, Geovanny Gonzales, Roberto Delatorre, Miguel Perulda, Cliff Benson, Riumas Soto, John Bohling, Zach Hurd, Wilson Lata, Larry McPherson, Juan Antonio De Los Angeles, Jorge Paucar, Miguel Pillcorema, Pat Ross, Geovanny Vasquez, Chris Eggers, Pablo Lopez, Bosco Coello, Jay Davis, JC Mace, Mario Silva, Shane Nielsen, Pablo Lara, Arnesto Jurado, James Shipley, Daniel Hernandez, Idelfonso Bernal, Gambino Morales, Angelo Romero, Caesar Vanda, Justin Davis, Edison Jara, Antonio Ortiz, Orlando Ziamabrano, Serafin Cabral, Carlos Lata, Matt Minium, Suphup Phann, Javier Lata, Marty Robey, Jake Bohannon, Salvador Sandoval, Francisco Paucar, Todd Elverson, and Mario Carpio. IWD properly found an employer-employee relationship existed.

IWD classified Residential Works as a new employer in the construction industry. There was no evidence presented at hearing that Residential Works previously paid unemployment insurance contributions. Because the workers are employees of Residential Works and because Residential Works has not previously paid unemployment insurance contributions, IWD properly classified Residential Works as a new employer in the construction industry.

DECISION

Iowa Workforce Development correctly determined that an employer-employee relationship existed between Residential Works as its workers, and that Residential Works should be classified as a new employer in the construction industry. Iowa Workforce Development shall take any steps necessary to implement this decision.

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