

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

Appeal Number: 10IWD074

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**MAINTENANCE & CONSTRUCTION
SERVICES OF IOWA
TOBY HUGHES, OWNER
3100 JUSTIN DRIVE STE D
URBANDALE, IA 50322**

**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)

September 23, 2010

(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 Iowa Workforce Development (“IWD”) initiated an investigation of the relationship between Appellant Maintenance & Construction Services of Iowa (“Maintenance & Construction”) and its workers. IWD determined an employee-employer relationship existed between Maintenance & Construction and Tom Heger, Luke Bain, Will Henry, Rusty Gilmore, and Kelly Von Schlotterback. IWD issued a decision on March 4, 2010 finding Maintenance & Construction was liable for unemployment insurance contributions effective January 1, 2009. Because Maintenance & Construction had not previously paid unemployment insurance contributions, IWD assigned the rate for newly covered construction employers. Maintenance & Construction 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 September 14, 2010. Toby Hughes appeared and testified on behalf of Maintenance & Construction. Attorney Emily Chafa appeared on behalf of Respondent IWD. Debra Mickles appeared and testified on behalf of IWD. Russ

Mussinger also appeared on behalf of IWD, but did not testify. Exhibits A and 1 were admitted into the record.

ISSUES

Was Maintenance & Construction Services of Iowa properly classified as a newly covered employer in the construction industry?

Whether Iowa Workforce Development correctly determined that an employer-employee relationship existed between Maintenance & Construction Services of Iowa and Tom Heger, Luke Bain, Will Henry, Rusty Gilmore and Kelly Von Schlotterback performing services for the business year 2009.

FINDINGS OF FACT

Mickles is an investigator with IWD's misclassification unit. Mickles conducted an investigation of Ceiling Pro, a company owned by Hughes. During her investigation of Ceiling Pro, she was also assigned to investigate Maintenance & Construction.

On November 25, 2009, Mickles called the Ceiling Pro office. The person who answered the telephone stated, "Ceiling Pro, this is Kelly." (Exhibit A at 10). Mickles asked Kelly how long she had worked there. Kelly informed Mickles she did not work there. When asked why she was answering the telephone if she did not work there Kelly responded, "You'll have to talk to Mr. Hughes about that." (Exhibit A at 10). Hughes was gone for the remainder of the Thanksgiving holiday.

Mickles determined that Hughes had a Facebook page for Maintenance & Construction. The Facebook posting indicating that Maintenance & Construction provides handyman services, carpentry, roofing, decking, electrical, plumbing, painting, siding, concrete, landscaping, windows, and fencing.

On December 3, 2009, Mickles called Ceiling Pro and left a message for Hughes to return her call. Hughes returned the call the same day. Hughes informed Mickles he did not have any employees. When she asked him about Kelly, Hughes told her that Kelly worked for Right Roofing. During the investigation Mickles determined that Maintenance & Construction made regular weekly and biweekly disbursements to Kelly Von Schlotterback who also works for Right Roofing. Hughes told Mickles he paid Von Schlotterback to watch his dogs while he was on vacation.

During the December 3, 2009 conversation, Hughes told Mickles "[a]ll my employees are subcontractors." (Exhibit A at 10). Mickles told Hughes that employees could not be treated as subcontractors. Hughes responded that IWD was "rewriting the law to suit ourselves." (Exhibit A at 10). Hughes told Mickles that he was setting his company up as an LLC and was giving everyone 1099s "to get around this." (Exhibit A at 10). He stated he would "set up my subs so they looked right so we can get around this." (Exhibit A at 10). Mickles informed Hughes that it did not matter "how they looked, it would not change the true substance of the relationship." (Exhibit A at 10). Mickles

told Hughes she would send a Notice to Produce if he was not going to cooperate. According to Mickles Hughes said, "Go ahead, this is a new company and there is nothing to produce, all my business has been done through Maintenance & Construction Services up until now." (Exhibit A at 10). Mickles replied that she would send a Notice to Produce.

Mickles scheduled Hughes' Notice to Produce for December 22, 2009. Mickles later agreed Hughes did not need to appear if he voluntarily sent the information before that date. Mickles received copies of cash disbursements journals and general journals for Ceiling Pro & Maintenance & Construction.

Mickles took the information and listed the subcontractor payees that were not registered contractors. She sent Hughes an e-mail asking him to provide an owner's name, taxpayer identification number, and address for each. Because she had been unable to substantiate a business presence for the payees, she asked Hughes to provide any additional information available.

Mickles received the list of subcontractors from Hughes. Mickles reviewed the list and noted that some of the information was marked "personal." She sent Hughes an e-mail asking him to provide information on the information marked "personal" because the individuals and businesses had performed services that may be taxable. Hughes responded stating the individuals did personal work for him at his home, that he not her "headhunter" and that she could find out who they were. (Exhibit A at 11). Hughes further stated "[i]f this is not satisfactory for you, then spend the state's money and take me to court." (Exhibit A at 11).

In January 2010, Mickles sent Hughes an e-mail asking him to complete the attached Report to Determine Liability and submit a Report to Determine Liability for each company. Hughes replied stating he had completed the forms in the past and did not see a reason to resubmit what was already on file. Mickles sent Hughes a copy of Iowa Code section 96.11(6)(a) regarding the right to request information. Hughes responded, stating, "[s]o I take it you lost the forms. You guy are wonder at what you do. I am taking to my lawyer this morning I will get back with you." (Exhibit A at 11). Mickles reported that two hours later she received the requested forms by facsimile from Hughes.

Hughes reported that Maintenance & Construction is sole proprietorship. The primary business activity for Maintenance & Construction is construction. Hughes reported that Maintenance & Construction remodels, completes drywall repairs, and painting for residential and commercial properties.

Mickles reviewed the case file and determined Heger, Bain, Henry, Gilmore and Von Schlotterback were employees of Maintenance & Construction. Mickles determined the individuals were not registered contractors and that Maintenance & Construction worked with quite a few registered contractors. Mickles further found the individuals did not have a separate business presence. Heger, Bain, Henry, Gilmore and Von Schlotterback did not have a registered business entity, did not have a business presence

on the internet, and did not have business telephone listings or advertisements. Mickles further found that Henry, Bain, and Von Schlotterback received regular income on a weekly or biweekly basis from Maintenance & Construction and were not offering their services to the general public. Even though she requested Hughes provide evidence substantiating their business presence, he did not do so.

Mickles testified Bain was paid on nearly a weekly basis or more frequently. There were a few periods where he was not paid, however, Hughes did not provide an explanation for the breaks in pay. Mickles also found Henry was frequently paid, sometimes daily. Mickles asked Hughes to provide information of a separate business presence for Bain and Henry. Hughes did not produce any information.

Mickles used the same process for Gilmore and Heger. Mickles reported the men were paid less than Bain and Henry. She asked Hughes to provide information of a separate business presence for Gilmore and Heger. Hughes did not produce any information.

Mickles found that Von Schlotterback answered the telephone every time she called. Von Schlotterback never admitted she worked for Maintenance & Construction. She reported that Mickles would need to speak to Hughes. Von Schlotterback never told Mickles that she watched Hughes's dogs.

Based upon a review of the information contained in the business records, and the lack of information Hughes provided, Mickles determined Bain, Henry, Gilmore, Heger and Von Schlotterback were employees of Maintenance & Construction. None of the individuals were registered contractors with the state of Iowa and had no separate business presence. During her investigation, Hughes never provided or mentioned having written contracts with Bain, Henry, Gilmore, Heger or Von Schlotterback.

Hughes testified it is not his fault Bain, Henry, Gilmore, Heger or Von Schlotterback are not registered contractors with the state of Iowa. He stated he pays Bain to install garage doors for him and has a full-time job with Adams Door Company. Heger is a full-time employee of Drake University who completes side work for Maintenance & Construction. Hughes reported Von Schlotterback works for Right Roofing and helped him out by answering the telephone.

Hughes testified Maintenance & Construction was formed in January 2009. In December 2008, he purchased a computer, desk, facsimile, other office equipment, yard signs and telephone number from Mark Dixon who owned Maintenance Made Simple. Hughes had previously worked for Maintenance Made Simple as a subcontractor.

Hughes rented space in building where Right Roofing was located. Von Schlotterback answered the telephone when he was not there. He reported that Von Schlotterback was an individual who was "helping him get on his feet." Hughes testified that in July or August 2009 he paid Von Schlotterback and again in October and November to watch his dogs while he was on vacation with his children.

Hughes stated that Henry knew when and where to report because he would contact Henry when he had a project and the two individuals would discuss payment. He would then schedule the project with Hughes or the homeowner.

Hughes testified that he would provide Bain with the address to perform the work. Bain would then go to the site, take the measurements and give the measurements to Hughes. Bain works for Hughes on the side. His regular employer is Adams Door Company.

Heger is a full-time plumber for Drake University. Heger fixes leaky faucets, and makes other plumbing repairs.

Hughes reported he hired Gilmore to rake and plant plants at his personal residence only. Gilmore worked directly for Hughes' wife.

Hughes testified he believed he had provided the Subcontractor Agreements, Exhibit 1, to Mickles. He reported he found them when he moved his office. Hughes did not present any evidence at hearing showing he provided Exhibit 1 to IWD prior to the hearing. Mickles denied receiving the Subcontractor Agreements.

Hughes reported he did not provide any equipment to Heger, Bain, Henry or Gilmore. Von Schlotterback used the telephone. Von Schlotterback is now an employee and answers every telephone call and arranges appointments. Hughes hired her in January 2010 to work as his office manager. Von Schlotterback continues to work for Right Roofing. Hughes reported that Von Schlotterback agreed to work without compensation to help him get established.

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 within 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

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.

applicable in determining the employer-employee relationship, has the status of an employee.”⁷

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.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

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 is 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

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).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* 23.19(2).

¹⁷ *Id.*

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

Services performed any 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

Maintenance & Construction is in the construction business. Maintenance & Construction bears the burden of proof in this case. At hearing Hughes presented Exhibit 1, which contains Subcontractor Agreements between Henry and Maintenance & Construction, Bain and Maintenance & Construction, and Heger and Maintenance & Construction. Hughes alleged he provided the Subcontractor Agreements to Mickles during her investigation. Mickles denies this. The Subcontractor Agreements are dated January 1, 2009. I must decide whether Hughes provided the Subcontractor Agreements to Mickles during her investigation and whether the parties entered into the Subcontractor Agreements on January 1, 2009. This raises credibility concerns. Some of the most common standards for assessing credibility include:

¹⁸ *Id.*

¹⁹ *Id.* 23.19(1).

²⁰ *Id.*

²¹ *Id.* 23.19(4).

²² *Id.* 23.19(5).

²³ *Id.* 23.19(3).

²⁴ *Id.*

²⁵ *Id.* 23.19(6).

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

²⁷ 871 IAC 22.19(7).

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

Hughes testimony is not reasonable and consistent with the other evidence I believe. The Subcontractor Agreements support Hughes' contention that Bain, Heger and Henry are independent contractors and not employees. Mickles reported she did not learn of the Subcontractor Agreements during her investigation. Given IWD was investigating whether the individuals were independent contractors, Hughes should have had a vested interest in producing the Subcontractor Agreements to Mickles. The record reveals that Hughes was not forthcoming with information during the investigation. He has a definite interest in establishing that Bain, Heger and Henry are independent contractors. I do not find Hughes' testimony credible. I believe Hughes did not provide the Subcontractors Agreements to Mickles. I do not believe that Hughes entered into the Subcontractor Agreements with Bain, Heger and Henry in January 2009. I believe the documents were prepared later in time, after IWD commenced its investigation.

IWD did not find Bain, Heger, Henry, Gilmore and Von Schlotterback were registered contractors with the state of Iowa or that they had a separate business presence. Maintenance & Construction did not produce any witnesses or documentary evidence at hearing showing Bain, Heger, Henry, Gilmore and Von Schlotterback had a separate business presence. Hughes or his wife provided the work assignments to Bain, Heger, Henry, and Gilmore.

Hughes testified Von Schlotterback answered the telephone for him without receiving pay to "get him on his feet." If Von Schlotterback were merely paid to watch Hughes' dogs, he could have presented a notarized affidavit, other document or witness testimony supporting his assertion. The evidence reveals Von Schlotterback answered the telephone for Hughes on more than one occasion.

Hughes seems to believe IWD bears the burden of proving these individuals are employees. It is Hughes who bears the burden of proof in this case. I conclude Maintenance & Construction has failed to prove an independent contractor relationship existed between Heger, Bain, Henry, Gilmore and Von Schlotterback and Maintenance & Construction. IWD properly found an employer-employee relationship existed.

IWD classified Maintenance & Construction as a new employer in the construction industry. There was no evidence presented at hearing that Maintenance & Construction previously paid unemployment insurance contributions. Because the workers are employees of Maintenance & Construction and because Maintenance & Construction

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

has not previously paid unemployment insurance contributions, IWD properly classified Maintenance & Construction as a new employer in the construction industry.

DECISION

Iowa Workforce Development correctly determined that an employer-employee relationship existed between Maintenance & Construction Services of Iowa and Tom Heger, Luke Bain, Will Henry, Rusty Gilmore and Kelly Von Schlotterback for the business year 2009, and that Maintenance & Construction Services of Iowa 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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