

IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION  
CENTRAL PANEL BUREAU

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Jorge D. Magana Lopez	)	Case No. 24IWDMO002
Good Guys Painting, LLC	)	
2311 E. 38 <sup>th</sup> Ct.	)	
Des Moines, IA 50317	)	
	)	
Appellant,	)	
	)	<b>ADMINISTRATIVE LAW</b>
<b>v.</b>	)	<b>JUDGE DECISION</b>
	)	
Iowa Workforce Development,	)	
	)	
Respondent.	)	

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**STATEMENT OF THE CASE**

Jorge Magana Lopez appealed from a June 12, 2023 decision by Iowa Workforce Development (IWD) that an employer-employee relationship existed between his business, Good Guys Painting, LLC., (Good Guys) and Alexis Gonzalez and other workers performing services for the entity. The matter was transmitted by IWD to the Administrative Hearings Division to schedule a contested case hearing. A telephone hearing was conducted on October 12, 2023. Attorney Valerie Cramer represented Good Guys. Magana appeared for the hearing and testified, with the aid of a Spanish language interpreter. Marlon Antonio Polanco Escobar (Marlon) and Elder Josue Polanco Escobar (Elder)<sup>1</sup> also appeared and testified using an interpreter.

Attorney Jeffrey Koncsol represented IWD. IWD Field Auditor Deborah Pendleton also appeared and testified for IWD. Prior to the hearing, IWD submitted its Appendix, along with additional exhibits 2 - 4. All documents were admitted into evidence without objection.

**ISSUE**

Whether an employer-employee relationship existed between Good Guys Painting, LLC., Alexis Gonzalez and/or other workers performing services for Good Guys Painting, LLC.

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<sup>1</sup> These individuals are referred to by first names solely to avoid confusion.

## **FINDINGS OF FACT**

### *General Background*

In December 2022, Pendleton was conducting a separate audit when she located a 1099 issued to Good Guys. She therefore opened an investigation to verify the entity's compliance with the Iowa Employment Security Law.<sup>2</sup> Magana was and continues to be the sole owner/member of the limited liability company (LLC). Central to Pendleton's review was whether persons who performed services for Good Guys were properly classified as independent contractors, rather than employees. (Pendleton Testimony; IWD App. at 19).

Pendleton began her investigation by locating the Iowa Secretary of State registration for Good Guys. The entity began business as an LLC in July 2018. Pendleton then submitted an audit notification letter and pre-audit questionnaire to Magana for the 2019-2021 tax years. The letter indicated that the information was due back to IWD on February 7, 2023. (Pendleton Testimony; IWD App. at 19).

On February 7, 2023, Pendleton received a voicemail from attorney Valerie Cramer requesting an extension of time to collect the necessary documents. Pendleton called the number provided, and spoke with "Sara." Sara provided Cramer's work email address. Cramer then emailed to Cramer a power of attorney form. Once the completed form was received, Pendleton emailed the pre-audit questionnaire. (Pendleton Testimony; IWD App. at 19).

On February 15, 2023, Pendleton received from Cramer copies of Internal Revenue Service (IRS) Schedule C forms and 1099 forms. She also received cancelled checks and bank statements for the tax years at issue. (Pendleton Testimony; IWD App., Synopsis at 1; IWD App. at 27-39).

Notably, each of the cancelled checks contained in IWD's appendix show either "labor," or "bon[us]" in the bottom left-hand corner of the check, rather than a particular job listing. Several individuals also appeared to have been paid on a weekly or bi-weekly basis. (IWD App. at 27-30).

As noted by Pendleton, the bank statements show numerous purchases at Sherwin Williams and Diamond Vogel paint stores, along with multiple purchases for gasoline. The bank statements also indicate that Good Guys paid cellular phone bills, satellite television and auto repair bills for Marlon and Elder. (Pendleton Testimony; IWD App. at 34-39).

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<sup>2</sup> See Iowa Code Chapter 96 (2023). All future references to the Iowa Code are to the 2023 edition.

Pendleton received the completed pre-audit questionnaire on February 16, 2023. Magana<sup>3</sup> was listed as the sole owner/partner/member or corporate officer. The company answered “yes” when asked if any people worked for Good Guys on a casual or temporary basis, but responded “no” when asked if those individuals were reported on quarterly IWD reports. The answer “no” was provided when asked whether any of the following are provided at the employer’s expense:

- expense reimbursement
- company vehicle
- meals
- menu/cafeteria plan
- profit sharing
- lodging
- health insurance plan
- retirement plan
- other

Good Guys also denied making any deductions from pay, including for retirement, or health insurance. (IWD App. at 23-24).

On February 17, 2023, Pendleton emailed to Cramer a “services provided” questionnaire listing the names of workers to whom checks had been written between 2019 and 2021. The questionnaire asked how each worker was paid, whether he submitted invoices, and whether he carried liability insurance. Pendleton also included “questionnaires to determine status of worker” for eleven workers. The completed questionnaires were due by March 6, 2023 – none were returned. (Pendleton Testimony; IWD App. at 19, 55-56).

Based on the documents received, along with her own search of state databases and the internet, Pendleton determined 27 individuals were employees. Pendleton found no online evidence that any operated an independent business, such as a business site and/or advertising. None had contractor’s registrations, identifiable business insurance, unemployment insurance accounts or had registered with the Iowa Secretary of State. The dollar amounts and frequency of checks written to each also suggested they worked continuously for Good Guys, in the company’s normal course of business. (Pendleton Testimony; IWD App. at 19).

On March 9, 2023, Pendleton emailed to Cramer and Magana a findings letter listing the individuals found to be employees. She requested additional information by March 17, 2023. Cramer responded the same day stating simply: “Send Appeal Notice.” (Pendleton Testimony; IWD App. at 52-54).

Also on March 9, 2023, Pendleton sent the following response to Cramer:

Thank you for your email.

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<sup>3</sup> Magana was listed on the form as “Jorge Lopez.”

The letter sent today was the findings letter. It is an opportunity for the employer to send additional information they have that could show which workers should be classified as an independent contractor and not an employee. Any information provided will be reviewed before a final determination is made.

After 03/17/2023, a determination will be made based on all information available. At that time, the unemployment account would be set up, the audit administered, and the wages added to the unemployment account. Management will then review the administration of the audit. Once the audit is approved, a final audit letter and appeal instructions will be sent.

It typically takes 3 – 4 weeks for audits to be approved by management before I am allowed to mail the final audit letter. The appeal timeline begins the day the final audit letter is sent.

Do you have any additional information to provide? I did send the services provided request spreadsheet that was not completed and returned. Please see attached.

(IWD App. at 51).

On March 30, 2023, Pendleton emailed Cramer and indicated that she had not received any additional information from Cramer or Good Guys. Accordingly, Pendleton had set up the unemployment account for the company, added the wages and planned to administer the audit. Cramer responded the same day by asserting she did not receive any completed services provided questionnaire or a findings letter. (IWD App. at 50).

On June 12, 2023, IWD issued its Unemployment Insurance Tax Audit Results showing amounts owed due to employee misclassification. Good Guys submitted a timely appeal thereafter. (Pendleton Testimony; IWD App. at 9-12).

Magana testified during the hearing that all of the individuals who perform labor and other services for his company work independently of Good Guys Painting. Specifically, Magana stated he learns of a painting job through a general contractor or other entity, and gives an initial quote for the job. He then calls a particular painter, and provides the address of the worksite. The painter will go to the job site and provide his own cost estimate to Magana. If the painter's cost estimate is greater than the quote initially provided by Magana, Magana will return to the general contractor or other client and negotiate. According to Magana, the entire process is negotiated by telephone. The individual will not provide a written estimate or invoice. The painter also will supply his own paint, equipment and transportation. (Magana Testimony).

According to Magana, the painter makes his own hours and completes the work on his own schedule, as long as he meets the ultimate deadline established by the general contractor. If the general contractor is not satisfied with the quality of the work, the individual who accepted the job is responsible for fixing the issue at his own expense.

Although many of the individuals at issue work consistently with Good Guys, each is free to work for other entities. (Magana Testimony).

Magana also denied paying workers any benefits or bonuses. He could not explain, however, why his company provided \$100.00 bonuses to at least two workers, however. And when asked to explain why Good Guys paid the cell phone and satellite bills for Marlon and Elder, Magana asserted the men had asked him for “loans” prior to completion of the current project.<sup>4</sup> (Magana Testimony).

Marlon and Elder testified that although they provide regular labor services to Good Guys, they remain free to work for other entities. Both Marlon and Elder denied working for anyone else during the two-year time period at issue, however. Notably, Elder formed his own LLC in February, and registered the LLC with the State. When asked why he did so, Elder responded that this was the only way he could work for other companies. Additionally, neither Marlon nor Elder has hired an assistant to complete a job for Good Guys, nor has either lost money working on one of Good Guys’ jobs. (Marlon Testimony; Elder Testimony).

When asked during cross examination, Marlon and Elder stated that Magana paid their cell phone and satellite bills as a “favor.” Both Marlon and Elder testified that they wore Good Guys t-shirts to a job site when such t-shirts were available. (Marlon Testimony; Elder Testimony).

### **CONCLUSIONS OF LAW**

For purposes of unemployment compensation, the term “employer” is defined under Iowa law as an employing unit that, in any calendar quarter in the current or preceding calendar year, paid wages of \$1,500 or more, or employed at least one individual for some portion of a day in each of twenty different calendar weeks during the current or preceding calendar year.<sup>5</sup> “Employment” is defined as service performed for wages or under any contract of hire, written or oral, express or implied.<sup>6</sup> An employer claiming that any employment is not “employment” under the Iowa Employment Security Law, bears the burden to prove the exemption claimed.<sup>7</sup>

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<sup>4</sup> Marlon and Elder testified that Magana had paid their cell phone and satellite bills as a favor. ’s testimony regarding the “loans” for the cell phone and satellite bills was confirmed by Marlon and Elder

<sup>5</sup> Iowa Code § 96.1A(16)(a) (2021). An employing unit paying wages exclusively for domestic service is excluded from this definition. *Id.*

<sup>6</sup> Iowa Code § 96.1A(18)(a) (2021).

<sup>7</sup> Iowa Admin. Code r. 871-22.7(3), 23.55(2). During her closing argument, Cramer argued that placing the burden of proof on the employer rather than IWD is unconstitutional. An administrative law judge lacks authority to consider constitutional challenges in this proceeding. *See, e.g., Endress v. Iowa Dep’t of Human Servs.*, 944 N.W.2d 71, 83 (Iowa 2020) (citing *Soo Line R.R. v. Iowa Dep’t of Transp.*, 521 N.W. 2d 685, 688 (Iowa 1994)). Regardless, Cramer’s argument was considered and rejected by the

In the unemployment compensation context, it is well-settled that “the right to control the manner and means of performance is the principal test in determining whether a worker is an employee or independent contractor.”<sup>8</sup>

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.<sup>9</sup>

The Department’s regulations outline several factors to be considered in determining whether a worker is an employee or an independent contractor.<sup>10</sup> Factors that support the existence of an employer-employee relationship include:

- Right to discharge an employee without being held liable for damages for breach of contract;
- Furnishing of tools, equipment, material, and a place to work;
- Continuous performance of work for the employer;
- Payment of a fixed wage on a weekly or hourly basis.

Factors that support an independent contractor relationship include:

- Performance of a specific job at a fixed price;
- Following a distinct trade, occupation, business, or profession in which an individual offers services to the public to be performed without the control of those seeking the benefit of his or her training or experience;
- Unreimbursed expenses and fixed, ongoing costs regardless of whether work is currently being performed;
- Significant investment in real or personal property that is used in performing services for someone else;
- Right to employ assistants with the exclusive right to supervise their activity and completely delegate the work.<sup>11</sup>

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District Court in *Contreras Roofing v. IWD.*, CVCV064796 (Iowa Dist. Ct. for Polk Cty., Oct. 3, 2023).

<sup>8</sup> *Gaffney v. Department of Employment Services*, 540 N.W.2d 430, 434 (Iowa 1995) (citations omitted).

<sup>9</sup> 871-23.19(1).

<sup>10</sup> *See gen.* 871-23.19.

<sup>11</sup> *Id.*

The regulations also provide that if, upon examination of the facts of a case, an employer-employee relationship is found to exist, the parties' own designation or description of the relationship is immaterial.<sup>12</sup>

Here, the record shows the individual workers had some scheduling flexibility, as long as they completed jobs within the time-frames established by the general contractor. It also appears the workers provided many of their own tools, and arranged their own transportation to each jobsite. These facts resemble the regulatory description of a business and its independent contractors.<sup>13</sup>

Certain entries on the bank statements, however, suggest that Good Guys may have paid for paint, gasoline, and certain tools. The payment of expenses weighs in favor of employee status.<sup>14</sup> It was Good Guys' burden to clarify who made the purchases questioned by IWD, and Good Guys failed to provide sufficient testimony or documentation to show that each paint and gasoline purchase was made by Magana himself. Furthermore, if Good Guys' payments of Marlon's and Elder's cell phone and satellite bills were in fact loans, there should have been corresponding loan repayments and/or deductions from future checks issued to both men.

Magana, Marlon and Elder also testified that Good Guys' workers had the *right* to employ assistants. There is no evidence that any did so, however. Accordingly, if multiple painters worked on the same job site, it follows that Good Guys would have hired each worker, and directed each worker's role in the project.<sup>15</sup> These facts weigh in favor of employee status.<sup>16</sup>

Next, Magana testified, and Elder and Marlon confirmed, that a job was offered and accepted orally over the telephone, and that none of the workers later submitted invoices for his services. Although there is no requirement that a contractor's "bid" be in

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<sup>12</sup> 871-23.19(7).

<sup>13</sup> *See Gaffney*, 540 N.W.2d at 434 (right to control "manner and means of performance" is principal test to determine whether worker is an employee); *see also* 871-23.19(1) (with employer/employee relationship employer has the right to control and direct "details and means by which that result is accomplished.")

<sup>14</sup> *But see* Iowa Admin. Code r. 871-23.19(3) (independent contractors more likely to have unreimbursed expenses).

<sup>15</sup> At least two images taken from Magana's social media account show more than one worker per job site. IWD App. at 42, 44.

<sup>16</sup> Despite being given ample opportunity by Pendleton to do so, Good Guys—through its designated agent, Cramer—provided no information while the audit was pending regarding the services provided by each individual. Cramer's assertion that she did not receive the blank "services provided" form is unreasonable in view of the fact she responded promptly to other emails Pendleton sent to the same email address. It also is important to note that Pendleton emailed her initial findings letter on March 9, 2023 to both Cramer and Magana—indicating Good Guys had the ability to submit additional information before the final audit was complete.

writing, it is not reasonable to believe that Magana would retain and later pay an independent contractor without even so much as a text to confirm the agreed-upon price for a job.<sup>17</sup> That Magana wrote “labor,” on each check, rather than the name of a particular job, also supports employee status, as does the fact he paid \$100.00 “bonuses” to at least two workers.<sup>18</sup> There is no evidence that any of the workers at issue lost money on a Good Guys’ job, which is more common with independent contractors.

The sample checks show workers were paid on a continuous basis, either weekly or bi-weekly. Magana testified during the hearing that the length of each job varied between a few days to several weeks. If it were true that Magana paid each worker two weeks after completion of a particular job, some checks would have been written on odd days, albeit two weeks after completion. The checks submitted tend to show payments were made on the same day of the week to all workers.

As noted by Pendleton during the hearing, it does not appear that any of the workers identified by IWD advertised his or her services to other entities, which often is the case with independent contractors.<sup>19</sup> Moreover, none—at least initially—maintained an active contractor registration with IWD.<sup>20</sup> Nor did any carry business insurance, have an unemployment insurance account or a Secretary of State Registration. It is significant, although not controlling, that Elder in fact registered his newly-formed LLC in February 2023—so that he could work for other entities.

Viewing the record evidence as a whole, the undersigned concludes Good Guys painting has failed to meet its burden to prove its employees were independent contractors and not employees.

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<sup>17</sup> *Id.* at 23.19(2), (4).

<sup>18</sup> *Id.* at 23.19(2) (“In general, employees perform the work continuously and primarily their *labor* is purchased, whereas the independent contractor undertakes the performance of a specific *job*.”) (emphasis added).

<sup>19</sup> *Id.* at 23.19(1), (2).


<sup>20</sup> *See* 875-150.3 (“Before performing any construction work in this state, a contractor shall be registered with the division.”); Iowa Admin. Code r. 875-150.2 (“‘*Contractor*’ means a person who engages in the business of construction as the term is defined in 871-23.82, for purposes of the Iowa employment security law, including subcontractors and special trade contractors.”); Iowa Admin. Code r. 871-23.82(2)(j)(1) (“The term ‘construction’ includes, home improvements and construction”).



**ORDER**

IWD's June 13, 2022 decision that an employer-employee relationship existed between the individuals identified during the audit is **AFFIRMED**. IWD is directed to take all steps necessary to effectuate this decision.

Dated this 26<sup>th</sup> day of October, 2023.



Carla J. Hamborg  
Administrative Law Judge

cc:

Good Guys Painting, LLC., c/o Jorge Magana Lopez, Appellant (By mail)

Valerie Cramer, Attorney (By AEDMS)

Jeffrey Koncsol, IWD (By AEDMS)

Deborah Pendleton, IWD (By AEDMS)

Stephanie Goods, IWD (By AEDMS)

**APPEAL RIGHTS**

**This decision constitutes final agency action.**

Any party may file with the presiding officer a written application for rehearing within 20 days after the issuance of the decision. A request for rehearing is deemed denied unless the presiding officer grants the rehearing request within 20 days after its filing.

Any party may file a petition for judicial review in the Iowa district court within 30 days after the issuance of the decision or within 30 days after the denial of the request for rehearing. *See* Iowa Admin. Code r. 871-26.17(5).

**Case Title:** GOOD GUYS PAINTING, LLC V. IOWA WORKFORCE  
DEVELOPMENT  
**Case Number:** 24IWDM0002  
**Type:** Order

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Carla Hamborg". The signature is written in a cursive style with a large, stylized initial "C".

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Carla Hamborg, Administrative Law Judge