

IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
CENTRAL PANEL BUREAU

Merle Marshall, Jr.)	Case No. 24IWDMO006
d/b/a Marshall Construction)	
1350 Gull Ave.)	
Coulter, IA 50431)	
)	
Appellant,)	
)	ADMINISTRATIVE LAW
v.)	JUDGE DECISION
)	
Iowa Workforce Development,)	
)	
Respondent.)	

STATEMENT OF THE CASE

Merle Marshall, Jr. (the Appellant)¹ appealed from a July 10, 2023 decision by Iowa Workforce Development (IWD) that an employer-employee relationship existed between the Appellant, Neil Marshall, and/or other workers performing services for the Appellant. The matter was transmitted by IWD to the Administrative Hearings Division to schedule a contested case hearing. An in-person hearing was conducted on December 6, 2023. Attorney Valerie Cramer represented the Appellant, who appeared for the hearing and testified. Attorney Jeffrey Koncsol represented IWD. IWD Field Auditor Lisa Gaeta also appeared and testified for IWD.

Prior to the hearing, IWD submitted exhibits 1-14, which were admitted into the record without objection.² Appellant’s exhibit B was admitted without objection. ³

ISSUE

Whether an employer-employee relationship existed between Merle Marshall, Jr., Neil Marshall and/or other workers performing services for Merle Marshall, Jr.

¹ Merle Marshall, Jr. is referred to as “the Appellant” throughout the decision solely to avoid confusion with his sons, Neil and Jason Marshall.

² For the sake of clarity, the two exhibits submitted by IWD outside of its general appendix have been re-labeled exhibits 13-14.

³ Exhibit A was stricken as incomplete and otherwise redundant of IWD exhibit 11.

FINDINGS OF FACT

General Background

In November 2022, Gaeta received a 1099 issued by Marshall Construction for tax year 2019 that was submitted in conjunction with an unemployment insurance benefits claim. Gaeta opened an investigation to verify the entity's compliance with the Iowa Employment Security Law.⁴ Her initial research uncovered a contractor registration for Sole Proprietor Merle Marshall d/b/a Marshall Construction. The registration listed finish carpentry as its primary activity. (Gaeta Testimony; Exh. 8 at 14).

Gaeta next submitted an audit notification letter and pre-audit questionnaire to the Appellant for the 2019-2022 tax years. The letter directed that all information be submitted to IWD on or before March 23, 2023. (Gaeta Testimony; Exh. 9 at 18-20).

The requested documents were received on March 30, 2023. The pre-audit questionnaire confirmed that the Appellant is a sole proprietor and operates as a construction contractor. The Appellant answered "no" when asked if any people worked for him on a casual or temporary basis, and "no" when asked if those individuals were reported on quarterly IWD reports. The answer "N/A" 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

The Appellant denied making any deductions from pay, including for retirement or health insurance. He stated that family members Neil Marshall and Jason Marshall had worked for him for 35 and 40 years, respectively. (Gaeta Testimony; Exh. 9 at 18-19).

On March 30, 2023, Gaeta mailed to the Appellant a "Services Provided" questionnaire listing the names of workers to whom checks had been written between 2019 and 2022. These workers were as follows: Neil Marshall; Jason Marshall; Jeff Bruns; Bob Kuhlemeier; Mark Ebaugh; Alex Ibarra; Troy Jensen; Jonathan Goerish; and Todd Larson. The questionnaire asked how each worker was paid, whether he submitted invoices, and whether he carried liability insurance. Gaeta also mailed "Questionnaires to Determine Status of Worker" to four persons. The completed questionnaires were due by April 13, 2023. (Gaeta Testimony; Exhs. 8, 11).

⁴ See Iowa Code Chapter 96 (2023). All future references to the Iowa Code are to the 2023 edition.

Only one of the four people who received a Questionnaire to Determine Status of Worker, Mark Ebaugh, completed and returned the form. Ebaugh indicated on the questionnaire that he operated under the name of “Doctor Drywall,” and performed drywall services for individuals and contractors. He provided a copy of his certificate of business insurance along with his questionnaire. (Gaeta Testimony; Exh. 8).

Rather than completing the written questionnaire, another individual, Jeff Bruns, called Gaeta on April 3, 2023. Bruns told Gaeta that he had a full-time job elsewhere, but occasionally worked for the Appellant on an hourly basis removing snow. Bruns believed he was an employee, not a contractor. Gaeta did not hear back from the remaining two questionnaire recipients. (Gaeta Testimony; Exh. 8).

The Appellant returned the completed Services Provided list on April 13, 2023. He listed Neil Marshall, Jason Marshall and Bob Kuhlemeier as carpenters; Alex Ibarra and Troy Jensen as day help; and Jonathan Goerish and Todd Larson as laborers. The Appellant indicated on the form that Jeff Bruns performed snow removal, and Mark Ebaugh performed drywall services. The Appellant stated that Neil Marshall, Jason Marshall, Bruns, Kuhlemeier and Ebaugh “help out on most projects but “do their own jobs too.” He added that Ibarra, Jensen, Goerish and Larson “come and go as they please.” (Exh. 10).

Copies of certificates of insurance for Kuhlemeier, Jason Marshall, Neil Marshall and Ebaugh were provided to Gaeta the same day. Notably, however, the certificates were for the 2023 – 2024 year. (Gaeta Testimony; Exh. 8).

Based on the documents received, along with her own search of state databases and the internet, Gaeta determined Neil Marshall, Jason Marshall, Kuhlemeier, Ibarra, Jensen, Goerish and Larson were employees during the years at issue. Gaeta 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 between 2019-2022, 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 Marshall Construction, in the Appellant’s normal course of business. (Gaeta Testimony; IWD App. at 19).

Nevertheless, because Bruns did not work on a continuous basis for the Appellant, and did not engage in the business of carpentry or general construction, Gaeta determined that Bruns was an independent contractor for purposes of the Iowa Employment Security law. (Gaeta Testimony; Exh. 8).

Similarly, Ebaugh operated under the name, Doctor Drywall.⁵ Drywall installation and repair also is a specialty often independent of general construction. This information, along with the fact the Appellant appeared to pay Ebaugh in large, lump sums, caused

⁵Ebaugh provided a copy of a certificate of business insurance at the time he submitted his Questionnaire to Determine Status of Worker.

Gaeta to determine Ebaugh also was an independent contractor. (Gaeta Testimony; Exh. 8).

On April 17, 2023, Gaeta emailed to the Appellant a findings letter listing the individuals found to be employees. The letter indicated that if the Appellant had additional evidence tending to show the workers at issue should instead be classified as independent contractors, he should submit the information no later than May 10, 2023. No additional information was provided during this time period. (Gaeta Testimony; Exhs. 8, 12).

On July 10, 2023, IWD issued its Unemployment Insurance Tax Audit Results showing amounts owed due to employee misclassification. The Appellant submitted a timely appeal thereafter. (Gaeta Testimony; IWD Exhs. 6, 7).

The Appellant testified during the hearing that all of the individuals who perform labor and other services for his company work independently of Marshall Construction, and prefer to receive Internal Revenue Service (IRS) Form 1099 at year-end instead of a W-2 form. (Appellant Testimony).

When asked to describe his business operations, the Appellant stated he learns of a construction job through a word-of-mouth referral. He will then submit a written bid for the project. Once awarded a project, the Appellant will contact one or more of the individuals at issue and ask whether he is interested in working on the project. The worker has the right to turn down a project for any reason. If he accepts the job, however, he will perform work at a negotiated hourly rate. At the end of the week, each worker will inform the Appellant of the number of hours he had worked, and the Appellant will pay him by check. (Appellant Testimony).

According to the Appellant, each worker who accepts his offer works on a day-to-day basis, depending on whether he is previously committed to another job or contractor. The Appellant will explain what work needs to be performed on that day, and expect the worker to complete the task on his own. The Appellant admitted, however, that if a worker does not know how to perform a particular task, he will explain it to him. If the client or the Appellant is not satisfied with the quality of the work, the individual who performed the work will fix the error, and will bill the Appellant for his time. The Appellant stated that of the individuals at issue, only his son Neil works consistently for Marshall Construction, and only as his health allows. (Appellant Testimony).

The Appellant testified that each worker will drive himself to the jobsite, and will bring his own hand tools with him. From the client's perspective, however, the work is performed under the Appellant's name and/or Marshall Construction. (Appellant 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.⁶ “Employment” is defined as service performed for wages or under any contract of hire, written or oral, express or implied.⁷ An employer claiming that any employment is not “employment” under the Iowa Employment Security Law, bears the burden to prove the exemption claimed.⁸

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.”⁹

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.¹⁰

The Department’s regulations outline several factors to be considered in determining whether a worker is an employee or an independent contractor.¹¹ 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.

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

7 Iowa Code § 96.1A(18)(a) (2021).

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

9 *Gaffney v. Department of Employment Services*, 540 N.W.2d 430, 434 (Iowa 1995) (citations omitted).

10 871-23.19(1).

11 *See gen.* 871-23.19.

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.¹²

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.¹³

Here, the record shows the workers at issue had some scheduling flexibility, as long as they completed jobs within the time-frames established by the client. It also appears the workers provided many of their own tools, and arranged their own transportation to each jobsite. Each of these facts tend to favor independent contractor status.¹⁴

A majority of factors however, support that on the days the workers performed services for the Appellant, they acted as *employees*. The record shows each was paid on an hourly basis, and received checks weekly when working for the Appellant. The fact a particular employee may also have worked for other people or entities is not determinative of employee status.

Additionally, the services performed by each of the persons found by Gaeta to be employees were integral to the business of carpentry/general construction. The Appellant himself even classified four of the individual's services as "labor," or "day help." Under the applicable regulations, an employee is someone whose *labor* is purchased, whereas "the independent contractor undertakes the performance of a specific *job*."¹⁵

Notably, none of the persons found to be employees had a financial investment in completing a particular job, and could quit at any time without incurring liability. If the work product was unsatisfactory for any reason, the Appellant would pay the worker an

¹² *Id.*

¹³ 871-23.19(7).

¹⁴ *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.")

¹⁵ *Id.* at 23.19(2) (emphasis added).

hourly wage to fix it. There is no evidence that any of the workers at issue lost money on a Marshall Construction job, which is more common with independent contractors.

The Appellant testified that each worker theoretically had the *right* to employ assistants. He admitted, however, that only Kuhlemeier did so, and that only if *the Appellant* needed another laborer. It follows therefore, that if multiple persons worked on the same job site, the Appellant would have hired or at least approved the hire of each worker, and directed each worker's role in the project. These facts weigh in favor of employee status.

As noted by Gaeta during the hearing, it does not appear that any of the workers identified as employees advertised his or her services to other entities, which often is the case with independent contractors.¹⁶ Moreover, none maintained an active contractor registration with IWD.¹⁷ Nor did any carry business insurance during the time period at issue, or maintain unemployment insurance account or Secretary of State registrations. It is significant, although not controlling, that Neil Marshall, Jason Marshall and Bob Kuhlemeier in fact purchased business insurance in April 2023—likely to help support that each could work as an independent contractor in the future.

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.¹⁸ Regardless, the argument was considered and rejected by the District Court in *Contreras Roofing v. IWD*.¹⁹

Viewing the record evidence as a whole, the undersigned concludes the Appellant has failed to meet his burden to prove that during the tax years 2019-2022, the persons designated by IWD as employees should in fact be considered independent contractors.

¹⁶ *Id.* at 23.19(1), (2).

¹⁷ 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”).

¹⁸ 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)).

¹⁹ *Contreras Roofing v. IWD.*, CVCV064796 (Iowa Dist. Ct. for Polk Cty., Oct. 3, 2023).

ORDER

IWD's July 10, 2023 decision that an employer-employee relationship existed between the individuals identified during the audit is **AFFIRMED**.

Dated this 2nd day of January, 2024.



Carla J. Hamborg
Administrative Law Judge

cc:

Merle Marshall, Jr., Appellant (By mail)

Valerie Cramer, Attorney (By AEDMS)

Jeffrey Koncsol, 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: MERLE MARSHALL JR. V. IOWA WORKFORCE
DEVELOPMENT
Case Number: 24IWDM0006
Type: Proposed Decision

IT IS SO ORDERED.

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

Carla Hamborg, Administrative Law Judge