IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
CENTRAL PANEL BUREAU

MIDWEST CLEANING/ALKOTA LLC d/b/a Midwest Cleaning Douglas Kiel 18297 Lincoln Rd. Fayette, IA 52142, Appellant, v. IOWA WORKFORCE DEVELOPMENT, Respondent.	)	Appeal No. 24IWDM0007 IWD No. 678868 **DECISION**

INTRODUCTION

Iowa Workforce Development (IWD) completed an investigation and determined that an employer-employee relationship existed between Midwest Cleaning/Alkota, LLC (Alkota) and some workers. The owner of Alkota, Mr. Douglas Kiel, appealed the decision. IWD then transferred the case to the Iowa Department of Inspections, Appeals, & Licensing, Division of Administrative Hearings, for a contested case hearing. The in-person hearing was held on October 25, 2023. Appellant Alkota, through Kiel, represented itself and Kiel testified at the hearing. Mr. Jeffrey Koncsol represented IWD. Field Auditor Deborah Pendleton appeared and testified on behalf of IWD. The administrative record and or exhibits submitted by IWD were admitted into the record pursuant to Iowa Code § 17A.14 and Iowa Admin. Code r. 871-26.15(17A,96).[1] Alkota's eight-page exhibit was also admitted into the record without objection. *Id*. The issue certified for a decision is "[w]hether an employer-employee relationship existed between Midwest Cleaning/Alkota LLC, and all other workers performing services for Midwest Cleaning/Alkota LLC." (Notice of Hearing).

FACTUAL BACKGROUND

Alkota is a limited liability company, owned by Kiel. Alkota was described by IWD in the documentation as a business entity for "power washer service and repair; concrete installation; and sales of steam cleaners and pressure washers. Primarily sales of Alkota power/pressure washers." (Record p. 13).

Alkota initially came to the attention of IWD following another audit in February of 2023. Kiel testified he received a letter from IWD's Waterloo office inquiring as to how many

[1] The administrative record will be referenced by the page numbers handwritten in the lower right-hand corner.

employees Alkota employed. Kiel did not immediately respond and believed he did not have any employees. There was a subsequent phone call to Kiel and his wife, apparently from IWD, asking about employees. The Kiels asked how did the caller know that they had employees and the caller referred to Alkota's social media postings (Alkota takes a picture of every purchaser with their power washer and posts it). Kiel stated he became "offended," stated he may just close the business and retire, and the caller allegedly took offense.

Two weeks later, Kiel stated he was the subject of an IWD audit without any in-person, pre-audit interview. Appellant believes the audit was conducted improperly because it was only conducted electronically or remotely, and without the benefit of IWD viewing his business(es). For instance, according to Kiel, IWD thought the person that combed rocks from his ditch by the roadway once a year, or the person baling his hay three or four times a year was an Alkota employee. Such a finding is incorrect because they were performing a task for Kiel, not Alkota. Likewise, Alkota does not have, and has never had, a concrete business. Rather, Mr. Galvan was hired to pour concrete on the farm, did so, presented a bill to Kiel, and Kiel paid it. Kiel later offered Galvan a job with Alkota, which Galvan accepted (because Galvan no longer wanted to travel long distances for concrete jobs and be away from his family). Kiel acknowledged that Galvan is now an Alkota employee, but he was not before August of 2023.

In the same vein, Kiel does not work on gasoline engines, but may hire an outside mechanic or worker to do so. Thus, workers Fischer and Woltzen were not employees according Kiel. Instead, Kiel felt that he was found "guilty" by IWD of having employees simply because his wife paid these workers by check from the Alkota business account for farm or property work, unrelated to the Alkota power washer business. Kiel testified that he pays his quarterly taxes from the Alkota business and has never been informed about employee unemployment insurance issues.

IWD maintained the Alkota audit simply arose from the other audit because that other business issued an Internal Revenue Service 1099 income form to Alkota. In any event, the audit was assigned to an IWD Field Auditor, Ms. Pendleton.

Initially, it was determined that Alkota began business under Kiel in 2014. On or about March 7, 2023, Pendleton then sent Alkota a notification letter and questionnaire regarding the years 2019 through 2022. (Record p. 17). Kiel responded on behalf of Alkota. Kiel described his business as "I am a franchised dealer for Alkota power washers. I also service and repair power washers." Kiel explained he is the sole member of the limited liability company. Kiel acknowledged that he hired workers on a "casual, temporary, on call, spot job, seasonal, part-time, probationary or try out basis." Kiel indicated he would be hiring an employee (Galvan) in 2023 and would report the wages to IWD. Kiel did not report any workers' wages because "none are employees." He described the workers as helping with special projects when they are available and indicated the workers have other "full-time jobs." Kiel also stated there were independent contractors that did not receive 1099 income forms because the amounts were under $600.00. He also responded by stating he has a "sub-dealer who is on his own and reports on his own schedule C." Alkota also does not offer the traditional hallmarks of employment, e.g. retirement, profit sharing, health insurance, etc. (Record pp. 23-25).

On May 22, 2023, Pendleton emailed Alkota's attorney, Mr. John C. Compton, as the representative of Alkota with specific inquiries regarding a number of workers. Pendleton listed the names of the workers for Alkota and had specific questions regarding them. While working on the responses and the requested documentation for IWD, Compton requested an in-person interview on June 6, 2023. The next day, Pendleton responded that the questionnaire served as the IWD pre-audit interview, but offered to meet the following week. Compton asked if the interview would be in Davenport (where Pendleton worked). The answer was probably yes, but Pendleton also suggested a phone conversation first. In the meantime, Alkota's responses for specific workers were submitted to Pendleton on June 13, 2023. (Record pp. 31-34).

IWD had requested information regarding 13 workers. IWD requested the business name for the workers. None of the workers had a listed name for their own business and were listed as only a worker on their own behalf. IWD asked how Alkota found the workers. The responses were: local man; cousin of our banker; cabinet store; concrete company, applied; college student; best friend; don't know him; neighbor; farmer; and "got back from Bangladesh – applied." IWD asked what service each worker provided Alkota. The responses were: "brush rocks out of grass from snow removal;" welded brackets; unknown; farm-shop; farm; concrete-shop; "reimburse parts & personal;" and bale hay. None of the workers submitted invoices for their work or pay. Some workers were paid by the job, some by hours, some both, and several were unknown. (Record pp. 35-36). Some of the workers later provided written statements. (Record p. 37).

The IWD synopsis document indicates a findings letter was issued on June 21, 2023. (Record p. 18). That letter appears to be incorporated, at least in part, in a letter dated August 1, 2023, and in an email chain exchange. (Record pp. 8-11, 44). Pendleton found eight workers to be "employees" for unemployment insurance purposes.

> The factors used to make the determination as an employee are:
>
> - The worker(s) performed duties in the regular service of the employer.
> - The work was performed under the name of the employer.
> - The service provided by the worker(s) was an integral part of the business.
> - The worker(s) did not have a financial investment in the business.
> - The worker(s) could end the relationship without incurring liability.
> - The worker(s) had a continuing relationship with the employer.
> - The worker(s) were paid bonuses and were paid hourly for pay periods.
> - The employer reimbursed the worker(s) for travel, mileage, and materials.
> - The worker(s) did not have a contractor's registration or invoice you for their work.
> - The worker(s) did not have business insurance or worker's

compensation insurance.

(Record p. 9).[2]

On June 21, 2023, Compton informed Pendleton that Alkota did not agree with her findings and classifications of the workers. Alkota requested an extension of time to respond to the findings and asked for a phone conference to discuss the matter. (Record p. 43). The next day, Pendleton extended the deadline and advised that Alkota could call her. Pendleton also stated that she had reviewed the information provided to her to that point and would not change her determination, but Alkota could send additional information which she would review before making a final determination. (Record pp. 41-42).

On July 13, 2023, Compton emailed Pendleton and requested "a face-to-face meeting" to address her findings. (Record p. 41). The next day Pendleton denied the requested meeting. Pendleton also asked for tax information regarding a tax schedule F for Kiel's farming activities. (Record p. 40). Compton responded and provided more income tax schedules. The email indicated Kiel businesses included the Alkota power washer franchise, farming, and a trucking operation. (Record p. 39).

Pendleton replied and informed Compton that any payments in excess of $1.00 could be considered wages and that worker could work for only one day and still be classified as an employee. At the hearing, Kiel testified that he feels this legal definition is wrong and that there should be a limited amount of time that someone should work before being deemed an employee because sometimes employees do not stay (whether they find something else to do, do not like the work, or are incompetent for the job).

At some point, Alkota provided cancelled checks for the workers. (Record pp. 26-30). Some of the checks indicated various things in the memo or "for" lines, e.g. "10 Hrs;" "labor;" days of the week or dates; travel; "built pallet;" "materials;" and "tools." IWD calculated the total amount paid to the 13 workers examined from 2019 through 2022 totaled $75,163.51. (Record unnumbered page entitled "Table of Payments to Workers).

On July 24, 2023, the synopsis indicates that Pendleton considered the Alkota business to be "primarily sales of Alkota Power Washers" and set up an unemployment insurance account "that best fits power washing wholesale." Apparently, a notice of employer status and liability was made on July 24, 2023. (Record p. 12).

Later, Pendleton's supervisor(s) instructed her to meet with Alkota. On July 27, 2023, Pendleton, a supervisor and IWD counsel met with Kiel, his wife, and Compton. Apparently, Kiel felt (and still does feel) that the in-person meeting was insufficient. (Record p. 18). Kiel testified that this meeting was a waste of taxpayer money because IWD (or Pendleton) had already made up its mind on the matter – that it was rigged against him because IWD saw pictures of people next to power washers on his social media posts.

[2] One of the factors in the letter stated "The employer withheld payments for bike and machine rent from the worker(s) pay." It is unknown what this refers to and is presumed to be a typographical error.

On August 1, 2023, IWD issued a document entitled "Unemployment Insurance Tax Audit Results." (Record pp. 8-11). Again, IWD determined that eight of the 13 workers audited were misclassified as independent contractors when they should have been classified as employees.

The workers classified as employees had certain common traits or factors in IWD's analysis:

- They did not operate their own business.
- They did not work with their own assistants.
- They did not submit invoices for their work or pay.
- They were paid for labor services on an hourly basis.
- There was a continuous basis for work between Alkota and the worker.
- The workers did not have a contractor's registration or business insurance.

(Record pp. 18-20). Accordingly, IWD sought unemployment insurance contribution payments or taxes from Alkota in the amount of $698.74 (not including possible interest and penalties). (Record p. 8). On August 29, 2023, Alkota appealed the determination that the eight workers were employees (misclassified as independent contractors) "and failure to follow protocol relating to initial in-person interview." (Record p. 7).

At the hearing Kiel testified on behalf of Alkota and provided further information. He worked in the trucking business for approximately 40 years before purchasing the Alkota business in 2014. He works (with his wife) on the business six to seven days a week. The business has increased dramatically over the years and what started as an anticipated weekend or part-time endeavor has grown substantially.

As mentioned earlier, Kiel believes that the impetus for the audit by IWD arose from his failure to respond to a letter from IWD. He also believes that his method of payment (from an Alkota checking account) led to the adverse IWD decision. He has spent much time and more than $2,000.00 (including legal fees) to respond to IWD's audit and he never received an in-person interview prior to IWD's preliminary decision.

Kiel explained in greater detail what a number of the workers did for either him, Alkota, or both. Andy Magnall installed or welded brackets for shelving in a trailer Kiel owned. Magnall worked on the brackets when he had time and told Kiel how much the cost was when he was done working. Kiel did not control and direct Magnall's work – Magnall welded the brackets at his own place or facility. Kiel found Magnall to perform the welding because he was the cousin of Kiel's banker and known in the area for welding projects.

Doug Fischer remodeled part of Kiel's home, Alkota's business office, and installed "chimneys" for Alkota products, but did not work on the actual pressure washers. Fischer had his own ladders, caulk, and screws for the chimneys. Fischer was found as a worker at the local cabinet store. Kiel gave some direction as to where he wanted Fischer to install the chimneys and their dimensions or qualities, but not how to install them, and Fischer never worked on the

power washers. There was limited direction and control for Fischer. In fact, Fischer ran his own business. Fischer also installed chimneys for others, but as a subcontractor for Alkota (because there was some sort of fee dispute).

Jeff Walker provided yardwork around the farm. Additionally, Walker tried to work on or with power washers for a couple of months, but it did not work out.

Jose Galvan poured concrete for Kiel's barn to work off buying a power washer. Kiel admits Galvan is an employee and has been so since August of 2023. Kiel acknowledges he does control, direct, and inspect Galvan's work now.

Josh Webber worked on the farm and yard for several months at the end of 2019 into 2020. Webber never worked on pressure washers, although he may have "pulled" usable parts from them. Kiel did direct and control Webber's work.

Sam Devries may have worked a day and half doing yardwork. Kiel hired him as a favor for a local church. Kiel did not direct and control Devries' work.

Travis Holdeman worked for three to four months for Alkota. Kiel would direct and control some of Holdeman's work.

Trent Woltzen baled hay ($14.00 per bale) and would also take power washer engines back to his shop to work on them with his tools (Kiel did not personally work on the engines himself and would take them to a local mechanic or, if they were under warranty, he was required to send them to an authorized service mechanic). Kiel did not direct and control Woltzen's work. Woltzen was a neighbor, worked as a farmer, and had the hay baler.

There were no contracts, set hours, bidding for jobs, or invoices for any of the workers. Typically, the workers would write down their hours and Kiel's wife would pay them. The workers would, generally, use their own tools if they were off the Alkota work site, but would use Alkota's tools when working at Alkota. Kiel would pay for the yardwork by the hour for discrete projects and does not know if any of the workers made a profit or loss working for himself or Alkota. The use of assistants by any of the workers was an issue that never came up. Some of these workers were simply Kiel's friend(s), some were hired for discrete tasks – helping fix a backhoe, for instance. Alkota, as a business entity, only prepares and services power washers. Kiel generally contacted the workers at issue as friends or acquaintances to hire, and only two workers actually applied for work. Kiel or Alkota did not offer salaries, insurance, paid time off, or retirement benefits to the workers.

Again, Kiel was upset that the field auditor, Pendleton, did not sit down with Compton and himself to discuss the workers before the audit. He felt the money spent by IWD for the unemployment insurance fund was not cost effective for taxpayers. He also felt that the meeting with IWD after its preliminary findings was a waste of time because IWD had made its determination.

Pendleton testified that there are six field auditors for the entire state regarding

"misclassification" cases and that in-person interviews with putative employers would not be an efficient, cost-effective strategy for taxpayers given those limited resources. The questionnaire serves as IWD's pre-audit interview. Further, the pre-audit interview is supplemented with relevant documentation, emails, and phone conversations for consideration. Pendleton testified that the COVID-19 pandemic public health emergency did not change the manner in which audits were conducted. Typically, Pendleton would *not* go visit a putative employer – this was the first time she had ever done so, although she had met with "employers" at her office on a handful of occasions. She pointed out she offered a phone interview to Alkota. Pendleton stated she met with Kiel to answer questions and educate Alkota about unemployment insurance. Finally, no final decision had been made regarding Alkota – in fact, some workers were redetermined to be farm employees, not Alkota employees, during the process.

Pendleton testified that the Alkota audit was based on an IRS 1099 income form discovered during the audit of another business and the fact that Alkota did not have its own unemployment insurance account with IWD. The Alkota audit was not retaliation for any phone call or other conduct by either Alkota or Kiel.

The letter from IWD dated March 3, 2023 inquiring into Alkota's business with the other employer was authored by another IWD field auditor, not Pendleton. Her synopsis explained her reasoning for her conclusions that the workers were misclassified as independent contractors when they should have been classified as employees.

Pendleton testified Alkota did not provide any evidence of invoicing. Moreover, a worker can be an "employee" for unemployment insurance purposes if they earn even as little as $1.00, regardless of the form of payment, e.g. check, cash, trade, etc. Further, just because a worker has another full-time job does not preclude a finding of the worker being an "employee" for another person or business for unemployment insurance purposes. Likewise, there is no minimum amount of time that a worker has to work in order to be considered an "employee" for unemployment insurance purposes.

There are some observations to make about checks written to the workers. For instance, Magnall had nine checks written.

	Date Written:	For:	Amount $:
1.	June 14, 2019	Labor	360.00
2.	September 29, 2019	[blank]	250.00
3.	November 23, 2019	Thurs.-Sat.	217.50
4.	December 1, 2019	11-29, 11-30	127.00
5.	December 6, 2019	13 ¼ hrs.	198.75
6.	December 13, 2019	20 ¼ hrs.	303.75
7.	December 31, 2019	12-23-12-31-19	573.75
8.	October 26, 2020	24 ½ 10-23-10-26	441.00
9.	June 23, 2021	32 hrs.	576.00

(Record p. 27). It appears from the checks, where the amount of hours were noted, that Magnall was paid $15.00 per hour and then it increased to $18.00 per hour. Some of the checks for Jeff

Walker average out to $14.25 per hour. Josh Webber average an hourly rate of $10.00 per hour. Travis Holdeman was paid several times with "bonus" or "mileage" noted. Trent Woltzen was paid an average of $17.00 per hour (as opposed to the pay of $14.00 per hay bale).

Nonetheless, the payment records reflected that the workers had different pay records – there were varying amounts paid at different intervals at different times. The hours completely varied and the dates were not discernably routine. There were not multiple workers for Alkota at the same time. The payments were indicative of ad hoc projects, not a set work schedule or type of work. The Alkota (or Kiel's) responses on the questionnaire reflected that the workers "help with special projects," and described the work as "sporadic." (Record p. 23).

CONCLUSIONS OF LAW

IWD oversees the unemployment compensation fund in Iowa, which is governed by Iowa Code chapter 96. Iowa Code § 96.9(1). IWD has the duty to administer Iowa Code chapter 96 and authority to adopt administrative rules "pursuant to chapter 17A prescribing the manner in which benefits shall be charged against the accounts of several employers for which an individual performed employment during the same calendar quarter." Iowa Code § 96.7(2)(a)(4). IWD has adopted rules found at 871 Iowa Administrative Code chapter 23.

IWD, as a state agency, initially determines all issues related to liability of an employing unit or employer, including the amount of contribution and the contribution rate. Iowa Code § 96.7(4)(a). There is an initial presumption that any worker is an "employee" and, therefore, the employer must contribute to the unemployment compensation fund.

> Services performed by an individual for remuneration are presumed to be employment unless and until it is shown to the satisfaction of the [IWD] department that the individual is in fact an independent contractor. Whether the relationship of employer and employee exists under the usual common law rules will be determined upon an examination of the particular facts of each case.

Iowa Admin. Code r. 871-23.19(6)(96). Generally, a worker is either an employee or an independent contractor. The determination is made by examining several factors.

An individual or business, here Alkota, bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96. Iowa Code § 96.1A(15) (". . . An employing unit shall not be deemed to employ an independent contractor[.]"); Iowa Admin. Code r. 871-23.55(1)(96) ("The burden of proof in all employer liability cases shall rest with the employer."); *see also* Iowa Admin. Code r. 871-23.55(2)(96).

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a[n] . . . independent contractor, or the like." Iowa Admin. Code r. 871-23.19(7)(96). "[W]hether a

person is an independent contractor or an employee is a 'factual determination based on the nature of the working relationship and many other circumstances, not necessarily on any label used to identify the parties in the contract.'" *Pennsylvania Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 813 (Iowa 2002) (quotation omitted). In other words, if the relationship of employer and employee exists, the parties' designation or description of the worker as an independent contractor is immaterial and of no consequence.

An employer is defined as "any employing unit which in any calendar quarter in either the current or preceding calendar year paid wages for service in employment." Iowa Code § 96.1A(14)(a). "'Wages' means all remuneration for personal services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash." Iowa Code § 96.1A(40)(a). An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it in Iowa. Iowa Code § 96.1A(15). The term "employment" is defined to include service "performed for wages or under any contract of hire, written or oral, express or implied." Iowa Code § 96.1A(16)(a). Further, 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." Iowa Code § 96.1A(16)(a)(2).

"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." *Gaffney v. Dep't of Emp. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995) (citations omitted).

> 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. The right to discharge or terminate a relationship is also an important factor indicating that the person possessing that right is an employer. Where such discharge or termination will constitute a breach of contract and the discharging person may be liable for damages, the circumstances indicate a relationship of independent contractor. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools, equipment, material and a place to work to the individual who performs the services. 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. . . .

Iowa Admin. Code r. 871-23.19(1)(96).

Here, the factors listed under the first subpart of this administrative rule are, necessarily, vague. Alkota had the right to control the work with regard to the power washer business. Kiel said he would inspect the work of some of the workers. This supports IWD's conclusion that the workers were employees. This factor is in favor of IWD's determination.

Next, Alkota appeared to have the right to terminate workers without breaching a contract and potentially be liable for damages. Appellant's testimony was that he hired the workers based a verbal contract or agreement for a set hourly rate of pay per project. If the worker did not actually work (whether by termination or by choice), it appears the worker was owed no wages and there is no liability. Under such circumstances, this factor weighs in favor of the workers being employees.

From the record, it appears Alkota and some workers each provided some of the materials and some of the tools. *See Connolly Bros. Masonry v. Dep't of Emp. Servs., Div. of Job Serv.*, 507 N.W.2d 709, 711 (Iowa Ct. App. 1993) ("the fact that the workers used the tools and equipment of the employer, especially if they are of substantial value, tends to show the workers were employees."). Whether workers used Alkota's tools or their own tools depended on where the work was conducted – generally Alkota's tools were used when the work took place at Alkota. This factor weighs in favor of the workers being employees while working at Alkota, but also in favor of the workers being independent contractors when not working at Alkota. However, it also appears that some travel on behalf of Alkota was conducted because there was reimbursement for "mileage" and going to a fair (presumably to advertise for Alkota). This points partially to the workers being employees, not independent contractors.

Additionally, IWD has also adopted a number of other factors to consider in determining whether a worker is an independent contractor or employee.

> The nature of the contract undertaken by one for the performance of a certain type, kind, or piece of work at a fixed price is a factor to be considered in determining the status of an independent contractor. In general, employees perform the work continuously and primarily their labor is purchased, whereas the independent contractor undertakes the performance of a specific job. Independent contractors follow a distinct trade, occupation, business, or profession in which they offer their services to the public to be performed without the control of those seeking the benefit of their training or experience.

Iowa Admin. Code r. 871-23.19(2)(96). This factor favors a finding of the workers (barely) as employees. Although the workers were hired for their labor, and were paid a set hourly wage, sometimes it was only for a specific project.

> Independent contractors can make a profit or loss. They are more

> likely to have unreimbursed expenses than employees and to have fixed, ongoing costs regardless of whether work is currently being performed. Independent contractors often have significant investment in real or personal property that they use in performing services for someone else.

Iowa Admin. Code r. 871-23.19(3)(96). The record is deficient on this factor. It is unknown whether the workers made a profit or a loss, whether they had fixed or ongoing costs, and how much investment in personal property was involved. Presumably, the workers would not have taken on or continued with the work unless they could make a profit. It appears the workers had no significant investment in the property used for performing work for Alkota.

> Employees are usually paid a fixed wage computed on a weekly or hourly basis while an independent contractor is usually paid one sum for the entire work, whether it be paid in the form of a lump sum or installments. The employer-employee relationship may exist regardless of the form, measurement, designation or manner of remuneration.

Iowa Admin. Code r. 871-23.19(4)(96). Here, the pay could be averaged to an hourly basis (apparently an hourly pay amount was negotiated with a given worker). Yet, the payments were made on a sporadic basis, not a set time period. The varied payments are also consistent with working on and completion of a project after a brief period of time. On the other hand, the workers did not submit formal bids for their work nor did they send invoices to Appellant. This factor slightly favors finding the workers were independent contractors.

"The right to employ assistants with the exclusive right to supervise their activity and completely delegate the work is an indication of an independent contractor relationship." Iowa Admin. Code r. 871-23.19(5)(96). This factor is inapplicable to the facts presented in this case. The workers did not have assistants, it was unclear whether they could have done so and, if they had hired assistants, it was unknown where the assistant pay would come from.

Alkota (or Kiel) called the workers independent contractors. That designation is not determinative pursuant to Iowa Admin. Code r. 871-23.19(7)(96). However, it is also not immaterial under the rule *when coupled with other facts*, e.g. Appellant issued 1099 forms to applicable workers. *Bauder v. Emp. Appeal Bd.*, 752 N.W.2d 33 (Iowa Ct. App. 2008) (Table) ("The board considered the parties' designation of Bauder as an independent contractor as one of several factors among those set forth in the administrative rules that indicated she was not an employee. It also found the manner in which she was paid, the 1099 income tax forms issued by Farm Bureau designating her income as "nonemployee compensation," and the limited control exercised by Farm Bureau over her 'work activities ... to the extent ... required by law' established her status as an independent contractor. ").

There are other considerations. Alkota offered no set hours of work for the workers – indeed, the ad hoc nature in the record of Alkota work is self-evident. Further, the work involved no traditional hallmarks of employment, e.g. health insurance or retirement planning,

no salary or paid time off. To the extent IWD would point out those are not listed as factors to be considered under the applicable statutes or Iowa Administrative Code rules, it is noted that these types of inquiries were made by IWD itself in its own questionnaire. (Record p. 24).

In *Louismet v. Bielema*, 457 N.W.2d 10, 12–13 (Iowa Ct. App. 1990), the Court found the workers were employees and not independent contractors.

> They were subject to the daily control and direction of Louismet's supervisory personnel. . . . They were required to work specific hours, use a time clock, and were subject to termination. . . . Louismet furnished the place to work and provided the workers with tools and equipment to use. . . . The workers were not retained at a fixed price to perform a specific job. Instead, they performed their work continuously and their labor was purchased on an hourly basis. . . . The workers did not have a right to employ assistants or delegate their work.

Here, some of the factors in *Louismet* favor IWD's position, e.g. hourly pay, control and direction. *Compare Connolly Bros. Masonry*, 507 N.W.2d at 711 ("We note that Connolly specified the time workers were to appear for work and assigned each worker a job for the day. . . . the fact that the workers used the tools and equipment of the employer, especially if they are of substantial value, tends to show the workers were employees."). Some factors do not, e.g. time clock.

Additionally, the absence of the workers advertising themselves, through traditional advertising or via social media, is not surprising and not particularly probative. Rather, it would be more surprising if a day laborer had a website offering services.

Significantly, there appears to be some miscommunication in this case. The notarized statements by some of the workers state "I am not a business." Kiel testified that the statement should have read "I am not a part of the business." Similarly, Kiel's wife filled out the spreadsheet and her answers were not very specific, or did not totally align with Kiel's testimony. Frankly, the most accurate evidence of what the workers did came from Kiel's testimony at the hearing.

Ultimately, some of the workers should be considered employees, primarily based on how Alkota controlled the work. *However, only to the extent those workers were involved in Alkota's power washer business*. Alkota is only in the power washing business and not farming, trucking, concrete, etc., at least for purposes of this audit. Alkota has hired, and Kiel agrees, that Galvan is an employee since 2023 (prior to that he poured concrete). Walker and Holdeman also appear to be employees under the factors listed above, insofar as power washers are concerned.

Employees hired for farm work or other non-power washer type of work are not employees for chapter 96 purposes, at least on this record. *See* Iowa Code § 96.1A(16)(g)(3)(a)-(c) ("The term "employment" shall not include: . . . Agricultural labor. . . . On a farm in the employ of any person in connection with cultivating the soil, or in connection with raising or

harvesting any agricultural or horticultural commodity . . . In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm . . . if the major part of such service is performed on a farm. . . . In connection with the production or harvesting of any commodity defined as an agricultural commodity").

Woltzen's statement was that he helped on carburetors for gas engines and engaged in baling hay for Kiel. Thus, Woltzen should be considered an employee only to the extent that he worked on engines for Alkota. Woltzen is a neighbor farmer that primarily helps with baling hay – to that extent he is not an employee. Pendleton stated that she discounted the farm work. Likewise, to the extent Webber worked on power washers, he is an employee. To the extent Webber only did yard or field work, and nothing with power washers – he is not an employee. Neither party presented evidence as to how much time Webber spent on power washers. Accordingly, half of Webber's pay is subject to contribution as an employee.

Magnall should not be considered an employee – he was an independent contractor hired to weld brackets. Devries did a day and a half of yard work, not Alkota work – he is not an employee. Fischer remodeled the Kiel's home and put in chimneys – he is not an employee for Alkota to that extent. The statement in Alkota's submission indicates Fischer may take a pressure washer from Alkota to Fischer's own shop to work on it, but billed Alkota based on the particular job, not on an hourly basis. Fischer's statement was that he owned Fischer construction business, was a subcontractor for Alkota, used his own tools, drove his own vehicle, and installed venting because Kiel did not want to work on a roof. Fischer is not an employee for purposes of unemployment insurance.

One final note. Kiel requested the in-person hearing, in part, to address the lack of a pre-audit interview.

> The department, through duly appointed field auditors, may perform a systematic audit of an employer's records as authorized by Iowa Code section 96.11, subsection 7, and as mandated by the United States Department of Labor. In addition to the provisions of subrules 22.17(1) to 22.17(3), the following provisions apply to systematic audits:
> *a.* The employer is to be given reasonable notice of the intent to audit, and a preaudit interview is to be conducted with the employer or a designated representative.

Iowa Admin. Code r. 871-22.17(4)(a)(96) (emphasis added). The term "interview" is not defined in the Iowa Administrative Code. An "interview" can take different forms, e.g. by phone, email, etc. "Field auditors are to provide a cost-effective method of promoting employers' understanding of employer rights and responsibilities under Iowa unemployment insurance laws." Iowa Admin. Code r. 871-22.17(1)(96).

In fact, the Iowa Administrative Code seems only seems to refer to in-person contact between audit subjects and IWD field auditors in order to confirm that a business is real. "The

department, through duly appointed field auditors, may perform a systematic audit of an employer's records . . . To verify the existence of the business, the auditor may require a visit to the business premises or to see other evidence of legitimate business activity." Iowa Admin. Code r. 871-22.17(4)(c)(96).

Kiel's dissatisfaction with the lack of an in-person preaudit interview in Alkota's case is understandable. Some things are lost in translation with when discerning facts from a paper document or an electronic record. At the same time, technology has made civil and criminal law enforcement faster and more effective. Alkota did not take Pendleton up with her offer for a phone conversation. However, Alkota received an in-person meeting after IWD's preliminary findings and before the final audit.

Lastly, Alkota's argument that IWD's audit was a waste of taxpayer money because the unemployment insurance money sought by IWD is a "pittance" compared to the money expended on salaries and resources by the State is without merit. State agency expenditures to enforce compliance with the law typically costs more than any revenue captured. Regulatory enforcement as directed by the Iowa Legislature is not a money-making, for-profit venture. The Iowa Legislature has made clear the purpose of unemployment insurance:

> As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment negatively impacts the health, morals, and welfare of the people of Iowa. These undesirable consequences can be reduced by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment. This chapter provides for payment of benefits to workers unemployed through no fault of their own. The policy in this chapter is intended to encourage stabilization in employment, to provide for integrated employment and training services in support of state economic development programs, and to provide meaningful job training and employment opportunities for the unemployed, underemployed, economically disadvantaged, dislocated workers, and others with substantial barriers to employment. To further this public policy, the state, through its department of workforce development, will maintain close coordination among all federal, state, and local agencies whose missions affect the employment or employability of the unemployed and underemployed.

Iowa Code § 96.2. The audit process by IWD for unemployment insurance purposes is not premised on a net profit-loss analysis – it is premised on equal enforcement of the law.

ORDER

IWD's decision that an employer-employee relationship existed between the individuals identified during the audit is **AFFIRMED IN PART** and **REVERSED IN PART**. Specifically, the decision is affirmed with regard to employees Walker, Holdeman, Galvan, Woltzen, and half of Webber's wages. The decision is reversed with regard to workers Magnall, Fischer, and Devries. IWD is directed to take all steps necessary to effectuate this decision.

IT IS SO ORDERED.

Dated November 21st, 2023.

Copy to:

cc: Midwest Cleaning/Alkota, LLC, d/b/a Midwest Cleaning, 18297 Lincoln Rd., Fayette, IA 52142, kieljd@hotmail.com (by mail and email)
Jeffrey Koncsol, Stephanie Goods, Abdullah Muhammad, and Deborah Pendleton, IWD (by AEDMS)

APPEAL RIGHTS

A presiding officer's decision constitutes final agency action in an employer liability contested case.

a. Any party in interest 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.

b. Any party in interest 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.

Iowa Admin. Code r. 871-26.17(17A,96).

Case Title: MIDWEST CLEANING,ALKOTA, LLC V. IOWA WORKFORCE DEVELOPMENT

Case Number: 24IWDM0007

Type: Final Decision

IT IS SO ORDERED.

Forrest Guddall, Administrative Law Judge