

- The worker had a continuing relationship with the employer.
- The workers were paid on a weekly basis and paid at an hourly rate.
- The worker did not have contractor's registration or invoice ... for their work
- The workers did not have a contractor's registration.
- The workers did not have business insurance or worker's compensation insurance for the work they performed.

Id. IWD sent B.N. a list of employees IWD wanted more information on, including Zimmerman; who is at issue here. IWD ex. 10. B.N. indicated in response that Zimmerman did consulting and "various projects." Id. B.N. noted that they found Zimmerman through referral, he does not formally invoice B.N., and he is paid hourly or per project." Id.

Upon investigation, Vo determined that Zimmerman did not have business insurance until January 16, 2023, which was after the audit timeframe. Ex. 8. Apparently, Zimmerman did not maintain insurance until 2023 because that was when a different client asked him for it. Id. Zimmerman does not hold contractor's registration but it is unclear whether he would be required to under Iowa law. Id. Zimmerman did not have an Iowa unemployment insurance account but this would be unsurprising as it appears Zimmerman works alone and is a sole proprietor. Id. Vo could not find advertising for Zimmerman's services on Google or social media, although, if Zimmerman works solely by referral, this would not be unusual. Id.

In 2019, Zimmerman was paid \$7,900.00 by B.N. over eleven payments. Id. Zimmerman was paid \$1,260.00 in 2020 over three payments. Id. In 2021, Zimmerman earned \$19,190.96 from B.N. over 26 payments. Id. Zimmerman also seemed to be reimbursed \$2,118.70 for various expenses in November 2021. Ex. 13. Zimmerman was paid \$16,519.01 in 2022 over 38 payments. Ex. 8. Zimmerman is paid directly in his own name and not through an LLC, dba account, or other business entity. Zimmerman did not receive any paid breaks or vacation time.

When looking at Zimmerman's pay from September 2019 through December 2022, the amount of pay fluctuates fairly significantly. App ex. IWD claims that Zimmerman was paid weekly but when looking at dates of payments, there were weeks that Zimmerman was paid twice and other weeks where he was not paid at all. Ex. 11. There does not appear to be much rhyme or reason to when Zimmerman is paid. This is not a situation where an employee is paid every Friday or every other week for example. See id. B.N.'s general ledger shows several entries to Zimmerman noted as "salary" and several other entries noted as "advance on salary." Ex. 13. Claes testified at hearing that his wife maintains B.N.'s books and she is not a professional bookkeeper.

At hearing, it was apparent IWD did not completely understand what B.N.'s business purpose is and especially what services Zimmerman provided to B.N. Without that information, it would be difficult to make many determinations regarding what may be

normal or not normal in regards to potential employment. The record shows that B.N. is a company that is developing a system to build homes more efficiently and less costly, partially through making custom bricks. Claes described the company as primarily research and development based. The prototype home B.N. is building would eventually be resided in by Claes.

Through Claes' testimony, it appears Zimmerman is primarily a construction worker with over fifty years of experience. It seems that he has experience with building foundations, putting in windows, and framing; described as a "jack of a trades." B.N. did not control how Zimmerman completed his work; Zimmerman was allowed to rely on his own training and experience. Claes testified that if Zimmerman would perform deficient work, Zimmerman would be required to remedy the situation at his own cost. This was never an issue though. Zimmerman used his fifty years of experience in construction to advise B.N. as they developed their new processes for building homes.

At hearing, Claes testified that there was no formal invoicing. Sometimes Zimmerman would write down what he was owed but generally would track his own time and orally communicate what B.N. owed him. Claes explained initially Zimmerman was paid by the day but later was paid by the project or per hour. Claes explained that paying Zimmerman hourly was typically fairer than by project because as B.N. is developing a new system to build homes, it could be hard to predict how long certain projects would take. Claes would pay Zimmerman when requested, which resulted in Zimmerman sometimes being paid multiple times in a single week.

Zimmerman was allowed to keep a company credit card. Zimmerman was given permission to make several small personal purchases using the company card that were entered on the general ledger as "advance on salary." Claes testified that Zimmerman was struggling financially and he gave Zimmerman permission to buy some food and other essential items. There were also some expenses made by Zimmerman on behalf of B.N. that were reimbursed to Zimmerman. Zimmerman did not charge B.N. for materials and B.N. supplied all building materials.

Claes explained that Zimmerman maintained and used his own work truck and tools for his work for B.N. However, there was one project that required Zimmerman to use B.N.'s truck when Zimmerman was hired to travel to Texas to pick up a very large piece of equipment.

Zimmerman seemed to have multiple rates of pay; one for actual construction work and another for driving time on the road to the Texas project. Zimmerman was able to choose when and how often he worked, depending on work availability. Zimmerman was never guaranteed ongoing work and would decline work if he was unavailable. Claes testified that Zimmerman worked for multiple other companies. If Zimmerman was unavailable, Claes would hire the company "Old World Art" to perform the work or do certain projects himself if he was able.

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 has adopted rules found at 871 IAC chapter 23.

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 Services performed by an individual for remuneration are presumed to be employment, unless proven otherwise.⁴ An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.⁵ 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.⁶

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."⁷ An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it in Iowa.⁸ The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."⁹ 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."¹⁰

Whether 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."¹¹ 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.

The right of control, as developed through the common law, is the principal test for determining whether a worker is an employee or independent contractor in the

¹ Iowa Code § 96.9(1).

² *Id.* § 96.11(1).

³ *Id.* § 96.7(4).

⁴ 871 IAC 23.19(6).

⁵ Iowa Code § 96.19(18)f, *Id.* 22.7(3).

⁶ 871 IAC 22.19(7).

⁷ Iowa Code § 96.19(16)a.

⁸ *Id.* § 96.19(17).

⁹ *Id.* § 96.19(18)a.

¹⁰ *Id.* § 96.19(18)a(2).

¹¹ Pennsylvania Life Ins. Co. v. Simoni, 641 N.W.2d 807, 813 (Iowa 2002) (quoting Harvey v. Care Initiatives, Inc., 634 N.W.2d 681, 684 n. 2 (Iowa 2001)).

unemployment context.¹² 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.¹³ IWD has also adopted a number of rules with factors to consider in determining whether a worker is an independent contractor or employee.¹⁴

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.¹⁵

The right to discharge or terminate a relationship is "an important factor indicating that the person possessing that right is an employer."¹⁶ If the discharging party may be liable for damages for breach of contract, the circumstances are indicative of an independent contractor relationship.¹⁷

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service are characteristic of an employer.¹⁸ "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."¹⁹

Another 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.²⁰ 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.²¹ 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.²²

¹² Gaffney v. Dep't of Employ. Servs., 540 N.W.2d 430, 434 (Iowa 1995).

¹³ 871 IAC 23.19(6).

¹⁴ *Id.* 23.19.

¹⁵ *Id.* 23.19(1).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* 23.19(2).

²¹ *Id.*

²² *Id.* 23.19(4).

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 Independent contractors have the right to employ assistants with the exclusive right to supervise their activity and completely delegate work.²⁵

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.²⁶ 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.²⁷ Professional employees who perform services for another individual or business are covered employees.²⁸

ANALYSIS

As in most of these cases, there are factors that support both an employer, employee relationship and an independent contractor relationship. Factors supporting an employee, employer relationship include there being no evidence that Zimmerman advertised his services online or on social media. However, Zimmerman could be potentially getting enough work through referral. Zimmerman did not have business insurance until 2023, which is unusual that he would work several years without such insurance. However, it must be considered that he holds such insurance now. Zimmerman did not have contractor registration but it is unclear whether he would be required to under Iowa law. Zimmerman once used a B.N. truck for a project because his personal work truck was not big enough to transport a certain item from Texas to Iowa.

The general ledger shows Zimmerman received reimbursement for items, which is not typical for independent contractors. Zimmerman also was allowed to keep a company credit card, which independent contractors should not have access to. Zimmerman was provided a small "salary advance" several times to pay for food and other essential personal items, which also should not occur with independent contractors. IWD claims there is a continuing relationship. While this is mostly true, gross pay varied widely and there were weeks and months where there were no wages earned. The working relationship was not continuous.

²³ *Id.* 23.19(3).

²⁴ *Id.*

²⁵ *Id.* 23.19(5).

²⁶ *Id.* 23.19(2).

²⁷ *Id.* 23.19(1).

²⁸ *Id.*

There is no evidence that Zimmerman ever incurred a loss on a project. However, Claes testified that if Zimmerman would ever perform any deficient work, Zimmerman would have been responsible to remedy it at his own cost. Either B.N. or Zimmerman could terminate the working relationship at any time seemingly without liability. Zimmerman does not have an unemployment insurance account, although this is unsurprising as by all accounts he operates a one-person operation. While B.N.'s general ledger shows entries labeled "salary," which could indicate employment; these entries are no more persuasive than when a business classifies a worker as an independent contractor. Subjective classifications or certain terminology used by businesses are not determinative, the actual factors surrounding the work relationship is what dictates the legal classification of the work relationship.

Factors supporting an independent contractor relationship include the testimony that Zimmerman was hired due to his unique and longtime technical expertise in construction. It is clear Zimmerman has a distinct trade and B.N., and other companies, use this trade for physical work and with B.N. also using Zimmerman for research purposes as they attempt to create their new building processes. While Zimmerman was paid an hourly rate, he was not paid at regular intervals such as weekly, biweekly, monthly, etc. There were times when Zimmerman was paid multiple times in the same week and other weeks and even months where he was paid nothing. Claes credibly testified that Zimmerman was paid hourly because due to the experimental nature of B.N.'s work, it was difficult to predict how much certain projects should cost. Zimmerman tracked his own time and was essentially paid on-demand, which would not be normal in an employer relationship.

Zimmerman's gross pay seemed to vary significantly over the period in question. There appears to be no rhyme or reason to when and how much Zimmerman was paid. Zimmerman had two different rates of pay, one for construction and one for driving, which can indicate he was hired per project and that he was not just ongoing purchased labor.

There is uncontroverted testimony that Zimmerman also provided construction services for other people and companies. Zimmerman declined work from B.N. occasionally, which would be unusual if he was an employee. Zimmerman was not required to work at any defined times. Zimmerman used his own tools and maintained his own work truck. Besides using B.N.'s truck for one project, it does not appear B.N. supplied Zimmerman any tools or equipment.

There were months at a time, specifically during 2020, where Zimmerman had no work with B.N. There is no evidence that Zimmerman filed for unemployment during these breaks in work with B.N. Zimmerman did not maintain business insurance during the audit period but he now carries business insurance.

Most persuasively, Zimmerman was able to rely on his own training / experience and complete projects how he saw fit; there was no control by B.N. over how Zimmerman performed his work. Zimmerman was hired due to his longstanding construction expertise

and not only performed work for B.N. but provided advice as B.N. attempts to create more efficient homebuilding.

This is an extremely close case. Again, as in most of these misclassification cases, there are factors that support both an employer, employee relationship and an independent contractor relationship. When considering the totality of the record, the factors supporting an independent contractor relationship are more persuasive. Many of the factors supporting an employee, employer relationship have reasonable explanations. While this judge struggles with the pay advances and Zimmerman's possession of a company credit card, the rest of the record better supports an independent contractor relationship. As stated, the lack of control by B.N. over Zimmerman's work is very persuasive. In addition, IWD did not completely understand what B.N. as a company does or what Zimmerman specifically did for B.N. during the audit. This lack of understanding hampered their ability to better accurately decide Zimmerman's status. With the benefit of a full record now, B.N. has met their burden to show that Zimmerman was correctly classified as an independent contractor.

DECISION

Iowa Workforce Development's decision is REVERSED. Zimmerman was correctly considered an independent contractor by B.N.

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.²⁹

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²⁹ 871 IAC 26.17(5)

Case Title: BETTER NATURAL, LLC VS IOWA WORKFORCE
DEVELOPMENT
Case Number: 24IWDM0008
Type: Proposed Decision

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to be 'TA' with a long horizontal stroke extending to the right.

Thomas Augustine, Administrative Law Judge