IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
CENTRAL PANEL BUREAU

JOHN McWILLIAMS J.A.M. Construction, LLC 2801 SW 28th St. Ankeny, IA 50023, Appellant, v. IOWA WORKFORCE DEVELOPMENT, Respondent.	)	Appeal No. 24IWDM0003 **DECISION**

INTRODUCTION

Iowa Workforce Development (IWD) completed an investigation and determined that an employer-employee relationship existed between J.A.M. Construction, LLC (J.A.M.) and five of its seven workers. After J.A.M. owner, Mr. John McWilliams appealed, IWD transferred the case to the Iowa Department of Inspections, Appeals, & Licensing, Division of Administrative Hearings, for a contested case hearing. The hearing in this matter was held on September 20, 2023, at 1:00 p.m. by telephone conference call. Appellant McWilliams represented himself and testified at the hearing. Appellant called Mr. Danny Carroll, a previous foster parent to Appellant, to testify as to Appellant's character. Mr. Jeffrey Koncsol represented IWD. Field Auditor Lisa Gaeta 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] The issue certified for hearing is "[w]hether an employer-employee relationship existed between J.A.M. Construction, LLC, James Smith and/or other workers performing services for J.A.M. Construction, LLC." (Notice of Hearing).

FACTUAL BACKGROUND

J.A.M. was a limited liability company, owned by Appellant McWilliams, starting in 2015. It is no longer an ongoing business entity according to the appeal submitted by Appellant. (Record p. 8). J.A.M. was hired by general contractors (or home builders) to frame residential housing construction.

According to Appellant and Mr. Cornell, generally Appellant would seek out or contact a builder or general contractor in order to secure work for J.A.M. The work typically was only for framing houses, inclusive of setting trusses and cutting or constructing stairs. Sometimes

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

Appellant worked alone; other times he contacted workers, usually by word of mouth (in fact, one by a Craig's list ad) to work on a project. (Record p. 19). Appellant would negotiate an hourly rate of pay for each worker for each project with payment made upon completion. (Record p. 19). The pay rate was based, in part, on the worker's experience. There was no bidding or invoicing submitted by the workers. Sometimes workers were paid weekly, or biweekly for short periods of time. Sometimes the pay was once a month, once pay was made on consecutive days to one worker.

Appellant would direct the workers to a work site. The workers would provide their own hand tools; although sometimes Appellant rented equipment. The audit found that J.A.M. rented equipment in the amount of $45,56500, and purchased small tools and equipment in the amount of $14,589.00 over a four-year period. (Record pp. 14, 25-26). Appellant testified he may also reimburse workers if their tools broke or became inoperable. Appellant stated he could not terminate the workers, but would have workers fix any errors, sometimes with "extra" materials. Nonetheless, generally, the building materials (with the exception of nails) were furnished by the builder or general contractor. Appellant requested contractor insurance registrations from workers, but the workers never provided them.

Appellant maintained that his workers were not employees; rather they were independent contractors. Appellant did not offer salaries, insurance, paid time off, or retirement benefits to the workers. The workers were issued Internal Revenue Service 1099 forms for their pay.

Field Auditor Lisa Gaeta testified for IWD. J.A.M. initially came to the attention of IWD because it had an incomplete unemployment insurance registration in November of 2022. (Record p. 13). Subsequently, an audit of J.A.M. was conducted. (Record pp. 9-12). IWD sent J.A.M. an audit questionnaire. (Record pp. 17-18). Gaeta found that five of the seven workers reviewed for J.A.M. were misclassified as independent contractors when they should have been classified as employees. (Record pp. 20-21).

The five workers determined by IWD to be misclassified as independent contractors instead of employees had a number of commonalities.

1. The individuals did not have a contractor's registration, unemployment insurance account, and there was no Secretary of State registration.
2. There was no evidence of the individuals having business insurance.
3. There was no evidence of the individuals advertising a business on the internet or through social media.
4. There was no evidence of the individuals operating an independent business nor holding himself out as a service for the public.
5. The individuals did not provide invoices for their services.
6. The individuals were paid at an hourly rate.
7. The individuals worked on a "continual" basis for J.A.M..[2]
8. The individuals provided framing service for J.A.M. which was "usual and necessary for the business."

[2] Gaeta testified there was no minimum amount of time at work required for a worker to be considered an employee.

(Record p. 14).

The payment records reflected that the five workers IWD thought were misclassified as independent contractors had different pay records – there were varying amounts paid at different intervals at different times. (Record p. 22). The amounts for one worker were three separate payments on consecutive months in 2021 for different amounts. The next was paid 19 times, with wildly varying amounts, sometimes weekly, sometimes biweekly, sometimes twice in one week, and once twice on the same day from October of 2019 through March 1, 2020. The third worker was paid nine times, about every two weeks, with less varied amounts from September through November of 2020. The fourth worker was paid five times, again with varying amounts from the middle of May to the middle of June of 2021. The fifth worker was paid three times, in March, April, and June of 2021, also with varying amounts. *Significantly, there was no overlap in the pay periods of the five workers – it seems that Appellant would hire one worker at a time to help him whenever he needed assistance*.

On April 27, 2023, IWD issued a letter to Appellant following the audit. Gaeta found some factors favored Appellant's contention that all seven workers were independent contractors – specifically, that the workers would bring some of their own hand tools to the worksite and that there was flexibility in their own work schedule. However, other factors favored finding some of the workers misclassified as independent contractors by J.A.M. Gaeta found:

- the workers performed duties in the regular service of J.A.M., and under J.A.M.'s name;
- their duties were integral to J.A.M.'s framing business;
- the workers did not have a financial interest in the J.A.M. business;
- the workers and J.A.M. could end the relationship without incurring liability;
- there was a continuing relationship between the workers and J.A.M.;
- the workers did not have a contractor's registration and did not invoice J.A.M. for their work; and
- the workers did not have business insurance nor worker's compensation insurance.

(Record p. 20).

Accordingly, IWD sought unemployment insurance contribution payments or taxes from J.A.M. and Appellant in the amount of $1,148.08 (not including possible interest and penalties). (Record p. 9).

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 initially determines all issues related to liability of an employing unit or employer, including the amount of contribution, the contribution rate, and successorship. Iowa Code § 96.7(4)(a). There is an initial presumption that a worker is an employee.

> Services performed by an individual for remuneration are presumed to be employment unless and until it is shown to the satisfaction of the 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).

An individual or business 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, somewhat, murky. It appears Appellant had the right to control the framing aspect of housing construction, subject to the authority of the general contractor or the builder. It also appears that Appellant could make his workers correct errors or changes to the framing, trusses, or stairs – he said he would inspect the work. This superficially supports IWD's conclusion that the workers were employees. Yet, it is hard to determine how much of the supervision resided with Appellant versus the general contractor. It seems obvious that Appellant and his workers had to follow the builder's floor plan and, presumably, there was not much deviation or discretion available for this type of hard, yet basic, manual labor. In contrast, for instance, ductwork and venting for a heating and cooling system may involve a degree of ingenuity not present in merely placing a wall in its proper position according to a floorplan. The result sought in Appellant's work project(s) is simply that the frame of the house is properly positioned – there are few details involved compared to other building trades, e.g. a finishing carpenter. Nonetheless, to the extent some limited right to control the framing was involved, Appellant appears to have had such control. This factor tips (barely) in favor of IWD's determination.

Next, Appellant testified that he did not have the right to terminate his workers. This is a curious position. If Appellant verbally agreed to pay them an hourly rate per project and had to recruit workers for specific jobs, it seems he could also discharge them when he no longer needed or wanted their help, regardless if the project was completed. Frankly, this factor, alone, is meaningless, without more context. Whether a worker is a fully registered, bonded, and licensed independent contractor or, alternatively, an employee, either worker can be terminated.

The more focused context is whether Appellant could terminate his 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 independent contractors.

From the record, the general contractor provided the materials (presumably the lumber for framing) and Appellant provided the nails. The workers provided their own hand tools. Appellant would rent equipment when necessary, and replace hand tools for some of the workers. *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."). This is a mixed bag of evidence that does not point in either direction clearly without more evidence.

Appellant and his workers would travel to a third-party construction worksite for framing. The nature of the business was not one where workers would arrive to Appellant's place of business to conduct the framing activity. This points to the workers being 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 (again barely) as employees. Although the workers were hired for a specific framing project, the only thing truly fixed on this record was the fact that the workers were paid a set hourly wage.

> 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 there were 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. What is known is that the workers would bring their own hand tools.

> 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). The pay was on an hourly basis (apparently an hourly pay amount was negotiated based on the experience of the worker). Yet, while there were some payments made, it appears, on a weekly or biweekly 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 employees.

"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.

Appellant called his 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. Appellant offered no set hours of work for the workers – indeed, Mr. Cornell testified he would see Appellant sometimes working on projects by himself.

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. 17).

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, daily 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."). Some factors do not, e.g. time clock, furnishing tools. *Id*., ("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.").

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.

If that were the end of the record, the workers would be considered employees, primarily based on how J.A.M. controlled the framing work, subject to any dictates by the home builder or general contractor. However, IWD found that only five of the seven audited workers were employees and the other two workers were independent contractors. The only difference in the record was that the two independent contractors had a copy of a certificate of insurance. (Record p. 13). It is unclear whether this a certificate of insurance for general or business liability, for worker's compensation insurance, some other type of insurance, or some combination of insurance products. Nonetheless, the mere presence of insurance does not indicate the independent contractors had any more control of their work than the other workers.

Further, at the hearing, a contractor registration with IWD was discussed. *See* Iowa Admin. Code r. 875-150.3(91C) ("Before performing any construction work in this state, a contractor shall be registered with the division."); Iowa Admin. Code r. 875-150.2(91C) ("*'Contractor'* means a person who engages in the business of construction as the term is defined in 871-23.82(96), for purposes of the Iowa employment security law, including subcontractors and special trade contractors."); Iowa Admin. Code r. 871-23.82(2)(j)(1)(96) ("The term

'construction' includes, but is not limited to: . . . Framing—contractors"). J.A.M. itself was a registered contractor. (Record p. 13). There is no evidence that any of Appellant's workers, whether found to be independent contractors or employees by IWD, were registered contractors. Rather, the two workers determined to be independent contractors simply held certificates of insurance; they were, apparently, not registered as contractors either. A lack of contractor registration did not prevent a finding that the two workers were, in fact, independent contractors.

In the end, the control of the work, the payment for the work, the type of work, was all the same, at least on this record. Accordingly, all of the workers should be treated the same under Chapter 96. The fact that two of the workers were found to be independent contractors when the only difference between them and the other five workers was a certificate of insurance is dispositive to a finding that Appellant's workers were independent contractors, on this record.

Ultimately, it appears that Appellant would seek residential framing projects for J.A.M. himself. The builder or general contractor would have final control of the framing, and Appellant would exercise minimal supervision or oversight. The builder or general contractor would supply the materials (apparently Appellant supplied the nails and perhaps other materials). If a project was secured, he would seek out a worker on an ad hoc basis. Appellant worked with and relied on a single worker as needed to complete the project. Based on the pay records, Appellant was working with only one other person at any given time. J.A.M. paid workers on a varying basis in varying amounts. (Record p. 22). On this limited record, Appellant has carried his burden under the mixed factors cited above.

ORDER

IWD's April 27, 2023 decision that an employer-employee relationship existed between the individuals identified during the audit is **REVERSED**. IWD is directed to take all steps necessary to effectuate this decision.

IT IS SO ORDERED.

Dated October 11th, 2023.

Copy to:

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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: J.A.M. CONSTRUCTION, LLC V. IOWA WORKFORCE DEVELOPMENT

Case Number: 24IWDM0003

Type: Final Decision

IT IS SO ORDERED.

Forrest Guddall, Administrative Law Judge