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IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
CENTRAL PANEL BUREAU

United Trades Group, LLC Tory Webb [redacted] 50211, Appellant, v. Iowa Workforce Development, Respondent.	)))))))))))	Case No. 24IWDM0014 **PROPOSED DECISION**

This matter came before the undersigned for a telephone hearing on March 29, 2024. Tory Webb ("Webb"), of United Trades Group, LLC, ("Appellant") was present and testified. Lisa Gaeta ("Gaeta"), Employer Auditor for Iowa Workforce Development ("IWD"), appeared and testified. Also present for IWD, but not testifying, were Stephanie Goods and Charles Mercer. IWD was represented by attorney Jeffrey Koncsol. IWD submitted a Table of Contents describing 12 documents, which are sequentially numbered pages 1 – 37. In addition, IWD presented an additional exhibit 13 consisting of 5 pages. IWD's documents were admitted into the record without objection. IWD's exhibits will be referred to in this Proposed Decision by exhibit number according to the order they appear in the Table of Contents, exhibits 1 – 12, plus the sequential page number as assigned by IWD. Exhibit 13, is marked as such and shall be referred to as Exhibit 13. The Appellant submitted documents which included: W-9 forms; Sub Contractor – Employee Guideline documents; Subcontractor Audit Questionnaires; and, text messages, consisting of 34 pages. These are collectively identified as Appellant's exhibit A, pages 1-34, which were also admitted without objection. Appellant's exhibits are referred to in this Proposed Order by Exhibit letter and page number in the order in which they appear in the administrative file.

ISSUE

Whether an employer-employee relationship existed between the Appellant, Tory Webb, and certain workers performing services for the Appellant.

FINDINGS OF FACT

IWD conducted an unemployment insurance tax audit regarding the Appellant business. The business owner, Webb, testified that United Trades Group, LLC, is in the business of doing drywall and painting work. (Webb Testimony). Gaeta performed the audit for IWD. Gaeta testified that she has a C.P.A. license and previously worked for 30 years in private industry in positions of Controller and V.P. of Finance. She has received specialized audit training with IWD

and has been conducting about 100 audits per year for the previous five (5) years. This particular audit was triggered when Gaeta was conducting another audit with a different company and found a 10-99 tax form issued to the Appellant company. Gaeta found the Appellant did not have an unemployment account with the State of Iowa, which triggered the audit.

On October 16, 2023, Gaeta issued a letter to the Appellant advising that she had completed her review for the period of 2020 through 2022 and found that 12 workers should be classified as employees, per Iowa Code 96.1A(16)(f)(1). The letter provided instructions to Webb to provide additional evidence that he believed may support his position that the workers were independent contractors and not employees. (Ex. 12, p. 37).

On November 20, 2023, Gaeta issued a letter to Webb, titled "Unemployment Insurance Tax Audit Results." (Ex. 7, p. 14). The letter again asserted the 12 previously identified workers were employees and not independent contractors. This decision was supported by citing certain factors, which tend to show a worker is an employee rather than an independent contractor. (Ex. 7, p. 15). Those included the following:

1) Method of Payment – weekly/hourly rate of pay, 871 – 23.19(1). The group of workers IWD believed to be employees during the audit period were paid on an hourly basis and received payment on a weekly basis. (Gaeta Testimony) (Ex. 10, p. 25). Gaeta stated that being paid on an hourly rate of pay and being paid on a weekly basis is consistent with a person working as an employee, because a true independent contractor is typically paid for the project and receives payment when the project is completed. (Gaeta Testimony). Gaeta testified that she was not aware of the Facebook post from May 21, 2021, contained in exhibit 13, p. 3, in which Webb posted that he was '[l]ooking for helpers, carpenters, skilled labor, etc. . . . [s]tarting at $15 and up," and therefore did not rely on it in her decision. (Ex. 13, p. 3). However, she stated that this post was within the audit period and appears to be Webb looking for employees and offering $15 per hour or more. She stated that this would again indicate an hourly rate of pay, applicable to an employee and not an independent contractor.

Webb countered in his testimony that the workers were paid hourly when doing a "time and materials jobs," in which the company was paid for the materials provided and an hourly rate for each worker. He further testified that he then paid the workers weekly because he knows what it is like to have a family and bills, and it was just something he did to try to be helpful. (Webb Testimony). Webb cited as an example of a "time and materials job" of working for a builder who hired a large company to do the drywall and painting work, and then would hire the Appellant to "fix their goofs on a time and materials basis," or words to that effect. (Webb Testimony).

2) Degree of Business Integration, 871 – 23.19(6). The Appellant's business is drywall and painting work. The 12 workers that are the subject of the audit were all engaged in drywall and painting work, which was integral to the regular service of the Appellant business. (Gaeta Testimony) (Ex. 10, p. 25). Gaeta testified this supported the conclusion that the workers were employees because a business typically does not hire independent contractors for the same work the company performs, ordinarily an independent contractor is hired to complete some part of the overall project the company does not regularly engage in. Gaeta further testified that it appeared the work was being completed under the name of the Appellant, UTG, in light of the fact that none

of the workers had a separate business name for themselves, again supporting the conclusion they were employees. (Ex. 10, p. 25).

Webb countered in his testimony that he is regularly called on by other companies engaged in drywall and painting work, to cover their overflow work. (Webb Testimony). He stated that he often works with other companies and in-house painters and drywallers to do the same type of work and that in the drywall and painting business, it is not uncommon for people to be hired on a contract basis to help complete a project of another drywall and painting company.

3) Lack of Investment in Business or Facilities, 871 – 23.19(3). Gaeta testified that she found no evidence the workers had any financial investment in the Appellant business and no evidence of any investment in their own separate independent businesses. (Gaeta testimony). Gaeta testified that she provided a list of names of people who had worked for Webb and requested additional information about them. (Ex. 10, pp. 25-26). Webb responded and provided additional information. (Id.). Gaeta noted from the information Webb provided, that none of the individuals were reported to have a separate business name, supporting her conclusion that none of the workers actually had their own separate business and were therefore, not independent contractors. While it is possible for an individual to function as a sole proprietor without a separate business name, Gaeta also asked Webb for a copy of any separate business insurance certificate or binders submitted to him by the workers, related to any of the jobs they completed for Webb, and none were produced. Although Webb did produce an Insurance document for the period of April 2023 through 2024, it was outside the period of Gaeta's audit, from 2020 through December 31, 2022, and not relevant to this specific audit. (Gaeta Testimony). The lack of insurance certificates for the workers during the relevant time support the conclusion that the workers did not have their own separate businesses and could not be functioning as independent contractors, but were employees. Gaeta also testified that Webb purchased tools and supplies used by the workers at the jobsites. (Gaeta Testimony) (Ex. 11, pp. 27-35). In addition, she noted from the information Webb reported, that the worker's received expense reimbursements. (Ex. 9, p. 23). Gaeta testified that ordinarily an employee would utilize tools and supplies provided by an employer, while an independent contractor would bring their own tools and supplies to complete a job. In addition, reimbursements of any kind and particularly for food, fuel, and lodging and providing a company vehicle are typically only given to employees not independent contractors. (Ex. 9, p. 23) (Ex. 11, pp. 31-32).

Webb testified that the cost for tools to be a drywaller and painter is low, which allows a person to function in the business without significant investment. (Webb Testimony). He stated that "everyone who works for me is required to have their own tools, although I've acquired tools over the years, and sometimes those get used by others, same as I have used the tools of others" or words to that effect. (Webb Testimony). Webb's testimony that the low cost for tools required to do the job, seems to cut against his own position, I that if the cost of tools is low, presumably an independent contractor would be able to bring their own tools to the jobsite. While Webb said this occurred, Gaeta's investigation found Webb did provide tools to the workers. This is supported by the Sub Contractor – Employee Guidelines, which provides that "[a]ll company tools are to be cleaned, and returned in functioning operation." (Ex. A, p. 23). Gaeta also referred to the Pre-Audit Questionnaire completed by Webb, which indicates the employer provided: expense

reimbursements for company vehicles and other things depending on the job. (Ex. 9, p. 23). In addition, Webb reported the Employer provided meals and lodging to the workers. (Id.). Although, Webb testified that the reimbursements have varied over the years. (Webb Testimony). Nevertheless, the existence of reimbursements tend to show the workers were employees and not independent contractors. (Gaeta Testimony).

4) Employer's Right to Discharge & Employee's Right to Quit, 871 – 23.19(1) & (3). Gaeta concluded in her October 16, 2023 Audit Results letter that the evidence showed Webb could discharge a worker without incurring liability. (Ex. 6, p. 10). This would tend to indicate an employer/employee relationship. There was no evidence that discharging a worker would result in a breach of contract causing the Appellant to be potentially liable for damages, such as would exist in an independent contractor relationship. Likewise, there was no evidence that a worker would incur any liability due to breach of contract if the worker chose to quit. Gaeta testified regarding the sub-contractor agreement provided by Webb, the agreement states that drug use or distribution of drugs "while on the clock . . . will be a [sic] automatic termination of position and immediate removal from the jobsite with potential loss of wages . . ." (Ex, A, p. 18). Gaeta testified that if the only loss is wages, as described in this agreement, this would tend to indicate the worker is an employee and not an independent contractor. Typically, if an independent contractor is removed from a jobsite before completing a job, it is likely to be due to a material breach of the contract, and the contractor is exposed to being held liable for damages to the sub-contractor. In addition, the sub-contractor, when removed from a jobsite, is typically held responsible for completing the job by supplying another company to complete the job, to mitigate against being held liable for damages to the contractor. Gaeta found nothing in her investigation to support this type of contractor-sub contractor agreement.

Webb testified that whether a worker could be discharged without incurring liability likely depends on the situation, and he has only been in that position a few times.

5) Continuous Relationship Between Workers and Appellant Company, 871 – 23.19(2). Gaeta found a general continuing relationship existed between some of the workers and the Appellant company. (Ex. 8, p.18). Gaeta testified that she found several workers were engaged in work for the Appellant company over a period of several years. (Ex. 8, p. 20). A continuing relationship tends to show an employer-employee relationship, rather than an independent contractor relationship in which the independent contractor is engaged to complete a particular job. Gaeta stated that ultimately the length of time is not controlling, and an individual worker may be an employee even if they only work one hour. (Gaeta Testimony). She further testified that a person who works for multiple entities, works a flexible schedule, works part-time, and/or who works a different number of hours from week to week, may still be considered to be an employee. (Id.).

Webb countered that it is common in his industry to have independent contractors maintain long lasting relationships with companies and that he personally has had several long relationships with various companies to perform work for them as needed.

6) Workers' Inability to Realize a Profit or Loss, and not making their services available to the public , 871 – 23.19(1) & (3). Gaeta found in her Audit Results letter that the workers did not submit bids or invoices for the work they performed. (Ex. 10, p. 25). This tends to support the conclusion that the workers are employees and not independent contractors for the obvious reason that employees do not bid on jobs and do not submit an invoice for work performed.

Web testified that there have been times in the past when workers submitted bids and invoices for jobs, but that he does not have any documentation to support that claim. He did not submit a single document showing even one invoice or bid from a worker in this case. Also, it was not clear if any bids or invoices Webb referred to were claimed to have been submitted during this audit period. Also, Webb's response to the audit inquiry was that none of the workers submitted invoices and he did not find any of the workers via submission of a bid. (Id.). This would support Gaeta's conclusion that at least for this audit period, no invoices or bids were submitted by any of the subject workers. Again, this tends to show the workers were employees and not independent contractors.

Gaeta testified that she saw no evidence that any of the workers could have incurred a loss from working for the Appellant company, they simply made wages, again indicative of an employee, not an independent contractor, who depending on the circumstances in a particular job, may realize a profit or a loss.

In addition, the workers did not advertise their services to the general public, and, did not have a contractor's registration, which is required in the State of Iowa to perform this type of work. (Ex. 6, p. 10). Gaeta testified that Iowa Code 91C.2 requires a contractor engaged in the type of work done by these workers, to be registered contractors with the State of Iowa. None of the workers in this case were so registered, again indicating they are more likely employees than independent contractors. Also, there was no evidence the workers advertised or offered their services to the general public and as mentioned previously the individual workers did not have individual business insurance. (Ex. 10, p. 25).

Webb testified that whether the workers offer their services to the public or had a contractor registration is their choice, not his. He said whether they offer their services to the general public is probably dependent on how busy they want to be. He also stated in reference to the workers not providing invoices that he does not have good records for his business due primarily to moving several times in the recent years, and he has simply lost track of those documents. He admitted that he was not as "on top of things" as he should have been. (Webb Testimony).

Webb stated that his understanding of whether the workers could sustain a profit or loss to be "primarily tax related" and concern a profit and loss statement. However, this is a misunderstanding of the concept. Whether the worker reports a profit or loss for tax purposes is separate from whether the worker could sustain a profit or a loss from doing a particular job. When a person cannot sustain a loss, because they are working at an hourly rate only, they look more like an employee than an independent contractor, because an independent contractor typically bids a job, completes the job, gets paid for the job, and then is able to determine whether the payment received exceeds the expenses and a profit or loss was realized.

Webb stated that his failure to send the workers 10-99's was due to a "long period of time when I was not current on my taxes," essentially saying that the failure to provide the 10-99's was his and is not indicative of whether the workers should have received them. Webb testified that he has recently engaged a professional accounting office to assist his business and these things will be made more clear in the future.

7) Other factors, Webb provided text messages in support of his position that the workers did work for others, not just his company. However, Gaeta noted that some of the text messages are from 2023 and not relevant to the time period of the audit in this case. Others involve workers who were not working for the Appellant at the time the text message was sent. Also, Gaeta testified that working for multiple employers is not necessarily an indication the worker is an independent contractor because workers can be employees of multiple employers.

Gaeta found no indication that a worker could bring assistants to the job. An independent contractor can send whomever they chose, whereas an employee is trading their own labor for wages. In this case, there was no indication that any of the workers had any other workers beyond themselves working for them. (Ex. 10, p. 25). In other words, the workers in question had no one else they could have sent in their place or brought to the jobsite as an assistant. Again, this indicates an employee rather than an independent contractor. Webb testified that workers did occasionally bring assistants to the worksite, but he did not explain why he completed the audit information indicating that each worker only had themselves and no additional workers.

Considering the right to direct and control the workers, from the information regarding pay, it appeared to Gaeta, the Appellant directed when and how much the workers were paid. There was no evidence Gaeta found to suggest the workers could direct or control their own work or refuse to accept any jobs assigned to them. In addition, the Sub Contractor – Employee Guidelines submitted by Webb provided specific work rules limiting the use of cell phones during work hours, setting the work schedule including specific breaktimes and lunchtimes, directing the type of clothing to be worn and stating that "other company clothing is not allowed," and forbidding smoking or vaping on or near jobsites, without regard to the client's rules. (Ex. A, pp. 22-23).

Gaeta testified that she did not believe there was any malicious intent on the part of the Appellant to avoid unemployment insurance tax, but that the evidence when viewed in the whole supports a conclusion the workers were employees and not independent contractors.

LAW AND ANALYSIS

For purposes of unemployment compensation, an "employer" is defined 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. Iowa Code § 96.19(16)(a). "Employment" is defined as service performed for wages or under any contract of hire, written or oral, express or implied. Id. § 96.19(18)(a). "Services performed by an individual for wages shall be deemed to be employment . . . unless and until it is shown to the satisfaction of the department that such individual has been and will continue to be free from control or direction over the performance of such services,

both under the individual's contract of service and in fact." Id. § 96.19(18)(f)(1). The employer is specifically given the burden of proof. 871 Iowa Administrative Code ("I.A.C.") § 23.55.

IWD promulgated administrative rules to expound on the circumstances that give rise to an employment relationship as opposed to an independent contractor status. Under the governing rules, "[t]he 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." Id. § 23.19(1). Continuing:

> 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. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules.

Id. § 23.19(1). Other considerations exist:

> 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.
>
> 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.
>
> 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.
>
> 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.

Id. §§ 23.19(2)-(5). As is evident from the considerations of all these factors, the determination of the existence of an employment relationship turns on "the particular facts of each case." Id. § 23.19(6). "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." Id. § 23.19(8).

In this case, IWD's decision with respect to the 12 workers in dispute should be affirmed. As an initial matter, all of the disputed workers had a similar relationship with the Appellant, and as such, it is appropriate to collectively look at their relationship with the company. With respect to Appellant's control and direction over the work, the Sub Contractor-Employee Guidelines are highly suggestive of an employee/employer relationship, in which the employer sets forth the hours to be worked, the break times and lunch times, and the specific times for those breaks. In addition, controlling the clothing to be worn and specifically excluding other company clothing is suggestive of an employer/employee relationship. In addition, the workers were paid on an hourly rate, and received payment on a weekly basis, again suggesting an employer/employee relationship. Also, there was no evidence the workers could realize a loss on any job they performed, being paid hourly and with their expenses reimbursed, including potential use of a company vehicle. The fact that the Appellant produced W-9's and other documents in an effort to show the workers were independent contractors is not controlling, the controlling evidence is based on what the workers actually did, how they performed with work and under whose direction and control. In this case, based on the above factual findings, the greater weight of the evidence supports the conclusion that the workers were, in fact employees and not independent contractors. Accordingly, IWD's decision is AFFIRMED as to the 12 employees in dispute.

DECISION

The appeal is AFFIRMED as to the 12 employees in dispute. IWD shall take any further action necessary to implement this decision.

IT IS SO ORDERED.

Dated this 3rd day of May, 2024.

Toby J. Gordon
Administrative Law Judge

cc: United Trades Group LLC, Tory Webb, [redacted] (by Email and mail)
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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.[1]

1 IAC 871—26.17(5)

Case Title: UNITED TRADES GROUP (UTG), LLC V. IOWA WORKFORCE DEVELOPMENT

Case Number: 24IWDM0014

Type: Proposed Decision

IT IS SO ORDERED.

Toby Gordon, Administrative Law Judge