

Iowa Department of Inspections and Appeals
Administrative Hearings Division
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

Justin South)	
South Construction and Insulation LLC)	Case No. 22IWDM0004
151 Forrest Ave.)	
Denver, IA 50622)	
)	
Appellant,)	
)	
v.)	ADMINISTRATIVE LAW JUDGE
)	DECISION
Iowa Workforce Development,)	
)	
Respondent.)	

STATEMENT OF THE CASE

South Construction and Insulation, LLC (“South Construction”), the appellant, appealed from two findings by Iowa Workforce Development (IWD): (1) that payments made to member Justin South in excess of his percentage of ownership of a multiple-member LLC should be reported as wages; and (2) that an employer-employee relationship existed between South Construction and various workers. The matter was transmitted by IWD to the Administrative Hearings Division to schedule a contested case hearing. A telephone hearing was held on June 6, 2022. IWD was represented by its attorney, Jeffrey Koncsol. Field auditor Deborah Pendleton appeared and testified for IWD. Supervisor Barbara Corson appeared but did not testify. South Construction was represented by attorney Luke Jenson. Justin South, Randa South, Keith Bergmeier, and Matt Henry appeared as witnesses on behalf of South Construction.

IWD submitted its 93-page Appendix, which includes the decision letter, the appeal letter, IWD’s synopsis, and other evidence. South Construction submitted two exhibits, which were admitted without objection.

ISSUES

Whether member Justin South’s wages/payments in excess of his percentage of ownership should be reported as wages.

Whether an employer-employee relationship existed between South Construction and Insulation L.L.C., Keith Bergmeier and other workers performing services for South Construction and Insulation L.L.C.

FINDINGS OF FACT

As its name suggests, South Construction performs construction and insulation services. It is organized as a limited liability company with two members: Justin and Randa South, each of whom has a 50% share in the company. (App. 27). IWD determined Justin South was paid out of proportion to his membership share. The two members received the following remuneration from South Construction:

Member	2016	2017	2018	2019	2020
Justin South	\$30,700	\$38,550	\$50,000	\$51,195.65	\$103,195.65
Randa South	\$0	\$7,647	\$17,500	\$18,200	\$38,850

(App. 12).

IWD also investigated whether workers who performed services for South Construction were employees or independent contractors. The workers whose services were examined are Keith Bergmeier, Matt Henry, and Ryan Rieter.

Bergmeier completed a questionnaire to determine his status. He reported he was an independent contractor with his own company. He reported he performed work under his own name, he was not required to attend any meetings, he was engaged for specific jobs, South Construction did not have the right to direct and control the manner in which his services are performed, and South Construction did not have priority over his services. When asked who provided equipment, supplies, materials, tools, and a vehicle, Bergmeier answered that both the firm and the worker supply all of the above. He reported being paid by the job. Bergmeier reported he could incur financial risk or loss. He reported benefits were not available to him from South Construction. He reported either the firm or worker could end the relationship at any time without incurring liability or penalty. He reported he was able to perform similar services for others during the same time period, and that there were no agreements preventing competition between the firm and the worker. A question asked, "Under whose name is the advertising placed?" He answered "n/a" on the questionnaire and both his and Pendleton's testimony suggested he does not advertise. (App. 78-82; Bergmeier testimony; Pendleton testimony).

Henry likewise completed a questionnaire. His responses were nearly identical. (App. 83-87). Rieter did not complete a questionnaire.

Bergmeier and Henry each had contractor registrations, and each had insurance for their businesses. (App. 32-33, 38-41).

Bergmeier received a Paycheck Protection Program (PPP) loan during the ongoing COVID-19 pandemic. (Ex. 1).

The above facts mostly suggest these workers were independent contractors. That notwithstanding, following Pendleton's investigation, IWD concluded the workers were employees.

Pendleton did not find any evidence Bergmeier performed services for other businesses. She noted that he reported he cannot and does not hire assistants. She found he does not issue invoices to South Construction. While he indicated he was paid by the job, the evidence she found was that he was paid a regular amount at regular intervals. For example, Bergmeier received checks for \$800 or \$1000 for several weeks in a row, and the memo of those checks included the note "pay" plus a time period of a week. Pendleton also found Bergmeier had received reimbursement from South Construction for a class he attended. Pendleton was also unimpressed by Bergmeier's business insurance. She testified it was "not a large financial investment," suggesting it should not weigh heavily in the analysis, and she further noted Bergmeier did not have worker's compensation insurance. Similarly, Pendleton reported the fact of a contractor registration is not a factor she weighs heavily in her decision. And, similarly, Pendleton testified the PPP data did not affect her decision because both employees and independent contractors are eligible for PPP loans. (Pendleton testimony; App. 42-47, 67-75).

Virtually the same analysis applies to Henry. Pendleton's conclusions differed only slightly with respect to him. He also did not hire assistants or invoices. He was paid at regular intervals. He had received reimbursement for attending a class. He was reimbursed by South Construction for his contractor registration. Pendleton presumably discounted Henry's contractor registration and business insurance for the same reasons she gave when analyzing Bergmeier's. Henry also received weekly checks from South Construction with a time period listed in the memo section of the check. (Pendleton testimony; App. 42-47, 67-75).

There is less information in the record about Rieter. South Construction wrote checks with the memo "Ryan pay." (App. 53-66). That appears to be the extent of the information presented about him.

At hearing, Bergmeier testified he was able to turn down jobs from South Construction. He had a set pay rate (\$200 per day) which accounted for the uniformity of the paychecks he received. He testified during multi-week projects he would be paid every week, not just at the conclusion of the job. He testified he occasionally brought his son to work as a helper, albeit not often. South Construction did not offer him training, advice, guidance, or evaluate the work he performed for the company. (Bergmeier testimony).

Henry also testified he was able to turn down work from South Construction. Henry pointed to a period of approximately a month where he did not work for South Construction and was not paid. (Henry testimony).

The Souths' testimony was in accord. (J. South testimony; R. South testimony).

CONCLUSIONS OF LAW

LLC remuneration. An "employer" is any employing unit which paid wages for service in employment. Iowa Code § 96.1A(14)(a). An "employing unit" is any type of organization that has in its employ one or more individuals performing services for it within Iowa. Iowa Code § 96.1A(15). "Employment" means service performed for wages or under any contract of hire, written or oral, expressed or implied. Iowa Code § 96.1A(16)(a). Employment also means any service performed by a member of a limited liability company. Iowa Code § 96.1A(16)(a)(8).

23.3(1) "Wages" means all remuneration for personal services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash. Wages also means wages in lieu of notice, separation allowance, severance pay, or dismissal pay. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rule 23.2(96).

23.3(2) The term "wages" shall not include:

....

j. Remuneration paid to members of limited liability companies based on membership interest. The term "wages" shall not include remuneration paid to a member of a limited liability company based on a membership interest in the company provided that the remuneration based on membership interest is allocated among members, or classes of members, in proportion to their respective investments in the company. The term "wages" shall not include any remuneration for services performed in lieu of a contribution of cash or property to acquire a membership interest in the limited liability company. See Iowa Code sections 96.19(18a)(9) and 96.19(41e). If the amount of remuneration attributable to membership interest or the purchase of a membership interest and the amount attributable to services performed cannot be determined, the entire amount of remuneration shall be considered to be based on the services performed.

Iowa Admin. Code r. 871-23.3; *see also* Iowa Code § 96.1A(40). The burden of proof rests with the employer or employing unit. Iowa Admin. Code r. 871-23.55.

Here, as South Construction argues, the remuneration based on the members' membership interest is not "wages." But, every year, Justin South has income in excess of the remuneration Randa South receives. That means South Construction remunerated Justin South in excess of that which would have been paid to him based solely on his membership interest. That excess remuneration was for services performed by a member of an LLC. See Iowa Code § 96.1A(16)(a)(8). In other words, it was for employment. *Id.* As such, it must be treated as wages. On this issue, IWD's decision should be affirmed.

Employee-employer relationships. "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't Servs.*, 540 N.W.2d 430, 434 (Iowa 1995). "An independent contractor represents the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." *Meredith Publ'g Co. v. Iowa Emp't Sec. Comm'n*, 6 N.W.2d 6, 10 (Iowa 1942).

The factors used to determine whether a worker is an employee or independent contractor are set forth in the Iowa Administrative Code. See Iowa Admin. Code r. 871-23.19. I will now discuss the factors set forth in the administrative rule.

23.19(1).

"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. 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. Professional employees who perform services for another individual or legal entity are covered employees." Iowa Admin. Code r. 871-23.19(1).

South Construction does not appear to have exercised control over Bergmeier and Henry. They could show up to job sites when they wanted. They used their own tools for most of their work. They could decline jobs if it suited them. Neither Justin nor Randa South offered training, instruction, or reprimands based on their job performance. (It does sound like occasionally customer complaints would make their way to Bergmeier and Henry via Justin South, but that is not Justin South exercising control.) There is no evidence South Construction could discharge

these workers. This factor cuts in favor of a finding that Bergmeier and Henry were independent contractors.

23.19(2).

“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.” *Id.* r. 871-23.19(2).

South Construction’s witnesses asserted these workers were performing specific jobs and were free to take others as they saw fit. But that does not appear to be what happened in practice. In practice, these workers performed work continuously for South Construction. South Construction argues this is nothing more than evidence of a good working relationship. The tribunal thinks it goes beyond “good working relationship” into something at least approaching employment. This factor suggests an employee-employer relationship.

23.19(3).

“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.” *Id.* r. 871-23.19(3).

Bergmeier and Henry reported they could make a profit or loss. Even accepting that in theory, it does not seem to be the reality of their situation. When they were hired continuously by South Construction for every job or nearly every job South Construction performed, it is hard to imagine them taking on any real financial risk. South Construction also reimbursed them for at least one class they took and for contractor-registration fees. This factor cuts in favor of an employee-employer relationship.

23.19(4).

“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.” *Id.* r. 871-23.19(4).

Bergmeier and Henry don’t appear to fall precisely in either bucket the rule offers, but the tribunal concludes they are closer to the “employee” bucket here. They were paid on a weekly basis. It was based on a rate—Bergmeier said his was a daily rate. It was not for a job, exactly, which seems to be the gist of the rule’s “independent contractor” consideration. This hews closer to an employee-employer relationship.

23.19(5).

“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.* r. 871-23.19(5).

Bergmeier and Henry could bring assistants out to job sites. They did not do so very often, but the credible evidence was that they could do so if they chose. This suggests they were independent contractors.

Discussion.

A presumption exists in favor of a finding of employment. *Id.* r. 871-23.19(6). As the Supreme Court of Kansas has persuasively put it, “the goal is not to simply compare the number of factors favoring one result against the number of factors favoring the other result. To the contrary, we are tasked with viewing the factors as a whole.” *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 80 (Kan. 2014).

As for Rieter, there was virtually no evidence presented on his case. The tribunal cannot assume anything about the nature of his relationship based on the other two workers at issue here. The employer bears the burden. With no evidence to go on, IWD’s decision as to Rieter is affirmed.

As to Bergmeier and Henry, the tribunal concludes they are independent contractors. This is a close decision, as suggested by the factors above. But on the most important factor, the right of control, the tribunal is satisfied that South Construction exercised no control over Bergmeier and Henry. The weight of that factor overcomes the others suggesting an employee-employer relationship.

In sum:

- IWD’s finding on LLC remuneration is affirmed.
- IWD’s finding that Ryan Rieter is an employee is affirmed.
- IWD’s findings that Keith Bergmeier and Matt Henry are employees are reversed.

DECISION

IWD’s decision is affirmed in part and reversed in part as described above. IWD shall take any steps necessary to implement this decision.

Dated this June 14, 2022.



Joseph Ferrentino
Administrative Law Judge

cc: South Construction and Insulation L.L.C c/o Justin South, Appellant (by mail and email)

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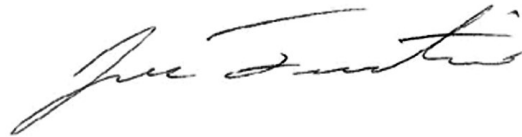
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Case Title: JUSTIN SOUTH, SOUTH CONSTRUCTION AND INSULATION,
L.L.C. V. IOWA WORKFORCE DEVELOPMENT
Case Number: 22IWDM0004
Type: Proposed Decision

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Joe Ferrentino", written in a cursive style.

Joseph Ferrentino, Administrative Law Judge