

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

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Jon Jeff Werle	)	
2460 Oakridge Rd	)	
North Liberty, IA 52317,	)	DIA Case No. 20IWD0015
	)	
Appellant,	)	
	)	
v.	)	<b>ADMINISTRATIVE LAW JUDGE</b>
	)	<b>DECISION</b>
Iowa Workforce Development,	)	
	)	
Respondent.	)	

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**STATEMENT OF THE CASE**

IWD completed an investigation and determined that an employer-employee relationship existed between Complete Property Maintenance Services (CPMS), LLC., and thirteen of its workers. After CPMS owner Jon Werle appealed, IWD transferred the case to the Iowa Department of Inspections and Appeals, Division of Administrative Hearings, to schedule a contested case hearing. A contested case hearing was held on February 17, 2020 at the Wallace State Office Building in Des Moines. Mr. Werle appeared and testified while attorney Matt Engelstad represented IWD. Field Auditor Lisa Gaeta appeared and testified on behalf of IWD. IWD exhibits 1-82 were admitted into the record. Werle's unlabeled exhibits were also admitted.

**ISSUE**

Whether IWD properly determined that an employer-employee relationship existed between CPMS and thirteen workers.

**FINDINGS OF FACT**

This matter began when an IWD field auditor received a public tip from a past worker of CPMS who indicated he had been doing general maintenance at apartment buildings, house flipping, installing insulation and drywalling. That worker also reported that CPMS set his work hours, provided tools for jobs, and that he was paid weekly. In response to this tip, the auditor mailed to Mr. Werle an Audit Notification Letter and a Pre Audit Questionnaire to audit 2013 through 2018. Eventually, field auditor Lisa Gaeta was assigned to complete an audit in this case.

IWD received certain documents in response to the inquiry from CPMS' accountant Tim Krusey and the field auditor identified a number of workers who may be considered employees. That auditor then sought from CPMS additional information about them.

Ms. Gaeta also mailed out nine separate Questionnaires to Determine Status of Worker (QDSW) to the workers in question. Based on either those questionnaires or phone calls with the workers, Gaeta determined that thirteen specific workers were in fact employees and not independent contractors. Those workers and the facts that led Gaeta to her conclusions are set forth here:

**Lonnie Melvin:** Gaeta spoke to this worker on the phone. He reported to doing lawn mowing and other miscellaneous jobs for CPMS from 2014 through 2018. According to Melvin, he was paid by the hour on a weekly basis and he had to fill out a time card. CPMS provided him with all the tools, including a lawnmower and fuel, to complete his job. He was not independently registered with the Iowa Secretary or State, does not operate an independent business, and does not hold his services out to the public. Krusey, who is CMPS' accountant, though, had reported as part of the audit that Melvin was an insulation and drywall contractor for CPMS.

**Austin McMillan:** Gaeta spoke with McMillan on the phone. From 2015 through 2017 McMillan also did lawn mowing, insulation, and other miscellaneous work for CPMS, who provided him all the tools for the job, including lawn mowers. He was not registered with the Secretary of State, had no contractor's registration, and no business insurance. He did not operate an independent business and did not hold himself out to the public for work. Krusey had reported McMillan was an insulation contractor.

**Andrew DeVries:** DeVries told Gaeta by phone that he mowed lawns, installed drywall, and scrapped for CPMS. He was paid an hourly rate, received weekly checks, and submitted a time card each week, which included arrival, lunch, and departure times. He did not operate an independent business and did not hold himself out to the public for work. Krusey had report that DeVries was a landscaper and mower.

**Dillon Schiltz:** DeVries reported to Gaeta that he also mowed lawns, installed drywall, and scrapped for CPMS in 2015 and 2016. He filled out a time card and received a weekly paycheck for his hourly rate. We was provided with a mower and fuel for his jobs. He was not registered or insured as a contractor, did not operate an independent business and did not hold himself out to the public for work. Krusey had identified Schiltz as a "landscape mower."

**Phillip Adolph:** Adolph told Gaeta via telephone that from 2014 through 2017 he did cleanup and "odds and ends" for CPMS. He had to submit weekly time cards that included arrival, lunch, and departure times. He was paid an hourly rate and received weekly paychecks. He did not operate an independent business, and was not a registered or insured contractor. He also told Gaeta that he never invoiced CPMS. Krusey had reported Adolph as providing drywall services.

**Chase Bickert:** Andrew DeVries told Gaeta during his phone interview that Bickert did insulation work for CPMS and was paid an hourly rate. Bickert worked in 2014 and 2015, and received 20 weekly checks during that time. He did not otherwise have a

business and was not registered as a contractor. Krusey said that Bickert was an insulation contractor.

**Justin Boyd:** From the records supplied to IWD, Gaeta learned that Boyd worked for CPMS from 2014 through 2017 and was paid weekly, receiving 52 checks in 2015, 50 checks in 2016, and 2 checks in 2017. He did not have a Secretary of State registration, a contractor's registration, or business insurance during this time. Krusey had reported Boyd was an insulation contractor.

**Alex Breiner:** Breiner received 25 weekly checks in 2015 and 40 weekly checks in 2016. He was not registered with the Secretary of State, had no contractor's registration, and no business insurance. Krusey had reported Breiner was an insulation contractor.

**Rugo Gathua:** CPMS records showed that Gathua worked there from 2017 through 2017, receiving 40 weekly checks in 2015, 29 checks in 2016, and 6 checks in 2017. He was not registered with the Secretary of State, had no contractor's registration, and no business insurance during that time. Krusey had reported that Gathua had provided landscaping and mowing services.

**Anthony Williams:** Williams worked for CPMS in 2015, receiving 12 weekly checks from 2/13/15 through 5/1/15. He was not registered with the Secretary of State, had no contractor's registration, and no business insurance during that time. Krusey had reported that Williams was a drywall contractor.

**Alex Darby:** Darby had worked for CPMS in 2014. He was not registered with the Secretary of State, had no contractor's registration, and no business insurance during that time. Gaeta found no other evidence that Darby operated an independent business or held out his services to the public. Krusey had reported that Darby was an insulation contractor.

**Eric Scott:** Scott had worked for CPMS in 2014. He was not registered with the Secretary of State, had no contractor's registration, and no business insurance during that time. Gaeta found no other evidence that Darby operated an independent business or held out his services to the public. Krusey had reported that Darby was an insulation contractor.

**Mark Hightower, Jr.:** Hightower had worked for CPMS in 2014. He was not registered with the Secretary of State, had no contractor's registration, and no business insurance during that time. Gaeta found no other evidence that Hightower operated an independent business or held out his services to the public. Krusey had reported that Hightower was a carpet and insulation contractor.

On August 28, 2019, IWD issued to Werle the results of its unemployment insurance tax audit. Its main finding was that the thirteen workers noted above should have been

classified as employees. Accountant Tim Krusey requested an appeal of this determination on behalf of Werle and CPMS.

On appeal from this determination, Werle generally disputed that the 13 workers were employees, claiming instead that they were independent contractors. Werle referred to a similar IWD audit in 2014 in which he believed the issued had been fully resolved. Apparently in response to this audit, he thereafter started having his new worker sign a written form agreeing that they were independent contractors, that their services were provided without direction or domination by CPMS, and that they were responsible for their own taxes. Werle also noted that he provided 1099 forms to these workers. He denied that he made any of the workers fill out a time card, but he did admit that he provided the mowers and gas. Finally, he said that he only paid them weekly because [REDACTED] they needed their money for the weekends.

### CONCLUSIONS OF LAW

IWD oversees the unemployment compensation fund in Iowa, which is governed by Iowa Code chapter 96.<sup>1</sup> IWD's Director administers Iowa Code chapter 96 and is charged with adopting administrative rules.<sup>2</sup> 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.<sup>3</sup> Services performed by an individual for remuneration are presumed to be employment, unless proven otherwise.<sup>4</sup> An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.<sup>5</sup> 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.<sup>6</sup>

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."<sup>7</sup> An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it in Iowa.<sup>8</sup> The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."<sup>9</sup> Employment includes service performed by "[a]ny individual who, under the

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<sup>1</sup> Iowa Code § 96.9(1).

<sup>2</sup> *Id.* § 96.11(1).

<sup>3</sup> *Id.* § 96.7(4).

<sup>4</sup> 871 IAC 23.19(6).

<sup>5</sup> Iowa Code § 96.19(18)*f*; *Id.* 22.7(3).

<sup>6</sup> 871 IAC 22.19(7).

<sup>7</sup> Iowa Code § 96.19(16)*a*.

<sup>8</sup> *Id.* § 96.19(17).

<sup>9</sup> *Id.* § 96.19(18)*a*.

usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.”<sup>10</sup>

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.”<sup>11</sup> 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 unemployment context.<sup>12</sup> 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.<sup>13</sup> IWD has also adopted a number of rules with factors to consider in determining whether a worker is an independent contractor or employee.<sup>14</sup>

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.<sup>15</sup>

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

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<sup>10</sup> *Id.* § 96.19(18)a(2).

<sup>11</sup> *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)).

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

<sup>13</sup> 871 IAC 23.19(6).

<sup>14</sup> *Id.* 23.19.

<sup>15</sup> *Id.* 23.19(1).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service are characteristic of an employer.<sup>18</sup> “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.”<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> Independent contractors often have significant investment in real or personal property that they use in performing services for others.<sup>24</sup> Independent contractors have the right to employ assistants with the exclusive right to supervise their activity and completely delegate work.<sup>25</sup>

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

## ANALYSIS

As noted above, services performed by an individual for remuneration are presumed to be employment, unless proven otherwise and the business bears the burden of proving

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* 23.19(2).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* 23.19(4).

<sup>23</sup> *Id.* 23.19(3).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* 23.19(5).

<sup>26</sup> *Id.* 23.19(2).

<sup>27</sup> *Id.* 23.19(1).

<sup>28</sup> *Id.*

the individual or business is exempt from coverage under Iowa Code chapter 96. In this case, Werle simply has not met his burden to rebut the presumption that the thirteen workers are employees of CPMS. The department's decision should be affirmed.

Significantly, all thirteen workers were paid an hourly wage. In other words, their labor was purchased. The fact that they had to report coming and going times in addition to lunch breaks shows that these workers were subject to the control of CPMS. They were not paid one sum for an entire piece of work and they did not bid jobs. Independent contractors are generally paid a lump sum for an entire piece of work. The fact that these workers were paid hourly reflects the status of an employee. CPMS provided all mowers and gas for the workers. This also leads one toward the status of an employee because independent contractors would generally supply their own tools and equipment. And, there is no evidence that any of these workers could have sustained any financial loss in the work they performed for CPMS.

There is no evidence that any of these thirteen workers held any sort of professional license for any of these drywall, insulation, or other services. They did not hold themselves out for work to the public as an independent contractor generally would. They held no business insurance and did not appear to operate any independent businesses. This again argues against a finding that these people were independent contractors.

Werle placed great emphasis on the form that he made workers sign purporting to affirm that they were independent contractors, worked at their own discretion, and did not act under the domination of CPMS. However, the self-given description of the parties' work relationship is not determinative, especially given the evidence that would lead to an inference that belies this statement.

Tim Krusey, CPMS' accountant, provided to the IWD auditor descriptions of the work allegedly done and the roles played by these thirteen workers. For example, he described Lonnie Melvin as a drywall and insurance contractor. However, Melvin told Gaeta that he mowed lawns and other miscellaneous jobs. Likewise, Krusey reported that Phillip Adolph was a drywall contractor; however, Adolph reported that he did cleanup and odds and ends. These descriptions by Krusey are not credible and do not match with other, more believable, facts in the record.

Here, the great weight of the evidence leads to a conclusion that these thirteen workers were employees of CPMS. Werle has not sustained his burden of proof to establish otherwise.

## **DECISION**

Iowa Workforce Development correctly determined that an employer-employee relationship existed between CPMS and the thirteen workers at all relevant times, and

its decision is AFFIRMED. Iowa Workforce Development shall take any steps necessary to implement this decision.

Issued this 19<sup>th</sup> day of February, 2020.

A handwritten signature in blue ink that reads "David Lindgren". The signature is written in a cursive style with a long, sweeping underline.

David Lindgren  
Administrative Law Judge  
(515) 281-7148  
David.lindgren@dia.iowa.gov

CC: Jon Jeff Werle (by mail)  
Tim Krusey (by mail)  
David Steen (by email)  
Matthew Engelstad (by email)  
Justin Knudson (by email)  
Lisa Gaeta (by email)

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.