

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

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GO SIDING & ROOFING LLC,	)	
	)	DIA Case No. 18IWD0013
	)	
Appellant,	)	IWD Appeal No. 544634
	)	
v.	)	
	)	<b>ADMINISTRATIVE LAW JUDGE</b>
IOWA WORKFORCE	)	<b>DECISION</b>
DEVELOPMENT,	)	
	)	
Respondent.	)	

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Iowa Code §§ 96.19(18), 96.19(41)  
871 Iowa Administrative Code 23.19

**STATEMENT OF THE CASE**

Go Siding & Roofing LLC filed an appeal of seven decisions issued by Iowa Workforce Development (IWD) on November 9, 2017. In those decisions, IWD determined that an employer-employee relationship existed between seven workers and Go Siding & Roofing LLC, therefore the business is liable for unemployment insurance contributions for those seven employees.

The case was transmitted from IWD to the Department of Inspections and Appeals to schedule a contested case hearing. On February 5, 2018, a telephone hearing was held before Administrative Law Judge Laura Lockard. IWD was represented by attorney David Steen. Field auditor Daniel Noonan testified for IWD. Appellant Go Siding & Roofing LLC was represented by Ying Sa, CPA. Sa, Geraldo Maldonado, member of Go Siding & Roofing LLC, and Juan Luna testified for Go Siding & Roofing LLC. IWD submitted Exhibit A, with pages 1 through 154, which was admitted as evidence.

An interpreter was present to facilitate the participation of Maldonado; the interpreter provided interpretation from Spanish to English and English to Spanish.

**ISSUE**

Whether IWD correctly determined in its decisions dated November 9, 2017 that an employer-employee relationship existed between Go Siding & Roofing LLC and seven workers performing services for Go Siding & Roofing LLC.

## FINDINGS OF FACT

At some point prior to October 26, 2017, IWD received a tip from a member of the public that possible misclassification of employees was occurring with Go Siding & Roofing LLC (GSR), which is a construction company engaged in siding and roofing projects. Geraldo Maldonado is a member of GSR. Field auditor Daniel Noonan was assigned to conduct an audit. Once Noonan determined that GSR had an active unemployment insurance tax account, Noonan met with Eileen Lee, a CPA with Community CPA, who was the designated representative of GSR for the tax audit. During the meeting with Lee, Noonan reviewed the Form 1099s issued by GSR in 2016 and the business's check register. During the meeting, Noonan identified seven workers, six of whom were issued 1099s and one of whom was not issued a 1099 but was issued 33 checks during 2016, who he believed were possibly misclassified by GSR as independent contractors. The workers who Noonan believed may have been misclassified were Josue Gomez Dominguez, Juan Luna, Jemerson Perez, Daniel Rincon, Abner Dominguez, Henry Sosa, and Cesar Andia. GSR had reported three employees during tax year 2015: Andia; Perez; and Luna. For tax year 2016, those three workers were not identified as employees. (Exh. A, p. 13; Noonan testimony).

Form 1099s for tax year 2016 reflected that the following six workers were paid the following amounts by GSR in that year:

Josue Gomez Dominguez:	\$7,690
Juan Luna:	\$3,190
Jemerson Perez:	\$33,075
Daniel Rincon:	\$8,700
Abner Dominguez:	\$8,630 <sup>1</sup>
Cesar Andia:	\$45,220 <sup>2</sup>

No Form 1099 was provided for Henry Sosa in 2016, but checks written out to Sosa in 2016 by GSR totaled \$20,913. The total amount paid to all seven workers during tax year 2016 was \$106,505. (Exh. A, pp. 13, 47, 150-52; Noonan testimony).

During the audit process, IWD checked a number of databases, including the unemployment insurance tax database, Iowa Revenue database, and the independent contractor registration database maintained by IWD, to determine whether any of the seven workers in question had started their own businesses. IWD could not find any information indicated that any of the seven were operating their own businesses. (Exh. A, p. 13; Noonan testimony).

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<sup>1</sup> The synopsis prepared by Noonan indicates that Dominguez was paid \$33,075. The 1099 form produced by GSR reflects that he was paid \$8,630. There is no evidence to demonstrate Dominguez was paid \$33,075. (Exh. A, pp. 13, 150).

<sup>2</sup> The synopsis prepared by Noonan indicates that Andia was paid \$8,630. The 1099 form produced by GSR reflects that he was paid \$45,220. There is no evidence to demonstrate Andia was paid \$8,630. (Exh. A, pp. 13, 150).

After meeting with Lee, Noonan sent her an e-mail on October 26, 2017. In the e-mail, he requested detailed invoices on all the 1099 recipients for tax year 2016. He also asked what prompted GSR to change the status of Andia, Luna, and Perez from employees who received W-2s in 2015 to independent contractors who received 1099s in 2016. Additionally, Noonan indicated that he would need a completed Form 68-1092, Questionnaire for Determining Status of Worker, for each of the seven workers in question. Noonan included a blank questionnaire form in the e-mail. (Exh. A, p. 13).

On November 2, 2017, Lee sent an e-mail to Noonan that included invoices GSR received from some of the workers in question during 2016 and the completed questionnaires for all workers except Andia, who Lee indicated was on vacation. Lee noted that Abner Dominguez and Luna were not presently working for GSR, so it was difficult to get their signatures. Luna's questionnaire was signed, but the questionnaires of Abner Dominguez and Daniel Rincon were not signed. Lee also provided additional information about Andia, Luna, and Perez, who were classified as employees by GSR in 2015 and as independent contractors in 2016. According to Lee, Andia requested that GSR change his status; Luna started running his own company; and Perez works for others as well and requested that his status be changed. (Exh. A, p. 30).

At hearing, Maldonado testified that he obtained the information from all but one of the workers for the questionnaires IWD requested. Not all of the workers speak English, so Maldonado helped to translate the questions into English then write down each person's answers in English. According to Maldonado, Perez had his wife help him fill the questionnaire out. Luna testified that Maldonado came to his house with the questionnaire, and both Maldonado and his son helped him to answer the questions in English. No questionnaire was submitted for Andia. (Maldonado, Sa, Luna testimony).

All of the workers except Luna indicated that the worker acted as a sole proprietor when working for GSR in 2016. Luna indicated that he was a limited liability company (LLC). Generally speaking, the answers for all six of the workers who completed the questionnaires were similar, if not identical. They all indicated that they considered themselves to be self-employed or independent contractors, had a written agreement to that effect, were engaged for a specific job which they obtained through a bidding process, and reported to Maldonado once the job was completed. All indicated that they could hire assistants without notifying GSR and that the assistants were not under GSR's control. All of the forms indicated that the workers paid the assistants, but were reimbursed. All indicated they were paid by the piece, not hourly. All noted that GSR provides supplies and materials, but the worker himself supplies the necessary equipment. Several indicated that GSR reimbursed them for gas, while others noted that "ring bells" and lumber were reimbursed also. Gomez noted that he was reimbursed for gloves and boots. All checked the "yes" box in response to a question regarding whether GSR has the right to control the manner in which the services are performed, noting that this was stated in the job contract. (Exh. A, pp. 56-85).

After examining the completed questionnaires that were returned, Noonan believed that they were all completed by one individual with virtually the same answers. On this basis, he doubted the truthfulness of the answers provided in the questionnaires. This

played a role in his determination that there was an employer/employee relationship between GSR and the seven workers. (Noonan testimony).

IWD did not communicate to GSR or its representative that it did not find the questionnaires credible, nor did it attempt to obtain any additional information after receipt of the questionnaires from GSR or its representative. At some point, Noonan sent a letter to each of the seven workers involved in the audit. None of the workers responded back to Noonan. There was no attempt to interview any of the workers. (Noonan testimony).

As part of the audit, GSR also submitted invoices that it indicated several of the workers had provided for services rendered. Based on his review, Noonan concluded that the invoices were incomplete, undated, or altered. Additionally, Noonan determined that the invoices did not add up to what the workers were actually paid. On that basis, he determined that the invoices were not credible. (Noonan testimony).

On November 9, 2017, IWD issued seven decisions to GSR finding that the each of the seven workers identified above had an employee relationship with GSR during the 2016 tax year. The decisions list an “effective date” of July 1, 2014 and a “determination date” of September 30, 2014. (Exh. A, pp. 15-33).

The letter that Noonan sent to GSR along with the decisions stated the following finding:

**Finding 1:** A review of your employer’s records revealed that 7 worker[s] received payments totaling \$127,418 for the calendar year 2016 that were not classified as wages or reported to IWD on quarterly unemployment reports. Information provided indicated:

- The worker was performing duties in the regular service of the employer.
- The service provided by the worker was an integral part of the business.
- The worker did not have a financial investment in the business.
- The worker could end the relationship without incurring liability.
- The employer could fire the worker without incurring liability.

(Exh. A, p. 10).

GSR appealed the decision. In the appeal, GSR reported that it experienced a fire in its office on November 27, 2016, which resulted in the loss of some of the documents that would have been responsive to IWD’s audit requests. GSR submitted insurance documentation related to the fire. Additionally, GSR disputed the conclusions drawn by IWD regarding GSR’s right to direct and control the workers at issue. GSR asserted that it paid the workers at issue on a piece work basis and does not have a financial relationship with any assistants or subcontractors hired by the workers. Additionally, GSR asserted that the workers identified could make a profit or loss from the project,

had the right to hire assistants, and could take on projects from other contractors. (Exh. A, pp. 67-68).

At hearing, Maldonado testified that for workers who work as independent contractors, GSR pays by the square foot. Maldonado calculates at the beginning of a job how much he will pay per square foot. Maldonado does not specify a time frame during which the job must be done. Typically, he goes out to inspect the job three or four times to see the quality of the work. GSR is typically itself a subcontractor for another contractor on its jobs; the contractor above GSR provides the materials, such as shingles and siding. GSR allowed the workers in question to hire their own workers to complete jobs. At least one of the workers covered in the November 9, 2017 decisions, Juan Luna, brought in his own workers when working on jobs for GSR. All seven of the workers did work for other companies as well as for GSR. (Maldonado testimony).

Maldonado testified at hearing that he would prefer to hire employees, but that it is difficult to find workers who want to work as employees and do work only for GSR. The workers typically want to have their own company, so that they can hire other workers and subcontractors to assist with the work. Maldonado currently only has one employee, who he pays by the hour, and there is too much work for him and his one employee to complete; for this reason, he must engage other workers to assist with the jobs. For workers that he engages as independent contractors, Maldonado requires proof of liability insurance from each one. Workers engaged as independent contractors also have their own tools and truck. (Maldonado testimony).

Luna was an employee of GSR in 2015, but asked to be changed to independent contractor status in tax year 2016. When Luna was an employee, he was paid by the hour. He wanted to be paid by the square foot so that if he worked faster, he could make more money on the same job. When he was an employee, he and Maldonado worked together on the same jobs. When he changed classification in 2016, he sometimes worked with Maldonado, but other times did not. If Luna worked with Maldonado on the same job, they would divide up the area on the job and Luna would be paid for the square feet that he completed. Luna has his own tools and truck. (Luna testimony).

### **CONCLUSIONS OF LAW**

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.<sup>3</sup> “Employment” is defined as service performed for wages or under any contract of hire, written or oral, express or implied.<sup>4</sup> When an employer claims that any employment is not employment under the Iowa Employment Security Law, the burden is on the employer to prove the exemption claimed.<sup>5</sup>

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<sup>3</sup> Iowa Code § 96.19(16)(a).

<sup>4</sup> Iowa Code § 96.19(18)(a).

<sup>5</sup> 871 Iowa Administrative Code (IAC) 22.7(3), 23.55(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.”<sup>6</sup>

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>7</sup>

The Department’s regulations set out in some detail the factors to be considered in determining whether a worker is an employee or an independent contractor.<sup>8</sup> Factors that support the existence of an employer-employee relationship include:

- Right to discharge an employee without being held liable for damages for breach of contract;
- Furnishing of tools, equipment, material, and a place to work;
- Continuous performance of work for the employer;
- Payment of a fixed wage on a weekly or hourly basis.

Factors that support an independent contractor relationship include:

- Performance of a specific job at a fixed price;
- Following a distinct trade, occupation, business, or profession in which an individual offers services to the public to be performed without the control of those seeking the benefit of his or her training or experience;
- Unreimbursed expenses and fixed, ongoing costs regardless of whether work is currently being performed;
- Significant investment in real or personal property that is used in performing services for someone else;
- Right to employ assistants with the exclusive right to supervise their activity and completely delegate the work.<sup>9</sup>

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<sup>6</sup> *Gaffney v. Department of Employment Services*, 540 N.W.2d 430, 434 (Iowa 1995) (citations omitted).

<sup>7</sup> 871 IAC 23.19(1).

<sup>8</sup> See generally 871 IAC 23.19.

<sup>9</sup> *Id.*

The regulations also provide that if, upon examination of the facts of a case, an employer-employee relationship exists, the designation or description by the parties of their relationship as anything other than an employer and employee is immaterial.<sup>10</sup>

While there are factors in this case that fall on both sides of the employee/independent contractor line, the weight of the evidence supports the conclusion that the seven workers identified by IWD in the audit were independent contractors. I found Maldonado's testimony at hearing credible in its entirety. While three workers shifted in classification from employees to independent contractors between 2015 and 2016, Maldonado explained at hearing that the shift was not just a shift on paper, but actually resulted in different terms; specifically, the workers who were employees in 2015 and paid hourly were paid by the piece in 2016 and could hire their own assistants if they wished to do so, as well as perform work for other contractors. Additionally, the workers who were paid by the piece could set their own schedules and complete the work at their own pace; the faster they worked, the more they could earn. These workers supplied their own equipment and transportation and did not necessarily work at the same job site as Maldonado or his one employee. These workers did not continuously perform work for GSR; they performed work for other contractors as well.

It should be noted that IWD did not put much stock in the questionnaires that GSR submitted from each of the workers. I credited Maldonado's testimony that he assisted the workers in filling out the questionnaires, which explains the identical handwriting on almost all of the questionnaires. The workers in question were not necessarily native English speakers and it is credible that they required assistance to fill out a four page, detailed questionnaire written only in English. I note, as did IWD, that each of the workers answered "yes" to the question about whether GSR had the right to direct and control the manner in which services are performed. That answer, however, is not dispositive. In concluding that GSR did not have the right to control the manner and means of performance, I gave weight to the evidence highlighted in the preceding paragraph. Under these circumstances, IWD's decision that an employer/employee relationship existed between GSR and the seven workers identified was incorrect and must be reversed.

## **DECISION**

IWD's November 9, 2017 decisions are reversed. IWD shall take any action necessary to implement this decision.

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<sup>10</sup> 871 IAC 23.19(7).

Dated and mailed this 17th day of April, 2018.



Laura E. Lockard  
Administrative Law Judge

cc: Carie O'Brien, IWD (by e-mail)  
Nicholas Olivencia, IWD (by e-mail)  
David Steen, IWD (by e-mail)  
FIELD AUDITOR, IWD (by e-mail)

### **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.