

IOWA DEPARTMENT OF INSPECTIONS AND
APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS
Wallace State Office Building
DES MOINES IOWA 50319

Appeal Number: 13IWD017

Appellant (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**WISCH SYSTEMS, INC.
JOSEPH R. GETZ, PRESIDENT**

**IOWA WORKFORCE DEVELOPMENT
JIM MADDEN, FIELD AUDITOR**

JOE BERVID, IWD
NICHOLAS OLIVENCIA, IWD
CARIE O'BRIEN, IWD
MARIO RIKLE, PARTY
JEFFREY RICHTMAN, PARTY

**This Decision Shall Become Final, as of the date of
mailing stated below unless:**

1. Either party files a WRITTEN application for a rehearing WITHIN TWENTY (20) DAYS AFTER the date below. The written application must state the specific reasons for the rehearing and the relief sought. If the request for a rehearing is denied or if the rehearing decision is not satisfactory, either party may petition the District Court WITHIN THIRTY (30) DAYS of either action;
OR
2. Either party may petition the District Court WITHIN THIRTY (30) DAYS after the date below.

YOU DO HAVE THE RIGHT TO HIRE A LAWYER at your own expense to represent you in these proceedings.

(Administrative Law Judge)

September 6, 2013

(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

STATEMENT OF THE CASE

IWD completed an investigation and determined that an employer-employee relationship existed between Wisch Systems, Inc., Mario Rikle, and three other workers performing services for Wisch Systems. A Notice of Employer Status and Liability dated April 19, 2013 with an effective date of August 31, 2010 was sent to the employer. Joseph Getz, President of Wisch Systems, appealed the determination.

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 July 30, 2013. Getz appeared and testified on behalf of Wisch Systems. Field Auditor Jim Madden appeared and testified on behalf of IWD. IWD exhibits 1-105 were admitted into the record. Wisch Systems exhibits A-C were also admitted into the record.

ISSUE

Whether an employer-employee relationship existed between Wisch Systems, Inc., and four workers performing services for Wisch Systems.

FINDINGS OF FACT

This matter first came to the attention of IWD with a pair of missing wage assignments from Mario Rikle and Jeffrey Richtman, who had both performed work for Wisch Systems, Inc. [Wisch Systems. Wisch Systems designs and manufactures electronic control devices and has a facility located in Keokuk. Joseph Getz is the president of Wisch Systems. Field Auditor Jim Madden was assigned to investigate the question of whether the workers for Wisch Systems are employees or independent contractors. Even though the initial missing wage assignments only involved Rikle and Richtman, as the matter proceeded Madden's investigation came to center on four workers. They are noted here, along with their period of time working for Wisch Systems:

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- Mario Rikle – March 2010 through January of 2013
- Jeffrey Richtman – January 2012 through January of 2013
- Tom Jackson – October of 2011 through January of 2013
- Steven Seipel – [timeframe uncertain in the record]

As part of his investigation, Madden sent Rikle, Richtman, and Jackson a "Questionnaire for Determining Status of Worker." Only Rikle and Richtman filled them out. When Madden completed his investigation, he presented to Wisch Systems a "Synopsis of Investigation" in which he set forth his conclusion that an employer-employee relationship exists between Wisch Systems and the four above-named individuals.

Madden also set forth in that synopsis his rationale, which was based on the "20 common law elements" used by the IRS in making the employee determination. In summary, he particularly noted that all three received assignment and instructions from Getz, none of them could hire assistants to perform their services, they worked full time and during set hours, they do work on the Wisch Systems premises, they had not had expenses reimbursed, save for a computer that Rikle purchased Wisch systems provided all tools and materials, none of them stood to have a profit of loss from the business, none of them performed services for another entity, none offered their services to the general public, and all parties agreed they were subject to termination at will.

Madden also noted that Wisch Systems made all of these workers W-2 employees as of July 1, 2012. At that time, Getz sent emails that, among other things, required all to work full-time hours from 8:00 to 5:00 and take two fifteen minute breaks. He also provided a list of paid holidays.

Getz provided IWD with a typewritten statement describing Rikle's history with the company. In particular, Rikle performed website design and media design for Wisch

Systems. According to Getz, they originally expected Rikle would work for one to two years and that they would pay him \$10 per hour. Rikle provided website development software and he repaid Wisch Systems for a computer that it purchased for him. Getz claims he only controlled the final product and not the process, and Rikle frequently worked from home. Only after he was very satisfied with the work Rikle was doing and other work requirements were changing, Getz decided to move him from a contractor to an employee. He does not believe Rikle's work was "key" to the company.

Rikle drafted a written explanation of his tenure and work for Wisch Systems. In it, he explained that when he came to work for Wisch Systems in March of 2010, Getz informed him he would be a contractor and would be given a 1099 at the end of the year. He claimed that during his tenure at Wisch Systems, his job title and duties never changed. He was considered a "master digital artist" and he performed "web development" and "graphic duties." He described the work done by Jackson and Richtman as "assembly."

Jackson and Richtman were described as assemblymen or technicians with Wisch Systems. It does not appear that their job functions changed during their time with Wisch Systems. Getz described Jackson as a personal friend who was mildly mentally retarded and whom he had helped to move from Texas to Iowa so he would work for him.

The record does not contain a great deal of information about Steven Seipel. Rikle did write that Seipel was hired full time on salary in May of 2012 as a hardware engineer and to oversee Richtman and Jackson. Rikle originally met Seipel in the summer of 2010 when he was hired as summer help while he was an engineering student in Carbondale, Illinois. Getz echoed this history, noting Seipel's start as a student and now his continuing work for Wisch Systems. He originally did not work many hours when he was a student, but he has evolved to fulltime work.

REASONING AND CONCLUSIONS OF LAW

IWD oversees the unemployment compensation fund in Iowa, which is governed by Iowa Code chapter 96.¹ IWD's Director administers Iowa Code chapter 96 and is charged with adopting administrative rules.² 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.³ Services performed by an individual for remuneration are presumed to be employment, unless proven otherwise.⁴ An individual or business bears the burden of proving the

¹ Iowa Code § 96.9(1).

² *Id.* § 96.11(1).

³ *Id.* § 96.7(4).

⁴ 871 IAC 23.19(6).

individual or business is exempt from coverage under Iowa Code chapter 96.⁵ 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.⁶

An employer is defined as “any employing unit which in any calendar quarter in either the current or preceding calendar year paid for service in employment wages of one thousand five hundred dollars or more.”⁷ An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it in Iowa.⁸ The term “employment” is defined as service “performed for wages or under any contract of hire, written or oral, express or implied.”⁹ 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.”¹⁰

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

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.

⁵ Iowa Code § 96.19(18)*f*; *Id.* 22.7(3).

⁶ 871 IAC 22.19(7).

⁷ Iowa Code § 96.19(16)*a*.

⁸ *Id.* § 96.19(17).

⁹ *Id.* § 96.19(18)*a*.

¹⁰ *Id.* § 96.19(18)*a*(2).

¹¹ *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)).

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

¹³ 871 IAC 23.19(6).

¹⁴ *Id.* 23.19.

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.¹⁵

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

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

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.²⁰ 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.²¹ 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.²²

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

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.²⁶ Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade,

¹⁵ *Id.* 23.19(1).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* 23.19(2).

²¹ *Id.*

²² *Id.* 23.19(4).

²³ *Id.* 23.19(3).

²⁴ *Id.*

²⁵ *Id.* 23.19(5).

²⁶ *Id.* 23.19(2).

occupation, business, or profession, in which they offer services to the public, are independent contractors and not employees.²⁷ Professional employees who perform services for another individual or business are covered employees.²⁸

At the outset, Mr. Getz conceded at the hearing that from July 1, 2012, all workers in question were indeed “employees.” As such, for purposes of this decision, the department’s decision must be affirmed for that particular time frame; that is, from July 1, 2012 through the date of decision—May 29, 2013. Accordingly, this decision will only analyze the timeframe prior to July 1, 2012.

Getz asserts that prior to July 1, 2012, the four workers were conceptually and substantively performing different duties and under such different conditions that they should be considered to have been independent contractors at that time. However, Madden’s position was the despite the changes (moving them to a W-2, requiring regular hours, vacation and holiday pay, etc.) that occurred in July 2012, the essential nature of their positions was unchanged and no substantive distinction need be made between the time before this change and after. I find that there was no significant difference in the types of work performed and in the terms of such work and that analysis remains the same regardless of the timeframe looked at.

I first address the situation of Jackson and Richtman, because in all material respects they are similarly situated. Their work can best be described as assembly in a small electronics manufacturing setting. All of their work was done at the Wisch Systems work site. Wisch Systems supplied all needed materials, equipment, and tools. They were in all respects totally at the direction and control of Mr. Getz and Wisch Systems. I find that, despite Getz’s claims to the contrary, neither could have hired an assistant or contractor to perform their required work. They were both paid an hourly wage. They were not engaged in a distinct trade, occupation, or profession. Neither offered their services to the general public beyond the work they provided for Wisch Systems. They did not stand to make a profit or loss from their work. They made no investment in their work or in Wisch Systems. They were able to be fired at any time and an “at will” relationship existed between them and Wisch Systems. In consideration of all these factors, there can be no question but that at all relevant times Jackson and Richtman stood in an employer-employee relationship with Wisch Systems.

Likewise, I also must conclude the department correctly determined that Rikle was an employee. I find that Getz had the full ability to control the end product and the means by which Rikle produced that end product. The “right of control” test has been met in this respect. Rikle did not stand to make a profit or loss from his work. He did not offer himself to the public to perform this work. He was paid a fixed wage at an hourly rate, rather than in a lump sum for a specific project. He worked on site. He could have been discharged at any time from his work at Wisch Systems. Moreover, I again reject the contention of Getz that Rikle could have hired a subcontractor to perform his duties.

²⁷ *Id.* 23.19(1).

²⁸ *Id.*

Rikle's work contained all the hallmarks of an employee and the department correctly considered him as such.

Finally, I also conclude the department correctly determined that Seipel must be considered an employee. Other than the fact that his work hours increased, it does not appear that the type of work he did changed in any way after his graduation. He is a hardware engineer and is subject to the control of Getz. He was paid a fixed wage and did not stand to profit or loss from the venture. He was portrayed as a "key team member" on the Wisch Systems website.

In conclusion, 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 the individual or business is exempt from coverage under Iowa Code chapter 96. In this case, Wisch Systems simply has not met its burden to rebut the presumption that the four workers in question are employees. The department's decision should be affirmed.

DECISION

Iowa Workforce Development correctly determined that an employer-employee relationship existed between Wisch Systems and the relevant workers at all relevant times, and its decision is AFFIRMED. Iowa Workforce Development shall take any steps necessary to implement this decision.

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