

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

Appeal Number: 12IWD018

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**ARDELL & DIANE BANTA
D/B/A D & B SALVAGE**

**IOWA WORKFORCE DEVELOPMENT
AMY LOUVRIEN, FIELD AUDITOR
2508 4TH STREET
SIOUX CITY, IA 51101**

JOE BERVID, IWD
NICHOLAS OLIVENCIA, IWD
CARIE O'BRIEN, IWD

**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)

July 25, 2012

(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

STATEMENT OF THE CASE

Jennifer Jacobson applied for unemployment insurance benefits, claiming D & B Salvage was her employer. IWD completed a missing wage investigation and determined an employer-employee relationship exists between D & B Salvage and its workers. Ardell Banta 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 at the Wallace State Office Building on July 18, 2012. Ardell Banta appeared and testified. Diana Banta also appeared, but did not testify. Lovrien appeared and testified on behalf of IWD. Exhibit A was admitted into the record.

ISSUE

Whether an employer-employee relationship existed between D & B Salvage, Jennifer Jacobson, and all other workers performing services for D & B Salvage making D & B Salvage a liable employer.

FINDINGS OF FACT

The Bantas operate a scrap business, D & B Salvage. D & B Salvage removes tires and appliances throughout Iowa. Jennifer Jacobson and her husband, Travis Jacobson, and Kevin Peterson have performed services for the Bantas. All three workers have performed the same services for D & B Salvage. Mrs. Jacobson filed a claim for unemployment insurance benefits. She alleged D & B Salvage was her employer. IWD commenced a missing wage investigation. IWD assigned the matter to Lovrien.

Mrs. Jacobson and the Bantas completed the Questionnaire for Determining Status of Workers. Lovrien obtained copies of 1099s, and time cards from D & B Salvage. Lovrien observed a vehicle driven by workers performing services for D & B Salvage. The name D & B Salvage was visible on the side of the vehicle.

The Bantas reported Mrs. Jacobson loaded tires and appliances for D & B Salvage four to eight hours per day. The Bantas noted she performed services for specific jobs under her own name. D & B Salvage paid Mrs. Jacobson by the hour. All contracts with customers were under D & B Salvage's name. The customers paid D & B Salvage directly.

The Bantas reported Mrs. Jacobson provided equipment and supplies and D & B Salvage supplied her tools and vehicle. Mrs. Jacobson stated that D & B Salvage provided all equipment, supplies, tools, and a vehicle. D & B Salvage reported it did not reimburse Mrs. Jacobson for any expenses. Mrs. Jacobson stated D & B Salvage reimbursed her for any expenses. The Bantas listed Mrs. Jacobson's clothing as a risk of loss. D & B Salvage did not provide workers' compensation coverage for Mrs. Jacobson.

Each day D & B Salvage informed Mrs. Jacobson of the location of her work and the duties she would perform. She reported D & B Salvage retained the right to discharge her. If she quit, Mrs. Jacobson would not sustain a penalty or loss. The Bantas stated Mrs. Jacobson was able to perform similar services for others and was not required to obtain D & B Salvage's approval before performing services for others.

The Bantas reported Mrs. Jacobson was able to employ assistants who were not under D & B Salvage's control. Mrs. Jacobson denied she was able to employ assistants. There is no evidence D & B Salvage's workers employed any assistants.

Mrs. Jacobson signed a work agreement acknowledging that no taxes were being withheld from her check and that she had to have her own insurance.

Mr. Banta and two of his workers met with Lovrien at her office in December 2010. Mr. Banta told Lovrien that if his workers were deemed employees he would not be able to remain in business.

At the conclusion of her investigation Lovrien determined an employer-employee relationship exists between D & B Salvage and its workers. Lovrien found the workers render the services personally. She concluded D & B Salvage provides instruction to its

workers regarding the location of the work and assigned duties. The workers are paid by the hour and cannot sustain a profit or loss. Lovrien concluded the workers do not have their own businesses and their services are directed by D & B Salvage. D & B Salvage provides the vehicle, trailer, and tools for the workers to use. Lovrien found employees have the right to quit without being held financially responsible for unfinished work on the job site and that D & B Salvage has the right to fire the workers.

IWD sent the Bantas an Notice of Employer Status and Liability dated December 2, 2010, with an effective date of January 1, 2008. The Bantas appealed.

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 determines all issues related to employing units and employer liability, including the amount and rate of contribution and successorship.³ IWD determined an employer-employee relationship exists between D & B Salvage and its workers.

The governing statute defines an employer 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."⁴ An employing unit includes any individual or organization that employs one or more individuals performing services in Iowa.⁵ The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."⁶ 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."⁷

A presumption exists that an individual is an employee if the individual receives services for compensation.⁸ An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.⁹ 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.¹⁰

In the unemployment compensation context, the right of control, as developed through the common law, is the principal test for determining whether a worker is an employee

¹ Iowa Code § 96.9(1).

² *Id.* § 96.11(1).

³ *Id.* § 96.7(4).

⁴ *Id.* § 96.19(16)a.

⁵ *Id.* § 96.19(17).

⁶ *Id.* § 96.19(18)a.

⁷ *Id.* § 96.19(18)a(2).

⁸ 871 IAC 23.19(6).

⁹ Iowa Code § 96.19(18)f; *Id.* 22.7(3).

¹⁰ 871 IAC 22.19(7).

or independent contractor.¹¹ 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.¹²

In addition to the common law test, IWD has adopted a rule with factors to consider in determining whether a worker is an independent contractor or employee.¹³ The factors include: (1) the right to control and direct the means and details by which the result is to be accomplished; (2) the right to discharge or terminate the relationship; (3) the furnishing of tools, equipment, materials, and a place to work; (4) the nature of the worker's contract for the performance of a certain type, kind or piece of work at a fixed price; (5) whether the worker is involved in distinct trade, occupation, business or profession; (6) payment of fixed or hourly wages; and (7) the ability of the worker to sustain a profit or loss.¹⁴

An independent contractor typically 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.¹⁵ 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.¹⁶ D & B Salvage's workers do not follow a distinct trade, occupation, business or profession. They perform manual hauling services.

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.¹⁷ 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.¹⁸ Each day D & B Salvage notifies the workers of the location where they are to perform the services and the specific job duties they are to perform.

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.¹⁹ Independent contractors often have significant investment in real or personal property that they use in performing services for others.²⁰ There is no evidence D & B Salvage's workers have fixed, ongoing costs independent of the work they perform for D & B Salvage.

¹¹ *Gaffney v. Dep't of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).

¹² 871 IAC 23.19(6).

¹³ *Id.* 23.19.

¹⁴ *Id.* 23.19(1)-(7).

¹⁵ *Id.*

¹⁶ *Id.* 23.19(1).

¹⁷ *Id.* 23.19.

¹⁸ *Id.*

¹⁹ *Id.* 23.19(3).

²⁰ *Id.*

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service are characteristic of an employer.²¹ D & B Salvage provides the tools and equipment its workers use. D & Salvage supplies vehicles marked with D & B Salvage's name.

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 D & B Salvage pays the workers by the hour. The workers do not have the ability to make a profit or loss on a given project.

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.²³ According to Mr. Banta, D & B Salvage's workers are now working an average of 30 to 35 hours per week. Their work is continuous and primarily purchased.

D & B Salvage's workers perform services personally for D & B Salvage. Each day D & B Salvage provides the workers with the location of their work and informs the workers of their job duties. The workers are paid by the hour and cannot sustain a profit or loss. D & B Salvage provides the workers with a vehicle, trailer, and tools to use. The workers have the right to quit without being held financially responsible for unfinished work on the job site. These factors support IWD's conclusion that an employer-employee relationship exists between D & B Salvage and its workers.

DECISION

Iowa Workforce Development correctly determined that an employer-employee relationship existed between D & B Salvage, Jennifer Jacobson, as its workers. Iowa Workforce Development shall take any steps necessary to implement this decision.

hlp

²¹ *Id.*

²² *Id.* 23.19(4).

²³ *Id.* 23.19(2).