

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

**Appeal Number: 12IWD014**

**Appellant (2)**

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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

**HODGE CONSTRUCTION**

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

**IOWA WORKFORCE DEVELOPMENT  
CHARLES HOSS, FIELD AUDITOR**

2. Either party may petition the District Court WITHIN THIRTY (30) DAYS after the date below.

JOE BERVID, IWD  
NICHOLAS OLIVENCIA, IWD  
JODI DOUGLAS, IWD  
SUSAN DAMERON, IWD  
LOUISE CALKINS, CLAIMANT

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

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(Administrative Law Judge)

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May 31, 2012

(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

### **STATEMENT OF THE CASE**

Respondent Iowa Workforce Development (“IWD”) initiated a missing wage investigation involving Louise Calkins and Appellant Hodge Construction. IWD issued a decision on February 24, 2011 finding an employer-employee relationship existed between Hodge Construction and Calkins. Wendy Fowler filed an appeal on behalf of Hodge Construction on March 22, 2011.

On April 20, 2012, 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 May 30, 2012. Fowler appeared and testified on behalf of Hodge Construction. Charles Hoss appeared and testified on behalf of IWD. Exhibit A, pages 1 through 25, was admitted into the record.

## **ISSUE**

Whether an employer-employee relationship existed between Hodge Construction Company and Louise A. Calkins who performed services for Hodge Construction Co.

## **FINDINGS OF FACT**

Calkins sought unemployment insurance benefits. IWD learned Calkins had received a payment from Hodge Construction. IWD commenced a missing wage investigation to determine whether an employer-employee relationship existed between Hodge Construction and Calkins. IWD assigned Hoss to conduct the investigation.

Hoss contacted Calkins and Hodge Construction. He learned that Calkins received \$397.50 from Hodge Construction for services she performed from July 31, 2010 through August 3, 2010. Calkins worked as an inspector, supervising a team of cleaners. Hoss found the work involved cleaning of new homes.

Fowler is the property manager for Hodge Construction. Fowler testified the cleaning crews cleaned existing apartments vacated by previous tenants. The cleaning was performed before the new tenants moved in. Calkins supervised the team clean the apartments. She did not perform any of the cleaning.

Hoss determined Calkins and Hodge Construction entered a verbal agreement.

Hoss sent Calkins and Hodge Construction a copy of the Questionnaire for Determining Status of Workers ("Questionnaire"). Hoss told Fowler and Calkins to turn in the completed Questionnaires as soon as possible. He did not send a letter stating the Questionnaires were due on a certain date. When Hoss spoke with Fowler and Calkins he did not tell them the Questionnaires were due on date certain. Hoss reported he sent the Questionnaires on December 2, 2010.

Hoss received Calkins's completed Questionnaire. He contacted Calkins. According to Hoss, Calkins indicated she worked under the direction and control of Hodge Construction. Hoss reported Calkins stated Hodge Construction set the hours of work, the location of the work, and only performed work for Hodge Construction. Hoss determined "claimant has no business of her own doing performing the same service." (Exhibit A at 24).

Hoss issued a decision on February 24, 2011, finding an employer-employee relationship existed between Calkins and Hodge Construction. Fowler testified she returned a copy of the completed Questionnaire to Hoss before February 24, 2011. He denied receiving the copy from Fowler. Fowler sent another copy of the Questionnaire to Hoss and appealed the decision. Hoss included the copy in Exhibit A. Hoss did not alter his determination upon receiving Hodge Construction's completed Questionnaire.

Hoss testified he determined Calkins was an employee because she operated under the direction and control of Hodge Construction. In support of his finding Hoss found

Hodge Construction told Calkins where to go, set her hours of work, and required her to report to Hodge Construction after each job. Hoss testified Calkins turned in the equipment used by the workers to Hodge Construction following the completion of the project. Hoss concluded that following every project, Hodge Construction inspected the work to determine if the work was satisfactory.

Hoss did not interview any of the other cleaners or inspectors performing services for Hodge Construction. IWD did not make a finding any other workers were employees of Hodge Construction.

Fowler testified Hodge Construction hired the individuals performing the cleaning for the crew Calkins worked with. Calkins testified other inspectors inspected properties owned by Hodge Construction during the same period. The inspectors were free to choose their own workers for the project. The inspectors would forward the names and payment information for the workers to Hodge Construction. Hodge Construction did not interview or speak with the workers chosen by the inspectors. Calkins did not choose any workers to work on the cleaning projects.

Hodge Construction agreed to pay Calkins \$15 per hour to perform the work. Hodge Construction informed Calkins that all of the workers were to meet at a specific time on the first day. Fowler testified after the first day, Calkins and the workers chose their own hours until the projects were completed. Calkins and the workers were to keep track of the hours they worked. Hodge Construction informed Calkins and the workers when each property was vacated and when the new tenants were moving in. The workers needed to complete the cleaning before the new tenants moved in.

Hodge Construction inspected the properties cleaned by the workers and inspected by Calkins. Hodge Construction did not have any problems with the work performed.

Hodge Construction paid Calkins \$397.50 for the work she performed over four days from July 31, 2010 through August 3, 2010. Fowler testified Calkins did not work for Hodge Construction prior to July 2010, and she has not worked for Hodge Construction since August 3, 2010.

Fowler testified Hodge Construction did not supply any tools or equipment to Calkins. Fowler reported Hodge Construction did not require Calkins to return the supplies used by the workers.

### **REASONING AND 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.

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<sup>1</sup> Iowa Code § 96.9(1).

<sup>2</sup> *Id.* § 96.11(1).

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 for service in employment wages of one thousand five hundred dollars or more.”<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 usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.”<sup>10</sup> According to Exhibit A, Hodge Construction pays wages exceeding the required threshold. The issue in this appeal is whether an employer-employee relationship existed between Hodge Construction and Calkins.

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>11</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>12</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>13</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

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<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*.

<sup>10</sup> *Id.* § 96.19(18)*a*(2).

<sup>11</sup> *Gaffney v. Dep’t of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).

<sup>12</sup> 871 IAC 23.19(6).

<sup>13</sup> *Id.* 23.19.

in which the services are performed; it is sufficient if the employer has the right to do so.<sup>14</sup>

The right to discharge or terminate a relationship is “an important factor indicating that the person possessing that right is an employer.”<sup>15</sup> If the discharging party may be liable for damages for breach of contract, the circumstances are indicative of an independent contractor relationship.<sup>16</sup>

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service are characteristic of an employer.<sup>17</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>18</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>19</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>20</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>21</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>22</sup> Independent contractors often have significant investment in real or personal property that they use in performing services for others.<sup>23</sup>

Independent contractors have the right to employ assistants with the exclusive right to supervise their activity and completely delegate work.<sup>24</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>25</sup> Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade,

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<sup>14</sup> *Id.* 23.19(1).

<sup>15</sup> *Id.*

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

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

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

<sup>19</sup> *Id.* 23.19(2).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* 23.19(4).

<sup>22</sup> *Id.* 23.19(3).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* 23.19(5).

<sup>25</sup> *Id.* 23.19(2).

occupation, business, or profession, in which they offer services to the public, are independent contractors and not employees.<sup>26</sup> Professional employees who perform services for another individual or business are covered employees.<sup>27</sup>

Fowler testified Calkins performed services as an inspector for four days for Hodge Construction from July 31, 2010 through August 3, 2010. Hodge Construction paid Calkins \$397.50 for her services. Fowler denied Hodge Construction set Calkins's hours of work after the first day. Calkins inspected work performed by a team of cleaners who cleaned apartments after tenants vacated the apartments and before the new tenants moved in. Calkins did not appear at hearing as a witness for IWD. The differing accounts by Calkins and Fowler raise issues of credibility. There are many factors used when considering the credibility of witness testimony. Some of the most common standards are as follows:

1. Whether the testimony is reasonable and consistent with other evidence you believe.
2. Whether a witness has made inconsistent statements.
3. The witness' appearance, conduct, age, intelligence, memory and knowledge of facts
4. The witness' interest in the trial, their motive, candor, bias and prejudice.<sup>28</sup>

Calkins has an interest in this case because if an employer-employee relationship exists between Calkins and Hodge Construction, she may be able to receive unemployment insurance benefits. Hodge Construction also has an interest in this case because if an employer-employee relationship exists between Calkins and Hodge Construction, Hodge Construction will be responsible for unemployment insurance contributions for Calkins.

Fowler's testimony is reasonable and consistent with the other evidence I believe. Hodge Construction contracted with Calkins to inspect cleaning of apartments after tenants moved out and before new tenants moved in. Calkins did not bring any cleaners with her to the project, but she was free to do so.

Hodge Construction informed Calkins and the cleaners the projects needed to be completed by a date certain. Hodge Construction also informed Calkins and the cleaners they should commence the projects on a specific date and time. After commencing the initial project, Calkins and the cleaners were free to pick their own schedule. Calkins and the cleaners determined how many hours were needed to perform the job. Hodge Construction did not dictate that Calkins and the cleaners needed to complete the job within three, four, or ten hours.

There is no evidence Hodge Construction restricted Calkins from performing services for others.

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<sup>26</sup> *Id.* 23.19(1).

<sup>27</sup> *Id.*

<sup>28</sup> *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996).

An ongoing relationship does not exist between Hodge Construction and Calkins. Hodge Construction contracted with Calkins to inspect the cleaning of apartments it owned for a period of four days. Hodge Construction paid Calkins a single check of \$397.50.

Fowler testified Hodge Construction did not supply any tools or equipment to Calkins. While Calkins returned the supplies to Hodge Construction used by the cleaners, Fowler reported Hodge Construction did not instruct her to do so.

Hodge Construction did not have any staff on-site inspecting the work performed by Calkins and the cleaners. Hodge Construction examined the finished work product at the conclusion of the cleaning. Hodge Construction has proven an independent contractor relationship existed between Calkins and Hodge Construction. IWD's decision should be reversed.

### **DECISION**

Iowa Workforce Development incorrectly determined that an employer-employee relationship existed between Hodge Construction and Calkins, and its decision is REVERSED. Iowa Workforce Development shall take any steps necessary to implement this decision.

hlp