

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

Appeal Number: 11IWD020

Respondent (2)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**LEDERMAN BONDING COMPANY
712 SYCAMORE STREET
WATERLOO, IA 50703**

**IOWA WORKFORCE DEVELOPMENT
JUSTIN DEMSKY, FIELD AUDITOR
1000 EAST GRAND AVENUE
DES MOINES, IA 50319**

JOE BERVID, IWD
CARIE O'BRIEN, IWD
PATRICIA HENRICH, IWD
BRANDI STITES, Party
DANIELLE DIXON SMID, Appellant Counsel

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)

December 22, 2011

(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination
871 IAC 23.19 – Employer – Employee Relationship

STATEMENT OF THE CASE

On February 16, 2011, Justin Demsky, a Field Auditor for Iowa Workforce Development (“IWD”) completed a missing wage investigation and determined that an employee-employer relationship existed between the appellant, Lederman Bonding Company, and Brandi Stites, one of its workers. IWD issued a decision on June 13, 2011, stating that Ms. Stites was determined to be an employee, and that any remuneration paid to her by the appellant was reportable for unemployment insurance contribution purposes beginning with the second quarter of 2010. Lederman Bonding Company timely appealed.

IWD transferred the case to the Iowa Department of Inspections and Appeals, Division of Administrative Hearings on October 24, 2011, to schedule a contested case hearing. Due notices issued on October 25, 2011, and the matter proceeded to a hearing by telephone on December 21, 2011, before Administrative Law Judge Robert H. Wheeler. Appellant appeared with counsel, Haley Van Loon, and Joshua Lederman, President, testified. The appellant also called Brandi Stites as a witness. Field Auditor Justin Demsky appeared on behalf of respondent IWD, and testified. Mr. Demsky’s report, IWD Exhibit A, pages 1 through 86, and the appellant’s Exhibits 1 and 2, an

Independent Bonding Contract, and the affidavit of Joshua Lederman, entered the record without objection.

ISSUE

Whether Iowa Workforce Development correctly determined that an employer-employee relationship existed between Lederman Bonding Company and Brandi Stites.

Whether Lederman Bonding Company owes unpaid unemployment tax if Ms. Stites is/was an employee.

FINDINGS OF FACT

Lederman Bonding Company sells bail bonds to the public in Iowa to secure the release of the criminally accused from incarceration. (Lederman testimony). Brandi Stites worked as a bond agent for the appellant from May 21, 2010, through the present. Ms. Stites signed an agreement titled "Independent Bonding Agent Contract" when she began work. (Exhibit 1). Ms. Stites testified that she also works as a substitute teacher. The company notifies Ms. Stites when an individual needs bond services. She then arranges a time to meet with the incarcerated individual at a jail to fill out bond paperwork and arranges for their release from jail. Ms. Stites collects the premium paid for the bond by the incarcerated individual and deposits it into the company's account. The company then issues a check to Ms. Stites. This check represents her commission for the bond plus an additional fee per bond. She receives no hourly wage, but rather receives only commissions for each bond sold. The company completes I.R.S. form 1099 for Ms. Stites each year. (Stites, Lederman testimony).

The company does not provide for any expenses for Ms. Stites and provides no tools, other than their standard documents for the bond process. The company does not control the manner in which Ms. Stites conducts her business and does not require any set work schedule. Ms. Stites is free to decline to post any bond referred by the company. (Stites, Lederman testimony).

Ms. Stites, and all bond agents in Iowa, are independently licensed by the State of Iowa after passing a test. This license is not specific to her work for the appellant company, and allows her to sell other surety products. (Stites, Lederman testimony).

The "Independent Bonding Agent Contract" provides that the agent, Ms. Stites in this case, may not work for other bonding companies during the contract term and for two years thereafter. Mr. Lederman testified that this clause constitutes an oversight and has never been enforced. Seven former company agents work for other competitors. Current versions of the contract do not include this provision. (Exhibit 1; Lederman testimony).

Mr. Demsky's investigation proceeded with questionnaires from Ms. Stites and the company, as well as interviews with Lederman representatives. Mr. Demsky

determined that Ms. Stites was an employee of Lederman Bonding Company due to several factors:

- Ms. Stites attended a one day training;
- Bond agreements are made in the company's name, not the agent's name;
- The agent deposits the entire premium paid by the customer into the company account;
- Ms. Stites' questionnaire referred to travel reimbursement;
- The contract refers to assigned duties;
- The contract refers to direction by the company;
- The proprietary paperwork of the company constitutes direction and provided tools;
- The contract gives instructions to the bond agent;
- The non-compete clause indicates an employment relationship. (Exhibit A, pp. 16 -18).

On June 13, 2011, IWD issued a decision finding that an employer – employee relationship existed between Lederman Bonding Company and Ms. Stites. As a result, the company had an obligation to report any remuneration paid to Ms. Stites for unemployment insurance contribution purposes. This appeal followed in a timely manner. (Exhibit A, p. 14).

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 initially determines all issues related to liability of an employing unit or employer, including the amount of contribution, the contribution rate, and successorship.³ 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."⁴ An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it within 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

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).

IWD contends Brandi Stites was Lederman Bonding Company's employee. The company disagrees and contends that Ms. Stites was and is an independent contractor.

In the unemployment compensation context, the right of control is the principal test for determining whether a worker is an employee or independent contractor, as developed through the common law.⁸ 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.⁹ IWD has also adopted rules with factors to consider in determining whether a worker is an independent contractor or employee.¹⁰

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.¹¹

The right to discharge or terminate a relationship is "an important factor indicating that the person possessing that right is an employer."¹² If the discharging party may be liable for damages for breach of contract, the circumstances are indicative of an independent contractor relationship.¹³

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service is characteristic of an employer.¹⁴ "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."¹⁵

One 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.¹⁶ 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.¹⁷

⁸ *Gaffney v. Dep't of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).

⁹ 871 IAC 23.19(6).

¹⁰ *Id.* 23.19.

¹¹ *Id.* 23.19(1).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* 23.19(2).

¹⁷ *Id.*

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.¹⁸ 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.¹⁹ Professional employees who perform services for another individual or business are covered employees.²⁰

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.²¹ Independent contractors have the right to employ assistants with the exclusive right to supervise their activity and completely delegate work.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

Services performed any an individual for remuneration are presumed to be employment, unless proven otherwise.²⁵ An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.²⁶ 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.²⁷

Application of the facts to the factors to be considered in determining whether a work relationship involves an employee or an independent contractor found in 871 IAC 23.19, reveals the following:

Ms. Stites controlled her own work. The company did not exercise control over her work. Although she used company paperwork, she chose her work hours and manner of doing business. Ms. Stites used her own car to travel. Ms. Stites furnished the supplies necessary for her work, and none of the work was done on the company's site. Ms. Stites did not have duties involving the company offices.

¹⁸ *Id.*

¹⁹ *Id.* 23.19(1).

²⁰ *Id.*

²¹ *Id.* 23.19(4).

²² *Id.* 23.19(5).

²³ *Id.* 23.19(3).

²⁴ *Id.*

²⁵ *Id.* 23.19(6).

²⁶ Iowa Code § 96.19(18)*f*; *Id.* 22.7(3).

²⁷ 871 IAC 22.19(7).

Ms. Stites did not perform general labor. Her duties were specific to each bond project;

Ms. Stites did not receive hourly wages. She received compensation in the form of commissions on each bond plus an additional fee per bond. Although Ms. Stites characterized this fee as a travel reimbursement on her questionnaire, the fee was based on the bond amount rather than any travel related factor;

Ms. Stites did not receive reimbursement for expenses, and faced the risk of profit or loss depending on her cost of doing business;

Ms. Stites did have the right to hire assistants; and

Breach of the contract in this case would give rise to a cause of action for the parties. The contract provides for liquidated damages.

All of these factors support the finding of an independent contractor status. . The only factors IWD relied on to find the employer-employee relationship involve the descriptions of the company control through the one day training, the required use of company documents and instructions for obtaining commission payment, noted in the investigative report. I do not find that the company exercised control over Ms. Stites on these bases. Mr. Dempsy candidly testified that the parties to the contract intended to form an independent contractor relationship. He felt that the parties erred in their establishment of this relationship. Although the non-compete clause weighs resembles an employer provision, Mr. Lederman testified credibly that this clause was an error, is never enforced, and no longer appears in this contract.

Lederman Bonding Company bears the burden of proof in this case to overcome the presumption that Brandi Stites was an employee. They have met that burden of proof. IWD improperly found an employer-employee relationship. Interestingly, Mr. Demsky's investigation led to an initial determination of an independent contractor relationship in this case. See Exhibit A, p. 28. He changed his mind after consultation with colleagues. I find that his initial determination is supported by a preponderance of the evidence.

DECISION

IWD's decision that that Brandi Stites was an employee of Lederman Bonding Company is REVERSED. IWD shall take any steps necessary to implement this decision.

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