

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

**Appeal Number: 11-IWD-014**

**Respondent (1)**

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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

**RUSSELL J. HARDY, PRESIDENT  
HARDY RENTALS  
524 2<sup>ND</sup> STREET, SW  
MASON CITY, IA 50401**

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  
MARK HEINY, FIELD AUDITOR  
600 S. PIERCE AVENUE  
MASON CITY, IA 50401**

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.

JOE BERVID, IWD  
JODI DOUGLAS, IWD  
PATRICIA HENRICH, IWD  
NICHOLAS OLIVENCIA, IWD

\_\_\_\_\_  
(Administrative Law Judge)

Jan Simonsen  
613 3<sup>rd</sup> Street, NE  
Mason City, IA 50401

\_\_\_\_\_  
November 30, 2011  
(Decision Dated & Mailed)

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## STATEMENT OF THE CASE

As the result of an unemployment benefits claim filing and a missing wage investigation, Iowa Workforce Development (the Department) issued a Notice of Employer Status and Liability dated August 20, 2010 finding that an employer-employee relationship existed between Hardy Rentals and Jan Simonsen beginning with the first quarter of 2008 and that any remuneration paid to Simonsen was reportable for unemployment insurance purposes.<sup>1</sup> Hardy Rentals filed this appeal from the Department's decision.

On September 13, 2011 Iowa Workforce Development transmitted Hardy Rentals' appeal to this office for purposes of holding a contested case hearing. IWD requested that the hearing be bifurcated so that the issue of whether Hardy Rentals filed a timely appeal could be determined prior to a hearing on the merits. Therefore, two hearings

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<sup>1</sup> It should be noted that Field Auditor Mark Heiny testified that Hardy Rentals began using written contracts to engage Simonsen's services after she bid on specific jobs in May 2009. Heiny stated at hearing that he is of the opinion Simonsen's status changed to that of an independent contractor at that time.

were scheduled; the first on November 7, 2011 and the second on November 28, 2011. At the November 7, 2011 hearing IWD admitted that Hardy Rentals' appeal was filed on a timely basis.

A hearing was held on the merits of the appeal by way of telephone conference call on November 28, 2011. Hardy Rentals appeared through its President, Russell J. Hardy. The Department was represented Field Auditor Mark Heiny presented testimony for the Department. The Department submitted an appeal packet with pages numbered 1-62, which was admitted into the record as evidence.

Jan Simonsen, the person whose status was at issue in this matter, did not appear although notice of the hearing was sent to her along with the other parties. The hearing was conducted in her absence.

### **FINDINGS OF FACT**

In January 2009 Jan Simonsen and another individual applied for unemployment insurance benefits through Iowa Workforce Development naming Hardy Rentals as their last employer. IWD was unable to find any wages reported by Hardy Rentals as paid to these individuals and a "missing wage" investigation was begun. (Appeal Packet, p. 18)

Field Auditor Mark Heiny conducted the investigation on behalf of the agency. He sent questionnaires to Simonsen and the other worker and to Hardy Rentals to be completed and returned. Russell Hardy completed the questionnaires on behalf of Hardy Rentals for both individuals. (Appeal Packet, pp. 50-57) Jan Simonsen completed her questionnaire. (Appeal Packet, pp. 46-49). Simonsen also signed a written statement about her relationship with Hardy Rentals and provided payroll information. (Appeal Packet, pp. 41-42; 46-49; 58-60) The other individual involved did not respond. (Heiny testimony)

Jan Simonsen's written statement indicated she had provided painting and cleaning services for Hardy Rentals off and on from August 2007. She stated that she was originally paid by the hour. Simonsen acknowledged that she received a 1099 at the end of each year showing her compensation. She noted that her relationship with Hardy Rentals had changed and that she now bids for the larger jobs. She also provided contracts for services dated May 2009 which are for specific jobs. (Appeal Packet pp. 58-62).

The questionnaires submitted by Simonsen and Russell Hardy for Hardy Rentals were in direct opposition. For instance, Hardy Rentals stated that Simonsen was not required to perform services personally and was free to work for others while Simonsen disagreed. However, both parties acknowledged that Simonsen was paid by the hour. Hardy reported Simonsen's pay was based on a "work slip" on which she kept the number of hours worked and work completed. (Appeal Packet, pp. 46-53)

The payroll information provided is captioned as showing "Employee Wages for 2006" for Jan Simonsen. The document contains handwritten notes reflecting "no overtime" for several weeks. It also contains an indication that Simonsen "quit" in July 2008 and

was “laid off” in October 2008. (Appeal Packet, pp. 41-42)

At hearing, Field Auditor Heiny testified that the payroll information along with the fact the parties did not have written contracts until May 2009 constituted the major bases for his decision that an employer/employee relationship existed between Hardy Rentals and Simonsen. Heiny also stated he considered the answers contained in the parties’ questionnaires. Heiny opined that when an individual is paid by the hour and told when and where to work, that person is under the control of the employer and should be considered an employee. (Heiny testimony)

Russell Hardy testified that Hardy Rentals’ relationship with Simonsen was no different that with that of electricians he hired to work on properties. He stated that while Simonsen was paid by the hour, she worked the hours she wanted which changed depending on her schedule. Hardy noted that he did not instruct Simonsen how or when to perform her services. Hardy acknowledged that the payroll information provided did refer to Simonsen as receiving employee wages but argued that was the only option available in the accounting software the company was using. He noted that Simonsen was issued a 1099 at the end of each year. (Hardy testimony)

Mr. Hardy also testified that the notations on the payroll information in the record regarding overtime were the result of an audit performed under the Fair Labor Standards Act. He acknowledged that the result of the audit was that he owed Simonsen overtime pay. Hardy admitted that Hardy Rentals did not appeal the decision that overtime was owed and elected to pay Simonsen instead. Hardy testified that he began using written contracts to secure Simonsen’s services as a result of the audit. (Hardy testimony)

### **REASONING AND CONCLUSIONS OF LAW**

For purposes of unemployment compensation law, the term “employer” is defined to mean any employing unit which paid at least \$1,500 in wages in any calendar quarter during the current or preceding calendar year or which employed at least one individual during the current or preceding calendar year.<sup>2</sup> In turn, “employment” means service “performed for wages or under any contract of hire, written or oral, expressed or implied.”<sup>3</sup> The department presumes that services performed for wages constitute employment unless it is shown that the individual performing the services is and will continue to be free from control or direction.<sup>4</sup>

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>5</sup>

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2 Iowa Code section 96.19(16)(a).

3 Iowa Code section 96.18(a).

4 Iowa Code section 96.19(6)(f); 871 IAC 22.7(3) (“Whenever an employing unit claims that any employment is not employment under this Act, the burden shall be on the employer to prove the exemption claimed.”).

5 *Gaffney v. Department of Employment Services*, 540 N.W.2d 430, 434 (Iowa 1995).

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>6</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>7</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>8</sup>

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>9</sup>

In this case, there are factors weighing both in favor of an employment relationship and in favor of a finding Simonsen was an independent contractor. For instance, as noted above, Simonsen was paid by the hour which is indicative of an employer/employee relationship. Further, it appears Simonsen's association with Hardy Rentals was more or less continuous rather than by the job. Additionally, Hardy Rentals answered the department's questionnaire indicating it had the right to discharge Simonsen at any time

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6 871 Iowa Administrative Code (IAC) 23.19(1).

7 See *generally* 871 IAC 23.19.

8 871 IAC 23.19.

9 871 IAC 23.19(7).

without incurring a penalty. (Appeal Packet, p. 52)

On the other hand, Simonsen provided her own equipment and worked the hours she preferred, which is indicative of an independent contractor.

Additionally, it should be noted that Hardy Rentals accepted a previous determination by another agency that Simonsen was an employee for purposes of the Fair Labor Standards Act. Hardy Rentals paid Simonsen overtime wages without appealing that decision.

The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments. The FLSA applies only to “employees”.<sup>10</sup> It does not apply to independent contractors. The basic definition of the term “employee” in the context of the FLSA is “... any individual employed by an employer.”<sup>11</sup> “Employ” means to “suffer or permit to work” under the statute.<sup>12</sup> The United States Supreme Court has interpreted these definitions to require use of the “economic realities” test when analyzing the nature of the relationship between a business and those who supply services to it.<sup>13</sup> That test “looks to whether the putative employee is economically dependent upon the principal or is instead in business for himself...”<sup>14</sup>

The test used to determine employment under the FLSA places more emphasis on economic dependence than the “hybrid” test adopted in the department’s rules which focuses on the right to control and it is possible that identical facts might lead to different conclusions depending on the test used. Therefore, the determination Simonsen was an employee for purposes of the FLSA is not controlling in this case.

While not dispositive, the decision that Simonsen was an employee deserving the protection of the FLSA resulted in the business paying Simonsen overtime wages. This is another factor which weighs against a determination Simonsen was an independent contractor for unemployment purposes. It is difficult to imagine a scenario in which an independent contractor would ever be paid overtime since such a worker is hired by the job rather than by the hour.

I find the weight of the evidence in this case supports the department’s determination that Simonsen was an employee of Hardy Rentals prior to the parties restructuring their relationship in May 2009. While there is at least one undisputed factor that suggests Simonsen was an independent contractor, the department’s rules provide for a

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10 See, e.g., 29 U.S.C. §207(a)(1) (“ Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

11 29 USC §203(e).

12 29 USC §203(g).

13 *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S.28, 81 S.Ct. 933 (1961).

14 *Lilley v. BTM Corp.*, 958 F.2d 740, 750 (6th Cir. 1992).

rebuttable presumption that services performed for remuneration constitute employment.<sup>15</sup> In this case, the undisputed element reflective of independent contractor status is insufficient to overcome that presumption. The department's decision must therefore be affirmed.

### **DECISION**

The Department's decision that Jan Simonsen was an employee of Hardy Rentals beginning with the first quarter of 2008 is affirmed. The Department shall take any action necessary to implement this decision.

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