

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

**Appeal Number: 11IWD011**

**Respondent (1)**

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**GUY MONNIN  
POSITIVE ELECTRIC INC.  
4738 GATEWAY CIRCLE  
KETTERING, OH 45440**

**IOWA WORKFORCE DEVELOPMENT  
JAMES MADDEN, FIELD AUDITOR  
1000 EAST GRAND AVENUE  
DES MOINES, IA 50319**

JOE BERVID, IWD  
JASON TRYON, IWD  
NICHOLAS OLIVENCIA, IWD  
PATRICIA HENRICH, 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.

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(Administrative Law Judge)

October 28, 2011

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(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

### **STATEMENT OF THE CASE**

On April 5, 2010, James Madden, a Field Auditor for Iowa Workforce Development (“IWD”) completed a missing wage investigation and determined that an employee-employer relationship existed between Positive Electric, Inc. and eleven men performing work for the company on a construction project. IWD issued a decision on October 6, 2010, stating that these workers were employees and any remuneration paid to them by Positive Electric, Inc., was reportable for unemployment insurance contribution purposes. Guy Monnin, the Chief Executive Officer of Positive Electric, Inc. timely appealed.

IWD transferred the case to the Iowa Department of Inspections and Appeals, Division of Administrative Hearings on August 31, 2011, to schedule a contested case hearing. Notices were issued to all parties setting a hearing by telephone on October 28, 2011, before Administrative Law Judge Robert H. Wheeler. Notice of the hearing went to Mr. Monnin and Positive Electric, Inc. at their address of record. This is the same address that appears on the company letterhead and the same address to which the decision under appeal was sent. The matter proceeded to a hearing by telephone on October 28, 2011. Appellant Guy Monnin did not appear. No representative of Positive Electric, Inc. appeared. No party requested a continuance of the hearing. James Madden appeared

on behalf of respondent IWD, and testified. IWD administrative file, pages 1 through 119, entered the record without objection.

## **ISSUE**

Whether Iowa Workforce Development correctly determined that an employer-employee relationship existed between Positive Electric, Inc. and eleven workers.

## **FINDINGS OF FACT**

Positive Electric, Inc. (PE) is an electrical contractor based in Kettering, Ohio. PE served as the electrical sub-contractor for a 16 building construction project in West Des Moines, Iowa, known as Whisper Ridge. PE engaged eleven electricians for this project, including hiring several Iowa based electricians. Another electrical sub-contractor was also on site installing fire alarms. Another electrician reported to IWD a potential misclassification issue involving PE. James Madden, a field auditor with IWD investigated the issue. (administrative file, p. 19; Madden testimony).

Mr. Madden sent a “Questionnaire to Determine Status of Workers” to PE and four randomly selected workers. The company and two workers, Jeffrey Blount and John Senn, responded. (administrative file pp. 32 – 35; pp. 48 – 52; pp. 53 – 56). Mr. Madden analyzed the responses in light of “20 Questions Used to Determine Employer/Employee Relationships.”

1. *Instructions.* PE claimed no control over the work performed by the eleven electricians. The workers agreed that reported to two PE foremen on site who controlled work assignments.
2. *Training.* There was n evidence of training.
3. *Integration.* The workers’ electrical work constitutes the primary business of PE.
4. *Services Rendered Personally.* The two responding workers stated that they had to perform the work themselves. PE responded that the workers did not have to personally perform the work, but another worker, Jason Smythe, told Mr. Madden that he knew of no instance involving a replacement worker, and that PE would frown on such a practice.
5. *Hiring Assistants.* PE responded that the worker were free to hire assistants, but did not know if this had occurred.
6. *Continuing Relationship.* Two of the electricians on site had ties to PE in Ohio. The remaining nine are from Iowa. Two of them have quit, and seven will remain with PE until completion of the project.
7. *Set Hours of Work.* Work hours run 7:30 am. To 4:30 pm., with a half hour lunch scheduled at 11:30 am. Smythe stated that PE expected the workers to keep these hours.
8. *Full Time Work.* Blount responded that work days averaged 8 -10 hours, and initially Saturdays were mandatory. PE responded that work days were 0 – 10 hours.
9. *Work Done on Premises.* All work occurred on site at the project.

10. *Order or Sequence Set.* PE determined which workers would work together and would designate daily work assignments. PE foremen regularly inspected the work.
11. *Reports.* Blount responded that workers had recently been required to submit invoices for labor and materials, but that he had never submitted an invoice.
12. *Payments.* PE paid workers by check, and is scheduled to issue 1099 forms at the end of the year.
13. *Expenses.* PE responded that workers' expenses were not reimbursed. However, PE submitted an invoice showing a \$716.84 charge for materials.
14. *Tools and Materials.* Workers supplied their own tools and PE supplied materials.
15. *Investment.* The workers only investment involved their tools.
16. *Profit or Loss.* The workers responded that the only investment risk they faced involved wear and tear on their tools.
17. *Works For More Than One Person of Firm.* The project work schedule is full time. There was no evidence of these workers having other employment.
18. *Offers Services to the General Public.* None of the eleven electricians have their own company. None of them are registered contractors with the Iowa Division of Labor, and most are apprentice level electricians.
19. *Right to Fire.* Independent contractor agreements specified a one year project with the right to terminate by either party with one week notice.
20. *Right to Quit.* Worker can quit at any time. (administrative file, pp. 19 – 20).

Mr. Madden concluded that the PE workers on the Whisper Ridge project were functioning as employees rather than independent contractors after considering seven factors. (1) He found a strong indication that PE exercised direction and control over the work. PE foremen on site told the workers who to work with and which daily tasks to work on. (2) Completed work was inspected by the PE foremen. (3) PE set the work hours. (4) Although PE asserted that he workers could hire assistants, it did not occur. (5) The electrical work performed by the eleven workers is the primary work of the company. (6) The workers do no incur an investment risk. (7) The workers do not operate their own businesses, and do not have Master Electrician ratings. At least one worker was hired by PE after responding to an advertisement on Craig's List. (administrative file, pp. 19- 20; Madden testimony).

Mr. Madden also felt that the company tried to mislead his investigation. PE had one worker fill out their own version of the status questionnaire and submit it to Mr. Madden unsolicited. PE had the workers sign "Independent Contractor Statements" on which the company had typed statements and the workers only initialed. These were signed on April 6, 2010. PE hired workers for this project in November of 2009. The April 6, 2010, signed agreements and statements occurred one day before Mr. Monnin, CEO, signed his questionnaire responding to Mr. Madden's investigation. (administrative file, pp. 89 – 119).

The company did not appear at the hearing in this matter to provide evidence. PE asserted, by letter from Mr. Monnin, that all of the workers were independent contractors because:

- They established their own hours;
- They were not told how to do their jobs;
- They used their own tools;
- They had significant investment (tools);
- They were under contract;
- They signed notarized statements asserting that PE did not exercise control;
- They were free to contract with other parties;
- They were not required to attend PE meetings or adhere to company policy;
- They could hire and pay their own employees;
- They were not reimbursed for expenses;
- They turned in invoices for payment;
- They received no training;
- They were not required to personally perform the work, and could hire subs;
- They were short term and not continuous; and
- They were not required to turn in reports. (administrative file, p. 10).

IWD issued a decision on October 6, 2010, which found that remuneration paid to these workers by PE was reportable as wages for state unemployment tax purposes because the workers were employees. (administrative file, pp. 15 – 18). This appeal followed in a timely manner. (administrative file, p. 10).

### **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 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> 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>4</sup> An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it within Iowa.<sup>5</sup> The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."<sup>6</sup> Employment includes service performed by "[a]ny individual who, under the usual common law rules

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<sup>1</sup> Iowa Code § 96.9(1).

<sup>2</sup> *Id.* § 96.11(1).

<sup>3</sup> *Id.* § 96.7(4).

<sup>4</sup> *Id.* § 96.19(16)a.

<sup>5</sup> *Id.* § 96.19(17).

<sup>6</sup> *Id.* § 96.19(18)a.

applicable in determining the employer-employee relationship, has the status of an employee.”<sup>7</sup>

IWD contends that the eleven electricians working on the Whisper Ridge project were PE employees. PE disagrees and contends that these workers were independent contractors.

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.<sup>8</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>9</sup> IWD has also adopted rules with factors to consider in determining whether a worker is an independent contractor or employee.<sup>10</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 in which the services are performed; it is sufficient if the employer has the right to do so.<sup>11</sup>

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

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

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<sup>7</sup> *Id.* § 96.19(18) a(2).

<sup>8</sup> *Gaffney v. Dep’t of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).

<sup>9</sup> 871 IAC 23.19(6).

<sup>10</sup> *Id.* 23.19.

<sup>11</sup> *Id.* 23.19(1).

<sup>12</sup> *Id.*

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

<sup>14</sup> *Id.*

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

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.<sup>16</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>17</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>18</sup> 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.<sup>19</sup> Professional employees who perform services for another individual or business are covered employees.<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 have the right to employ assistants with the exclusive right to supervise their activity and completely delegate work.<sup>22</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>23</sup> Independent contractors often have significant investment in real or personal property that they use in performing services for others.<sup>24</sup>

Services performed any an individual for remuneration are presumed to be employment, unless proven otherwise.<sup>25</sup> An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.<sup>26</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>27</sup>

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:

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<sup>16</sup> *Id.* 23.19(2).

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

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

<sup>19</sup> *Id.* 23.19(1).

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

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

<sup>22</sup> *Id.* 23.19(5).

<sup>23</sup> *Id.* 23.19(3).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* 23.19(6).

<sup>26</sup> Iowa Code § 96.19(18)*f*; *Id.* 22.7(3).

<sup>27</sup> 871 IAC 22.19(7).

PE controlled the work and provided materials. Two onsite PE foremen directed the work to be done on a daily basis, and inspected the work on a regular basis, and all of the work was done on the site.

PE set the work hours. Unlike contractors running their own business, the workers were required to work the set hours.

PE paid workers for the hours worked, and not a set amount for the project. Although the company stated that the workers had to submit invoices, the evidence established that this did not occur. The workers earned their pay by working the assigned hours, and did not face the risks associated with profit and loss.

These workers did not operate their own businesses. None of the workers is registered as an electrical contractor in the State of Iowa, and most held apprentice credentials. No evidence in the record indicated that any of the workers worked simultaneously for other contractors or on other project.

All of these factors support the finding of an employer-employee relationship. The only factors supporting an independent contractor status involve the descriptions of the status by Mr. Monnin and the independent contractor agreements. The agreements signed after commencement of an investigation have little probative value, and per 871 IAC 23.19(7),

“23.19(7) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial.”

The Iowa Code, at Section 96.19(18)(f) provides that the employer – employee relationship is presumed in this matter. PE and Mr. Monnin bear the burden of proof in this case to overcome the presumption that the electricians in this matter were employees. They have failed to meet that burden of proof. IWD properly found an employer-employee relationship existed between PE and the eleven electricians working on the Whisper Ridge project.

## **DECISION**

IWD's decision that that individuals performing work on the Whisper Ridge project for Positive Electric, Inc., were employees of that company is affirmed. As a result, any remuneration paid to them by Positive Electric, Inc., was reportable for unemployment insurance contribution purposes. IWD shall take any steps necessary to implement this decision.

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