

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

**Appeal Number: 11IWD009**

**Respondent (1)**

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**MG PRECISION CONSTRUCTION  
ATTN. JOEL GELNER  
2549 MANOR STREET  
WATERLOO, IA 50702-5132**

**IOWA WORKFORCE DEVELOPMENT  
RUSSELL MUNSINGER, INVESTIGATOR  
1000 EAST GRAND AVENUE  
DES MOINES, IA 50319-0209**

JOE BERVID, IWD  
NICHOLAS OLIVENCIA, IWD  
JASON TRYON, IWD  
RYAN DOSTAL, IWD  
JOSEPH MARTIN, ATTORNEY

**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)

November 4, 2011

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(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

### **STATEMENT OF THE CASE**

The misclassification unit for Respondent Iowa Workforce Development (“IWD”) initiated an investigation of the relationship between Appellant MG Precision Construction (“MG Precision”) and its workers. Joel Gelner is the principal for MG Precision. IWD issued a decision in December 2010 finding an employer-employee relationship existed between MG Precision and its workers and finding MG Precision was liable for unemployment insurance contributions for 2008 through 2010. MG Precision timely 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 on October 24, 2011. Attorney Joseph Martin appeared on behalf of MG Precision. Joel Gelner appeared and testified on behalf of MG Precision. Todd Gelner appeared on behalf of MG Precision, but did not testify. Attorney Nicholas Olivencia appeared on behalf of Respondent Iowa Workforce Development (“IWD”). Russell Munsinger and Ryan Dostal appeared and testified on behalf of IWD. Exhibit A, pages 1 through 111, was admitted into the record.

## ISSUE

Whether Iowa Workforce Development correctly determined that an employer-employee relationship existed between MG Precision Construction and its workers.<sup>1</sup>

## FINDINGS OF FACT

Joel Gelner is the owner MG Precision, a construction business located in Waterloo, Iowa. Joel Gelner testified MG Precision performs framing, roofing, siding and remodeling work. Joel Gelner has framed approximately 200 Skogman homes in the Cedar Falls area.

In late 2010, IWD received an anonymous tip that MG Precision had misclassified its workers as independent contractors. The person providing the tip identified two MG Precision worksites in the Cedar Falls area located at 1625 Quail Ridge Road (“Quail Ridge”) and 2613 Feather Ridge Road (“Feather Ridge”).

IWD investigators Dostal and Matthew Mardesen went to the worksites to investigate. The investigators arrived at Feather Ridge and observed work being conducted from a distance. The investigators approached the workers introduced themselves to a person named Todd Gelner. Dostal and Mardesen interviewed Todd Gelner, Andy Johnson, Zachary Rekers, Andy Switzer, and Derrick Bass. The workers identified Todd Gelner as being in charge of the worksite. The investigators asked the workers whether they were registered contractors, who they worked for, and who owned the equipment.

Dostal testified Todd Gelner told him he had worked for Joel Gelner for eight years and was paid weekly based on a day rate. Dostal reported the other workers informed him they were paid hourly and received a check biweekly. Johnson stated he was paid \$18 per hour. Rekers stated he was paid \$14 to \$15 per hour. Switzer told Dostal he worked for MG Precision full-time and had worked for MG for two years.

At the Quail Ridge site Dostal spoke with Eric O’Connell, Luke Wilson, Kyle Crosser, and Wayne Carrier. Carrier told Dostal that MG Precision sets his hours. Dostal observed O’Connell was wearing a shirt containing the MG Precision logo and had a MG Precision sign on his own truck. Crosser told Dostal MG Precision set his hours of work. Wilson, Crosser and Carrier reported they were paid by the hour and received a check biweekly. O’Connell stated he had worked for MG Precision for two years. Wilson and Crosser told Dostal they had worked for MG Precision for one year. Carrier reported he had worked for MG Precision for less than a year.

O’Connell called Joel Gelner after Dostal arrived and handed Dostal the telephone. Dostal explained to Joel Gelner who he was and why he and Mardesen were

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<sup>1</sup> When the case was transmitted to the Department of Inspections and Appeals a second issue was identified, “Was MG Precision Construction properly classified as a newly covered employer in the construction industry?” The parties agreed this was not an issue in the hearing because MG had an existing account with IWD for unemployment insurance contributions.

investigating. Dostal told Joel Gelner he had serious concerns about the classification of the workers because the workers were wearing MG Precision shirts, and there were trailers with MG Precision advertising on the sites. Dostal reported the conversation became heated, Joel Gelner raised his voice, and Dostal ended the call.

Dostal gave each of the workers at the worksites his business card and a packet with a return envelope addressed to IWD containing a Contractor Registration form, Report to Determine Liability, and Questionnaire to Determining Status of Worker. Dostal testified the workers at both worksites informed him they had their own personal tool belts, but MG Precision provided the saws, ladders, and other larger equipment to perform the work.

Dostal took photographs of the Feather Ridge site found in Exhibit A, pages 34 through 41, and Quail Ridge site, found in Exhibit A, pages 29 through 33. Trailers and trucks at both worksites had advertising for "MG Precision Construction" and provided MG Precision's telephone number. Dostal took photographs of workers on both worksites who were wearing shirts printed with MG Precision's logo.

Dostal and Mardesen reported their findings to Munsinger. On August 25, 2011 Munsinger sent Joel Gelner at MG Precision a letter informing him that IWD investigators had recently stopped at an MG Precision worksite in the Cedar Falls area and observed a number of individuals who claimed to be working for MG Precision. The letter provided, in part:

Iowa law assumes all workers to be employees unless it is shown to the department's satisfaction that they are independent contractors. According to Iowa law, any employing unit that has workers it considers to be exempt from unemployment insurance tax liability shall file a Questionnaire for Determining the Status of Workers, along with supporting exhibits and documents (IAC 871-22.7(1)).

Please complete and return the following to my attention by September 8, 2010:

1. Questionnaire for Determining Status of Workers
2. Names and contact information for all workers that have performed services for MG Precision since 2005
3. Wage information for all workers that have performed services for MG Precision since 2005 (1099s, W-2s, canceled checks, check stubs, general ledger, disbursement journal, ect.).

(Exhibit A, p. 58). Munsinger attached a Notice to Produce Records to the letter.

Joel Gelner responded to Munsinger's letter by electronic mail on September 2, 2011, as follows:

Attached is the information requested. I had a conversation with your investigator. I was informed that I need to make some of my subs, employees. I was informed that I am not operating correctly. I was not aware of this because I make my subs carry their liability insurance. I have currently started the process of providing workmans comp, and the W-2 for my subs that fall into your investigators requirements. I have spoken with my insurance man. I have spoken with my accountant. I will provide proof of W-2 if required. My records of MG Precision date back to 2008. 2008 was when MG Precision was created. I am in full cooperation of your needs for information.

(Exhibit A, p. 48). Joel Gelner attached the 1099s for his workers for 2008 and 2009 and the 2008 and 2009 Annual Summaries and Transmittals of US Information Returns. MG Precision and Joel Gelner did not provide any additional information to Munsinger.

Munsinger mailed each worker present at the Quail Ridge and Feather Ridge worksites and the workers identified in the 1099s a letter requesting the worker complete an enclosed Questionnaire for Determining Status of Worker.

Dostal received a partially completed Questionnaire for Determining Status of Worker from Switzer. Switzer reported MG Precision decides how work assignments are completed and if his services were not satisfactory his services would be discontinued. Switzer stated that he would need to notify MG Precision if he hired an assistant, the assistant would be subject to MG Precision's control or supervision, and MG Precision could discharge his assistant. Switzer further reported MG Precision provides his equipment, supplies, materials and tools and Switzer provides his own vehicle. Switzer responded the customer pays MG Precision and Switzer receives an hourly wage from MG Precision. Switzer noted MG Precision does not have the right to require him to attend meetings or work fixed hours. IWD did not receive any additional documents from any of the other workers present at the Quail Ridge and Feather Ridge worksites or identified in the 1099s.

On September 15, 2010, Dostal received a telephone call from O'Connell. O'Connell told him he thought he had been fired and was afraid he would lose his income. O'Connell stated he believed he was an employee. Dostal testified O'Connell told him he was afraid to provide information, but reported the workers are expected to be on the job site between the hours of 7:00 a.m. and 4:30 p.m., that Joel Gelner made O'Connell pick up many of the workers for work, O'Connell ran the crew, and the workers had to call in to report when they were going to be absent. O'Connell confirmed he had the packet of paperwork IWD provided to him. Dostal asked O'Connell to complete the paperwork and send it to him. Dostal also explained the missing wage process to O'Connell. Dostal did not hear back from O'Connell. Dostal determined the information O'Connell provided was not consistent with an independent contractor relationship because MG Precision was exercising direction and control over the workers.

Munsinger determined an employer-employee relationship existed between MG Precision and Derrick Bass, Wayne Carrier, Kyle Crosser, Todd Gelner, Matthew Gonzalez, Andrew Johnson, Erick Kettleon, Arden Miller, Eric O'Connell, Jonathan Pickar, Zachary Rekers, Ryan Rikkels, Mark Rodenburgh, Andrew Switzer, Robert Wallace, Brock Weliver, Kyle Weliver, Christopher Wilson, and Lucas Wilson. Munsinger found MG Precision had an unemployment insurance account that was active, but MG Precision had only reported wages for Joel Gelner. Munsinger made wage adjustments based on the 1099s provided by MG Precision.

Joel Gelner testified he provides a lift and Skogman provides a generator for some projects. Joel Gelner testified all of the work performed was done on the homeowner's or Skogman's premises. None of the worksites were owned by MG Precision. Joel Gelner testified the workers could earn more money by working faster or longer hours so they would be available to complete the next project.

Joel Gelner reported Todd Gelner has been framing homes as long as he has and that he has not provided Todd Gelner with any instruction. Joel Gelner testified Todd Gelner is paid \$2 per square foot and uses some of Joel Gelner's equipment, but also uses his own equipment and truck. Joel Gelner stated that when Todd Gelner arrives for a framing project Skogman has the materials on the worksite for Todd Gelner to use. Joel Gelner noted Todd Gelner works for other contractors and that their relationship has not changed over time. Joel Gelner testified O'Connell has a set schedule to work, but Todd Gelner does not and Todd Gelner determines how fast he completes a framing project.

Joel Gelner testified Gonzalez and Rikkels have provided roofing services to MG Precision, while working for other businesses. Joel Gelner reported Gonzalez and Rikkels provided him with a bid for a square of shingles. Joel Gelner denied MG Precision provided Gonzalez and Rikkels with tools to perform their work, instructed Gonzalez and Rikkels on how to perform their work, and dictated the hours Gonzalez and Rikkels worked. Joel Gelner reported that if Gonzalez and Rikkels did not finish a project, they would not be paid and MG Precision would have to hire a replacement worker. Joel Gelner stated Skogman supplied the materials to perform the work completed by Gonzalez and Rikkels.

Joel Gelner testified Rodenburgh also performed roofing services and he was paid by each square of shingles for each project.

Joel Gelner reported Kyle Weliver provided siding and roofing services to MG Precision and other contractors. Joel Gelner stated Kyle Weliver was paid by check and by the job. Joel Gelner denied setting Kyle Weliver's hours of work and denied providing Kyle Weliver with training.

Joel Gelner testified Kettleon is a computer software specialist who set up his business software. Joel Gelner denied providing Kettleon with training and materials to perform his work. Joel Gelner paid Kettleon \$30 to \$35 per hour and stated that he was present when Kettleon performed the computer work for him. According to Joel

Gelner, Kettleison is not a regular employee of MG Precision, and does not work in the construction industry.

Joel Gelner did not testify at hearing that Bass, Carrier, Crosser, Johnson, Miller, O'Connell, Pickar, Rekers, Switzer, Wallace, Brock Weliver, Christopher Wilson, or Lucas Wilson were independent contractors. Joel Gelner did not produce any contracts, bids, invoices, or other evidence supporting a separate business presence for any of the workers to IWD during its investigation or at hearing.

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

IWD oversees the unemployment compensation fund in Iowa, which is governed by Iowa Code chapter 96.<sup>2</sup> IWD's Director administers Iowa Code chapter 96 and is charged with adopting administrative rules.<sup>3</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>4</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>5</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>6</sup> The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."<sup>7</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>8</sup>

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 or independent contractor.<sup>9</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>10</sup> IWD has also adopted rules with factors to consider in determining whether a worker is an independent contractor or employee.<sup>11</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

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<sup>2</sup> Iowa Code § 96.9(1).

<sup>3</sup> *Id.* § 96.11(1).

<sup>4</sup> *Id.* § 96.7(4).

<sup>5</sup> *Id.* § 96.19(16)a.

<sup>6</sup> *Id.* § 96.19(17).

<sup>7</sup> *Id.* § 96.19(18)a.

<sup>8</sup> *Id.* § 96.19(18)a(2).

<sup>9</sup> *Gaffney v. Dep't of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).

<sup>10</sup> 871 IAC 23.19(6).

<sup>11</sup> *Id.* 23.19.

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>12</sup>

The right to discharge or terminate a relationship is “an important factor indicating that the person possessing that right is an employer.”<sup>13</sup> If the discharging party may be liable for damages for breach of contract, the circumstances are indicative of an independent contractor relationship.<sup>14</sup>

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service are characteristic of an employer.<sup>15</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>16</sup>

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>17</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>18</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>19</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>20</sup> Professional employees who perform services for another individual or business are covered employees.<sup>21</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>22</sup> Independent contractors have the right to employ

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<sup>12</sup> *Id.* 23.19(1).

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

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

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

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

<sup>17</sup> *Id.* 23.19(2).

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

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* 23.19(1).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* 23.19(4).

assistants with the exclusive right to supervise their activity and completely delegate work.<sup>23</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>24</sup> Independent contractors often have significant investment in real or personal property that they use in performing services for others.<sup>25</sup>

Services performed by an individual for remuneration are presumed to be employment, unless proven otherwise.<sup>26</sup> An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.<sup>27</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>28</sup>

MG Precision is in the construction business. During the hearing MG Construction alleged additional information was not provided to IWD because IWD failed to request additional information. MG Precision bears the burden of proof in this case, not IWD. During the investigation MG Precision was aware that IWD was investigating whether its workers were properly classified as independent contractors. MG Precision had all of the business records and had the assistance of an accountant in preparing its submissions to IWD.

Joel Gelner alleges Bass, Carrier, Crosser, Todd Gelner, Gonzalez, Johnson, Kettleon, Miller, O'Connell, Pickar, Rekers, Rikkels, Rodenburgh, Switzer, Wallace, Brock Weliver, Kyle Weliver, Christopher Wilson, and Lucas Wilson are not employees of MG Precision. Joel Gelner's testimony is inconsistent with Dostal's and Munsinger's testimony, raising credibility concerns. 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>29</sup>

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<sup>23</sup> *Id.* 23.19(5).

<sup>24</sup> *Id.* 23.19(3).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* 23.19(6).

<sup>27</sup> Iowa Code § 96.19(18)*f*; *Id.* 22.7(3).

<sup>28</sup> 871 IAC 22.19(7).

<sup>29</sup> *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996).

IWD requested Joel Gelner complete:

1. Questionnaire for Determining Status of Workers
2. Names and contact information for all workers that have performed services for MG Precision since 2005
3. Wage information for all workers that have performed services for MG Precision since 2005 (1099s, W-2s, canceled checks, check stubs, general ledger, disbursement journal, ect.).

(Exhibit A, p. 58). Joel Gelner provided an e-mail response and attached 1099s for his workers for 2008 and 2009 and the 2008 and 2009 Annual Summaries and Transmittals of US Information Returns. He did not complete the Questionnaire for Determining Status of Workers or submit any cancelled checks, check stubs, general ledgers or other documents supporting that the workers are independent contractors.

Joel Gelner testified he did not provide additional information to IWD because he was unfamiliar what he needed to provide. According to his e-mail response, Joel Gelner had been conferring with his accountant. Munsinger's August 25, 2011 letter asked for specific types of documents. When questioned at hearing why he did not prepare a response to the Questionnaire for Determining Status of Workers Joel Gelner responded he is an employee of MG Precision. Joel Gelner is the owner and principal of MG Precision. Joel Gelner's testimony is not credible.

Joel Gelner testified Kettleon provides computer services to him on an hourly basis. He further testified Gonzalez, Rikkels, and Rodenburgh provided roofing services to MG Precision and were paid by the square. He avers Kyle Weliver was paid by check and by the job. Joel Gelner was not forthcoming with information during IWD's investigation. He did not report this information to IWD during its investigation. Joel Gelner has a definite interest in establishing the workers identified by IWD were independent contractors. Joel Gelner did not produce any bids, invoices or other documents from any of the workers. He did not call any of the workers as witnesses or produce any affidavits or other statements supporting his allegations. Todd Gelner was present at the hearing, MG Precision did not call him as a witness to verify Joe Gelner's assertions.

Joel Gelner contends that MG Precision did not instruct the workers on how to perform their services. Joel Gelner testified he provided a lift for the workers to use and Skogman provided the materials and a generator. He stated MG Precision did not provide other tools to the workers. The workers at both worksites informed Dostal they had their own personal tool belts, but MG Precision provided the saws, ladders, and other larger equipment needed to perform the work.

During the visits to the worksites Dostal observed trailers with MG Precision's logo. Workers at both of the worksites were wearing shirts printed with MG Precision's logo. Dostal also observed O'Connell's personal truck had MG Precision's logo on a magnet on the side of his truck. Joel Gelner testified he did not pay O'Connell for the advertising. MG Precision paid for the magnet.

Many of the workers at the worksites told Dostal they were paid hourly. O'Connell and Switzer reported they had worked for MG Precision full-time for two years. Dostal testified O'Connell told him the workers were expected to work on the job site from 7:00 a.m. through 4:30 p.m. Carrier also stated MG Precision set his hours of work. O'Connell reported he picked up many of the workers for work at Joel Gelner's direction. O'Connell told Dostal he ran the work crew and the workers had to call in to report when they were going to be absent.

IWD did not find the workers were registered contractors with the state of Iowa or that they had a separate business presence during the time they worked with MG Precision. At hearing MG Precision did not produce any witnesses or documentary evidence showing the individuals had a separate business presence from MG Precision. I conclude MG Precision has failed to prove an independent contractor relationship existed between MG Precision and Bass, Carrier, Crosser, Todd Gelner, Gonzalez, Johnson, Kettleon, Miller, O'Connell, Pickar, Rekers, Rikkels, Rodenburgh, Switzer, Wallace, Brock Weliver, Kyle Weliver, Christopher Wilson, and Lucas Wilson. IWD properly found an employer-employee relationship existed.

### **DECISION**

Iowa Workforce Development correctly determined that an employer-employee relationship existed between MG Precision as its workers. Iowa Workforce Development shall take any steps necessary to implement this decision.

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