

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

Appeal Number: 11IWD001

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**PETER GREINER
INDIAN HILLS INN, INC.
100 HIGHWAY 34 EAST
ALBIA, IA 52531**

**IOWA WORKFORCE DEVELOPMENT
MATT MARDESEN, INVESTIGATOR
1000 EAST GRAND AVENUE
DES MOINES, IA 50319**

JOE BERVID, IWD
JOE MOWERS, IWD
JODI DOUGLAS, IWD
GEORGE THIBAULT, Party

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)

March 30, 2011

(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

STATEMENT OF THE CASE

On May 14, 2010, Kim Ardueser, a Field Auditor for Iowa Workforce Development (“IWD”) completed a missing wage investigation and determined that an employee-employer relationship existed between Indian Hills Inn, Inc. and George Thibault, one of its workers. IWD issued a decision on May 19, 2010, stating that Mr. Thibault was determined to be an employee, and that any remuneration paid to him by Indian Hills Inn, Inc., was reportable for unemployment insurance contribution purposes. Peter Greiner, the President of Indian Hills Inn, Inc. timely appealed.

IWD transferred the case to the Iowa Department of Inspections and Appeals, Division of Administrative Hearings to schedule a contested case hearing. The matter proceeded to a hearing by telephone on March 28, 2011. Appellant Peter Greiner appeared pro se and testified, and called Jim Rotz as a witness. Attorney Nick Olivencia appeared on behalf of respondent IWD, and presented testimony from Kim Ardueser, and George Thibault. IWD Exhibit A, with pages 1 through 58 entered the record without objection. Mr. Greiner submitted written witness statements from Joan McDonald, Michelle Curry and Tammy Post. These statements also entered the record without objection.

ISSUE

Whether Iowa Workforce Development correctly determined that an employer-employee relationship existed between Indian Hills Inn, Inc. and George Thibault.

FINDINGS OF FACT

Indian Hills Inn, Inc. (IHI) is a motel, RV park, swimming pool, and restaurant facility in Albia, Iowa. (Greiner questionnaire, Exhibit A p. 15). George Thibault worked for the appellant from February 29, 2008, until April 16, 2010. He testified that he answered a newspaper advertisement, spoke to Mr. Greiner and was hired as a painter, for an undetermined period of time. During his time with IHI, Mr. Thibault also did housekeeping, cleaned rooms, cleaned bathrooms, shampooed rugs, cleaned the swimming pool, cleaned the grounds, ran errands, chauffeured other employees and Mr. Greiner's family members and plowed snow. He testified that he submitted a time card to Mr. Greiner and was paid every week at an hourly rate. Mr. Thibault's name appeared on the weekly work schedule with other IHI employees. (Exhibit A, p. 8). Mr. Thibault never submitted an invoice or a bill for his work. Mr. Greiner supplied all equipment and supplies used by Mr. Thibault to perform his duties. Mr. Thibault used the business vehicle for errands and supplies. When he occasionally used his own vehicle, Mr. Greiner reimbursed the gas expenses. Mr. Thibault received his schedule from Mr. Greiner. He testified that Mr. Greiner told him to work Monday through Friday at 8:00 a.m. On one Saturday occasion Mr. Thibault could not drive one of Mr. Greiner's nannies home as instructed. When he reported for work on Monday, Mr. Greiner told him to take the week off without pay as a penalty. Mr. Greiner told him his duties on a daily basis and supervised all work. If work was not done to Mr. Greiner's satisfaction, Mr. Thibault had to re-do the work. When this happened, the hourly rate of pay still applied. Mr. Thibault received a free room at the IHI motel for a while, and parked an RV at the IHI park at a reduced rent thereafter. Mr. Greiner installed a telephone in the RV so that Mr. Thibault could be available as needed. (Thibault testimony; Exhibit A, pp. 5-7, pp. 20-21).

Mr. Thibault testified that was initially hired as a painter, but worked as a handy man. He is not a registered contractor, in the State of Iowa, and does not own his own business. Mr. Thibault assumed that either he or Mr. Greiner could terminate the relationship at any time, and, in fact, Mr. Greiner did terminate Mr. Thibault's services by a letter on April 18, 2010. (Exhibit A, p. 9).

Mr. Greiner testified that he hired Mr. Thibault as an independent contractor, not an employee, for a specific remodeling project. Mr. Thibault's job was to follow the general contractor, Mr. Rotz through the project, cleaning and painting. He stated that he told Mr. Thibault that he was an independent contractor, and that he would have to set up his own account for taxes. He also informed Mr. Thibault that he was not covered by worker's compensation insurance and was not entitled to vacation time. Mr. Greiner testified that Mr. Thibault had no set hourly schedule and used a time card to bill for the hours that he worked. Mr. Greiner also acknowledged that he offered additional duties to Mr. Thibault at the same hourly rate as the project neared completion. Mr. Greiner

also stated that Mr. Thibault did not have the right to hire assistants to help with his work. (Greiner testimony; Exhibit A pp. 12-19).

Jim Rotz testified that he worked as a general contractor on the IHI remodeling project. He is a registered contractor in Iowa and owns his own company. As such, he stated that he set his own hours and did not require permission to take vacation or hire assistants. Mr. Rotz testified that he did not receive daily direction from Mr. Greiner. He used his own tools and equipment and submitted bills to Mr. Greiner to get paid. Mr. Rotz testified further that he did not know the nature of Mr. Thibault's working relationship with Mr. Greiner, but that he knew that Mr. Greiner laid out the work to be done in the morning for Mr. Thibault, and "...George took care of it." Mr. Rotz also testified that Mr. Thibault was paid by the hour. (Rotz testimony).

Tammy Post, an IHI employee, submitted a written statement indicating that Mr. Thibault told her that he was an independent contractor, and that he liked it that way.

Joan McDonald, an IHI employee, submitted a written statement indicating that Mr. Thibault bragged about his independent contractor status. He stated that he could work when he wanted to work and did not have taxes withheld from his paycheck. Ms. McDonald also noted that Mr. Thibault did other painting jobs while working at IHI.

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 George Thibault was IHI's employee. IHI disagrees and contends that Thibault 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:

Mr. Greiner had the right to terminate Mr. Thibault's services, and did so. This discharge did not raise a claim for breach of contract for Mr. Thibault;

Mr. Thibault performed general labor. His duties were not specific to a project;

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).

Mr. Thibault received hourly wages. He did not face a risk of work related economic loss. When he had to fix work that was not done to Mr. Greiner's satisfaction, Mr. Thibault still received his hourly pay;

Mr. Thibault did not have the right to hire assistants; and

Mr. Greiner controlled the work. He directed the work to be done on a daily basis, and had the right to require that the work be done to his satisfaction. Mr. Greiner furnished the tools and equipment for Mr. Thibault's work, and all of the work was done on the site.

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 relationship by Mr. Greiner and Mr. Thibault, as reported by other employees. Per 871 IAC 23.19, these descriptions are immaterial.

IHI and Mr. Greiner bear the burden of proof in this case to overcome the presumption that George Thibault was an employee. They have failed to meet that burden of proof. IWD properly found an employer-employee relationship existed between IHI and George Thibault.

DECISION

IWD's decision that that George Thibault was an employee of Indian Hills Inn, Inc. is affirmed. IWD shall take any steps necessary to implement this decision.

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