

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

Appeal Number:

10IWD083

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

RF CONSTRUCTION LLC
E6782 BUTTERNUT ROAD
MANAWA, WI 54949-8606

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

JOE BERVID, IWD
JOSEPH WALSH, IWD
JASON TRYON, IWD
RYAN FUHS, OWNER

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)

November 5, 2010

(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 RF Construction LLC (“RF Construction”) and its workers. IWD issued a decision on May 20, 2010 finding an employer-employee relationship existed between RF Construction and its workers, and that RF Construction was liable for unemployment contributions for its workers effective January 1, 2006. RF Construction 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 November 3, 2010. Accountant Gary Janssen appeared on behalf of RF Construction, but did not testify. Janssen did not call any witnesses at hearing or submit any documentary evidence. Attorney Joseph Walsh appeared on behalf of IWD. IWD Field Auditor Jim Madden appeared and testified on behalf of IWD. Exhibit A with pages 1 through 112 was admitted into the record.

ISSUE

Whether an employer-employee relationship existed between RF Construction LLC and its workers.

FINDINGS OF FACT

Ryan Fuhs is the owner of RF Construction. RF Construction installs fiber optic cable lines. RF Construction was a registered limited liability company in the state of Wisconsin. In September 2009 the state of Wisconsin administratively dissolved the limited liability company.

Qwest Communications had a contract with Gaylord Construction to install fiber optic cable lines. Gaylord Construction subcontracted with RF Construction to install the fiber optic cable lines.

In September 2009, RF Construction submitted an Iowa Contractor Registration Application. As part of the application process, RF Construction submitted a Report to Determine Liability form. IWD reviewed the Contractor Registration Application. RF Construction had identified its workers as subcontractors. Madden commenced an investigation behalf of IWD to determine if RF Construction had misclassified the subcontractors.

Madden submitted a Questionnaire for Determining Status of Workers ("Questionnaire") to RF Construction. RF Construction produced a response to the Questionnaire pursuant to a Notice to Produce. In the Questionnaire, RF Construction reported it subcontracted with Allen Berne of Al's Plowing in Farmsburg, Greg Coalbank in Knoxville, Jerry Godlove in Knoxville, Daron Williams of AW Construction in Oskaloosa, Allan Guy Robuck in Knoxville, and Larry Givens in Indianola to perform the work for Qwest Communications. RF Construction also sent a copy of the written contract it entered with each of the workers.

Written Contracts with the Workers

RF Construction entered into a written contract with each of the workers. The written contract discusses work performed for Qwest Communications and Iowa Telecom.

The workers to call the dispatcher on a daily basis to report completed jobs or work status. For each day a worker fails to call to report an absence or illness sickness, RF Construction assesses a \$50 fee. If a worker fails to call for seven days, the worker's employment is terminated. The workers also agreed to report daily by 9:00 a.m. The contract provides, "if not working for any reason there will be a fine of \$50.00 per day for no call. This is mandatory due to due Dates on jobs, held order, and holds." (Exhibit A at 63). If a worker is late, "without reason for the hold-up" the worker is charged \$10 per day, per job. (Exhibit A at 63). "Any job footage over billed by more than 20 ft. will lost compensation for the entire job. (No excuses)." (Exhibit A at 63).

Under the contract, “[a]ll liquid dated damages reported to dispatcher in office will be taken off check after notified. Sub-contractor is responsible if he/or she has a dispute and to Resolve situation with in that week of check.” (Exhibit A at 63).

RF Construction agreed to pay the workers on a weekly basis. The workers agreed RF Construction would withhold a 10% retainer from each payment. Pursuant to the contract, one-half of the retainer is dispersed at the end of the work season, and the second half is paid in the spring at the beginning of the new work season. The contract is silent as to whether the retainer is forfeited if a worker is terminated or terminates his or her employment. To receive payment for a week of work, the worker must submit a job sheet to the dispatcher by Monday at 9:00 a.m.

The workers retainer responsibility for all damages and line cuts. If a worker cuts more than five lines in a year, the worker is discharged. Workers take full responsibility for any drops buried shallow, and “will need to rebury drop at their expense and time. If unable to bury at mandatory depth, sub-contractor must document all information and reasons to dispatcher at time of closing out ticket. If no documentation is given and Qwest inspects job, operator will pay for damage claim.” (Exhibit A at 63).

The workers must be bonded. If a worker fails to be bonded for a job and “[i]f this is an issue and job is inspected there will be a \$40 quality fee paid by subcontractor” that is taken out of the worker’s retainer for the week. (Exhibit A at 64).

In the event of a claim, the worker must contact the “customers” within 24 hours of being notified by the dispatcher. **“After contacting customer, you must call dispatcher & let her know what was done. Subcontractors must take care of the situation within 72 hours (this Qwest requires). If claim is not taken care of in this timely manner, the claim will be taken out of sub-contractor’s retainage.”** (Exhibit A at 64, emphasis original).

The contract requires the workers to call for “permission for any job over 2,700 ft. if you do not have permission you will not receive pay for that job at all. You must call Trish at Gaylords for permission.” (Exhibit A at 63).

The workers are required to take picture before the work is perform and document the address, city, date, Iowa number and damage of anything unusual not pertaining to the workers on site. The workers must also complete a monthly inventory sheet.

Questionnaire Responses

Madden sent each of the subcontractors a Questionnaire. Coalbank, Givens, and Berns submitted responses. Coalbank and Givens stated they performed the work pursuant to a contract. Berns denied performing the work pursuant to a contract.

Coalbank and Berns reported they perform the work under their own names. Givens reported he performs the work under the firm’s name.

Coalbank and Givens stated they perform work on a piece basis. Berns noted he is paid on by the foot or job.

Coalbank and Berns reported they provided the equipment, tools, and vehicles, and Qwest Communications provided the supplies. Givens stated he and RF Construction provided the equipment and vehicle, RF Construction and Qwest provided the supplies, and that he provided the tools. The workers retained responsibility for property damage.

Coalbank reported that RF Construction does not have the right to direct and control the work and that RF Construction does not have priority over his services. Givens stated that RF Construction has the right to direct and control the work and has priority over his services. Berns reported that RF Construction does not have the right to direct and control the work, but RF Construction has priority over his services.

Coalbank and Berns did not report RF Construction supervised or reviewed their work, rather Qwest inspects their work. Coalbank noted he could be assessed quality fees by Qwest or Gaylord. Givens noted all of his work is supervised or reviewed. If work is unsatisfactory, Givens stated money would be taken out of his pay and his work may be taken away.

Coalbank noted that he does some construction work other than his work for RF Construction. Givens stated he does not perform any similar services for others. Berns reported he usually performs the service for others, but had not this year due to the recession.

Fuhs did not testify or present any documentary evidence at hearing. He submitted an appeal letter found in Exhibit A, which states:

We issued 1099's to these individuals because it is our opinion that they are not employees of our company. These individuals supply their own tools and equipment to complete the jobs. They carry their own liability insurance policies. I contract with these individuals to do the job, the individuals set their own work schedule as to when to complete the job and they perform the work without supervision. These individuals are paid on a per job basis, not hourly or salary. It is our opinion these factors qualify them as independent contractors and not employees.

(Exhibit A at 12).

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

¹ Iowa Code § 96.9(1).

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

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

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).

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.*

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

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

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* 23.19(2).

¹⁷ *Id.*

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).

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

RF Construction is in the business of installing fiber optic cable lines and bears the burden of proof in this case. In its appeal letter RF Construction contends that the workers are independent contractors because it contracts with the individuals to do the job, the individuals set their own work schedule as to when to complete the job and they perform the work without supervision. RF Construction did not present any evidence at hearing to support its contention that the workers are independent contractors.

The written contract supports a finding RF Construction had right to control and direct the workers. For example, the contract requires the workers to arrive by 9:00 a.m. each day, or the workers will be assessed a fine. The contract also requires the workers to timely report to the dispatcher that they are going to absent or late, or the workers face a fine. The workers must submit their job sheets by 9:00 a.m. on Monday to receive payment for the week. Under the contract, the workers are required to obtain permission for jobs over 2,700 feet. RF Construction also holds a retainer from their payment. The workers are also required to take photographs of each project before commencing work and complete inventory sheets each month. The evidence in this case supports IWD's determination that an employer-employee relationship exists between RF Construction and its workers.

DECISION

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

hlp

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

²⁷ 871 IAC 22.19(7).