

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

Appeal Number: 10IWD075

Respondent (2)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**K&M HOME IMPROVEMENTS
DUANE PUTNEY, OWNER
2927 105TH STREET
STUART, IA 50250-8141**

**IOWA WORKFORCE DEVELOPMENT
JASON TRYON
1000 EAST GRAND AVENUE
DES MOINES, IA 50319**

DAN ANDERSON, IWD
JOSEPH BERVID, IWD
DEB MICKLES, IWD
JANET DICKSON, DICKSON ACCOUNTING

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.

Laura E. Lockard

(Administrative Law Judge)

November 17, 2010

(Decision Dated & Mailed)

STATEMENT OF THE CASE

As the result of an application for contractor registration renewal, Iowa Workforce Development (the Department) issued a Notice of Employer Status and Liability dated January 12, 2010 reactivating the employer account of K&M Home Improvements on the basis of its conclusion that it had paid wages in a quarter prior to having ten consecutive quarters without employees. K&M Home Improvements filed an appeal from the Department's decision.

A telephone hearing was held before Administrative Law Judge Laura Lockard on October 1, 2010. Jim Madden participated for the Department and presented testimony. CPA Janet Dickson represented K&M Home Improvements and presented testimony. Duane Putney, owner of K&M Home Improvements, also testified. The Department submitted Exhibit A, which was admitted into the record as evidence.

The Department certified two issues for appeal when the case was transmitted to the Department of Inspections and Appeals: 1) whether the unemployment account for

K&M Home Improvements was properly reactivated; and 2) whether the Department correctly determined that an employer-employee relationship existed between K&M Home Improvements and its workers. At hearing, K&M Home Improvements stipulated that it was not appealing the reactivation of the unemployment account. The Department did not issue a separate decision finding that an employer-employee relationship existed between K&M Home Improvements and its workers. The Department's synopsis of its investigation, however, makes clear that the Department determined that Fernando Ricarlez, Jurmencio Cruz Ortega, Jim Downs, and Diana Sanchez were employees of K&M Home Improvements. The Department stipulated at hearing that K&M Home Improvements has the right to appeal its determination regarding employees even though a separate decision was not issued. K&M Home Improvements stipulated that Fernando Ricarlez was an employee during the time period in question; it challenges only the classification of Mr. Ortega, Mr. Downs, and Ms. Sanchez.

ISSUE

Whether the Department correctly determined that an employer-employee relationship existed between K&M Home Improvements and its workers.

FINDINGS OF FACT

Duane Putney is the owner of K&M Home Improvements (K&M). Mr. Putney previously did business as D&J Seamless Gutters. K&M primarily does installation of siding, roofing, doors, and windows for residential clients. K&M and D&J are both the same unincorporated business owned by Mr. Putney; he simply changed the name under which he does business. (Exh. A, p. 11; Madden testimony).

At some point in 2009, K&M submitted an application for a renewal of his contractor registration number. As part of this process, in September, 2009, the Department sent a letter to Mr. Putney requesting that he complete a Questionnaire for Determining Status of Workers and provide a listing of payments made to all subcontractors and workers for 2009. (Exh. A, p. 27). In response to the information that Mr. Putney provided, the Department solicited information from all the workers or businesses that Mr. Putney reported K&M paid in 2009. The Department determined that two of them – Herbert Gibson and Carter Exteriors LLC – were properly classified as independent contractors. Mr. Gibson had been a registered contractor since March, 2008 and has an incorporated business, Herb Gibson Siding, Inc. Carter Exteriors LLC is a limited liability company and has been a registered contractor since October 21, 2008. (Exh. A, p. 12).

With respect to the remaining four people who were paid by K&M in 2009 – Fernando Ricarlez, Jurmencio Cruz Ortega, Jim Downs, and Diana Sanchez – the Department determined that they should have been classified as employees. The Department's initial investigation focused on Mr. Ricarlez, who had been employed by Mr. Putney for several years before Mr. Putney's business began classifying him as an independent contractor. At hearing, K&M stipulated that Mr. Ricarlez should have been classified as an employee during the relevant time period.

The Department sent a letter to Mr. Cruz Ortega on October 26, 2009 requesting that he contact the Department to discuss his work as an independent contractor. Mr. Cruz Ortega did not respond to the letter. Deb Mickles, the field auditor who investigated this case for the Department, did not find any evidence that Mr. Cruz Ortega had registered as a contractor with the Department, nor did she find any unemployment insurance tax account or business telephone listing. On this basis, the Department determined that Mr. Cruz Ortega was an employee of K&M rather than an independent contractor. (Exh. A, p. 12).

The Department sent an identical letter to Mr. Downs on October 26, 2009. Mr. Downs called Ms. Mickles in response to the letter. Ms. Mickles sent Mr. Downs a contractor registration application, which he did not return. Ms. Mickles concluded there was no evidence to support that Mr. Downs had a "business operation," therefore he was classified as an employee of K&M. (Exh. A, p. 12).

The same letter that was sent to Mr. Cruz Ortega and Mr. Downs was also sent to Diana Sanchez. Ms. Sanchez called Ms. Mickles and stated that if she had to start keeping books she would have to let her day laborers go. Ms. Sanchez reported that when she worked for Mr. Putney, he instructed her crew how to put the roof on and if he did not like their work he told them how to change their methods. Ms. Sanchez said that in her opinion Mr. Putney supervised their work. Ms. Mickles sent Ms. Sanchez a Questionnaire for Determining the Status of Workers, a Report to Determine Liability, and a contractor registration form. Ms. Sanchez was to come to Ms. Mickles' office for assistance in filling those forms out in November, 2009, but she canceled her appointment and did not return any of the forms. Regarding Ms. Sanchez, Ms. Mickles wrote in her synopsis of investigation:

The only evidence found verifying that she has a business operation was her own admission that she has day laborers. With respect to her relationship with Duane Putney and the degree of direction control [sic] exercised over her by Mr. Putney, she has been determined to be his employee.

(Exh. A, p. 12).

The Department subsequently opened a separate investigation regarding Diana Sanchez as a possible employer or labor broker. (Madden testimony). There is no evidence in the record regarding the results, if any, of that investigation.

On December 2, 2009, the Department sent a letter to Mr. Putney informing him that the Department had determined that Fernando Ricarlez, Jim Downs, Jurmencio Cruz Ortega, and Diana Sanchez were considered to be K&M employees for unemployment tax purposes. The letter informed Mr. Putney that an official decision would be mailed to him in the next week to ten days and he would have the right to appeal that decision. (Exh. A, p. 26). The Department issued a decision on January 12, 2010 reactivating the account of K&M and setting a tax year 2010 contribution rate of 5.4%. (Exh. A, p. 8).

Mr. Cruz Ortega did a total of five jobs for K&M. He also did work for other contractors

during the same time frame. K&M paid Mr. Cruz Ortega on a square foot basis. (Putney, Dickson testimony).

Mr. Downs sided one house for K&M; the job lasted four days. He bid the job per square foot, gave Mr. Putney an estimate, and got the job. Mr. Downs also works for other contractors. (Putney, Dickson testimony).

Ms. Sanchez did one roofing job with K&M as R&D Roofing. Mr. Putney solicited a bid from Ms. Sanchez for the job and she gave him an estimate. The work required on the roof was quite extensive; it needed new sheeting and Mr. Putney told Ms. Sanchez how many layers of sheeting it would require. Mr. Putney inspected the job once it was completed and instructed her that it needed to be fixed. (Putney, Dickson testimony).

Mr. Cruz Ortega, Mr. Downs, and Ms. Sanchez's crew all provided their own tools for the work they did for K&M; none of them used tools belonging to K&M or Mr. Putney. K&M did provide material for the jobs. Mr. Putney occasionally went to the job sites to see how much material was needed, but he did not go to job sites to supervise the workers. K&M did not dictate an hourly schedule to any of the three individuals in question; they and their crews, if any, came and went from the job site as they pleased. The deadlines that were established for jobs to be completed were based upon the individuals' reports to Mr. Putney regarding when they could fit the job or jobs into their schedules. (Putney testimony).

Each of the three individuals in question provided Mr. Putney with proof of liability insurance at the time they did jobs for K&M. K&M required that all independent contractors produce this proof. Neither Mr. Putney nor K&M purchased the policies that covered these three individuals. (Putney, Dickson testimony; Exh. A, p. 39, 42, 45).

REASONING AND CONCLUSIONS OF LAW

For purposes of unemployment compensation, an "employer" is defined as an employing unit that, in any calendar quarter in the current or preceding calendar year, paid wages of \$1,500 or more, or employed at least one individual for some portion of a day in each of twenty different calendar weeks during the current or preceding calendar year.¹ "Employment" is defined as service performed for wages or under any contract of hire, written or oral, express or implied.² When an employer claims that any employment is not employment under the Iowa Employment Security Law, the burden is on the employer to prove the exemption claimed.³

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."⁴

¹ Iowa Code § 96.19(16)(a) (2009).

² Iowa Code § 96.19(18)(a) (2009).

³ 871 Iowa Administrative Code (IAC) 22.7(3).

⁴ *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. ⁵

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.⁶ 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.⁷

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.⁸

In this case, the majority of facts weigh in favor of finding that the three individuals in question were independent contractors. They all provided their own tools, set their own work schedules, were paid by the job rather than hourly, and carried their own general liability insurance. None of them had an exclusive working relationship with K&M; Mr. Cruz Ortega did five jobs and Mr. Downs and Ms. Sanchez did only one job apiece. Each individual provided his or her own tools for the job; none utilized K&M or Mr. Putney's

⁵ 871 IAC 23.19(1).

⁶ See generally 871 IAC 23.19.

⁷ 871 IAC 23.19.

⁸ 871 IAC 23.19(7).

tools.

At hearing, the Department relied heavily on its conclusion that none of the three individuals in question had, in its estimation, a “business presence.” The Department argued that an individual who wished to hire one of these individuals to do roofing work would not even be able to locate them. The Department argued that these individuals worked for contractors on what it termed a “rotating employee” basis.

In the determination of independent contractor versus employee, no one factor is dispositive and the relationship as a whole must be considered to determine the status of the parties’ relationship. The Department’s exclusive reliance on the “business presence” factor is misplaced. The factors in this case clearly point to an independent contractor relationship between K&M and these three individuals. Subcontractors do not necessarily have to offer services to the general public in order to be classified as non-employees. This argument ignores the reality of the construction industry, in which contractors who provide specific services are often very knowledgeable about the array of subcontractors who perform the specialized tasks they require.

K&M met its burden in this case to prove that Jurmencio Cruz Ortega, Jim Downs, and Diana Sanchez were not its employees. The evidence demonstrates that all three were properly classified by K&M as independent contractors. Under these circumstances, the Department’s classification of these three individuals as employees of K&M must be reversed.

DECISION

The Department’s determination that Jurmencio Cruz Ortega, Jim Downs, and Diana Sanchez were employees of K&M Home Improvements for unemployment tax purposes is reversed. The Department shall take any action necessary to implement this decision.

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