

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

**Appeal Number: 10IWD072**

**Respondent (1)**

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**CUSTOM ONE LLC  
JOHN LONGLEY, OWNER  
809 60TH STREET  
WEST DES MOINES, IA 50266-5985**

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

JOE BERVID, IWD  
EMILY CHAFA, IWD  
JASON TRYON, IWD  
STEVEN L. KANE, KANE COMPANY PC

**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)

September 22, 2010

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(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

### **STATEMENT OF THE CASE**

The misclassification unit for Iowa Workforce Development (“IWD”) initiated an investigation of the relationship between Appellant Custom One LLC (“Custom One”) and its workers. IWD determined an employee-employer relationship existed between Custom One and its workers. IWD issued a decision on April 8, 2010 stating that Custom One was determined to be an employer in the construction industry effective April 1, 2009. James Longley, the owner of Custom One 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 September 1, 2010 at the Wallace State Office Building in Des Moines, Iowa. Accountant Steven Kane appeared on behalf of Custom One. Longley appeared and testified on behalf of Custom One. Attorney Emily Chafa appeared on behalf of Respondent IWD. Matthew Mardesen, Ryan Dostal, and Steven Heinle appeared and testified on behalf of IWD. Exhibit A, with documents 1 through 362 was admitted into the record.

**ISSUE**

Whether Iowa Workforce Development correctly determined that an employer-employee relationship existed between Custom One and the individuals performing services for the business from 2008-2009.

### **FINDINGS OF FACT**

Mardesen and Dostal are investigators with IWD's misclassification unit. On November 16, 2009, Mardesen and Dostal made a visit to a construction site for a new residential home located at [REDACTED] NE Beaver Brooke Boulevard in Grimes. Custom One was the builder on site. According to Mardesen, the home was being framed. Mardesen noted there were four people at the site. Longley was in his truck and the other three were framing the structure.

Mardesen observed tools common in the construction industry, including an air compressor running to nail guns, a saw, a lift, and ladders. Mardesen learned that Longley was responsible for the lease for the lift. He also determined that Longley owned the ladders and air compressor. Dostal reported that the men stated they were independent contractors. Dostal testified the men stated that Longley provided the lift and nail guns, and the men provided their own hand tools.

Mardesen spoke with the workers, who were identified as Jack Jordan, Chris Scott, and Philip Reiner. The workers informed him that they were subcontractors for Longley. Mardesen testified the workers told him that Longley owned the tools and lift.

Mardesen introduced himself to Longley. Longley reported that Jordan, Scott, and Reiner were subcontractors. Longley later classified Jordan as an employee. During the November visit Jordan and Longley reported Jordan was a subcontractor. Longley testified that Jordan intended to purchase contractor's insurance, but Jordan could not afford it. Longley stated that because Jordan did not have contractor's insurance, he had to pay him as an employee.

Mardesen did not request the Jordan, Scott, and Reiner produce certificates of insurance. The men did not inform Mardesen they were self-insured. Mardesen testified that in his experience some employees carrying their own general liability insurance.

When Mardesen returned to IWD he determined Jordan, Scott and Reiner were not registered contractors with the state of Iowa. Mardesen did not find that Longley or Custom One were currently registered contractors with the Division of Labor for the state of Iowa. Longley testified he has always been a registered contractor. Mardesen could not find a separate business presence for Jordan, Reiner and Scott.

Dostal also looked for a separate business presence for Reiner and Scott. He looked at the Secretary of State's website, the contractor registration database and the internet. Dostal testified he could not find a separate business presence for Reiner and Scott.

Mardesen also looked on the IWD system and found Custom One had a prior unemployment account with IWD that was in pending status and had been closed in the 4th quarter of 2007. Mardesen looked at the account and determined that Jordan had been an employee in the past. This is confirmed by the Employer's Contribution and Payroll Reports submitted for the 2nd and 3rd quarters of 2007 and for the 2nd Quarter of 2009. The Employer's Contribution and Payroll Reports were prepared by Kim Longley, Longley's ex-wife. Reiner and Scott were not previously classified as Longley's employees.

Longley testified that in 2008 he went out of business until February 2009. During this period he worked for a previous employer.

On December 7, 2009, Mardesen spoke with Longley. Mardesen found that it appeared Longley controlled and planned the daily activities and took a leadership roll for Jordan, Scott and Reiner and provided their tools. Mardesen informed Longley he believed the men were employees. Longley disagreed. Mardesen asked what had changed since 2007. Longley stated the housing market declined and he could not afford to pay for unemployment compensation coverage. During the hearing Longley testified he informed Mardesen he could not afford to pay for workers' compensation coverage, not unemployment compensation coverage.

Mardesen had Scott and Reiner complete the Questionnaire for Determining Status of Workers ("Questionnaire"). Scott and Reiner mailed the forms to Mardesen. The Questionnaire asked how the worker was paid. Scott and Reiner responded, "lump sum." (Exhibit A at 31, 35). The Questionnaire also asked "[i]s the work performed under the terms of a written agreement between the firm and the worker?" (Exhibit A at 31). Scott and Reiner answered "no." (Exhibit A at 31, 35).

Mardesen met with Longley, Reiner and Scott at Longley's attorney's office on January 13, 2010. At that time Longley presented written agreements between Custom One and Reiner and Scott and stated both men were independent contractors. When Longley completed his Questionnaire, he did not report that the work Reiner and Scott performed was under the terms of a written agreement between Custom One and the workers. Mardesen testified there was no mention of taking draws from a given project until the January 2010 meeting.

During the January 2010 meeting, Longley, Scott and Reiner stated that they were splitting up the proceeds from the builder. Mardesen determined this was different than what he had learned before.

Longley testified that he had oral agreements with Scott and Reiner in November 2009. He stated that his attorney advised him to have written agreements, which were drafted after IWD began its investigation. Longley obtained forms on-line, which were the same as the verbal agreements. Longley stated the men were to be paid at the conclusion of the project, but sometimes took draws. Longley reported Jordan was paid on an hourly basis.

Mardesen explained that he believed Longley had direction and control over the work site, the services were integrated into a framed house, the work was done on site, both men could quit or be fired without a penalty. Mardesen stated that based on his investigation, he believed the workers were employees and not independent contractors.

Mardesen later learned that Scott and Reiner completed the paperwork to be registered contractors with the state of Iowa. Mardesen found Scott and Reiner were not liable to pay for unemployment coverage because they do not have any employees.

Mardesen requested financial information from Custom One. He received the 2006 through 2008 income tax returns and payments to the workers from 2009 forward. In examining the financial records, Mardesen discovered that on page 95, all of the individuals listed except for Jordan were not included on the Employer's Contribution and Payroll Report for the period in question in 2007. Longley reported that he had been instructed that if a worker was paid less than \$600, he did not need to include the worker on the Employer's Contribution and Payroll Report.

Longley included a handwritten note with the documents, which states "[c]ontract Labor for 2007 No 1099s sent All were new hire and less than \$600." (Exhibit A at 97). Mardesen determined that the individuals listed in the documents following the handwritten note were paid on an hourly basis. For example, on page 99, Jordan was paid for 26 hours and \$15 for gas.

Mardesen examined the pay records and determined that the men were paid on an hourly basis. He also found that the majority of the payments were made toward the end of the week. Mardesen determined that Reiner was paid between Thursday and Saturday 11 of 15 times. He also found Scott was paid 15 of 20 times, as set forth on pages 116 and 117.

In late June, early July, Dostal and Heinle approached the same work site. Heinle is a certified public accountant working for the misclassification unit. According to Dostal, Longley, Jordan and Scott were present on the site. Dostal testified the workers were hostile. Dostal and Heinle reported Reiner stated they had already talked and that IWD had already "busted us once" and that they were "doing it right now."

On July 29, 2010, Mardesen and Dostal were in Grimes and saw a construction crew working on a house at [REDACTED] NE 12th Street. Mardesen observed two people working around the main door working on framing. He also saw Longley in the garage carrying lumber. Mardesen determined the two men were Jordan and Jim Hopemeyer. IWD took a photograph of the trailer for the project containing an air compressor with airlines, a saw for framing, a radio, and electrical cords. Mardesen determined this was the same type of equipment the workers told him belonged to Longley during the November 2009 visit.

Dostal testified that during the late July visit, Reiner informed him he was present during the previous visit. Dostal reported he did not see Reiner during that visit. Dostal opined that based upon his training and experience he believed that Reiner and Scott

were Longley's employees and not independent contractors. He stated that Longley was in charge and the other men did not have a separate business presence.

Longley testified the air compressor shown in the photograph at page 358 is not his. He stated the air compressor belonged to Reiner. He reported that Scott and Reiner bring their own tools and drive their own vehicles. Longley stated he did not know that Scott and Reiner needed to be registered with the state of Iowa.

Longley has been in business for seventeen years. He testified that during this time he has used subcontractors and that the use of subcontractors is common in the construction industry.

During his visits to the sites, Dostal did not observe any Custom One trucks. He did note the men had their own hand tools and belts.

Heinle reviewed the investigative file and business records produced by Longley. He noticed that Custom One had an unemployment insurance account that had been inactivated. Heinle reported inactive accounts exist for entities that do not have employees and have discontinued their business. Heinle stated that if a business regains employees it is required to reactive the account. According to IWD's records, Custom One's account was inactive at the start of the investigation, but was reactivated through a decision on March 25, 2010, effective April 1, 2009.

Heinle testified that upon reviewing the investigative file and business records, he also concluded Scott and Reiner were employees. Heinle stated he based his opinion in part on the lack of business presence, history of tax returns, and financial documents.

Longley reported that Jordan is paid much less than Scott and Reiner because he is an employee. Longley testified that Jordan was destitute. Longley stated that Scott is paid \$2,000 per house, Reiner is paid \$1,700 to \$1,800 per house, and Jordan may earn \$800. Longley explained that he pays the men differently because Scott and Reiner have their own tools and insurance.

Longley stated that he does not have the right to control Scott's and Reiner's work and that they work for other contractors. Longley testified that Reiner quit working during the last house he constructed.

## **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>

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<sup>1</sup> Iowa Code § 96.9(1).

<sup>2</sup> *Id.* § 96.11(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.<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 applicable in determining the employer-employee relationship, has the status of an employee.”<sup>7</sup> IWD contends Scott and Reiner are Custom One’s employees. Custom One contends Scott and Reiner are 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>

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<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.

<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.*

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>

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

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

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

<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).

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>

Scott and Reiner furnished their own hand tools and belts, which is indicative of an independent contractor relationship. However, the evidence revealed that Longley was responsible for the lease for the lift. Longley also furnished the work site. Scott and Reiner's services were integrated into a framed house. All of the work was done on the site. Either side could terminate the relationship without penalty. These facts support the finding of an employer-employee relationship.

When Scott and Reiner completed the Questionnaires, they indicated they were paid in a "lump sum." (Exhibit A at 31, 35). The records reveal that Scott and Reiner performed services for specific jobs, which is more indicative of an independent contractor relationship. The payment records for Scott and Reiner reveal regular payments, the majority of which occurred between Thursday and Saturday.

Longley presented written employment contracts for Scott and Reiner. In completing the Questionnaires, Longley, Scott and Reiner reported there were no written employment contracts. Longley explained that he operated under verbal agreements with Scott and Reiner and that the written agreements were the same as the verbal agreements. This raises an issue of credibility. Some of the most common standards for assessing credibility include:

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>28</sup>

I do not find Longley's testimony credible. The written agreements contain provisions concerning intellectual property and confidentiality. The agreements are also dated July 2009. Longley admitted the written agreements were prepared much later in time. Moreover, the agreements provide that Scott would be paid \$1.10 per square foot and Reiner would be paid \$1 per square foot. Longley testified that Scott would be paid \$2,000 per house and Reiner would be paid \$1,700 to \$1,800 per house. The difference is more than ten cents per square foot. If a house were 1,900 square feet, under the written agreements, Scott would be paid \$1,980 and Reiner would be paid \$1,900. These amounts do not compute.

In November 2009, Scott and Reiner did were not registered contractors with the state of Iowa. A review of the Secretary of State's website and internet failed to reveal a

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

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

<sup>28</sup> *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996)



separate business presence for Scott and Reiner. There is no evidence Scott and Reiner were holding themselves out to the public as contractors. There is no evidence Scott and Reiner employed any assistants.

Custom One bears the burden of proof in this case. While some of the factors support an independent contractor status, Custom One has failed to overcome the presumption that Scott and Reiner are employees. IWD properly found an employer-employee relationship existed between Custom One and Scott and Reiner.

### **DECISION**

IWD's decision that that Scott and Reiner were employees of Custom One from 2008 through 2009 is affirmed. IWD shall take any steps necessary to implement this decision.

hlp