

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

Appeal Number: 10IWD069

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**RIGID CONSTRUCTION SERVICES, INC.
2026 NORTH WEST LAKESIDE DRIVE
ANKENY, IA 50023-4803**

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

DAN ANDERSON, IWD
JOSEPH BERVID, IWD
JODI DOUGLAS, IWD
EMILY CHAFA, IWD
JASON TRYON, IWD
TRAVIS SISSON
JAMES GOCKE, ATTY

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)

September 17, 2010

(Decision Dated & Mailed)

STATEMENT OF THE CASE

As the result of a compliance check, Iowa Workforce Development (the Department) issued a Notice of Employer Status and Liability dated April 8, 2010 finding that an employer-employee relationship existed between Rigid Construction Services Inc. (Rigid) and the individuals performing services for the business from 2005 through 2009. Rigid filed an appeal from the Department's decision.

A telephone hearing was held before Administrative Law Judge Laura Lockard on August 13, 2010. The Department was represented by attorney Emily Chafa. Investigators Matt Mardesen and Ryan Dostel and field auditor Steven Heinle testified for the Department. Attorney James Gocke represented Rigid Construction Services, Inc. Troy Wiese, president and owner of Rigid, testified for the corporation.

The Department submitted Exhibit A, which was admitted into the record as evidence.

ISSUE

Whether the Department correctly determined that an employer-employee relationship existed between Rigid Construction Services Inc. and individuals performing services for the business from 2005 to 2009.

FINDINGS OF FACT

On October 9, 2009, investigators Matt Mardesen and Ryan Dostal with the misclassification unit of the Department's tax bureau conducted a compliance check at a residential new construction site in Grimes, Iowa. Upon arrival, the investigators observed the job site for several minutes before initiating contact with the individuals working on the home. The investigators noted a large trailer with "Rigid Construction" on the side. As they approached the site, they observed three men working. The home was in the process of being framed. Two of the workers, later identified as Chad Galetich and Ryan Pierce, advised the investigators that Troy Wiese was in charge at the site. (Exh. A, p. 10; Mardesen testimony). Mr. Mardesen primarily interviewed Mr. Wiese, while Mr. Dostal primarily interviewed Mr. Galetich and Mr. Pierce. (Mardesen, Dostal testimony).

During the on-site interview, Mr. Wiese told the Department representatives that he was a registered contractor and that the workers at the job site were subcontractors rather than employees and were issued 1099s at the end of each year. Mr. Wiese did not know whether the workers on the site with him were registered as contractors with the state of Iowa. Mr. Wiese stated that the majority of tools on the site belonged to him and were used by the workers on-site. Mr. Wiese also informed the investigators that he had another framing crew working at a different site on the same date. (Mardesen testimony).

Mr. Galetich and Mr. Pierce reported to Mr. Dostal that the tools and equipment they used were largely provided by Mr. Wiese. Each did have a tool belt with their own hand tools. They both indicated that they only worked for Mr. Wiese at the time of the compliance check, though each one had worked for other contractors in the past. (Dostal testimony).

Mr. Mardesen did not observe Mr. Wiese giving the workers any verbal instructions while he was on the site. When the investigators initially arrived, Mr. Pierce was uncooperative and would not give his name. When Mr. Wiese joined the conversation, Mr. Wiese told Mr. Pierce that he should just give his name to the investigators. (Mardesen testimony).

During the compliance check, Mr. Wiese, Mr. Pierce, and Mr. Galetich were each given the Department's questionnaire to determine the status of workers and were asked to complete the questionnaire and return it to the Department. None of the three ever returned the questionnaire. (Mardesen testimony).

After the compliance check, the Department verified that Rigid was registered with the State of Iowa. The Secretary of State's web site listed Kevin Davidson as president and

treasurer of Rigid. Troy Wiese was listed as secretary. (Exh. A, p. 124). Rigid had an active unemployment insurance account with the Department. The only two individuals who Rigid reported were paid wages from 2005 onward were Troy Wiese and Kevin Davidson. (Exh. A, p. 10). By 2009, when the Department conducted its compliance check, Mr. Davidson was no longer involved with Rigid. (Wiese testimony). The corporation, however, had not registered any changes in its corporate officers with the Secretary of State's office. (Mardesen testimony).

On October 30, 2009, Mr. Mardesen followed up with Mr. Wiese in an attempt to get the questionnaire that Mr. Wiese was provided on-site completed and returned. Mr. Wiese reported that he had turned the questionnaire over to his accountant, who had not yet filled it out. Mr. Wiese had questions about the factors that went into a determination of whether a worker was an employee or independent contractor. Mr. Mardesen agreed to e-mail Mr. Wiese a link to the Department's regulations on this point as well as another copy of the questionnaire. Mr. Mardesen did so in early November, 2009. In his e-mail, he requested that Mr. Wiese complete the questionnaire and return it as soon as possible. Mr. Wiese never did so. (Exh. A, p. 11, 126; Mardesen testimony).

About a week after the e-mail request, Mr. Mardesen sent Mr. Wiese a Notice to Produce Records. The notice scheduled a meeting on November 23, 2009 at 8:30 AM to discuss potential delinquent unemployment insurance compensation fund contributions from 2005 to present. In connection with the meeting, the notice requested that Rigid produce payroll records from 2005 to present, a disbursement journal and ledgers for 2005 to present, personal and business tax returns from 2005 to present, copies of all 1099s issued, all 1096 forms, all W-2 and W-3 forms issued, and the "941 Federal Form" from 2005 to present. (Exh. A, p. 127). Rigid ultimately submitted copies of the 1096, 1099, and W-2 forms that it had issued from 2005 through 2009. Rigid did not submit any tax returns or payroll records. (Mardesen testimony).

After completing its investigation, the Department determined that the workers who did framing work for Rigid were employees rather than independent contractors. Based on its investigation, the Department concluded that Rigid had the right to direct and control the workers at its job sites. The Department also considered the continuing relationship between some of the workers who received 1099s from Rigid and the corporation during the time period of its operation. One of the workers had worked for Rigid for the previous four years. Four or more workers had two or more consecutive years of service. Another factor the Department considered was that Rigid provided the tools the workers used. The Department determined that Rigid had the main investment in and control of the project. The Department did not believe that the workers had independent profit or loss potential. Based on the fact that neither of the two workers at the job site where the compliance check was completed was registered as a contractor in Iowa, the Department determined that neither of these individuals were in business for themselves or offered their services to other framing contractors.¹

¹ When examining the financial documents that Rigid provided, Mr. Mardesen discovered that 1099s were issued to two workers, John Kleen and Terry Rushing, under a federal employer identification number. Mr. Mardesen discovered that Mr. Kleen is a registered contractor in Iowa. Because of these factors, the monies paid to Mr. Kleen and Mr. Rushing were not included in the quarterly wage reports the Department prepared for Rigid. The Department determined

The Department issued a Notice of Employer Status and Liability on April 8, 2010. That decision determined that an employer-employee relationship existed between Rigid and the individuals performing services for the business from 2005 through 2009. The notice indicated that compensation for the years 2005 through 2009 was being reported for unemployment purposes. (Exh. A, p. 9). Rigid appealed the Department's decision. (Exh. A, p. 136).

At hearing, Mr. Wiese acknowledged that he did provide some tools for the workers who worked on Rigid's jobs. He provides a forklift, an air compressor, and other specialty tools that the average person does not have, such as a sawzall, a nail gun, and an oil gun. (Wiese testimony).

Mr. Wiese explained at hearing that his typical day at a job site just involves "com[ing] to work." He explained that he would determine whether reasonable progress had been made on the job and observe whether framing was done according to plan. If things were not being done according to plan, he would instruct the framing crew to make corrections. (Wiese testimony).

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.² "Employment" is defined as service performed for wages or under any contract of hire, written or oral, express or implied.³ 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.⁴

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."⁵

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

that Rigid did not owe unemployment contributions on these sums. (Exh. A, p. 11).

² Iowa Code § 96.19(16)(a) (2009).

³ Iowa Code § 96.19(18)(a) (2009).

⁴ 871 Iowa Administrative Code (IAC) 22.7(3), 23.55(2).

⁵ *Gaffney v. Department of Employment Services*, 540 N.W.2d 430, 434 (Iowa 1995).

right to do so. 6

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.⁷ 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.⁸

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.⁹

Rigid argued at hearing that the Department made its finding that Rigid's workers were employees based on minimal investigation and observation. While it is true that details of the workers' relationship with Rigid are skimpy here, it is no less true that Rigid had every opportunity to provide the Department with additional information to aid in the determination. The Department provided Mr. Wiese with a questionnaire to aid in determining the status of workers at least two times and he declined to return it. The Department made a formal request of Rigid to view its payroll records, tax returns, and other financial documents, which Rigid declined to produce. Finally, Rigid had an opportunity at hearing to present additional information in support of its assertion that its workers were properly classified as independent contractors. The employer has the burden in these cases to prove that a work relationship is exempt from the Iowa Employment Security Law. Having failed to fully cooperate with the Department and having failed to shed much additional light at hearing on how the workers interacted with Rigid, Rigid is not in a favorable position to complain about the lack of information

6 871 IAC 23.19(1).

7 See generally 871 IAC 23.19.

8 871 IAC 23.19.

9 871 IAC 23.19(7).

that the Department used in making its decision.

The evidence that was presented regarding Rigid's relationship with its workers supports the Department's conclusion that the workers were employees. Rigid was providing the workers with tools and equipment and both of the employees who were interviewed were only working for Rigid at the time. The Department's investigation revealed that a number of workers had worked for Rigid over a period of years. Neither of the two employees interviewed was registered as a contractor in Iowa, which supports the Department's conclusion that neither was offering his services to the general public.

Rigid presented no evidence to show whether the workers were paid an hourly rate or a fixed price for a job. Rigid provided no evidence to contradict the Department's testimony that the workers who were interviewed were only working for Rigid and not for any other employers. There was no evidence provided by Rigid regarding workers having any fixed costs with respect to the job, nor any evidence to show that the workers were unable to leave without incurring financial costs over and above a loss of wages.

In order to prevail on its assertion that its workers are independent contractors, Rigid bears the burden of proving that it does not have the right to direct and control the work its workers are performing. It failed to meet this burden.

DECISION

The Department's decision dated April 8, 2010 is AFFIRMED. The Department shall take any action necessary to implement this decision.