

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

Appeal Number: 10IWD068

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**ROD FREEMAN CONSTRUCTION
249 EAST HOLLAND
COLFAX, IA 50054-1700**

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

JOE BERVID, IWD
EMILY CHAFA, IWD
TENA GASKILL, IWD
JASON TRYON, IWD
MICHAEL VER MEER

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 23, 2010

(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination
Iowa Code section 96.7-2c(1) – New Employer Determination

STATEMENT OF THE CASE

The misclassification unit for Iowa Workforce Development (“IWD”) initiated an investigation of the relationship between Appellant Rod Freeman Construction (“Freeman Construction”) and its workers. IWD determined an employee-employer relationship existed between Freeman and its workers for 2005 through 2009. IWD issued a decision on May 11, 2010 stating that Freeman Construction had an employer-employee relationship with the individuals performing services for the business for the years 2005, 2006, 2007, 2008, and 2009 for unemployment purposes. Freeman 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 September 8, 2010. Accountant Michael Ver Meer appeared on behalf of Freeman Construction. Ron Freeman appeared and testified on behalf of Freeman Construction. Attorney Emily Chafa appeared on behalf of Respondent IWD. Matthew Mardesen and Ryan Dostal appeared and testified on behalf of IWD. Steven Heinle also appeared on behalf of IWD, but did not testify. IWD’s submission pages 1 through 347, and Exhibits A and B were admitted into the record.

ISSUES

Was Rod Freeman Construction properly classified as a newly covered employer in the construction industry.

Whether Iowa Workforce Development correctly determined that an employer-employee relationship existed between Rod Freeman Construction and the individuals performing services for the business.¹

FINDINGS OF FACT

Mardesen and Dostal are investigators with IWD's misclassification unit. On October 20, 2009, Mardesen and Dostal stopped at a construction site at [REDACTED] Stonegate in Johnston, Iowa. There were nine people working on the site. According to Mardesen, the majority of the people were framing. A few were outside cutting lumber and one person was running a saw in the garage.

Mardesen identified the men as Rod Freeman Sr., Rod Freeman Jr., Rick Freeman, Chris Boals, Michael Altier, Tim Freeman, Jeff Corey, Shawn Rank, and Jeremy Cartee. Dostal asked who was in charge and was informed the Rod Freeman Sr. was in charge. Mardesen observed Rod Freeman Sr. working alongside the others. Mardesen explained why he and Dostal were at the site. Mardesen determined Rod Freeman Sr. and Rick Freeman were brothers. Rod Freeman Sr. is Rod Freeman Jr.'s father.

Dostal asked whether the workers were employees and they reported they were subcontractors. Mardesen did not inquire who owned the tools the men were using. Dostal saw there were a large number of tools. He asked the workers who the tools belonged to and they stated that they shared the tools. Dostal observed the workers working in small groups together. Some were working on walls, sheeting, and rafters. Dostal observed the workers interacting and working while Mardesen was talking with Rod Freeman Sr. Dostal also observed Rod Freeman Sr. directing and supervising the work.

Mardesen and Dostal documented each worker and provided each worker with a packet containing a state of Iowa contractor registration application, an Iowa Workforce Development Report to Determine Liability form ("Report to Determine Liability"), and a Questionnaire for Determining Status of Workers form ("Questionnaire"). Each packet included a self-addressed envelope.

Mardesen asked the workers how they were paid. They reported they received paychecks, but also received 1099s.

¹ The second issue was not identified on the Notice of Telephone Hearing. The parties agreed on the record that both issues are the subject of the appeal. The decision that is the subject of the appeal determined an employer-employee relationship existed between Rod Freeman Construction and the individuals performing services for the business.

Mardesen determined the individuals working at the site on October 20, 2009 were not registered contractors with the state of Iowa. He also learned that Rod Freeman Sr. had been in business since 2005. Rod Freeman Sr. testified he was unaware that he needed to be a registered contractor.

On December 8, 2009, Mardesen left a message for Rod Freeman Sr. and requested the documents issued during the October 20, 2009 visit. Rod Freeman Sr. did not respond.

On December 29, 2009, Mardesen left a message for Rod Freeman and requested the documents issued during the October 20, 2009 visit. Rod Freeman Sr. did not respond.

Mardesen prepared a Notice to Produce for Freeman Construction to appear at IWD on January 22, 2010. Mardesen testified he issues a Notice to Produce when an individual or business fails to cooperate with an investigation. Mardesen issued the Notice to Produce because he could not proceed with his investigation without the business documents.

On January 22, 2010, Rod Freeman Sr. called Mardesen and requested additional time to obtain the documents. Mardesen granted the request.

On January 26, 2010, Mardesen met with Rod Freeman Sr. at the IWD office. Mardesen requested the documents. Rod Freeman Sr. did not have all of the documents requested in the Notice to Produce. Rod Freeman Sr. explained he had just received the Notice to Produce on January 21, 2010 and did not have time to put all the requested documents together. Rod Freeman Sr. had copies of the 1099s from 2006, but not any of the additional years requested. Mardesen agreed to allow Rod Freeman Sr. additional time. Mardesen told Rod Freeman Sr. he would contact him on February 8, 2010 to check on the progress of collecting the documents. Mardesen informed Rod Freeman Sr. what documents he needed.

Rod Freeman Sr. completed the Report to Determine Liability and the Questionnaire during the meeting on January 26, 2010. Mardesen testified Rod Freeman Sr. did not want to complete the Questionnaire, so Mardesen wrote down his responses. Rod Freeman Sr. signed the Questionnaire after Mardesen completed it. Rod Freeman Sr. testified he was confused about the Questionnaire and wanted Mardesen to explain the Questionnaire to him.

When questioned by Mardesen, Rod Freeman Sr. reported the work was not performed pursuant to a written agreement. Rather, he reported the work was performed pursuant to a verbal agreement with each worker. Rod Freeman Sr. stated that the workers were required to perform the services personally for Rod Freeman Sr. Rod Freeman Sr. told Mardesen the workers typically work six to eight hours per day for Freeman Construction and are paid based on a percentage of the house. Rod Freeman Sr. testified that the workers would be paid the same whether they completed a project faster or slower.

In responding to the Questionnaire, Rod Freeman Sr. reported Freeman Construction had the right to direct and control the manner in which the services are performed. He also noted that quality of the services are supervised or reviewed by Freeman Construction. Rod Freeman Sr. reported that if the worker's work is unsatisfactory, Freeman Construction will "point out mistake, tell then what/how it needs fixed." (Page 17). Rod Freeman Sr. testified that he does not tell the workers how to perform their work, and that the workers know what to do based on their years of experience. Rod Freeman Sr. reported that if a worker did not fix a mistake and walked off the job, he would charge the worker for the mistake. Rod Freeman testified that the nine workers on site in October 2009 did not exclusively work for him.

Rod Freeman Sr. reported that Freeman Construction may discharge the worker at any time for poor quality and the worker may terminate services without incurring a liability or penalty. According to Rod Freeman Sr., the workers could employ assistants and Freeman Construction could tell the workers to "get rid" of the assistants. (Page 17). Rod Freeman Sr. reported Freeman Construction pays the assistants directly. Rod Freeman Sr. testified that he does not pay any of the workers benefits.

When Freeman Construction starts a new project Rod Freeman Sr. obtains the address for the site from Windsor Homes and picks up the blueprints. He testified he does not tell the workers when to arrive or when to take breaks.

Rod Freeman Sr. reported the workers have their own compressors, nail guns and hoses. He supplies the nails and fasteners and Windsor Homes supplies some of the fasteners. Rod Freeman Sr. does not provide any training to the workers. Rod Freeman Sr. stated all of the workers have their own liability insurance.

Mardesen reviewed the financial documents supplied by Freeman Construction. He received 1099s for 2005 through 2009, and checks from the bank from 2006 through 2010. In reviewing the documents Mardesen found that the workers received regular payments from Freeman Construction from 2005 through 2009.

Mardesen reviewed the payment records for Rod Freeman Jr. Mardesen determined Rod Freeman Jr. was typically paid on Friday. Rod Freeman Jr. was paid on Friday 43 of 46 times in 2006, 30 of 31 times in 2007, 31 of 34 times in 2008, and 31 of 35 times in 2009. Mardesen noted that the amounts appeared to be the same or similar. Mardesen determined these payments were a salary.

Mardesen also reviewed the payment records for Randy Freeman. Randy Freeman was paid on Friday 35 of 39 times in 2006, 28 of 29 times in 2007, and five out of five times in 2008. Mardesen found the payments were reflective of a continuing employment relationship.

Mardesen found the same pattern he saw with Rod Freeman Jr. and Randy Freeman with the remaining workers. For example, Jeff Cory was paid on Friday 26 of 27 times in 2007, 30 of 32 times in 2008, and 25 of 31 times in 2009. Mardesen found Jeff Cory was paid consistent amounts. Mardesen found a similar pattern with remaining

workers. Most of the payments were made on Fridays, which Mardesen found indicative of an employer-employee relationship.

Rod Freeman Sr. testified Randy Freeman is not his employee. He reported that when he receives a new project from Windsor Homes that he cannot complete, he will give the blueprints and job address to Randy Freeman and Randy Freeman will complete the project with his own crew, including Jeff, John, or Ron Cory. Rod Freeman Sr. reported he gives the money he earns from Windsor Homes to Randy Freeman. Rod Freeman Sr. testified he pays Randy Freeman's workers directly to make sure they are paid. Jeff Cory was on site on October 20, 2009. Randy Freeman was not present and supervising that day. The business records do not reflect any payments were made to Randy Freeman in the fourth quarter of 2009.

Mardesen also examined the payroll records, Rod Freeman Sr.'s Questionnaire, the 1099s, and the checks issued by Freeman Construction. Mardesen found that there were several checks for equipment, which indicated Freeman Construction was supplying some or a majority of the materials used on the site. The materials included fasteners, nails, screws, and brackets. Mardesen determined the payments for equipment purchases continued over three years. Mardesen testified that independent contractors typically supply their own materials and employers typically supply the materials for a project. Rod Freeman Sr. testified that he purchased fasteners and equipment for the Windsor Homes projects and for his own separate construction projects. Rod Freeman Sr. testified that he performs 90% of his work for Windsor Homes and 10% for his own separate business. He stated that he purchases the equipment, just as Windsor Homes supplies the wood.

Some individuals received payments from Freeman Construction who did not receive 1099s. Mardesen asked Rod Freeman Sr. about the payments to Brad Howe and Roy Penny. Rod Freeman Sr. reported that Howe is his nephew and that he needed money and was never an employee. Rod Freeman Sr. stated that Roy Penny was a "convict" who worked for Freeman Construction. Rod Freeman Sr. reported he did not know Cliff Rice, and that Shaune Osborne only worked a few hours. At hearing Rod Freeman Sr. testified that Osborne hung drywall in his personal residence and was not an employee. Rod Freeman Sr. also reported that Matt Hiediman is a high school student who performed yard work at his home. He did not explain why he failed to provide this information to Mardesen before the hearing.

Rod Freeman Sr. further reported he purchased a gun from Andrew Stutsman. Mardesen found he was not an employee. Rod Freeman Sr. stated he made several purchases from Sam Meissen, but could not recall what he purchased.

Mardesen found that Rick Freeman was on site working on October 10, 2009 and June 17, 2010. Mardesen could not find any payments to Rick Freeman in the business records. Mardesen estimated wages for Rick Freeman. Rod Freeman Sr. testified that Rick Freeman is a veteran with a disability. Rick Freeman does not charge for his labor and may work a day or two or three days at a time, depending on how he feels.

Mardesen further found that Matt Barney, Thomas Derek, Ken Downing, Holly McClain, Heather Kissel, and Donnie Bebee were employees. Several of the individuals were performing clean-up services on the construction sites. Rod Freeman Sr. noted that he is not usually present during clean-up of a site. He provides the workers with the address and they are responsible for cleaning up the site and taking the refuse to the dump.

Rod Freeman Sr. reported that Wally Freeman had received a loan. Mardesen did not find that Wally Freeman was an employee.

Rod Freeman Sr. stated that Ryan Lusk supplied a truck, but did not give any additional information. Because of the regular payments, Mardesen found he was an employee. At hearing Rod Freeman Sr. testified that Lusk is a mechanic and owns his own business. He did not explain why he failed to provide this information to Mardesen before the hearing.

Mardesen provided Rod Freeman Sr. with the opportunity to provide more information, but he did not. Mardesen presumed all of the individuals who received payments were employees, unless Rod Freeman Sr. provided an explanation that the payments were for something other than services for the business.

In June 2010, Mardesen and Dostal made a visit to another construction site at 3001 SE Keystone at approximately 2:00 p.m. There were three workers on site. As Mardesen and Dostal approached, the workers recognized them and packed up and left the site. Mardesen reported the workers were uncooperative, impolite, and used profanity. Rick Freeman told Mardesen and Dostal they should worry about "the Mexicans across the street." Mardesen observed Rick Freeman sawing wood and bringing it to the others. Mardesen could not find any financial records showing a payment to Rick Freeman. While on the site, Mardesen and Dostal saw a sign for Windsor Homes. Dostal called the telephone number listed on the sign and spoke with David Jones. Jones reported the workers on the site worked for Rod Freeman Sr.

Dostal wrote down the license plate numbers for the three men. He found the owners were Jeff Cory, Ambrose Coleman, and Rick Freeman. Dostal noted that Jeff Cory received checks from Freeman Construction and was also present during the October 2009 visit. Rick Freeman was also present during both visits.

Mardesen testified he checked to see if all of the workers had a separate business presence. He checked the state of Iowa contractor registration, the internet, and Qwest business. Mardesen could not find a separate business presence for the workers in October 2009.

Mardesen later found that Rod Freeman Jr. had submitted a contractor registration in January or February 2010. Mardesen determined Freeman Construction had paid Rod Freeman Jr. an average of \$800 per week for four or five years.

Mardesen found that Rod Freeman Sr. had the right to direct and control the work. During the October 2009 visit, nine people were working under his authority framing the home. Mardesen concluded the services were performed personally. He found the workers had a continuous relationship with Freeman Construction on a full-time basis over a period of years. Mardesen also determined that Freeman Construction was providing the fasteners for the work and overall authority for the project. Mardesen concluded the workers were not offering their services to the general public and had the right to quit and be fired without penalty. Based on a review of these factors, Mardesen determined the workers were employees and not independent contractors.

REASONING AND CONCLUSIONS OF LAW

IWD oversees the unemployment compensation fund in Iowa, which is governed by Iowa Code chapter 96.² IWD's Director administers Iowa Code chapter 96 and is charged with adopting administrative rules.³

IWD initially determines all issues related to liability of an employing unit or employer, including the amount of contribution, the contribution rate, and successorship.⁴ 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."⁵ An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it within Iowa.⁶ The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."⁷ 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."⁸

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.⁹ 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.¹⁰ IWD has also adopted rules with factors to consider in determining whether a worker is an independent contractor or employee.¹¹ 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

² Iowa Code § 96.9(1).

³ *Id.* § 96.11(1).

⁴ *Id.* § 96.7(4).

⁵ *Id.* § 96.19(16)a.

⁶ *Id.* § 96.19(17).

⁷ *Id.* § 96.19(18)a.

⁸ *Id.* § 96.19(18)a(2).

⁹ *Gaffney v. Dep't of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).

¹⁰ 871 IAC 23.19(6).

¹¹ *Id.* 23.19.

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.¹²

The right to discharge or terminate a relationship is “an important factor indicating that the person possessing that right is an employer.”¹³ If the discharging party may be liable for damages for breach of contract, the circumstances are indicative of an independent contractor relationship.¹⁴

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service is characteristic of an employer.¹⁵ “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.”¹⁶

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.¹⁷ 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.¹⁸

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.¹⁹ 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.²⁰ Professional employees who perform services for another individual or business are covered employees.²¹

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.²² Independent contractors have the right to employ

¹² *Id.* 23.19(1).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* 23.19(2).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* 23.19(1).

²¹ *Id.*

²² *Id.* 23.19(4).

assistants with the exclusive right to supervise their activity and completely delegate work.²³

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.²⁴ Independent contractors often have significant investment in real or personal property that they use in performing services for others.²⁵

Services performed by an individual for remuneration are presumed to be employment, unless proven otherwise.²⁶ An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.²⁷ 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.²⁸

Freeman Construction bears the burden of proof in this case. Freeman Construction directed where the work was performed. While the workers could come and go as they pleased, and did not require any training, Freeman Construction controlled the quality of the work. While Rod Freeman Sr. testified the workers on site in October 2009 did not work exclusively for Freeman Construction, he presented no documentary evidence or testimony from any other source showing the individuals worked for another business or individual. Mardesen could not find a separate business presence for any of the workers in October 2009.

Rod Freeman Sr. reported that the workers were paid based on a percentage of the house. However, the payments the workers received were regular and consistent. For some of the workers, the payments occurred over a period of years.

The evidence in this case reveals that Freeman Construction and the workers could terminate the relationship without being liable for damages. While the workers supplied their own hand tools and some of the equipment, Freeman Construction supplied the fasteners and other materials for the work.

The workers could employ assistants and supervise their activity. However, Rod Freeman Sr. reported that he could direct a worker to “get rid” of an assistant. Freeman Construction also paid the assistants directly.

Pages 27 through 92 set forth the listings of employees Mardesen found for tax years 2005 through 2010. At hearing Rod Freeman Sr. presented Exhibit B and limited testimony concerning the relationship between Freeman Construction and some of the identified individuals.

²³ *Id.* 23.19(5).

²⁴ *Id.* 23.19(3).

²⁵ *Id.*

²⁶ *Id.* 23.19(6).

²⁷ Iowa Code § 96.19(18) *f*, *Id.* 22.7(3).

²⁸ 871 IAC 22.19(7).

During IWD's investigation, Rod Freeman Sr. stated that Lusk supplied a truck, but did not give any additional information. Because of the regular payments, Mardesen found Lusk was an employee. At hearing Rod Freeman Sr. testified that Lusk is a mechanic and owns his own business. 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.²⁹

I do not find Rod Freeman Sr.'s testimony credible. He did not explain why he failed to provide this information to Mardesen before the hearing. Certainly if Lusk owns a separate business, Rod Freeman Sr. could have presented an advertisement, a notarized statement from Lusk, or testimony from Lusk regarding the separate business.

Rod Freeman Sr. testified that the Cory brothers were Randy Freeman's assistants. I do not find his testimony credible. During the June 2010 visit, Randy Freeman was not on site and Jeff Cory was present. When Dostal contacted Windsor Homes, Jones informed him that the individuals on site were Rod Freeman Sr.'s workers.

At hearing Rod Freeman Sr. testified that Osborne hung drywall in his personal residence and was not an employee. He did not present any documentary or evidence at hearing, other than his bare assertion. Rod Freeman Sr. also reported that Matt Hiediman is a high school student who performed yard work at his home. He did not explain why he failed to provide this information to Mardesen before the hearing. Rod Freeman Sr. did not present any documentary or other evidence supporting his bare assertion.

I conclude Freeman Construction has failed to prove an independent contractor relationship existed between the workers performing services for Freeman Construction and Freeman Construction. IWD properly found an employer-employee relationship existed between Freeman Construction and the individuals performing services for the business.

IWD classified Freeman Construction as a new employer in the construction industry. There was no evidence presented at hearing that Freeman Construction previously paid unemployment taxes. Because the workers are employees of Freeman Construction and because Freeman Construction has not previously paid unemployment taxes, IWD properly classified Freeman Construction as a new employer in the construction industry.

²⁹ *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996)

DECISION

Iowa Workforce Development correctly determined that an employer-employee relationship existed between Rod Freeman Construction and the individuals performing services for the business, and that Rod Freeman Construction should be classified as a new employer in the construction industry. IWD shall take any steps necessary to implement this decision.

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