

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

**Appeal Number: 10IWD067**

**Respondent (1)**

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**TRISTAN CONSTRUCTION, INC.  
P.O. BOX 35038  
DES MOINES, IA 50315**

**IOWA WORKFORCE DEVELOPMENT  
MATT MARDESEN, INVESTIGATOR  
1000 EAST GRAND AVENUE  
DES MOINES, IA 50319-0209**

YING SA  
DAN ANDERSON, IWD  
EMILY CHAFA, IWD  
JOE BERVID, IWD  
JASON TRYON, IWD  
SHANNON ARCHER, IWD  
TENA GASKILL, IWD

**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)

9/15/2010

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(Decision Dated & Mailed)

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## **STATEMENT OF THE CASE**

Iowa Workforce Development ("IWD") determined an employer-employee relationship existed between Appellant Tristan Construction Inc. and its workers, and found that Tristan Construction Inc. was liable for unemployment insurance contributions (tax) effective February 1, 2007. IWD issued the decision on December 18, 2009. Tristan Construction Inc. filed an appeal on January 18, 2010.

IWD transferred the case to the Iowa Department of Inspections and Appeals, Division of Administrative Hearings to schedule a contested case hearing. On September 1 and 9, 2010, a telephone hearing was held before Administrative Law Judge Heather L. Palmer. Accountant Ying Sa represented Tristan Construction Inc. Mariano Tristan, Cesar Tristan, and Alberto Pino appeared and testified on behalf of Tristan Construction Inc. Marisela Tristan also appeared on behalf of Tristan Construction Inc., but did not testify. Attorney Emily Chafa represented 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. Exhibits A, B, and C were admitted into the record. The parties also reached a stipulation on the first day of hearing.

## ISSUES

Whether the Tristan Construction Inc. filed a timely appeal.

Was Tristan Construction Inc. properly classified as a newly covered employer in the construction industry?

Whether IWD correctly determined that an employer-employee relationship existed between Tristan Construction Inc. and the individuals performing services for the business effective February 1, 2007.<sup>1</sup>

## FINDINGS OF FACT

IWD conducted an investigation of whether the individual performing services for Tristan Construction Inc. were properly classified as independent contractors. IWD issued a decision on December 18, 2009 concluding Tristan Construction Inc. was liable for unemployment insurance contributions (tax) effective February 1, 2007 under Iowa Code chapter 96 because the individuals performing services for Tristan Construction Inc. were employees and not independent contractors. IWD found that Tristan Construction Inc. was a newly covered employer. Tristan Construction Inc. filed an appeal on January 18, 2010.

## REASONING AND CONCLUSIONS OF LAW

IWD determines the liability of an employing unit or employer, the amount of contribution, the contribution rate, and successorship.<sup>2</sup> The affected employing unit or employer may appeal from the initial determination. The governing statute provides:

“[a]n appeal shall not be entertained for any reason by the department unless the appeal is filed with the department within thirty days from the date on which the initial determination was mailed. If an appeal is not so filed, the initial determination shall with the expiration of the appeal period become final and conclusive in all respects and for all purposes.”<sup>3</sup>

The Iowa Supreme Court has determined that timely appeal is both mandatory and jurisdictional.<sup>4</sup>

Tristan Construction Inc. had until January 17, 2010 to file its appeal. IWD did not receive Tristan Construction Inc.'s appeal until January 18, 2010. The decision states, in part, “DECISION BECOMES FINAL UNLESS AN APPEAL IS POSTMARKED BY 1/17/10, OR RECEIVED BY THE IOWA WORKFORCE DEVELOPMENT APPEAL’S

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<sup>1</sup> The Notice of Telephone Hearing did not address this issue. However, the decision dated December 18, 2009 did address the issue. The parties agreed on the record that this issue should be considered on appeal.

<sup>2</sup> Iowa Code § 97.(4).

<sup>3</sup> *Id.*

<sup>4</sup> *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373, 377 (Iowa 1979).

BUREAU BY THAT DATE.” (Exhibit A at 131). IWD raised the issue at hearing. Tristan Construction Inc. did not submit any evidence showing it submitted a post-marked appeal by January 17, 2010, or that IWD received the appeal by January 17, 2010. Because Tristan Construction Inc. failed to file a timely appeal, I do not have jurisdiction to consider whether IWD correctly determined Tristan Construction Inc. was properly classified as a newly covered employer in the construction industry, and whether IWD correctly determined that an employer-employee relationship existed between Tristan Construction Inc. and the individuals performing services for the business from February 1, 2007.

### **DECISION**

Tristan Construction Inc. failed to file a timely appeal. IWD’s decision dated December 18, 2009 is affirmed.

hlp