

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

**Appeal Number: 10-IWD-059**

**Respondent (2)**

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**This Decision Shall Become Final, as of the date of mailing stated below unless:**

**VISION CONSTRUCTION, LLC  
JEFF KNUTSEN, MEMBER  
11195 DEVILS CREEK RD  
BLUE GRASS, IA 52726-9352**

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

**DAVID BISHOP**

2. Either party may petition the District Court WITHIN THIRTY (30) DAYS after the date below.

**IOWA WORKFORCE DEVELOPMENT  
GERRY O'REILLY, FIELD AUDITOR  
1700 S. 1<sup>ST</sup> AVENUE, STE 11B  
IOWA CITY, IA 52240-6036**

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)

**August 30, 2010**

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(Decision Dated & Mailed)

JOE BERVID, IWD  
EMILY CHAFA  
SANDRA TAYLOR, IWD  
JODI DOUGLAS, IWD

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### **AMENDED DECISION**

This Amended Decision is issued to correct a typographical error in the original version.

### **STATEMENT OF THE CASE**

As the result of an investigation, Iowa Workforce Development (the Department) issued a Notice of Employer Status and Liability dated March 11, 2010 finding that an employer-employee relationship existed between Vision Construction, LLC (Vision) and David Bishop and the remuneration paid to Bishop and any other person performing construction labor was reportable for unemployment insurance contribution purposes. Jeff Knutson of Vision filed this appeal.

A telephone hearing was held on July 19, 2010. Jeff Knutson appeared and participated on behalf of Vision. He also presented the testimony of Scott Bouchard. The Department was represented by attorney Emily Chafa. Field auditor Gary O'Reilly testified for the Department. The Department submitted Exhibit A, pages 1-42, which was admitted into the record as evidence. David Bishop did not appear. The notice of hearing mailed to him was returned to this office as undeliverable.

## FINDINGS OF FACT

David Bishop filed a claim for unemployment benefits naming Vision Construction, LLC as his former employer. Because Vision had not reported wages paid to Bishop for unemployment purposes Iowa Workforce Development Field Auditor Gerry O'Reilly was assigned to conduct an investigation. O'Reilly attempted to contact Jeff Knutson of Vision but was unable to reach him. O'Reilly sent a *Questionnaire for Determining Status of Workers* to Vision by certified mail. He also asked Bishop to fill out a questionnaire to Bishop. (O'Reilly testimony).

Both Vision and Bishop filled out the questionnaires and returned them to O'Reilly. The answers provided by Bishop and Vision were inconsistent. Vision answered that Bishop's services were engaged for a specific job and that he needn't have performed the work personally. He stated that Bishop performed his services under his own name and that Bishop could and did perform similar services for others without the necessity of Vision's approval. Vision stated that Bishop supplied his own tools, vehicle and supplies but that he could have leased equipment from Vision had he needed to. Vision answered that Bishop carried his own workers compensation insurance and bore the risk of economic loss with regard to damage to tools and equipment. Further, Vision stated that it did not retain the right to direct and control Bishop's work nor did it exercise a priority over his services. Vision stated that the end product of Bishop's work was reviewed for quality and completeness and if the work was not satisfactory, he would be asked to repair the defects on his own time. Vision noted that Bishop could hire assistants who would not be subject to Vision's control and who would be paid by Bishop. Vision stated that Bishop no longer provided services because he had either turned down any work offered to him or failed to appear at the job site when he accepted work. (Exh. A, pp. 10-13).

Bishop, on the other hand stated he was hired on a permanent basis and worked under Vision Construction's name. He stated he was required to provide the services agreed to personally and did not have the freedom to provide similar services for others. Bishop answered that Vision supplied all equipment, tools and supplies and he supplied only his vehicle. Bishop stated he bore no risk of economic loss on a job and that no one carried workers compensation insurance covering him. Bishop noted that he worked under the control and direction of Vision, his work was supervised at all times by a foreman and if he did not perform satisfactorily he could be fired. Bishop answered that he did not have the ability to hire assistants to help him perform his services. He stated he was laid off due to a lack of business. (Exh. A, pp. 14-17).

Vision and Bishop agreed that Bishop was paid on an hourly basis, although Vision stated Bishop had a choice of being paid hourly or by the job. Both agreed that all advertising was done in Vision's name, that Bishop provided his services as various job sites and was only required to come to Vision's office to get paid. The parties further agreed that Bishop was not reimbursed for any expenses and that either party could end the relationship at any time without penalty. (Exh. A. pp. 10-17).

O'Reilly compared the answers provided by the parties. He then spoke with Bishop. Bishop told O'Reilly that he had originally received W-2 form from Vision but the same was lost and Vision replaced it with a 1099. Bishop provided the 1099 to O'Reilly. Bishop also informed O'Reilly there were other individuals who were employees of Vision and were in the same position as he. O'Reilly reviewed the responses those individuals supplied in other investigations and determined they corroborated Bishop's answers to the questionnaire.<sup>1</sup> (O'Reilly testimony).

O'Reilly then requested that Vision fill out a *Report to Determine Liability*. Knutson filled out part of the form on behalf of Vision and O'Reilly filled out the remainder after speaking with Knutson. (Exh. A, pp. 18-19; O'Reilly testimony).

Based on the information he received from Bishop O'Reilly determined that an employer/employee relationship existed between Vision and Bishop. O'Reilly based his conclusion on the determination the following factors:

- Vision reserved the right to terminate Bishop at any time without penalty;
- Bishop could terminate his relationship with Vision at any time without penalty;
- Bishop used Vision's tools and equipment;
- Bishop was paid on an hourly basis;
- Bishop performed services at job sites designated by Vision;
- Bishop averaged an 8-hour day with Vision;
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- The contracts involved were between Vision and a customer and the customer paid Vision which then paid Bishop for his services;
- All advertising was under Vision's name;
- If Bishop's work was unsatisfactory he would be asked to repair it on "his own time";
- Bishop could be terminated if his work was unsatisfactory;
- Bishop's work framing houses constituted an integral part of the Vision's business as a residential construction company. Vision's reputation hinged, in part, on the quality of Bishop's work. These factors give rise to an implication that Vision exercised control and direction over Bishop's work.

(Exh. A, pp. 35-36; O'Reilly testimony).

On March 11, 2010, the department issued its decision holding that the relationship between Vision and Bishop was that of employer/employee and that all remuneration paid to Bishop "and any worker performing services as a construction laborer" was reportable to Workforce Development for unemployment insurance purposes. (Exh. A, p. 6).

At hearing, Knutson testified that Vision served a construction consultant to the owners of the housing being built. Ninety percent of Vision's contracts provided for payment to

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<sup>1</sup> None of the responses O'Reilly relied on as corroborative of Bishop's allegations were provided as evidence in this proceeding.

the company on a time and materials basis. Since Vision was paid on a weekly basis based on time and materials, Knutson paid Bishop weekly based on an hourly rate of \$18 which Bishop stated he needed to cover his time and taxes. If work performed by Bishop was unsatisfactory, he would be asked to remediate it without pay. (Knutson testimony).

Knutson also testified that he would go to the job sites Vision was involved with only every two or three weeks. The foreman Bishop discussed, Scott Bouchard, was not affiliated with Vision. Bouchard was hired by the owners of the sites to ensure their jobs stayed on schedule. Knutson stated that the workers controlled the job sites and came and went as they pleased. Each time a new worker was brought on the worker was informed he or she needed to provide insurance, tools and equipment and pay his or her own taxes. Knutson noted that the workers provided their own saws, nailers and other hand tools. Vision provided a skid steer and fork lift when needed because the equipment was too expensive for the workers to own. Knutson emphasized that Bishop and the other workers each also worked for Thirty-three Carpenters, Inc. (Knutson testimony).

Scott Bouchard also testified at hearing. He stated he was the foreman on many of the jobs on which Vision acted as a consultant. Bouchard noted that he was not hired by Vision but by the owners of the projects. Bouchard stated that he worked alongside Bishop on projects and that he, along with Bishop, also worked for Thirty-three Carpenters, Inc. remodeling a building for apartments. Bouchard stated that Bishop and the other workers on Vision's projects would go back and forth between Vision's projects and the apartment building as well as their own projects as they wished. (Bouchard testimony).

### **REASONING AND CONCLUSIONS OF LAW**

For purposes of unemployment compensation law, the term "employer" is defined to mean any employing unit which paid at least \$1,500 in wages in any calendar quarter during the current or preceding calendar year or which employed at least one individual during the current or preceding calendar year.<sup>2</sup> In turn, "employment" means service "performed for wages or under any contract of hire, written or oral, expressed or implied."<sup>3</sup> The department presumes that services performed for wages constitute employment unless it is shown that the individual performing the services is and will continue to be free from control or direction.<sup>4</sup>

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."<sup>5</sup>

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2 Iowa Code section 96.19(16)(a).

3 Iowa Code section 96.18(a).

4 Iowa Code section 96.19(6)(f); 871 IAC 22.7(3) ("Whenever an employing unit claims that any employment is not employment under this Act, the burden shall be on the employer to prove the exemption claimed.").

5 *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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

The present case hinges on the credibility of the evidence. If one accepts that the relationship between Bishop and Vision was as set forth by the department, Bishop was clearly an employee. However, if one accepts the evidence presented by Knutson, Bishop was most likely an independent contractor.

There are many factors used when considering the credibility of witness testimony.

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6 871 Iowa Administrative Code (IAC) 23.19(1).

7 See *generally* 871 IAC 23.19.

8 871 IAC 23.19.

9 871 IAC 23.19(7).

Some of the most common standards are as follows:

1. Whether the testimony is reasonable and consistent with other evidence you believe.
2. Whether a witness has made inconsistent statements.
3. The witness's appearance, conduct, age, intelligence, memory and knowledge of the facts.
4. The witnesses' interest in the trial, their motive, candor, bias and prejudice.<sup>10</sup>

Gauging credibility is always a difficult job. Here, it all the more difficult because it is not Investigator O'Reilly's credibility that is involved. Rather, it is the credibility of David Bishop, who provided the answers to the questionnaire, and that of the other workers whose answers to questionnaires O'Reilly deemed corroborative of Bishop's responses that is at issue. Neither Bishop nor the other workers appeared or were called as witnesses. Therefore, the undersigned is left to judge the reliability of their statements without the advantage of having heard them testify.

Investigator O'Reilly testified that Bishop informed him that Vision had originally issued him a W-2 form at the end of the year. According to Bishop that form was lost and was replaced with a 1099 which was subsequently provided to O'Reilly. This scenario is simply not believable. If an employer issued a W-2, the employer would have a copy of the document and could supply another copy to the employee or could issue a new W-2. No employer would replace a missing W-2 form with a 1099; the forms are issued for different purposes.

While the way Vision reported Bishop's wages for income tax purposes is not determinative of the relationship between the two, the fact that Bishop was less than honest with O'Reilly about receiving a 1099 calls into question the remainder of the information he provided to O'Reilly. Bishop was clearly eager for O'Reilly to find that he was an employee of Vision so that Bishop might receive unemployment benefits. It appears Bishop was willing to provide false information to O'Reilly to insure O'Reilly arrived at the conclusion there was an employer/employee relationship between Vision and himself. As a result, I do not find any of the answers Bishop provided to the department's questionnaire to be reliable.

Further, while O'Reilly testified that other workers provided responses to questionnaires that were corroborative of Bishop's answers, the department did not place those documents into evidence. Therefore, not only is the fact-finder without the opportunity to hear the testimony of the individuals upon whose statements the department relied in making its decision, but I am also without the opportunity to even see the statements and evaluate for myself whether they do provide corroboration. Therefore, I cannot give any weight to O'Reilly's testimony in this regard.

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<sup>10</sup> *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996) (citing Uniform Jury Instructions).

On the other hand, Jeff Knutson testified on behalf of Vision Construction and, while Knutson clearly has an interest in seeing the department's decision reversed, he also supplied the corroborative testimony of a disinterested witness, Scott Bouchard. Therefore, I find the evidence presented on behalf of Vision to be more credible than the information provided to Investigator O'Reilly.

Having determined that Knutson's version of the parties' relationship is the more credible leads me to the conclusion that the department erred in its determination that an employer/employee relationship existed between Vision and Bishop and the other workers. As in most cases, there are some factors that weigh in favor of the department's determination that an employer/employee relationship existed between Vision and Bishop: both Vision and the workers had the right to terminate the relationship at any time without penalty and Bishop was paid at a fixed rate by the hour. The latter factor is somewhat mitigated by the fact Bishop was given the choice of whether he wanted to be paid hourly or by the job. He chose the payment method and set his own hourly rate.

However, it is clear from Knutson's and Bouchard's testimony that Vision did not reserve the right to exercise control and direction over these individuals. They were hired for specific jobs. They were free to, and did, supply the same services they supplied to Vision to Thirty-Three Contractors, Inc. without first seeking approval from Vision. They were also free to work on any other projects they might find. The workers could come and go from the job sites as they saw fit. They could hire assistants without approval from Vision. Knutson did not oversee their work on a daily basis but only visited the sites once every few weeks and while Bouchard worked alongside Bishop and the others, he was not affiliated with Vision but rather with the projects' owners. If the services performed by the workers were unsatisfactory, they were asked to remediate the problem without additional compensation.

The preponderance of the evidence in this case demonstrates that David Bishop and the other workers acted as independent contractors in providing services for Vision Construction, LLC. Therefore, the department's decision to the contrary must be reversed.

#### **DECISION**

The department's decision that David Bishop was an employee of Vision Construction, LLC and that all remuneration paid to him and to others providing services as construction laborers is REVERSED. The department shall take any action necessary to implement this decision.

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