

Iowa Department of Inspections and Appeals
Administrative Hearings Division
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

DES MOINES PAINTING COMPANY,)

████████████████████)
████████████████████)

Appellant,)

v.)

Iowa Workforce Development,)

Respondent.)

DIA Case No. 18IWD0011

**ADMINISTRATIVE LAW JUDGE
DECISION**

STATEMENT OF THE CASE

The in-person hearing in this case was held on March 19, 2018. Des Moines Painting Company (“DMPC”) appeared through its attorney Billy Mallory. Todd Siefkas (“Siefkas”) also appeared and provided testimony for DMPC. Iowa Workforce Development (“IWD”) appeared through its attorney David Steen. Daniel Noonan also appeared and provided testimony for IWD. The entire administrative file, including all the exhibits both parties submitted, was admitted into the record. The record was held open until April 2, 2018, so IWD could resubmit its exhibits in redacted form. The redacted exhibits were received, and the unreacted exhibits were destroyed by the Tribunal. The matter is now fully submitted.

ISSUE

Whether IWD properly determined in a series of decisions on November 6, 2017, that an employer-employee relationship existed between DMPC and certain workers.

FINDINGS OF FACT

The issue in this case is whether six individuals who performed worked for DMPC in 2016 were employees or independent contractors. DMPC is a painting company that has historically painted hundreds of homes and other structures in the Des Moines area each year. Siefkas is the owner and operator of DMPC, and in 2016, he had more than 20 employees. Ex. 9. Due to fluctuation in the amount of work the business would receive at any given time, DMPC would also employ independent contractors. Siefkas credibly testified to at least the existence of two independent contractors that IWD has never sought to reclassify as employees.

The six individuals at issue in this case did business as sole proprietors, as opposed to utilizing

a separate business entity such as the two independent contractors not at issue appear to have done. In addition, the individuals did not register as contractors with the Secretary of State. The first listed by IWD as being misclassified was R.M. IWD Exs, at p. 12. DMPC issued a 1099 for \$84,587.25 to him for 2016. Id. There appears to be a document entitled “subcontractor agreement” between him and DMPC; however, the document is a form contract with only a date and signatures completed. Ex. 1. Such things as the scope of work and price were not completed. Id. Siefkas credibly testified the document was meant essentially to be a master sub-contractor agreement to cover all the projects later that year. In addition, DMPC had R.M. submit a certificate of liability insurance, showing a million dollars or more of coverage, and he filed a document with IWD stating he was a sole proprietor and waiving certain coverage. Ex. 5, at p. 6; Ex 6, at p. 5. Siefkas credibly testified that he required liability coverage and the IWD filing for individuals who were independent contractors and not employees.

The other five individuals at issue are similarly situated to R.M. With respect to C.R., DMPC issued a 1099 for \$149,071.15, and C.R. had a signed “subcontractor agreement,” a certificate of liability insurance, and an IWD submission that he was an independent contractor. IWD Exs, at p. 12; Exs. 2, 5, at p. 1, 6 at p. 2. With respect to E.R., DMPC issued a 1099 for \$96,858.80, and E.R. had a signed “subcontractor agreement,” a certificate of liability insurance, and an IWD submission that he was an independent contractor. IWD Exs, at p. 12; Exs. 5, at p. 9, 6, at p. 3. With respect to D.S, DMPC issued a 1099 for \$25,520.00, and D.S. had a certificate of liability insurance and an IWD submission that he was an independent contractor. IWD Exs, at p. 12; Exs. 5 at p. 12, 6 at p. 4. With respect to E.S., DMPC issued a 1099 for \$720.00. IWD Exs, at p. 12. With respect to E.T., DMPC issued a 1099 for \$58,215.00, and E.T., had a certificate of liability insurance and an IWD submission that he was an independent contractor. IWD Exs, at p. 12; Exs. 5 at p. 3, 6 at p. 1.

At some point, IWD selected DMPC for a random audit, and during that audit, IWD looked into whether DMPC’s workers were appropriately classified as employees or independent contractors. It identified the six individuals at issue and requested further information concerning them. DMPC’s response was lacking. See generally, IWD Ex., at pp. 12-13 (description of investigation). Included in what DMPC provided to IWD was a series of invoices; however, the invoices contained only general project descriptions, dates, and total amounts due unlike more traditional invoices that include greater descriptions of work, pricing, and information. See Ex. 8. In fact, the invoices were numbered, and in at least one occasion, an invoice with a higher number had an earlier date than another invoice with a lower number, thereby naturally calling into question the veracity of all such invoices. Id. IWD attempted to reach out to the six individuals using the contact information with the Iowa Department of Transportation to no avail, and faced with incomplete and questionable information, IWD issued a series of decisions finding the six workers at issue to be misclassified. DMPC appealed.

Shortly before the hearing in the exhibits and during the hearing through testimony, DMPC provided a significant amount of additional information concerning the matter. Among other things, Siefkas credibly testified he did not control the methods and means of these six individuals performing their work unlike jobs that involved the company’s employees where he or a key DMPC employee would go to the jobsites and dictate how the work was to be performed. Siefkas also credibly testified jobsites never involved mixing employees and independent contractors including the six at issue, and while DMPC would have the appropriate paint delivered to the jobsites for the independent contractors, DMPC would not furnish them with any tools, such as sprayers. Independent contractors including the six individuals at issue were also free to hire their own workers, and they were not required to represent themselves as DMPC employees.

Siefkas additionally and credibly testified that independent contractors including these six would incur financial liability in the form of a breach of contract and not getting paid should they quit the job before completion and that DMPC would be liable for the contract price should it order any of them off the jobsite without reason. Siefkas also highlighted the fact that his employees were generally paid less than \$50,000.00, which reveals that the payments made to most of the six concerned non-employment work and implied they would be hiring a crew. For example, C.R. was paid \$149,071.15, which would not be possible as a single employee. Siefkas, moreover, explained the price for using independent contractors was \$.50 per square foot of the house (not of the surface to be painted), and as this information is available from the Polk County Assessor, the invoices did not need to be more complete than identifying the location of the project and final cost, which could be verified. Finally, Siefkas credibly testified at least some of the six held themselves out to the public as painters and completed such work apart from DMPC. There was no specific evidence to contradict any of Siefkas's testimony, and much of the documents corroborated it at least in part.

LAW AND ANALYSIS

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. Iowa Code § 96.19(16)(a). “Employment” is defined as service performed for wages or under any contract of hire, written or oral, express or implied. *Id.* § 96.19(18)(a). “Services performed by an individual for wages shall be deemed to be employment . . . unless and until it is shown to the satisfaction of the department that such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of service and in fact.” *Id.* § 96.19(18)(f)(1). The employer is specifically given the burden of proof. 871 Iowa Administrative Code (“I.A.C.”) § 23.55.

IWD promulgated administrative rules to expound on the circumstances that give rise to an employment relationship as opposed to an independent contractor status. Under the governing rules, “[t]he 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.” *Id.* § 23.19(1). Continuing:

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. The right to discharge or terminate a relationship is also an important factor indicating that the person possessing that right is an employer. Where such discharge or termination will constitute a breach of contract and the discharging person may be liable for damages, the circumstances indicate a relationship of independent contractor. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools, equipment, material and a place to work to the individual who performs the services. 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. An individual performing services

as an independent contractor is not as to such services an employee under the usual common law rules.

Id. § 23.19(1). Other considerations exist:

The nature of the contract undertaken by one for the performance of a certain type, kind, or piece of work at a fixed price is a factor to be considered in determining the status of an independent contractor. In general, employees perform the work continuously and primarily their labor is purchased, whereas the independent contractor undertakes the performance of a specific job. Independent contractors follow a distinct trade, occupation, business, or profession in which they offer their services to the public to be performed without the control of those seeking the benefit of their training or experience.

Independent contractors can make a profit or loss. They are more likely to have unreimbursed expenses than employees and to have fixed, ongoing costs regardless of whether work is currently being performed. Independent contractors often have significant investment in real or personal property that they use in performing services for someone else.

Employees are usually paid a fixed wage computed on a weekly or hourly basis while an independent contractor is usually paid one sum for the entire work, whether it be paid in the form of a lump sum or installments. The employer-employee relationship may exist regardless of the form, measurement, designation or manner of remuneration.

The right to employ assistants with the exclusive right to supervise their activity and completely delegate the work is an indication of an independent contractor relationship.

Id. §§ 23.19(2)-(5). As is evident from the considerations of all these factors, the determination of the existence of an employment relationship turns on “the particular facts of each case.” Id. § 23.19(6). “If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial.” Id. § 23.19(8).

In this case, IWD’s decision with respect to six individuals at issue should be set aside. As an initial matter, it is worth noting that IWD’s actions are more than understandable given the information it had available to it at the time of its decision. With the benefit of a much larger record and Siefkas’s unrebutted testimony to explain the company’s process and the gaps in the records, it is clear that there was no employer/employee relationship. Siefkas credibly testified DMPC did not control the methods and means of the six at issue in completing their tasks much as he did not with the others independent contractors not in dispute. Siefkas on behalf of DMPC essentially bid jobs to the six, occasionally would inspect the final product, and pay the invoices. There was financial risk for either party if they breached the agreement, and the six were free to hire others as they deemed fit. They could also and in some cases did offer painting services to the public.

Further, DMPC did not provide the tools of the job beyond paint to ensure quality control,

which is not suspect, and none of the six were required to identify themselves as DMPC. In addition, the invoices reveal that there was no ongoing remuneration that would be typical of a salary, which generally is more consistent and periodic. In fact, the amount at issue at least with some of the six could likely not have been reached had they been an employee or even working without a crew. While it is true that none of the six had their own business entities such as an LLC and did not register with the Secretary of State, most of them had insurance and an IWD filing showing they were sole proprietors, which (while of limited relevance) does cut somewhat in favor of an independent contractor status much as the limited value of the mostly blank “subcontractor agreements.” In short, there is little in the record to suggest an employment relationship.

At the conclusion of the hearing, when it finally had a chance to hear all of the information that could have been provided to it earlier by DMPC, IWD did not advance any specific argument for why the six individuals would be considered employees and could point to no specific evidence to contradict any of Siefkas’s testimony. IWD’s silence is telling, and pivoting back, it is worth noting that DMPC had no reason to misclassify any of the individuals since it had numerous employees at the time. This is not a case where an employer is seeking to avoid certain obligations by incorrectly classifying all of its employees. Accordingly, IWD’s decision must be REVERSED. DMPC may wish to consider be more forthcoming with information to IWD in the future.

DECISION

The appeal is REVERSED as to the individuals in dispute. IWD shall take any further action necessary to implement this decision.

IT IS SO ORDERED.

Dated this the 26th day of March, 2018.



Jonathan M. Gallagher
Administrative Law Judge

Cc: Todd Siefkas, Des Moines Painting Company (By mail)
Billy Mallory, Appellant’s Attorney (By mail)
David Steen, IWD Attorney (By email)
Justin Knudson, IWD (By email)
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APPEAL RIGHTS

This decision constitutes final agency action.

Any party may file with the presiding officer a written application for rehearing within 20 days after the issuance of the decision. A request for rehearing is deemed denied unless the presiding officer grants the rehearing request within 20 days after its filing.

Any party may file a petition for judicial review in the Iowa district court within 30 days after the issuance of the decision or within 30 days after the denial of the request for rehearing.