

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

Appeal Number: 10-IWD-064

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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

**ASTRA MASONRY, INC.
c/o EMIN KESEROVIC
4843 – 63RD STREET
URBANDALE, IA 50322-8057**

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

**IOWA WORKFORCE DEVELOPMENT
RYAN DOSTAL, INVESTIGATOR
1000 EAST GRAND AVENUE
DES MOINES, IA 50319**

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

CHIP LOWE
ATTORNEY AT LAW
2824 – 104TH STREET
URBANDALE, IA 50322

YOU DO HAVE THE RIGHT TO HIRE A LAWYER at your own expense to represent you in these proceedings.

JOE BERVID, IWD
SHANNON ARCHER
EMILY CHAFA
SANDRA TAYLOR, IWD
JASON TRYON, IWD

(Administrative Law Judge)

August 30, 2010

(Decision Dated & Mailed)

STATEMENT OF THE CASE

Iowa Workforce Development (the Department) issued a Notice of Employer Status and Liability dated March 4, 2010 holding that an employer-employee relationship existed between Astra Masonry, Inc. (Astra) and the individuals performing services for it during the years 2007, 2008 and 2009. Additionally, the notice held that the remuneration paid to these individuals was reportable for unemployment insurance contribution purposes. Astra filed this appeal.

A hearing was held at the Wallace State Office Building on August 4, 2010. Attorney Chip Lowe represented Astra. He presented the testimony of Astra President Emin Keserovic and the company's tax preparer, Loren Wagner. An interpreter assisted with communication between Mr. Keserovic and the others present. Appellant's Exhibits 1 and 2 were admitted into the record.

Attorney Emily Chafa represented IWD. She presented the testimony of IWD Investigator Ryan Dostal and IWD Field Auditor Steven Heinle. The department's

Exhibit A, pp. 1-148 was admitted into evidence.

FINDINGS OF FACT

Iowa Workforce Development received an anonymous tip that Astra Masonry, Inc. was misclassifying workers associated with the business as employees rather than independent contractors. Thereafter, on November 3, 2009, IWD Misclassification Unit Investigator Ryan Dostal, along with another investigator, visited the construction site for a new Waukee School District elementary School for which Astra was providing the block and brick work. The general contractor informed the investigators that Emin Keserovic owned Astra and was on site supervising the work. The investigators then interviewed Keserovic. (Dostal testimony; Exh. A, p. 9).

English is not Keserovic's first language and the interview conducted on November 3, 2010 did not involve an interpreter. The investigators asked Keserovic how many workers he had on site and he told them fourteen. He also stated that Astra was providing all of the scaffolding, tubs, ladders and materials that the workers were using but that most of the workers provided their own hand tools. Keserovic also stated that he required the people he hired to perform the work themselves. When asked whether he provided direction and control over the workers Keserovic indicated he did not understand the question. He was then asked whether he told the workers what to do and he responded, "Yeah, of course." (Dostal testimony; Exh. A, p. 9).

Keserovic informed the investigators that he was treating the workers as independent contractors and reporting their pay for income tax purposes on 1099s. The investigator inquired as to the identity of the workers on site and, eventually, Keserovic produced copies of state identification cards and passports he had for the workers. Keserovic indicated his wife or his bookkeeper would have additional information. The investigators then telephoned Keserovic's wife who supplied contact information for Astra's bookkeeper, Loren Wagner. The investigators subsequently contacted Wagner who eventually supplied them with 1099s, payroll records, and income tax returns for Astra and Keserovic. (Dostal testimony; Exh. A, pp. 9-10).

Investigator Dostal searched the State's database but was unable to find that any of the workers whose names had been supplied were registered contractors. Additionally, he checked with the Secretary of State and determined that none of the workers had businesses listed with that office. Finally, Dostal sent questionnaires to each of the workers whose names were provided inquiring into the nature of the workers' relationship with Astra. None of the questionnaires was returned. (Dostal testimony; Exh. A, p.10).

Dostal reviewed the information he obtained during his investigation with the other members of the Misclassification Unit and, as a result, it was determined that all of the workers identified during the investigation were employees of Astra Masonry, Inc. On March 4, 2010 a Notice of Employer Status and Liability was issued informing Astra of the decision. (Dostal testimony; Exh. A, pp. 7, 10).

Field Auditor Steven Heinle testified at hearing that he also reviewed the information obtained by Dostal and agreed with the decision that the workers in question were employees of Astra. He emphasized the lack of evidence that any of the workers was a registered contractor or operated a business of his own. Heinle noted that he applied the “twenty-step process” they apply in all cases to the information received. Heinle also noted that, under Iowa law, officers of corporation are considered employees of that corporation and wages paid to the officers are reportable for unemployment purposes. (Heinle testimony).

At hearing, Loren Wagner testified that he is an enrolled agent and a tax preparer with H&R Bloc. He prepared Astra’s 2007 and 2008 tax returns. During his 25 years preparing taxes and his 21 years as an enrolled agent he has had the opportunity on many occasions to make the determination whether an individual is an employee or an independent contractor for income tax purposes. In making this determination he relied on the factors used by the Internal Revenue Service. According to Wagner, of the nineteen factors used by the IRS in determining whether an individual is an employee or an independent contractor, four are the most important. Those factors are:

- Whether the individual establishes his or her own hours of work;
- Whether the individual is provided a place to work;
- Whether the individual provides his or her own tools; and,
- Whether the individual is subject to supervision.

(Wagner testimony; Exh. 2).

Wagner testified that when he applied these factors to Astra he reached the conclusion that the workers in question were independent contractors. He arrived at this position because Keserovic offered work to the workers when it was available and they were free to accept or not. Further, Keserovic only provided tools such as scaffolding because those tools were required by OSHA regulations. Hand tools were provided by the workers. Additionally, Keserovic did not direct the work. Finally, Keserovic did not provide the place of work. (Wagner testimony).

Wagner also testified that Keserovic struggles with the English language. Wagner stated that he uses an interpreter when working with Keserovic on tax matters. Wagner implied that Keserovic’s English skills were insufficient to allow him to accurately answer the questions asked of him by the investigators. (Wagner testimony).

Emin Keserovic testified that owned Astra Masonry during 2007 and 2008. Astra had a six month contract worth \$900,000 for the block and brick work to be done at the school. Keserovic planned to fulfill Astra’s obligations under the contract by finding professional “freelancers”. The workers bid on specific portions of the project. They were all paid a fixed rate per hour but they based their bids on the number of hours they believed necessary to complete the task at hand. They workers were paid for the number of hours they told him they worked. Keserovic stated that Astra was a subcontractor of Midwest Masonry for the job. Midwest paid Astra which, in turn, paid the workers on site. (Keserovic testimony).

Keserovic also testified that while, the gentlemen whose services he retained did not have their own companies, they could, and did, work for others under their social security numbers. Keserovic noted that the workers set their own hours and, if there was no work available at the site, he did not find other work for them. Keserovic stated that the workers were free to hire assistants. When assistants were hired, sometimes the worker paid them and sometimes Astra did. (Keserovic testimony).

Keserovic denied that he ever referred to the workers as his employees. He stated that he never told the investigators he watched over the work being performed. Rather, he told them he was there to help the workers if they needed him. He testified he does not speak English well and he did not understand what the investigators were asking when they interviewed him. Keserovic noted that he was never offered an interpreter during the interview and he stated he asked the investigators to call his wife and talk to her because she understands English better than he.

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.¹ In turn, “employment” means service “performed for wages or under any contract of hire, written or oral, expressed or implied.”² 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.³

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.”⁴

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.⁵

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

2 Iowa Code section 96.18(a).

3 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.”).

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

5 871 Iowa Administrative Code (IAC) 23.19(1).

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.⁶ 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.⁷

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.⁸

In the present case, Keserovic's testimony was inconsistent with the answers he gave the investigators at the work site. During the interview, Keserovic told investigators that the workers were his employees, he required them to personally provide services and that he told them what to do. At hearing, he testified the workers were freelancers and he did not direct or control their work. Keserovic denied that he ever referred to the workers as employees or stated he directed their work. However, he also argued that he was not proficient in English and did not understand what the investigators were asking him.

I find it most likely that Keserovic did tell the investigators the workers on site were his employees and that he answered, "Yeah, of course" when asked whether he told them what to do. There is no reason for Investigator Dostal to fabricate these answers.

The larger question in this case is whether Keserovic understood what was being asked of him by the investigators during the interview. I believe he did. While Keserovic was assisted by a translator at the hearing, it was clear he has more than a basic understanding of the English language. Additionally, when the investigators asked him

⁶ See generally 871 IAC 23.19.

⁷ 871 IAC 23.19.

⁸ 871 IAC 23.19(7).

a question he did not understand during the interview he let them know immediately and the question was rephrased. I find it more likely that Keserovic did not understand the ramifications of his answers to the investigators rather than their questions and his own responses. Ignorance of the legal consequences of an individual's actions does not excuse the person from compliance with the law.

Having found that Keserovic accurately portrayed his relationship to the workers during the interview with IWD investigators, I find IWD correctly determined the workers to be Astra's employees. Astra, through Keserovic, worked alongside the workers and supervised their efforts. Astra provided most of tools and equipment necessary for the job including scaffolding, tubs, ladders and materials. Astra required that the workers hired personally provide their services and it paid the workers a fixed hourly wage on a regular basis. Astra bore all risk of economic loss in the relationship and the workers had little or no investment in the project.

While there may be a few factors that would support a finding the workers involved in this case were independent contractors, the preponderance of the evidence clearly dictates they be deemed employees of Astra Masonry. The department's decision in that regard must be affirmed.

DECISION

The department's decision that Astra Masonry, Inc. had an employer/employee relationship with the individuals performing services for the business is **AFFIRMED**. The department shall take any action necessary to implement this decision.

kka