

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

Appeal Number: 14IWD005

Respondent (4)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

LORENCE ENTERPRISES, LLC.

**IOWA WORKFORCE DEVELOPMENT
JAMES HARRIS, INVESTIGATOR
1000 EAST GRAND AVENUE
DES MOINES, IA 50319**

TERESA K. HILLARY, IWD
JOSEPH BERVID, IWD
NICHOLAS OLIVENCIA, IWD
CARRIE OBRIEN, IWD
THOMAS SKEWES, ATTY
FRANK JOHNSON, PARTY

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)

May 19, 2014

(Decision Dated & Mailed)

STATEMENT OF THE CASE

As the result of a complaint, Iowa Workforce Development (the Department) conducted an investigation to determine if Lorence Enterprises, LLC had employees or independent contractors. The Department issued a Notice of Employer Status and Liability dated December 24, 2013 finding that an employer-employee relationship existed between Lorence Enterprises LLC (Lorence) and the individuals performing services for the business from January 1, 2011 on. Lorence filed an appeal from the Department's decision.

A telephone hearing was held before Administrative Law Judge John M. Priester April 11, 2014. The Department was represented by field auditor James Harris, who testified for the Department along with Frank Johnson. Attorney Thomas Skewes represented Lorence. Andrew Lorence, Tonya Lorence and Steve Brown testified for Lorence.

The Department submitted Exhibit A (pp. 1-75), which was admitted into the record as evidence. Lorence submitted Exhibit 1 (pp. 1-36) which was admitted into the record as evidence.

ISSUE

Whether the Department correctly determined that an employer-employee relationship existed between Lorence Enterprises LLC and the individuals performing services for the business from January 1, 2011 to the present.

FINDINGS OF FACT

A. The Department's Investigation

Frank Johnson filed for an unemployment claim with Lorence Enterprises. The claim was ultimately denied, but the Department began an investigation to determine whether Mr. Johnson should have been classified as an employee or as an independent contractor with Lorence Enterprises.

The Department determined that Mr. Johnson was in fact an employee and not an independent contractor. This determination was made after interviewing Mr. Johnson and reviewing the records relating to the appeal.

Mr. Johnson was a homeless individual who had moved to Iowa from Orlando, Florida looking for employment. He did not have an Iowa driver's license so he rode around town on his bicycle. Mr. Johnson had a background in dry walling and construction.

Mr. Johnson starting working with Steve Brown doing drywall work. He initially was hired to repair a drywall job that had not gone well. He was paid \$50-\$60 a day for a week or two. After he completed this job he was offered more work.

Mr. Johnson began working for Lorence Enterprises. Lorence Enterprises owns numerous apartments. When a tenant would move out Lorence Enterprises would have Mr. Johnson clean up the apartment and repair it so that it could be rented again. At the end of each week Mr. Johnson would provide his hours to Lorence Enterprises and he would be paid for the work he performed.

Lorence Enterprises let Mr. Johnson stay in one of their apartments. Half of the rent was paid by Mr. Johnson and the other half was compensation for working for Lorence Enterprises.

Mr. Johnson also mowed lawns for Lorence Enterprises. He would be paid each week for his lawn mowing also. He was paid \$12.50 per lawn that he mowed. Then that amount would be taken off his rent.

Mr. Johnson also did drywall work for Lorence Enterprises. Mr. Johnson provided some of his own tools, and Lorence Enterprise purchased some tools for him. Lorence provided the drywall lift.

Andy Lorence told Mr. Johnson what to do.

B. Lorence's Position

Lorence Enterprises' position is that this was an independent contractor relationship with Mr. Johnson. Andrew Lorence would inform Mr. Johnson when an apartment would need to be cleaned out, and Mr. Johnson would clean the apartment. Mr. Johnson was not told what hours to work or how to do the job, he was just told where to go and he would clean out the apartment. At the end of the week Mr. Johnson would report how many days and how many hours he worked and then he would be paid.

Mr. Johnson was the one who suggested that he be paid \$50 per day. Mr. Lorence testified that supplies were furnished most of the time for Mr. Johnson.

Tonya Lorence testified that she felt sorry for Mr. Johnson so she rented him an apartment for \$200 per month. This had nothing to do with his employment. Ms. Lorence explained that she would text Mr. Johnson and direct him to clean out an apartment. Then at the end of the week Ms. Johnson would text asking how many days or hours he worked. At the end of the year Lorence Enterprises gave Mr. Johnson a 1099 form. Mr. Johnson was treated the same as the other subcontractors that worked for Lorence Enterprises.

REASONING AND CONCLUSIONS OF LAW

A. Overview

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.¹ "Employment" is defined as service performed for wages or under any contract of hire, written or oral, express or implied.² When an employer claims that any employment is not employment under the Iowa Employment Security Law, the burden is on the employer to prove the exemption claimed.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.

¹ Iowa Code § 96.19(16)(a) (2009).

² Iowa Code § 96.19(18)(a) (2009).

³ 871 Iowa Administrative Code (IAC) 22.7(3), 23.55(2).

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

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

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

The undersigned finds, after a complete review of the file, that an employee-employer relationship existed between Lorence Enterprises and Mr. Johnson. Mr. Johnson was not an independent contractor, regardless if that is how Lorence Enterprises labeled him.

Mr. Johnson was directed to his job-whether it was cleaning out an apartment or performing dry walling or tiling. At the end of the week he would tell Lorence Enterprises how many hours he worked and he would be paid. This is the classic example of an hourly employee. It is very important to note that Mr. Johnson was not paid per job when he was cleaning out apartments. He was paid by the hour and by the day.

⁵ 871 IAC 23.19(1).

⁶ See generally 871 IAC 23.19.

⁷ 871 IAC 23.19.

⁸ 871 IAC 23.19(7).

The relationship with Mr. Johnson and Lorence Enterprises with respect to the lawn mowing was an independent contractor relationship. He was paid per job, not per hour. However, this aspect of employment does not change the entire picture of Mr. Johnson's employment.

Mr. Johnson may have brought some tools to the dry walling operation, but Lorence Enterprise furnished the supplies and some tools from Mr. Johnson's jobs.

The factors listed above show that Lorence Enterprises has failed to carry its burden of proof to establish that the relationship with Mr. Johnson was not an employee-employer relationship. Lorence Enterprise paid a fixed wage to Mr. Johnson for an extended period of time. He would perform the jobs that Lorence directed him to do, and he would be paid for his time. This is not an independent contractor but an hourly employee.

DECISION

The Department's decision is affirmed. The Department's determination that Frank Johnson was an employee of Lorence Enterprises is affirmed. The Department shall take any action necessary to implement this decision.

jmp