

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

Appeal Number: 13IWD008

Appellant (2)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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

CORNBELT DEVELOPMENT INC.

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

SIoux CITY, IA 51103

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

**IOWA WORKFORCE DEVELOPMENT
AMY LOUVRIEN, FIELD AUDITOR**

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

JOE BERVID, IWD
NICHOLAS OLIVENCIA, IWD
CARIE O'BRIEN, IWD
DOUGLAS LEHMAN, PARTY
THEODORE KARPUK, ATTORNEY

(Administrative Law Judge)

September 12, 2013

(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

STATEMENT OF THE CASE

Douglas Lehman applied for unemployment insurance benefits. Iowa Workforce Development (“IWD”) learned Lehman had performed services for Appellant Cornbelt Development, Inc., d/b/a Travel Plus Limousines (“Travel Plus”). IWD completed a missing wage investigation and determined an employer-employee relationship exists between Travel Plus and its workers. Travel Plus appealed.

IWD transferred the case to the Iowa Department of Inspections and Appeals, Division of Administrative Hearings to schedule a contested case hearing. A contested case hearing was held September 3, 2013. Theodore Karpuck represented Travel Plus. Lehman and Phillip Karpuck appeared and testified on behalf of Travel Plus. Amy Lovrien appeared and testified on behalf of IWD. Exhibits A and 1 were admitted into the record.

ISSUE

Whether an employer-employee relationship existed between Travel Plus, Doug Lehman and all other workers performing services for Travel Plus.

FINDINGS OF FACT

Phillip Karpuck and his wife own Travel Plus. They started Travel Plus as a travel agency in 1997 and expanded the business to include limousine services. Travel Plus owns eight vehicles for limousine and trolley services. Travel Plus provides services for weddings, proms, and VIP customers. Travel Plus has a pool of 10 drivers that it calls on from time to time to provide driving services.

In 2011 Lehman started driving for Travel Plus. Lehman has not provided any services to Travel Plus in 2013.

Lehman was employed by Arrow Stage Lines full-time from February 2008 through December 2011. In 2011 Arrow Stage Lines laid off Lehman. Lehman's position was eliminated when Arrow Stage Lines went out of business.

Lehman last drove for Travel Plus in 2012.

Lehman applied for unemployment insurance benefits when Arrow Stage Lines eliminated his position. IWD determined Lehman also performed services for Travel Plus. Lehman told IWD he worked as an independent contractor for Travel Plus. Lehman reported he received unemployment insurance benefits based on his work with Arrow Stage Lines.

IWD commenced an investigation of whether Lehman was an employee or independent contractor of Travel Plus. Lovrien sent Lehman a Questionnaire for Determining Status of Workers. Lovrien also spoke with Lehman on the telephone to obtain additional information concerning his relationship with Travel Plus. In his response to the Questionnaire, Lehman reported he is on-call, works part-time, performs services for a specific job, and also works for others.

Travel Plus also completed a Questionnaire for Determining Status of Workers and a Report to Determine Liability. Travel Plus provided a Travel Plus Limousines Driver Application & Checklist and an independent contractor agreement.

After reviewing the documents from Lehman and Travel Plus and after speaking with Lehman, Lovrien determined an employer-employee relationship existed between Travel Plus and its workers. IWD sent Travel Plus a Notice of Employer Status and Liability dated January 24, 2013, with an effective date of January 1, 2008. Karpuck appealed.

Lehman fits the profile of drivers who perform services for Travel Plus. Most of the drivers are older, and either retired or semi-retired individuals looking for part-time work.

When Travel Plus receives a request for limousine services, Travel Plus waits until a day or two before the event to pick a driver. Customers sometimes request a specific driver as well. Travel Plus contacts the driver and tells the driver Travel Plus would like the driver to drive for the event. The driver does not have to accept the job. He can accept or refuse the job, with no consequence for future work.

If the driver accepts the job, Travel Plus calls the customer and gives the customer the driver's telephone number to discuss the details of the event, including when the driving is needed, where the driving will occur, a contact person for the services, and any expectations of the driver. Customers sometimes want certain music, ice, drinks, ect. Travel Plus does not discuss these details with either the driver or the customer. During the drive customers may also request a change in the route. Travel Plus refers to each driver as "the captain of the ship." Travel Plus does not retain the right to discharge a driver during a drive. The drivers do not report back to Travel Plus.

Travel Plus charges the customer for the service. The charge is typically \$300 to \$500 for a wedding. The customer provides a gratuity to the driver of 15% through 20%. The driver is not guaranteed a gratuity from the customer. At times customers do not provide gratuities to the drivers. Because not all customers provide gratuities, Travel Plus guarantees the driver a flat \$20. Drivers have negotiated larger stipends at times. For example, one customer requested services for 13 hours. Travel Plus agreed to pay a stipend of \$100 to the driver.

The drivers do not turn in timesheets. The drivers' primary form of payment is the gratuity.

Lehman testified after a drive, the driver is responsible for checking the vehicle and performing any maintenance, including cleaning the vehicle, checking the fluids, determining if the vehicle needs oil or gas, and changing the wiper blades. Travel Plus pays for the parts, gas and oil.

Karpuck testified drivers may arrange their own substitutes and they are free to decline a request for driving, but will remain in the driving pool. The drivers do not work regular hours. They may work a given Saturday and then not work for several months.

The drivers are free to work for other companies, including Royal Charters, a bus and tour line, Kelly Coaches, a bus and tour line, Black Tie Limousine, a limousine service, Prince and Princess Limousine, a limousine service, taxi companies, Arrow Stage Lines. Drivers who drive for Travel Plus are free to drive for competitors.

Travel Plus has always treated the limousine drivers as independent contractors. Travel Plus issues each driver at 1099 and all of the drivers sign independent contractor agreements.

Each driver is responsible for his own licensing. The drivers must obtain their own chauffer's license. Some vehicles require the driver to have a CDL, an airbrake endorsement, and/or a passenger endorsement. Travel Plus does not compensate the drivers for the licensing or provide any training.

Lehman testified he had a CDL, a chauffer's license, and the passenger and air brake endorsements. Lehman preferred driving Travel Plus' trolley. Lehman cannot pass the physical for a CDL because he takes insulin. He can only drive as a chauffeur at this time.

The drivers for Travel Plus wear their own chauffer's clothing. Some of the drivers have their own business cards. The drivers are free to solicit customers. Karpuck testified customers think the drivers work for Travel Plus.

Travel Plus pays for a taxi permit for its vehicles. Travel Plus also pays for insurance for its vehicles. If a driver has an accident, the driver is responsible for cost of Travel Plus' deductible.

REASONING AND CONCLUSIONS OF LAW

IWD oversees the unemployment compensation fund in Iowa, which is governed by Iowa Code chapter 96.¹ IWD's Director administers Iowa Code chapter 96 and is charged with adopting administrative rules.² IWD determines all issues related to employing units and employer liability, including the amount and rate of contribution and successorship.³ IWD determined an employer-employee relationship exists between Travel Plus and its workers by applying a multi-factor test.

The governing statute defines an employer as "any employing unit which in any calendar quarter in either the current or preceding calendar year paid for service in employment wages of one thousand five hundred dollars or more."⁴ An employing unit includes any individual or organization that employs one or more individuals performing services in Iowa.⁵ The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."⁶ Employment includes service performed by "[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."⁷

A presumption exists that an individual is an employee if the individual receives services for compensation.⁸ An individual or business bears the burden of proving the individual

¹ Iowa Code § 96.9(1) (2013).

² *Id.* § 96.11(1).

³ *Id.* § 96.7(4).

⁴ *Id.* § 96.19(16) *a.*

⁵ *Id.* § 96.19(17).

⁶ *Id.* § 96.19(18) *a.*

⁷ *Id.* § 96.19(18) *a*(2).

⁸ 871 IAC 23.19(6).

or business is exempt from coverage under Iowa Code chapter 96.⁹ If an employer-employee relationship exists, the designation or description of the relationship by the parties as anything other than an employer-employee relationship is immaterial.¹⁰

In the unemployment compensation context, the right of control, as developed through the common law, is the principal test for determining whether a worker is an employee or independent contractor.¹¹ In the employer liability context, IWD also applies the common law standard when deciding whether an employer-employee relationship exists by applying the common law rules to the individual facts in each case.¹² “Generally the relationship (that 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 details and means by which that result is accomplished. That is, 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.”¹³

In addition to the common law test, IWD has adopted rules with factors to consider in determining whether a worker is an independent contractor or employee.¹⁴ The rules flush out the common law test and expand upon the common law test.

Some of the factors include: (1) the right to control and direct the means and details by which the result is to be accomplished; (2) the right to discharge or terminate the relationship; (3) the furnishing of tools, equipment, materials, and a place to work; (4) the nature of the worker’s contract for the performance of a certain type, kind or piece of work at a fixed price; (5) whether the worker is involved in distinct trade, occupation, business or profession; (6) payment of fixed or hourly wages; and (7) the ability of the worker to sustain a profit or loss.¹⁵ Travel Plus entered into an independent contractor agreement with each of its drivers. Both parties are afforded the right to terminate the agreement. Travel Plus does not monitor the drivers’ driving activity. The drivers do not report back to Travel Plus.

Travel Plus provides the vehicles to the drivers. The drivers provide their own clothing. Travel Plus contacts the driver and inquires whether a driver wants to accept a particular job. The driver can refuse the work without consequence to future work. The place of work is negotiated directly by each driver with the customer. Travel Plus does not direct the route or the details of the job. While Travel Plus pays the drivers a stipend, typically \$20, the drivers’ primary remuneration is through gratuities from customers. The drivers are not paid an hourly wage. The drivers bear the risk of not receiving gratuities for their work.

⁹ Iowa Code § 96.19(18)f; 871 IAC 22.7(3).

¹⁰ 871 IAC 22.19(7).

¹¹ *Gaffney v. Dep’t of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).

¹² 871 IAC 23.19(6).

¹³ *Meredith Publ’g Co. v. Iowa Employment Sec. Comm’n.*, 232 Iowa 666, 678, 6 N.W.2d 6, 13 (1942).

¹⁴ 871 IAC 23.19.

¹⁵ *Id.* 23.19(1)-(7).

The rules recognize an independent contractor typically follows a distinct trade, occupation, business or profession in which the worker offers his or her services to the public to be performed without the control of those seeking the benefit of the worker's training or experience.¹⁶ Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, occupation, business, or profession, in which they offer services to the public, are independent contractors and not employees.¹⁷ The drivers are responsible for their own licensing. Travel Plus does not pay for or provide any training for the drivers. The drivers offer their services to others, may solicit customers on their own and many have their own business cards.

IWD's rules further note 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.¹⁸ 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.¹⁹ Travel Plus does not monitor the drivers' activities during jobs. The drivers do not report back to Travel Plus. Travel Plus provides the customer with the driver's telephone number to work out the details. The drivers negotiate the details of each job directly with the customer.

Additional factors include expenses, the risk of loss, the furnishing of tools and equipment, payment of wages, and the purchasing of labor. Independent contractors can make a profit or loss and are more likely to have unreimbursed expenses than employees and to have fixed, ongoing costs regardless of whether work is currently being performed.²⁰ Independent contractors often have significant investment in real or personal property that they use in performing services for others.²¹ The drivers are responsible for their own clothing. They are not reimbursed for any expenses related to the trip. The drivers' primary remuneration is from gratuities. While the drivers receive a general stipend of \$20, sometimes more for longer jobs, drivers may spend time working and not receive a gratuity.

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service are characteristic of an employer.²² Travel Plus provides the vehicles for the driving, the gas, oil, and supplies. The drivers provide their own uniforms.

An employee is typically paid a fixed wage on a weekly or hourly basis, whereas an independent contractor is typically paid one sum for the entire work, whether it is paid in a lump sum or installments.²³ The drivers are paid a fixed \$20, or sometimes more for longer jobs, for the entire work. They are not paid on a weekly or hourly basis.

¹⁶ *Id.*

¹⁷ *Id.* 23.19(1).

¹⁸ *Id.* 23.19.

¹⁹ *Id.*

²⁰ *Id.* 23.19(3).

²¹ *Id.*

²² *Id.*

²³ *Id.* 23.19(4).

Generally an employee performs the work continuously and his or her labor is primarily purchased, whereas an independent contractor undertakes the performance of a specific job.²⁴ The drivers work sporadically and are free to work for other businesses, including competitors. The drivers do not work continuously for Travel Plus. A driver may choose to accept or reject a specific job with Travel Plus. If a driver accepts a job, the driver may not perform another job for Travel Plus for several months. A driver may refuse a job without consequence to future jobs.

Travel Plus does not direct the details of the work to be performed. Travel Plus gives each customer the name of the driver and the customer and driver negotiate the details. While drivers receive a typical stipend of \$20 for each job, the primary remuneration comes from gratuities. The drivers are not paid hourly.

The drivers are responsible for their own licensing and training. Travel Plus provides the vehicles, gas, oil and tax permit. The drivers provide their own clothing. Travel Plus provides insurance for the vehicles, but the drivers are responsible for the cost of the deductible if an accident occurs. The drivers are free to work for other businesses, including competitors. The facts of this case do not support IWD's determination that an employer-employee relationship exists between Travel Plus and its workers. The decision should be reversed.

DECISION

An employer-employee relationship does not exist between Travel Plus, Lehman and all other workers performing services for Travel Plus. IWD's decision is REVERSED.

hlp

²⁴ *Id.* 23.19(2).