

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

Appeal Number: 13IWD006-07

Respondent (4, 6)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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

BARTELS HOME SERVICES, LLC

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

HARNESS NATURE, LLC

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

**IOWA WORKFORCE DEVELOPMENT
JAMES HARRIS, FIELD AUDITOR
1000 E. GRAND AVE.
DES MOINES, IA 50319**

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

(Administrative Law Judge)

October 10, 2013

(Decision Dated & Mailed)

TERESA HILLARY, IWD
JOSEPH BERVID, IWD
CARIE O'BRIEN, IWD
NICHOLAS OLIVENCIA, IWD
MIKE DODD
JOSEPH HAPPE, ATTORNEY

STATEMENT OF THE CASE

Bartels Home Services, LLC and Harness Nature, LLC each filed an appeal of decisions issued by Iowa Workforce Development (the Department). At hearing, the Department represented that it was withdrawing the September 27, 2012 decision that Harness Nature, LLC was appealing. Harness Nature, LLC acknowledged that the Department's withdrawal of the decision renders the appeal moot. Accordingly, the Harness Nature, LLC appeal is dismissed based on the Department's withdrawal of its decision.

In the September 25, 2012 decisions that Bartels Home Services, LLC appeals, the Department determined that an employer-employee relationship existed between Appellant Bartels Home Services, LLC and its workers from 2007 through 2011. The Department issued a decision dated June 3, 2013 which amended and superseded the decision of September 25, 2012. The parties agreed at hearing that the June 3, 2013 decision is currently the controlling decision and is therefore the subject of the appeal.

The case was transmitted from Workforce Development to the Department of Inspections and Appeals on February 12, 2013 to schedule a contested case hearing. The hearing was originally set for April 8, 2013 and was continued twice. The hearing was held on August 5, 2013 before Administrative Law Judge Laura Lockard at the Wallace State Office Building in Des Moines, Iowa. The Department was represented by field auditor James Harris, who presented testimony. The Appellant was represented by attorney Joseph Happe. Steve Bartels testified for the Appellant. The Department submitted Exhibits A, B, and D,¹ which were admitted as evidence. The Appellant submitted Exhibits 1B through 17B, Exhibits 1HN through 13HN, and Exhibit C, which were admitted as evidence.

ISSUE

Whether the Department correctly determined that an employer/employee relationship existed between Bartels Home Services, LLC and the individuals performing services for the business between 2007 and 2011.

FINDINGS OF FACT

A. The Department's Investigation

On April 16, 2012, field auditor James Harris and lead investigator Ryan Dostal visited a work site in Urbandale, Iowa where Appellant Bartels Home Services, LLC ("BHS") was working on a job. Three workers were engaged in framing a home. A trailer on site was owned by Steve Bartels; Bartels himself was not at the job site.² BHS had provided the air compressor, nail guns, and ladders for the workers at the job site. The workers provided their own hand tools. According to Harris, the three workers advised the Department during the site visit that they were paid on an hourly basis. (Exh. A-20; Harris testimony).

The workers told Harris and Dostal during the site visit that they were employees of BHS. Harris and Dostal did not ask the workers if they performed services for anyone else, whether they set their own hours, or how long they had been working for the business. (Harris testimony).

After the site visit, the Department mailed copies of its Questionnaire for Determining Status of Workers to Bartels and to the three workers who were at the job site on April 16. Neither Bartels nor any of the workers returned the questionnaire. (Harris testimony; Exh. A-20).

In July, 2012, after several requests, Bartels provided copies of BHS's tax returns and payroll records to the Department. Bartels informed the Department that BHS did not

¹ The Department submitted a set of exhibits for Bartels Home Services, LLC and a set of exhibits for Harness Nature, LLC, both labeled Exhibits A and B. Only the Bartels Home Services, LLC exhibits were admitted.

² The Department's Synopsis of Investigation indicates that Bartels was at the jobsite on April 16. Harris testified at hearing that the synopsis is in error.

issue 1099 forms to its workers. During the course of the investigation, Bartels informed the Department that he had suffered a back injury and had not personally been framing houses since 2006. (Harris testimony; Exh. A-20 – A-21, A-25).

The Department made an inference, based on the fact that the three workers were at the jobsite working together on April 16, that they were being directed and controlled by BHS and that BHS was, therefore, their employer. Harris testified that someone must have coordinated for the workers to be at the site at the same time ready to work. (Harris testimony).

The Department issued a decision dated September 25, 2012 which determined that an employer-employee relationship existed between BHS and the individuals performing services for the business from 2007 through 2011. The decision calculated the amount of contributions, penalty, and interest owed by the business at \$48,177.28. The Department issued an amended decision dated June 3, 2013; that decision determined that an employer-employee relationship existed between BHS and the individuals performing services for the business from the fourth quarter of 2007 through the second quarter of 2012. The decision states that it now also includes wages earned and paid for services performed by Steve Bartels and Pamela Bartels. The contribution, penalty, and interest owed in the amended decision is \$66,874.31.³ (Exh. A-8).

B. Bartels Home Services, LLC's Organization and Business Practices

Bartels Home Services, LLC was established in the late 1990s or early 2000s. The business changed at some point from an S corporation to a limited liability company. The organizational change was done upon the recommendation of an accounting firm. Bartels felt that LLC members would have a greater incentive to make the business profitable as they would own a piece of the business. (Bartels testimony).

Bartels' usual practice was to hire new workers for a probationary period, during which time he would decide whether to make them members of the LLC. As reflected by K-1 forms issued by the LLC during the time period in question, the LLC members were as follows:

³ A list of the individuals the Department determined to be employees is found at Exh. A-21.

--	--	--

--

(Exh. 17B; Exh. B-74 – B-162).

At hearing, Bartels made a distinction between “casual labor” and LLC members. The individuals who were paid by BHS and who were not LLC members were considered to be casual laborers. Bartels did not make unemployment insurance contributions for either category of worker. (Bartels testimony).

Regardless of whether they are LLC members or not, BHS pays all of its workers by the square foot.⁴ BHS owns the air compressor, air hoses, ladders, and nail guns that are used by workers at its jobsites. The workers provide their own hammers, hand tools,

⁴ The only evidence to the contrary is the hearsay testimony of field auditor Harris, who testified that the workers at the job site inspected in April, 2012 reported that they were paid by the hour. None of these workers testified at hearing. In contrast, Bartels provided credible testimony that house framers were paid by the square foot by the LLC and that the business consciously chose this payment strategy in order to incentivize faster, more efficient work.

belts, pens, and wrenches. Some workers have had their own air hoses, nail guns, cordless drills, and ladders; they are permitted to use those if they wish to do so. (Bartels testimony).

BHS did not organize or hold any safety meetings during the time period from 2007 through 2012. BHS did not have planning meetings on site to lay out the schedule for any job. Typically, the builder's superintendent would bring blueprints to the job site on the start date to show to the workers; Bartels usually never saw the blueprints. All of the workers that BHS used had the ability and expertise to read blueprints for framing purposes. (Bartels testimony).

Bartels' role with BHS was to line up jobs. Generally speaking, he would try to get hooked up with a builder then do a number of jobs for that builder, but the years in question were tough ones for framing contractors. Occasionally, BHS would go two weeks to a month without jobs. The LLC members usually had side jobs during the time that they weren't doing work for BHS. (Bartels testimony).

The three framers assigned to a job by BHS would decide what hours to work. Bartels never worked alongside workers as a foreman or lead worker. None of the workers was designated as a foreman. Bartels testified that there was lots of peer pressure between the LLC members if a particular worker was not pulling his weight. (Bartels testimony).

With a three-person crew, it typically took about two weeks to frame a 1,500 square foot ranch house; a two-story home would take longer. Bartels did not receive periodic updates from the workers, nor did he visit the job sites frequently. He typically visited only when the house was getting close to completion. Bartels also did not conduct any inspection of the jobs upon completion; typically the builder would do a quality inspection before the official city inspection. (Bartels testimony).

Bartels did not know if workers got sick or needed time off; the workers handled these types of issues between them. The workers typically got paid after BHS got paid for the work; if there was a worker who took time off during the job, the workers worked out the monetary split between themselves (i.e. the worker who took time off might pay the other two workers a certain amount from his check). Bartels also did not have any problem with workers hiring someone to fill in if they were unable to work for some reason. One crew brought a helper on a job and paid the helper themselves from their checks. (Bartels testimony).

With regard to the timing of payment, BHS typically had to get an invoice in to the builder every other Friday in order to get paid seven days later. The crews typically wanted to do one house every two weeks in order for their pay to remain consistent. Occasionally, owing to the timing of jobs and invoices, a crew would go without pay for a month or would get paid for two houses at the same time. Additionally, some builders would allow a weekly draw for houses that were in the process of being framed. (Bartels testimony).

In the framing industry, if a framing crew does not do the work adequately and a builder has to hire another crew to get the fix done quickly, the builder back charges the framing

contractor. If any back charges resulted from work done by one of BHS's crews, the crew itself was responsible for paying the back charge. (Bartels testimony).

REASONING AND CONCLUSIONS OF LAW

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.⁵ "Employment" is defined as service performed for wages or under any contract of hire, written or oral, express or implied.⁶ 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.⁷

A. LLC Members

While BHS believed that members of the LLC were self-employed and that they therefore were not considered employees for purposes of the unemployment insurance system, its belief on this point is incorrect. Members of an LLC who perform services other than for the purpose of acquiring membership in the LLC are classified as employees for unemployment insurance purposes.⁸ Bartels acknowledged in testimony at hearing that LLC members did not perform services to acquire membership in the LLC.

Remuneration to a member of an LLC that is based on a membership interest in the company is not considered wages provided that the remuneration is allocated among members in proportion to their respective investments in the company. If the amount of remuneration attributable to a membership interest cannot be determined, the entire amount of remuneration is deemed to be based on services performed.⁹

In this case, the amounts paid to LLC members are properly classified as wages. The Findings of Fact section contains information about the identity of BHS's members in the years 2007 through 2011. The Department shall use the information contained in Exhibit D and elsewhere in the record to calculate BHS's unemployment insurance contributions attributable to its members from 2007 through 2012. Remuneration to LLC members based on their membership interest shall not be counted in the calculation if the amount of that remuneration can be determined; if the amount of remuneration attributable to a membership interest cannot be determined, the Department shall deem the entire amount paid as wages based on services performed.

BHS argues in an exhibit prepared by Bartels that it did not report wages of certain workers because of an IRS rule purportedly indicating that income below \$600 does not

5 Iowa Code § 96.19(16)(a) (2013).

6 Iowa Code § 96.19(18)(a) (2013).

7 871 Iowa Administrative Code (IAC) 22.7(3), 23.55(2).

8 871 IAC 23.18(9).

9 Iowa Code § 96.19(41)(e) (2013); 871 IAC 23.3(2)(j).

have to be reported. While I express no view on whether there is such an IRS rule and whether it operates as BHS asserts, even if there is such a rule it does not govern wage reporting for purposes of Iowa's unemployment insurance law.

B. Non-LLC Members

In the context of the workers who performed services for BHS who were not members of the LLC, "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."¹⁰

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.¹¹

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.¹² 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.¹³

¹⁰ *Gaffney v. Department of Employment Services*, 540 N.W.2d 430, 434 (Iowa 1995).

¹¹ 871 IAC 23.19(1).

¹² See generally 871 IAC 23.19.

¹³ 871 IAC 23.19.

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.¹⁴

While there are factors in this case that fall on both sides of the employee/independent contractor line, the weight of the evidence supports the conclusion that the non-LLC members that performed services for BHS were independent contractors. Notably, the workers who did the framing were paid by BHS on a square foot basis only after BHS received payment from the builder; while BHS tried to submit invoices to builders in such a fashion that its workers received consistent paychecks, this was dependent upon the builder's payment schedule. The crews that BHS hired to frame houses were not overseen by Bartels or any other member of BHS; they made their own hours and were responsible for completing the work on schedule. Crews worked out among themselves adjustments in pay based upon whether each worker spent a roughly equal time on the job. Additionally, crews could and did hire helpers on jobs; when that occurred, the helper was paid by the crew and not by BHS directly. BHS did not inspect the job while it was in progress or upon completion. In addition, while BHS's workers did not have a significant investment in each job, they could still experience loss, for example if they worked very slowly or if they were back charged by the builder for errors in completing the job.

While BHS did provide some tools, such as an air compressor, ladder, and nail guns, this fact does not outweigh the bulk of the evidence supporting the conclusion that BHS did not direct and control the work of its non-LLC laborers. Under these circumstances, the Department erred in classifying the workers who performed services for BHS and who were not members of the LLC as employees; they are independent contractors.

DECISION

The Department's decision is MODIFIED. The Department was correct in classifying members of BHS as employees. The Department shall calculate BHS's unemployment insurance contributions for the time period in question using monies paid to members that were not distributed in proportion to their investment in the company. If it is impossible to determine the amount of remuneration attributable to membership interest for a particular member, the Department shall use the entire amount paid to that member in calculating the contribution amount.

The Department was incorrect in classifying non-members who performed work for BHS as employees. The Department shall not include in the modified contribution amount any amount attributable to monies paid to non-members who performed work for BHS.

Pursuant to this order, the Department shall recalculate BHS's unemployment insurance contributions for the applicable time period and issue a new decision to BHS reflecting the modified contribution amount.

¹⁴ 871 IAC 23.19(7).