

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

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**H & S CONCRETE
JOSE & ANGELIA SANCHEZ**

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

JOE BERVID, IWD
NICHOLAS OLIVENCIA, IWD
CARIE O'BRIEN, IWD
RYAN DOSTAL, IWD
RUSSELL MUNSINGER, IWD

Appeal Number: 13IWD018

Respondent (1)

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)

August 20, 2013

(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

STATEMENT OF THE CASE

On June 18, 2012, IWD Investigator Ryan Dostal and Field Auditor Russell Munsinger visited a worksite in Waukee, Iowa. They observed five workers and subcontractor Jose Sanchez, owner of H & S Concrete, laying concrete at the worksite. All of the workers were using H & S Concrete forms and equipment, though they reported being subcontractors. IWD completed an investigation and determined an employer-employee relationship exists between H & S Concrete and its workers. Jose Sanchez and his spouse and business partner, Angelia Sanchez, 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 at the Wallace State Office Building on July 24, 2013. Jose and Angelia Sanchez appeared and testified. James Harris appeared and testified on behalf of IWD. Ryan Dostal and Russell Munsinger were present on behalf of IWD, but did not testify. Exhibits A and B were admitted into the record.

ISSUE

Whether an employer-employee relationship existed between H&S Concrete, and its workers performing services for H & S Concrete.

FINDINGS OF FACT

Jose Sanchez operates a concrete business, H & S Concrete. Following the June 18, 2012 worksite visit by Dostal and Munsinger, an investigation of H & S Concrete was initiated by IWD. IWD assigned the matter to Harris.

IWD sent a letter requesting business records to Mr. Sanchez on June 22, 2012. A 30-31. After no response was received, a notice to produce was mailed on July 16, 2012. A 32 – 33. Mr. Sanchez completed the Questionnaire for Determining Status of Workers and submitted 2011 1099's, W-9 taxpayer certifications, 2011 and 2010 H & S Concrete Partnership returns, and 2007 to 2011 personal returns. Sanchez reported the workers' job was to set and pour concrete. He acknowledged that H & S Concrete has the right to direct and control the services performed as well as to require policies and instructions be followed. The firm provides the equipment, supplies, materials, and some of the tools the workers use. Workers are paid hourly. They are free to end their relationship with H & S Concrete at any time without incurring liability or penalty. Likewise, H & S Concrete can discharge a worker at any time. The workers do not provide services for others.

Mr. Sanchez indicated any remaining business records were in the possession of his former business partner, Sergio Hernandez. IWD sent a notice to produce to Mr. Hernandez on August 8, 2012. Mr. Hernandez produced the requested records on September 10, 2012. Hernandez indicated he left H & S Concrete due to differences relating to the management of the business.

At the conclusion of his investigation Harris determined an employer-employee relationship exists between H & S Concrete and its workers. IWD sent Mr. and Mrs. Sanchez a Notice of Employer Status and Liability dated November 28, 2012, with an effective date of January 1, 2007. Mr. and Mrs. Sanchez appealed.

At hearing, Mr. Sanchez did not dispute the testimony presented by IWD. He contends, however, that any liability should be shouldered at least in part by his former business partner, Hernandez. Sanchez explained that following the formation of the partnership, he handled the concrete work while Hernandez handled the paperwork. He reported that Hernandez walked away from the business in 2010 and Sanchez continued to run the business on his own. He was unaware of all of the requirements. Mr. Sanchez's wife, Angelia Sanchez, signed on as a partner at the suggestion of their tax preparer. Sanchez testified that he has been running the business for the last 2.5 years without Hernandez. He has issued 1099s to the workers and thought he was doing the right thing. He indicated his strength was the concrete work itself and he continues to get concrete jobs based upon word of mouth due to the quality of his work. Mrs. Sanchez has occasionally assisted with writing checks and making deposits for H & S Concrete; she has no other involvement with the business.

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 H & S Concrete and its workers.

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 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 Whether an employer-employee relationship exists under the usual common law rules is determined based upon an analysis of the individual facts in each case.¹²

In addition to the common law test, IWD has adopted a rule with factors to consider in determining whether a worker is an independent contractor or employee.¹³ The factors

¹ Iowa Code § 96.9(1).

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).

⁹ Iowa Code § 96.19(18)f; *Id.* 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 *Id.* 23.19.

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.¹⁴

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.¹⁵ 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.¹⁶ H & S Concrete's workers do not follow a distinct trade, occupation, business or profession. They perform manual services setting and pouring concrete.

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.¹⁷ 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.¹⁸ H & S Concrete notifies the workers of the job when it comes in and the specific job duties they are to perform.

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.¹⁹ Independent contractors often have significant investment in real or personal property that they use in performing services for others.²⁰ There is no evidence H & S Concrete's workers have fixed, ongoing costs independent of the work they perform for H & S Concrete.

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service are characteristic of an employer.²¹ H & S Concrete provides the equipment, supplies, materials, and some of the tools for its workers use.

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.²² H & S Concrete pays the workers by the hour, as

¹⁴ *Id.* 23.19(1)-(7).

¹⁵ *Id.*

¹⁶ *Id.* 23.19(1).

¹⁷ *Id.* 23.19.

¹⁸ *Id.*

¹⁹ *Id.* 23.19(3).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* 23.19(4).

opposed to by the project. The workers do not have the ability to make a profit or loss on a given project.

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.²³ H & S Concrete receives jobs and instructs the workers as to specific job duties they are to perform.

H & S Concrete's workers perform services personally for H & S Concrete. The workers are paid by the hour and cannot sustain a profit or loss. H & S Concrete provides the workers with equipment, supplies, materials, and some tools. The workers have the right to quit without being held financially responsible for unfinished work on the job site. These factors support IWD's conclusion that an employer-employee relationship exists between H & S Concrete and its workers. Mr. Sanchez did not contest the IWD's findings regarding the relationship between the workers and H & S Concrete. He did contest the liability assigned.

There was testimony at hearing indicating H & S Concrete was a partnership originally started by Jose Sanchez and Sergio Hernandez. This is documented by the 2007 and 2009 tax returns in evidence at Exhibit B 102-126. Testimony was submitted indicating the partnership was not properly dissolved and that Hernandez simply abandoned the business. Angelia Sanchez subsequently signed on as a partner to keep the business running as a partnership. Exhibit B 71-101. Harris contends that Mr. and Mrs. Sanchez are liable for five years of tax in this matter as a result of successor liability. While I am sympathetic to the situation Mr. and Mrs. Sanchez are now in, this issue is beyond the scope of my review.

DECISION

Iowa Workforce Development correctly determined that an employer-employee relationship existed between H & S Concrete, as its workers. Iowa Workforce Development shall take any steps necessary to implement this decision.

eks

²³ *Id.* 23.19(2).