BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID DICUS,

Claimant,

vs.

WINDOWS AMERICA,

Employer,

and

IOWA MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED
DEC - 8 2017
WORKERS' COMPENSATION

File No. 5042736

REMAND DECISION

Head Note Nos.: 1402.10, 1504

STATEMENT OF THE CASE

This matter is before the Iowa Workers' Compensation Commissioner on remand from the Iowa District Court for Polk County from a decision dated August 25, 2016.

This matter was initially heard on March 18, 2014. An arbitration decision was filed on October 20, 2014. That decision held, in part, claimant, David Dicus, was an employee of defendant Windows America (Windows), and that claimant was entitled to a running award of healing period benefits commencing on July 25, 2012.

The appeal decision affirmed the arbitration finding that claimant was an employee of Windows.

A petition for judicial review was filed. In the Ruling on Petition for Judicial Review, the District Court concluded it was the current law of Iowa that when an injured worker claims, and the employer denies, employee status under Iowa Code section 85.61(11), the controlling question is whether the parties had a mutual agreement of employment. If not, the person is not an employee under Iowa Code section 85.61(11) and not entitled to workers' compensation benefits. The case was remanded to the commission for further proceedings consistent with the ruling ". . . including a finding on the controlling fact issue — the intent of the parties regarding Dicus' employment status." (Ruling on Petition for Judicial Review, page 9)

Upon written delegation of authority by the Workers' Compensation Commissioner under Iowa Code section 86.3, I render this decision as a final agency decision on behalf of the Iowa Workers' Compensation Commissioner.

ISSUE

As required by the Remand Order from the district court, the sole issue on remand is did the parties have an intent to establish an employee-employer relationship?

FINDINGS OF FACT

The record in this case indicates the following:

David Dicus began working for Windows in the fall of 2005.

Claimant's job with Windows was to finish window installations of the outside of a home. (Transcript page 22) Claimant also did other jobs for Windows that included, but were not limited to, helping a coworker do inside installations and unloading trucks. (Tr. p. 25)

Claimant received an IRS form 1099 for every year he worked for Windows. (Tr. p. 20; Ex. 6, pp. 15-18; Ex. C)

Claimant testified at hearing he thought the work he performed for Windows was ". . . an employee-type deal. . ." (Tr. p. 16) Claimant testified he left Windows approximately in 2008 because he wanted Windows to give him the proper tax forms. Claimant said he eventually returned to work for Windows. (Tr. pp. 16-17)

In a sworn statement claimant indicated he knew by getting a 1099, he was considered self-employed. Claimant said he did not believe this was consistent with the work he did with Windows. Claimant testified he believed because he performed work that was scheduled and controlled by Windows, he should have been considered an employee. (Ex. A, pp. 44-45)

Claimant indicated in the sworn statement, if Windows did not request jobs to be completed in a certain order, he would determine sequencing of jobs. (Ex. A, pp. 47-48)

Claimant said after his work injury, he went to an Iowa Workforce Development office to see if someone at the agency could tell him if he was an employee or self-employed. (Ex. A, pp. 51-52)

Claimant said he initially agreed with Windows that he would be paid $35.00 per window. He said he and Windows mutually agreed he could be paid more on certain windows jobs. (Ex. A, pp. 91-94)

Robert Beller testified he was a co-owner of Windows. Mr. Beller testified he hired claimant to finish window jobs by putting metal trim around the windows. (Tr. p. 107) Mr. Beller testified he did not recall if claimant had a work schedule and only remembered asking that claimant complete work in a timely fashion. (Tr. p. 108) Mr. Beller testified claimant did not work on a regular schedule and did not work on a full-time basis. He said if claimant refused to do a job, Windows would hire another subcontractor to do the work. (Tr. p. 114) Mr. Beller testified he did not consider claimant an employee "Because Dave got to do what he wanted when he wanted." (Tr. p. 127)

Amanda Beller is a co-owner of Windows with her husband. At the time of hearing, Ms. Beller testified she was the day-to-day manager of Windows. (Tr. p. 146; Ex. 4, p. 18) Ms. Beller testified she believed claimant was a subcontractor, not an employee. (Tr. p. 147; Ex. 4, pp. 23, 40) She said claimant set his own hours and did not have a fixed schedule. (Tr. pp. 147, 149; Ex. 4, pp. 22, 25, 32) She said claimant had a flexible schedule and that he controlled the locations where he worked. (Ex. 4, pp. 20, 22, 25, 29, 39, 87) Ms. Beller testified if claimant refused work, Windows would hire another subcontractor to work. (Ex. 4, p. 29-32) She said claimant received $35.00 per window. She said claimant occasionally charged more per window, and that Windows would pay the extra charge. (Tr. pp. 166-167)

Ms. Beller said claimant would charge $50.00 to unload trucks for Windows. (Tr. p. 170) She said if there was a bigger or difficult job, claimant would set the amount to be paid. (Tr. p. 170)

Ms. Beller testified claimant was not paid by a set schedule and would request and receive checks on the days he requested. (Tr. pp. 172, 173) Ms. Beller testified claimant chose and declined the jobs he wanted to work on. (Tr. p. 192)

Ms. Beller testified claimant would occasionally raise the issue of not having taxes withheld from his pay. She said claimant left Windows, at one time, due to Windows' failure to withhold taxes, and for other reasons. (Ex. 4, pp. 39, 50, 51)

Nick Faulk, testified he worked for Windows with claimant. Mr. Faulk did interior window installation. (Ex. 3, p. 9; Ex. 4, p. 21) Mr. Faulk was paid with a 1099 by Windows and paid his own taxes from his earnings with Windows. (Ex. 3, p. 11) Mr. Faulk said he believed, because he had to pay his own taxes, he was an independent contractor. (Ex. 3, p. 11) Mr. Faulk said sometime in 2012, he believed he became an employee with Windows and was no longer considered an independent contractor. (Ex. 3, p. 14)

Victoria Holzrichter testified she was a part-time employee with Windows. She testified claimant came in to work when he wanted, while Mr. Faulk came to work on a regular basis. (Tr. p. 136) Ms. Holzrichter testified claimant was paid by the job. She said claimant would request pay at different times, which Ms. Beller approved. She said claimant had no regular payroll date. (Tr. pp. 138-139, 144) Ms. Holzrichter said there

were occasions when claimant was supposed to be at a job and would not show. She said Ms. Beller would try to reach claimant, and he would not return texts or answer phone calls. She said this happened regularly. (Tr. pp. 139-141)

Claimant used the van furnished by Windows for work for years. Claimant wore a Windows logo shirt and sweatshirt while on the job. (Tr. p. 51) In 2011 claimant began using his own vehicle to go to work sites. (Tr. p. 164) Claimant also wore a logo shirt when he was with friends or while drinking. (Ex. 4, p. 84) Claimant was supplied a compressor, nail gun, and other equipment by Windows. (Tr. p. 51) Claimant supplied his own hand tools, such as a hammer, screwdriver, tape measurer, utility knife, and other hand tools. Claimant used ladders provided by Windows.

There was nothing in writing explaining the terms of claimant's relationship with Windows. (Ex. 4, p. 38)

CONCLUSIONS OF LAW

The only issue to be determined in this remand decision is whether the parties had a mutual agreement of employment.

Section 85.61(11) provides in part:

> "Worker" or "employee" means a person who has entered into employment of, or works under contract of service, express or implied, or apprenticeship, for an employer. . . .

It is claimant's duty to prove, by a preponderance of the evidence, that claimant or claimant's decedent was an employee within the meaning of the law. Where claimant establishes a prima facie case, defendants then have the burden of going forward with the evidence which rebuts claimant's case. The defendants must establish, by a preponderance of the evidence, any pleaded affirmative defense or bar to compensation. Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1967).

Factors to be considered in determining whether an employer-employee relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. Where both parties by agreement state they intend to form an independent contractor relationship, their stated intent is ignored if the agreement exists to avoid the workers' compensation laws, however. Likewise, the test of control is not the actual exercise of the power of control over the details and methods to be followed in the performance of the work, but the right to exercise such control. Also, the general belief or custom of the community that a particular kind of work is

performed by employees can be considered in determining whether an employer-employee relationship exists. Nelson, 259 Iowa 1209, 146 N.W.2d 261.

Factors used to determine whether an independent contractor relationship exists are: 1. The existence of a contract for the performance of a certain piece or kind of work that affects price. 2. Whether the worker has a separate business apart from the work he is performing for the employee. 3. The employment of assistants and the right to supervise their activities. 4. The obligation of the worker to furnish necessary tools, supplies, and materials. 5. The right of the worker to control the progress of the work, except as to the finished result. 6. The method of payment, whether by time or by job. 7. The intention of the parties to create a particular relationship. Crane v. Meier, 332 N.W.2d 344 (Iowa App. 1982).

In Stark Const. v. Lauterwasser, No. 13-0609. (unpublished) (Iowa Ct. App., April 16, 2014) (Table) 847 N.W.2d 612, the Iowa Court of Appeals also addressed the intent of the parties as a potential factor in analyzing the existence of an employee-employer relationship: The court in Lauterwasser noted:

> The *Nelson* court also called attention to "another possible element which, when applicable, might be used with others as an aid in determining whether one person is or is not the employee of another, to-wit: the intention of the parties as to the relationship created or existing." *Id.* at 265. The *Nelson* court warned that looking at intent "standing alone" could be "somewhat misleading." *Id.* The court then quoted comment m, under section 220 of the Restatement (Second) of Agency, which explained:
>
> It is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control by the other. However, community custom in thinking that a kind of service, such as household service, is rendered by servants, is of importance. *Id. Nelson* stated the trier of fact may, where appropriate, use the subjective standard of the parties' intent "to the extent it serves to shed light upon the true status of the parties concerned." *Id.*
>
> Our supreme court discussed the parties' intention again in *Henderson v. Jennie Edmundson Hospital*, 178 N.W.2d 429 (Iowa 1970). There, the court said "in addition to the five . . . elements we recognize the overriding element of the intention of the parties as to the relationship they are creating may also be considered." *Henderson*, 178 N.W.2d at 431. *Henderson* cited *Nelson* and *Usgaard* as supporting that conclusion. *Id.*
>
> "With [those] rules in mind," the *Henderson* court focused on the commissioner's finding that the second factor—payment of some compensation by the employer—had not been proved by Henderson, who

> was injured while enrolled in a nurse's aide training course for which she did not receive any wages. *Id.* at 431–33. The court also noted: "[I]t did not appear under the entire record it was the intention of the claimant or the hospital authorities to enter into the relationship of employer-employee." *Id.* at 433.
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> In an appeal involving unemployment benefits, the Supreme Court discussed workers' compensation cases appearing to hold "the intent of the parties is conclusive in determining whether an employment relationship exists." *Gaffney v. Dep't of Emp't Servs.*, 540 N.W.2d 430, 434 (Iowa 1995) (reviewing *Nelson* and *Usgaard*).

The Gaffney court suggested the parties' intent remained just one of several factors to be considered, and primarily only to settle the question whether the would-be employee has submitted to the control of the would-be employer. Gaffney, 540 N.W.2d at 435.

"The threshold determination in deciding whether a worker falls into the workers' compensation scheme is whether the worker entered into a contract of hire, express or implied." Parson v. Procter & Gamble, 514 N.W.2d 891, 893 (Iowa 1994). When an express contract is absent, courts must look for evidence of the employer-employee relationship. *Id.* At 894.

Under Parson, the main question to be considered is whether the parties had an informed and deliberate intent to enter into an employment relationship. *Id.* At 895.

With all respect to the District Court, I believe the law, as detailed in Nelson, Lauterwasser, Gaffney, and other cases detailed above, is the intent of the parties is one factor, not the controlling factor, to be considered in determining if an employee-employer relationship exists.

However, as noted in the ruling on the Petition for Judicial Review, the District Court interpreted the law to be that in determining if an employment relationship exists, the controlling issue is the intent of the parties. (Ruling on Petition for Judicial Review, pp. 8-9) This agency does not have the authority to ignore the order of the District Court regarding this interpretation of law. The District Court ordered this agency to make a finding if the parties had a mutual agreement of employment. The District Court also ordered this agency that if it was found that the parties did not have mutual intent of an employment relationship, the claimant was not considered an employee under Iowa Code section 85.61(11).

Both the arbitration and the appeal decision do a fine job of discussing the factors detailed in Nelson to determine if an employee-employer relationship exists, and when a worker is considered an independent contractor. This remand decision will briefly reiterate the factors discussed in the arbitration and appeal decision. This

decision will also elaborate on claimant's tax forms, and claimant's flexibility regarding time worked and jobs accepted.

The following issues suggest an intent of the parties that an employee-employer relationship existed:

1. Defendants provided all material including windows. Windows also provided all large tools. These included ladders and a tool used to bend metal (called a brake).

2. Defendants provided claimant with a truck for most of the time he worked for Windows.

3. Claimant wore a shirt and sweatshirt with the Windows logo.

4. Claimant did not hire assistants to do work. If claimant needed help, Mr. Faulk would usually assist him.

5. Customers were never told claimant was an individual contractor.

6. Windows' business was selling and installing windows.

Factors that suggest an intent of the parties that claimant was not an employee include the following:

1. Claimant was paid per window installed.

2. Claimant was initially paid $35.00 per window. Eventually, claimant requested and received more, per window, depending upon the job.

3. Claimant requested and received his pay at different times. Claimant often requested to be paid at different times.

4. Claimant had no supervisor on the job site. Claimant was allowed to control the work at the job site.

5. Claimant would refuse to do jobs he did not want to perform.

In addition, there are two additional factors that suggest there was not a mutual intent of an employment relationship.

Claimant began working for Windows in 2005. He received an IRS form 1099 for every year he worked at Windows. (Tr. p. 20; Ex. 6, pp. 15-18)

In 2008 claimant left Windows for a few months. Claimant left Windows, as defendants were not taking out taxes for him, and because Windows did not consider claimant an employee. (Tr. pp. 16-17; Ex. 4, pp. 50-52, 64-65) In brief, claimant knew from 2005 until he left in 2008, defendants did not consider him to be an employee.

Claimant returned to Windows a few months after he stopped working for the company. The record indicates in approximately 2008, when claimant returned to Windows, until his injury in 2012, claimant continued to receive 1099 tax forms. (Ex. C; Ex. 6, pp. 15, 16)

Claimant left Windows in 2008, in part, because the company did not consider him to be an employee. Claimant returned to Windows sometime in 2008 after leaving the company for two to three months. Despite leaving the company regarding his employment status, claimant continued to receive 1099 forms for the next two to three years until the date of injury. Based on the 1099 forms, Windows did not consider claimant to be an employee from the time he was hired, when he quit in 2008, and when he returned to work for Windows for the next two to three years. Although claimant wanted Windows to consider him an employee, claimant knew, or should have known, that Windows continued to view him as an independent contractor.

Both Mr. and Mrs. Beller testified they did not consider claimant to be an employee. This is largely because claimant ". . . got to do what he wanted when he wanted." (Tr. p. 127) Windows did not consider claimant an employee because he set his own hours and did not have a fixed schedule. (Tr. pp. 110, 127, 147; Ex. 4, pp. 23, 40)

The appeal decision notes, in the finding of facts section, claimant was often late to work, difficult to reach, and refused to do certain jobs for various reasons. (Appeal decision, p. 6)

The right to control the progress of work, the time the worker is employed, and the method of payment are all factors that lean towards considering a worker an independent contractor. Nelson at 264-265. These were the factors that led to the belief, by the Bellers, claimant was not an employee. Because of the claimant's flexibility to choose his work and his work hours, Windows did not intend or believe claimant was an employee of the company.

Claimant knew Windows did not consider him an employee and was not deducting taxes from 2003 through 2008. Claimant quit his work with Windows for that reason. Claimant returned to work for Windows for another two to three years, and still continued to receive 1099 forms. Claimant knew, or should have known, that both before 2008, and after his return to Windows in 2008, Windows did not consider him to be an employee. Because of claimant's flexibility regarding his work hours and his right to choose the work he performed, Windows did not consider claimant an employee and did not intend claimant to be an employee.

As noted above, the District Court's interpretation of the law is that the intent of the parties is the controlling issue in this case. This agency does not have the authority to ignore the direction from the District Court.

Claimant has the burden of proof to show the existence of an employee-employer relationship. Based on the District Court's direction, claimant has the burden of proof to show the parties had a mutual intent that claimant was an employee of Windows.

Based on the factors detailed above, it is found Windows did not have the intent to have a mutual agreement of employment with Mr. Dicus. It is also found claimant knew, or should have known, Windows did not have the intent that claimant was an employee at Windows. Based on the direction of the District Court order in the remand decision, it is found claimant is not an employee under Iowa Code section 85.61(11) and is not entitled to workers' compensation benefits.

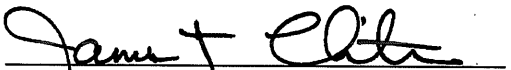
The agency is bound by the order contained in the judicial review decision, as there was no appeal from the District Court's decision. Therefore the order constitutes the law of the case and the order of the District Court will be followed in this case. With all respect due to the Court in Polk County, the decision of the District Court, however, is not binding precedent upon the agency for future cases involving this particular issue and will not be followed in future cases by the agency, absent a new published decision of the Iowa Court of Appeals or a decision of the Iowa Supreme Court.

ORDER

That claimant shall take nothing from these proceedings

That both parties shall pay their own costs.

Signed and filed this 8th day of December, 2017.



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