

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

SHERMAN R NAPIER
Claimant

APPEAL NO. 07A-UI-02937-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**DIVERSE MARKETING INTERNATIONAL
INC**
Employer

OC: 02/18/07 R: 02
Claimant: Respondent (2)

Iowa Code section 96.19(18)(g)(7)(b) – Definition of Employment
871 IAC 23.19 – Independent Contractor

STATEMENT OF THE CASE:

Diverse Marketing International filed a timely appeal from the March 16, 2007, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on April 9, 2007. Claimant Sherman Napier did not respond to the hearing notice instructions and did not participate. Desiree Bergsten, owner, represented Diverse Marketing International. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which records indicate that no benefits have been disbursed to Mr. Napier in connection with the claim. The administrative law judge received Exhibit One into evidence.

ISSUE:

Whether the claimant was an employee or independent contractor.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sherman Napier established his business relationship with Diverse Marketing International on February 7, 2007 and voluntarily severed the business relationship on eight days later. The nature of the business relationship was set forth in an "Independent Distributor Agreement" executed by the parties. That agreement indicates an independent contracting, rather than an employer-employee relationship. Though Diverse Marketing International provided Mr. Napier with products to sell, Mr. Napier was free to exercise his discretion regarding when, where, how, and for how much he sold the products. Mr. Napier was free to make a profit or loss, sell or not sell the products, enter into other business relationships, and/or terminate the business relationship. At the end of the business relationship, Mr. Napier was obligated to return Diverse Marketing's product to it or compensate Diverse Marketing. The agreement spelled out additional rights and obligations indicative of a contractual, rather than an employment, relationship.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.19(18)(g)(7)(b), provides as follows:

g. The term "*employment*" shall not include:

(7) Services performed by an individual, who is not treated as an employee, for a person who is not treated as an employer, under either of the following conditions:

(b) The services are performed by an individual engaged in the trade or business of selling or soliciting the sale of consumer products to any buyer on a buy-sell basis or a deposit-commission basis, for resale by the buyer or another person in the home or in a place other than a permanent retail establishment, or engaged in the trade or business of selling or soliciting the sale of consumer products in the home or in a place other than a permanent retail establishment; substantially all of the remuneration for the services is directly related to sales or other output rather than to the number of hours worked; and the services are performed pursuant to a written contract between the individual and the person for whom the services are performed, which provides that the individual will not be treated as an employee with respect to the services for federal tax purposes.

Workforce Development Rule 871 IAC 23.19 provides as follows:

Employer–employee and independent contractor relationship.

23.19(1) 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. The right to discharge or terminate a relationship is also an important factor indicating that the person possessing that right is an employer. Where such discharge or termination will constitute a breach of contract and the discharging person may be liable for damages, the circumstances indicate a relationship of independent contractor. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools, equipment, material and a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, that individual is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. 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. Professional employees who perform services for another individual or legal entity are covered employees.

23.19(2) The nature of the contract undertaken by one for the performance of a certain type, kind, or piece of work at a fixed price is a factor to be considered in determining the status of an independent contractor. In general, employees perform the work continuously and primarily their labor is purchased, whereas the independent contractor undertakes the performance of a specific job. Independent contractors follow a distinct trade, occupation, business, or profession in which they offer their services to the public to be performed without the control of those seeking the benefit of their training or experience.

23.19(3) Independent contractors can make a profit or loss. They are more likely to have unreimbursed expenses than employees and to have fixed, ongoing costs regardless of whether work is currently being performed. Independent contractors often have significant investment in real or personal property that they use in performing services for someone else.

23.19(4) Employees are usually paid a fixed wage computed on a weekly or hourly basis while an independent contractor is usually paid one sum for the entire work, whether it be paid in the form of a lump sum or installments. The employer–employee relationship may exist regardless of the form, measurement, designation or manner of remuneration.

23.19(5) The right to employ assistants with the exclusive right to supervise their activity and completely delegate the work is an indication of an independent contractor relationship.

23.19(6) Services performed by an individual for remuneration are presumed to be employment unless and until it is shown to the satisfaction of the department that the individual is in fact an independent contractor. Whether the relationship of employer and employee exists under the usual common law rules will be determined upon an examination of the particular facts of each case.

23.19(7) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

23.19(8) All classes or grades of employees are included within the relationship of employer and employee. For example, superintendents, managers and other supervisory personnel are employees.

Because Mr. Napier did not participate in the hearing the evidence in the record is limited to the testimony of Ms. Bergsten and the “Independent Distributor Agreement.” The greater weight of the evidence indicates that Mr. Napier was an independent contractor, not an employee of Diverse Marketing International. Under Iowa Code section 96.19, there was not employment. Accordingly, a separation from this business relationship would not subject Diverse Marketing International to liability on a claim for unemployment insurance benefits. In addition, a separation from this business relationship would not make Mr. Napier eligible for unemployment insurance benefits. Contrast Iowa Code section 96.5(1), regarding voluntary quit of employment, and Iowa Code section 96.5(2)(a), regarding discharges from employment.

DECISION:

The claims representative’s March 16, 2007, reference 02, decision is reversed. The claimant was an independent contractor, not an employee. The business relationship between the claimant and Diverse Marketing International did not constitute “employment.” The claimant is

not eligible for benefits based on the severing of this business relationship. In addition, the claimant would not be subject to any additional period of disqualification based on a severing of this business relationship. The claimant has received no benefits in connection with the claim and, therefore, is not overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs