

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JACOB SEELINGER
Claimant

APPEAL NO: 10A-UI-16113-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

DIRECT COMMUNICATIONS INC
Employer

OC: 01-31-10
Claimant: Respondent (4-R)

Section 96.6-2 – Timely Protest
871 IAC 23.19 – Correct Employer

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 17, 2010, reference 04, decision that allowed benefits to the claimant. After due notice was issued, a hearing was scheduled by telephone conference call before Administrative Law Judge Julie Elder on January 13, 2011. The claimant was present. Dennis Peterson, human resources, represented Direct Communications, Inc., ^{c/o} Merit Resources. After speaking to the parties and reviewing the evidence, no additional testimony was necessary.

ISSUE:

The issues are whether the employer's protest is timely and whether the claimant was employed by this employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant's notice of claim was mailed to the employer's address of record on October 1, 2010, and received by the employer within ten days. The notice of claim contains a warning that any protest must be postmarked, faxed or returned not later than ten days from the initial mailing date. The employer did not file a protest until October 21, 2010, which is after the ten-day period had expired. The employer did not file a protest immediately because the claimant had never worked for it before and it was not sure what to do with the protest, as it had not experienced that situation in the past. For that reason, and in the interest of justice, the administrative law judge finds the employer's protest is timely.

The claimant was employed with Direct Communications out of Austin, Minnesota, and had never worked for or heard of Direct Communications, Inc., ^{c/o} Merit Resources, based in Des Moines, Iowa.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was never employed with this employer.

871 IAC 23.19 provides:

Employer-employee and independent contractor relationship.

(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 the furnishing of 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. A 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.

(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.

(3) 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.

(4) 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.

(5) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

(6) 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.

(7) 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.

The claimant was never employed by Direct Communications, Inc., c/o Merit Resources, in Des Moines. He was employed by a company called Direct Communications, headquartered in Austin, Minnesota.

Consequently, this matter is remanded to the Claims Section for a correct determination of the claimant's employer so that the out-of-state employer may have an opportunity to file a protest and participate in the process.

DECISION:

The November 17, 2010, reference 04, decision is modified in favor of the appellant. The claimant is eligible for benefits through Gossman Construction. Benefits are allowed, provided the claimant is otherwise eligible. The issue of the claimant's correct employer is remanded to the Claims Section for a correct determination of the employer.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw