

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

TRENT F ZOLICOFFER, Employee

UNEMPLOYMENT INSURANCE
DECISION

Hearing No. 09608424MW

ZOE ENGINEERING LLC, Employer

**SEE ENCLOSURE AS TO
TIME LIMIT AND
PROCEDURES ON
FURTHER APPEAL**

An administrative law judge (ALJ) for the Division of Unemployment Insurance of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the ALJ. Based on its review, the commission agrees with the decision of the ALJ, and it adopts the findings and conclusion in that decision as its own.

DECISION

The decision of the administrative law judge is affirmed. Accordingly, the wages paid to the claimant by the employer during the time period at issue shall be included in the department's computation of the employee's base period wages.

Dated and mailed

MAR 19 2010

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/s/

James T. Flynn, Chairperson

/s/

Robert Glaser, Commissioner

Ann L. Crump, Commissioner

MEMORANDUM OPINION

The claimant (Zolicoffer) earned wages performing engineering services for the putative employer (Zoe) during the base period of his claim. The issue is whether these wages should be considered base period wages.

Zoe's petition for commission review was filed on December 8, 2009. On March 8, 2009, Zoe, for the first time, requested "the opportunity to file a brief of position." In this request, Zoe also included a "statement of position," setting forth what appears to be an outline of what it would argue in its brief.

In view of the fact that Zoe waited three months after filing its petition to request a briefing schedule, and that the commission was in the process of reviewing this matter before the request was made, the request for a briefing schedule is denied pursuant to Wisconsin Administrative Code § LIRC 1.07.

Wisconsin Statutes § 108.02 states as follows, as relevant here:

108.02 Definitions. As used in this chapter:

(4) Base period. "Base period" means the period that is used to compute an employee's benefit rights under s. 108.06...

(4m) Base period wages. "Base period wages" means:

(a) All earnings for wage-earning service which are paid to an employee during his or her base period as a result of employment for an employer;...

(12) Employee.

(a) "Employee" means any individual who is or has been performing services for pay for an employing unit, whether or not the individual is paid directly by the employing unit, except as provided in par. (b), (bm), (c), (d), (dm) or (dn)....

(e) This subsection shall be used in determining an employing unit's liability under the contribution provisions of this chapter, and shall likewise be used in determining the status of claimants under the benefit provisions of this chapter....

(14m) Employing unit. "Employing unit" means any person who employs one or more individuals.

(15) Employment.

(a) "Employment", subject to the other provisions of this subsection means any service, including service in interstate commerce, performed by an individual for pay....

(26) Wages. Unless the department otherwise specifies by rule:

(a) "Wages" means every form of remuneration payable, directly or indirectly, for a given period, or payable within a given period if this basis is permitted or prescribed by the department, by an employing unit to an individual for personal services....

Pursuant to Wis. Stat. § 108.02(4m), in order to be considered base period wages, earnings must be "paid to an employee during his or her base period as a result of employment for an employer..."

Wisconsin Statutes § 108.02(12)(a) creates a presumption that a person who provides services for pay is an employee, and it requires the entity for which the person is performing those services to bear the burden of proving that the person is not an employee. See, Dane County Hockey Officials, UI Hearing No. S9800101MD (LIRC Feb. 22, 2000); Quality Communications Specialists, Inc., UI Hearing Nos. S0000094MW, etc. (LIRC July 30, 2001).

Since the record shows that Zolicoffer performed services for Zoe for pay during the relevant base period, Zoe has the burden to rebut the presumption that Zolicoffer did so as a statutory employee by proving that seven or more of the conditions set forth in Wis. Stat. § 108.02(12)(bm) are satisfied.

The record does not show that Zolicoffer held or applied for a FEIN, as required to satisfy **condition 1**.

The record does not show that Zolicoffer filed a business or self-employment tax return based upon the services he performed for Zoe, as required by **condition 2**, and this condition is not satisfied. Zoe's owner testified that she believed that Zolicoffer filed a business or self-employment tax return because Zoe issued him a 1099. However, the issuance of a 1099 does not prove that Zolicoffer actually filed a self-employment tax return. See, *Gamble v. American Benefits Ltd.*, UI Hearing No. 04004847MD (LIRC Feb. 15, 2005)(condition 2. is not satisfied simply because the employer considers the claimant to be an independent contractor and issues a 1099 form to him); *Spencer Siding, Inc.*, UI Hearing Nos. 50300142GB, 50300133GB (LIRC June 2, 2006). Zoe asserts in its petition that Zolicoffer "verbally stated to Zoe's owner...that he filed self-employment income tax returns...based on engineering services" performed for Zoe. However, this fact is not a part of the record and, even if it were, would constitute uncorroborated hearsay evidence.

The focus of **condition 3.** is upon determining whether a separate business, i.e., an enterprise created and existing separate and apart from the relationship with the putative employer, is being maintained with the individual's own resources. *Princess House, Inc., v. DILHR*, 111 Wis.2d 46, 330 N.W.2d 169 (1983); *Larson v. LIRC*, 184 Wis.2d 378, 516 N.W.2d 456 (Ct. App. 1994). In *Quality Communications Specialists, Inc.*, UI Hearing Nos. S0000094MW, etc. (LIRC July 30, 2001), the commission clarified that each factor set forth in the statutory language governing this condition must be met in order for the condition to be satisfied.

Although Zolicoffer used his own computer to perform work for Zoe, the record does not show that he had a separate business office or even a separate space in his home devoted primarily to a business purpose. Condition 3. is not satisfied.

To satisfy **condition 4.**, it must be established that the individual operates under contracts to perform specific services for specific amounts of money, and that, under these contracts, he controls the means and method of performing the services.

Condition 4 requires multiple contracts. These may take the form of multiple contracts with separate entities, or multiple serial contracts with the putative employer if such contracts are shown to have been negotiated "at arm's length," with terms that will vary over time and will vary depending on the specific services covered by the contract. The existence of bona fide multiple contracts tends to show that the individual either has multiple customers, or that he has periodic opportunities for "arm's length" negotiation with the putative employer as to the conditions of their relationship, and that he is not dependent upon a single, continuing relationship that is subject to conditions dictated by a single employing unit. See, *T-N-T Express LLC*, UI Hearing Nos. S9700385, etc. (LIRC Feb. 22, 2000); *Dane Co. Hockey Officials, supra*.

The record shows that Zolicoffer performed services under a single contract with Zoe, with terms that did not vary over time or by event. The record does not show that Zolicoffer performed similar services for any other entity. Consequently, the multiple contracts requirement of condition 4. is not met.

Applying **condition 5.** requires a determination of what services are performed under a contract, what expenses are related to the performance of those services, which of those expenses are borne by the person whose status is at issue, and whether those expenses constitute the main expense. See, *Quality Communications Specialists, Inc., supra*. This inquiry typically requires quantification of these expenses. See, *Quale & Associates, Inc.*, UI Hearing No. S0200210MW (LIRC Nov. 19, 2004), *aff'd Quale & Assoc. d/b/a Handyman Connection v. LIRC & DWD*, Case No. 04-CV-10648 (Wis. Cir. Ct., Milwaukee Co., May 24, 2005)

The record shows that Zolicoffer would have borne some computer costs; and Zoe would have borne some computer costs, office expenses, and administrative expenses in keeping records related to the services performed by Zolicoffer and

issuing payments to him. None of these costs is quantified in the record, and it is not obvious that Zollicoffer would necessarily have borne the larger expense. Condition 5. is not satisfied.

In order to show that the requirements of **condition 6.** are satisfied, the record would have to show that Zollicoffer was responsible for the satisfactory completion of the services he performed, and liable for any failure to satisfactorily complete them. This conditions would be satisfied if the record showed that Zollicoffer was expected to remedy any unsatisfactory work, and incurred a penalty for generating such work. Zoe's owner testified that, when Zollicoffer's work was unsatisfactory, he was expected to correct it without additional compensation, and, had he missed a deadline, Zoe would have chosen not to use his services any more. However, a penalty must consist of something more than simply performing remedial work without additional compensation, since this obligation is typical as well of piecework employees. *See, T & D Coils*, UI Hearing No. S9800147MW (LIRC Dec. 15, 1999); *Quality Communications Specialist, Inc., supra.*; *Wisconsin Tennis Officials, Inc.*, UI Hearing Nos. S0200129MW, etc. (LIRC Feb. 28, 2005). A penalty must also consist of something more than not being called upon by the putative employer to perform work for it in the future. *See, Vanpelt v. Quality Controlled Services*, UI Hearing No. 07200634EC (LIRC Aug. 31, 2007). Consequently, condition 6. is not satisfied here.

Condition 7. requires that the individual receive compensation for his services on a commission, per-job, or competitive-bid basis and not on any other basis. Zollicoffer was compensated on an hourly basis, i.e., on some basis other than those set forth in the statutory language. As a result, condition 7. is not satisfied. *See, Quale, supra.*

Condition 8. examines whether, under an individual contract for the claimant's services, there can be a profit (if the income received under that contract exceeds the expenses incurred in performing the contract), as well as whether there can be a loss under that contract (if the income received under that contract fails to cover the expenses incurred in performing the contract). The test is whether, over the course of the contract between Zollicoffer and Zoe, there was a realistic possibility that Zollicoffer could realize a profit or suffer a loss. *See, Zoromski v. Cox Auto Trader*, UI Hearing No. 07000466MD (LIRC Aug. 31, 2007). The receipt by Zollicoffer of more in pay for his services than he was required to spend could constitute "realiz[ing] a profit under contracts to perform services." *See, Quality Communications Specialists, Inc., supra.* However, the fact that Zollicoffer had few expenses and was guaranteed payment for every hour he worked, militates against a conclusion that he assumed any type of business risk and could realistically suffer a loss over the term of his relationship with Zoe. *See, Ziebell v. Cox Auto Trader*, UI Hearing No. 07606213MW (LIRC Jan. 4, 2008). As a result, condition 8. is not satisfied here.

Condition 9. requires proof of a cost of doing business which Zollicoffer would incur even during a period of time he was not performing work for Zoe, such as rent or utilities for a business space, liability insurance, or certain professional

fees. The record does not show that Zollicoffer incurred any such costs, and condition 9. is not satisfied.

The commission has interpreted **condition 10**, as intending to examine the overall course of a person's business. *See, Quality Communications Specialists, Inc., supra.; Harlan Mrochinski, UI Hearing No. S0100001WR (LIRC July 15, 2004)*(condition 10. requires that a significant investment is put at risk and there is the potential for real success through the growth in the value of the investment and for real failure in the sense of actual loss of the investment). The record does not show that Zollicoffer made a significant business investment, or, in fact, any investment, and condition 10. is not satisfied.

In summary, none of the ten conditions is satisfied. Since Wis. Stat. § 108.02(12)(bm) requires that seven conditions be satisfied in order for a worker to be considered an independent contractor, the satisfaction of none of the ten conditions compels the conclusion that Zollicoffer performed services for Zoe as an employee, not an independent contractor.

Zoe argues by implication that the fact that its agreement with Zollicoffer specified that he would be performing services as an independent contractor should govern here. However, Zollicoffer's status as an independent contractor or a statutory employee is determined by statute, not by the terms of a private agreement. *Roberts v. Industrial Comm.*, 2 Wis. 2d 399 (1957). *See, also, Knops v. Integrity Project Management*, UI Hearing No. 06400323AP (LIRC May 12, 2006).