

IN THE COURT OF APPEALS OF IOWA

No. 6-181 / 95-889

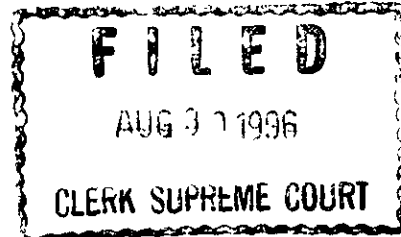
**CAMDEN AMUSEMENT &
VENDING, INC.,**

Petitioner-Appellant,

vs.

JOB SERVICE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

Employer appeals from finding that claimant was an employee entitled to unemployment benefits and not an independent contractor. **AFFIRMED.**

Richard D. Raymon, Cedar Rapids, for appellant.

Joseph Bervid, Des Moines, for appellee.

Considered by Habhab, P.J., and Huitink and Streit, JJ.

HABHAB, P.J.

Camden Amusement and Vending, Inc. ("Camden") appeals a finding that Gerald Carney was not an independent contractor but was a former employee entitled to unemployment benefits. We find there is substantial evidence to support the decision of the administrative law judge and we affirm.

In April 1992, Camden hired Carney as a salesperson in its vending machine business. Camden claims Carney was hired on a commission basis to sell accounts and work on Camden's current accounts. Carney claims he was paid a weekly salary and was to do public relations work in addition to acquiring and servicing accounts. During his association with Camden, Carney was paid \$230 per week and was given a \$10 weekly allowance for gasoline expenses. Camden claims the weekly payments were draws against commissions Carney was expected to generate and were not salary. Camden did not withhold any money from these payments for taxes or social security.

Carney claims Camden provided a car for him to use and business cards which listed Carney as a sales representative for Camden. Camden claims these items were personally provided by its president and no Camden funds were used. Although Carney did not have assigned office space at Camden's office, he would use vacant office space at Camden to do his work. Carney claims to have met with a Camden employee who supervised his work on a regular basis. However, Camden claims it

exercised no control over Carney and he was an independent contractor rather than an employee.

In August 1992, Carney was laid off from his work for Camden. Carney filed a claim for unemployment compensation benefits. Camden claimed Carney worked for Camden as an independent contractor, receiving only commissions for new accounts. Job Service of Iowa¹ conducted an employer liability investigation and determined an employer-employee relationship existed between Camden and Carney. Camden appealed and an evidentiary hearing was held before an administrative law judge ("ALJ"). The ALJ concluded Carney was an employee and not an independent contractor. Upon judicial review, the district court affirmed the ALJ's decision. Camden now appeals.

I. Scope of Review. Our review of job service cases is governed by the administrative procedures set forth in chapter 17A of the Iowa Code. *Cobb v. Employment Appeal Bd.*, 506 N.W.2d 445, 447 (Iowa 1993). In reviewing a district court decision on the validity of agency action, we ask only whether the district court correctly applied the law. *Id.* The district court is itself acting in an appellate capacity to correct errors of law on the part of the agency. *Id.* On appeal from the district court's judicial review, we apply the standards of Iowa Code section

¹ Now known as Workforce Development Department.

17A.19(8) (1995) to the agency action to determine whether our conclusions are the same as those of the district court. *Id.*

We accord an agency only limited deference on matters of law, but an agency's findings of fact are binding on this court if supported by substantial evidence in the record when the record is viewed as a whole. *Id.* Evidence is substantial if a reasonable mind would accept it as adequate to reach the same findings. *Id.*

II. Review of Agency's Decision. "An employee is defined as a person bound to the duty of service, subject to the command of the employer, as to the manner in which the work is performed." *Connolly Bros. Masonry v. Department of Employment Servs.*, 507 N.W.2d 709, 711 (Iowa App. 1993). An independent contractor is defined as one who carries on an independent business and contracts to do a piece of work according to his or her own methods, subject to the employer's control only as to results. *Id.* The determinative question is did the employer have the right to direct the workers as to the manner and means of doing the work. *Id.* The right of control is the principal test. *Id.* The fact that an employer fails to exercise control does not mean the right of control does not exist. *Id.*

An employer has the burden of proof to show the Iowa Employment Security Law does not apply to it. *Id.* Services performed by an individual for wages are deemed to be employment subject to chapter 96 unless and until it is shown to the satisfaction of the division of job service that the performance of services by the

worker is not subject to the control and direction of the employer, both as a matter of contract and in fact. *Id.*

Camden claims the district court erred in not applying the “right to control” doctrine in conducting its judicial review of the ALJ’s decision. A review of the record reveals the ALJ set forth and carefully applied the regulations which address the “right to control” test. *See* Iowa Admin. Code r. 345-3.19 (1996). In affirming the ALJ’s decision, the district court applied the proper standard of determining whether there was substantial evidence to support the ALJ’s finding.

There is substantial evidence in the record to support the finding of an employer-employee relationship. There was evidence Carney received a fixed weekly salary. Camden provided Carney with a vehicle and business cards to use. The parties had a terminable-at-will relationship. While Camden did not opt to exercise its right to control Carney’s work, there was evidence it had that power. Carney reported to Camden’s offices each day and informed his supervisor of his contacts. Carney would attend meetings held by his employer.

In exercising judicial review, we are not to try or review the case anew. We defer to the fact the ALJ had the first-hand opportunity to observe the witnesses and assess their credibility. We review only to determine if there is substantial evidence to support the agency’s decision. We find there is substantial evidence and affirm.

AFFIRMED.