BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JULIAN LOPEZ, Claimant, vs. LONE WOLF CONSTRUCTION, INC., Employer, SFM INSURANCE, Insurance Carrier, Defendants.	File No. 5043947 ARBITRATION DECISION FILED AUG 10 2015 WORKERS' COMPENSATION Head Note No: 1601

STATEMENT OF THE CASE

Claimant, Julian Lopez, filed a petition in arbitration seeking workers' compensation benefits from Lone Wolf Construction, employer, and SFM Mutual Insurance, insurance carrier, both as defendants, as a result of an alleged injury sustained on November 12, 2012. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on July 29, 2014, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 through 11, defendants' exhibits A through G, and the testimony of the claimant, Medardo Alvarez, and Michael Rehberg. The parties submitted post-hearing briefs, the matter being fully submitted on August 29, 2014.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an injury on November 12, 2012, which arose out of and in the course of employment;
2. Whether claimant's claim is barred because of the affirmative defense of intoxication pursuant to Iowa Code section 85.16(2);
3. Whether the alleged injury is a cause of temporary disability;

4. Whether claimant is entitled to temporary disability benefits from November 13, 2012 through February 11, 2013;
5. Whether the alleged injury is a cause of permanent disability;
6. The extent of claimant's industrial disability;
7. The proper rate of compensation;
8. Whether claimant is entitled to payment of various medical expenses;
9. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39; and
10. Specific taxation of costs.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant was 43 years of age at the time of hearing. Claimant was born in Guatemala, where he attended three years of schooling. His primary language is Spanish. Claimant's English language skills are very limited; he understands a limited number of English words, but cannot speak, read, or write in English. (Claimant's testimony)

Claimant's entire work history is comprised of work in the construction industry. While in Guatemala, claimant was self-employed in residential construction from 1986 to 2002. He arrived in the United States in 2002. From 2002 to 2003, claimant worked residential construction in Texas, earning $10.00 per hour. From 2003 to 2009, claimant worked residential construction in Virginia and New York, earning $11.00 or $12.00 per hour. During the remainder of 2009, claimant worked residential construction in Louisiana and earned $13.00 per hour. Claimant moved to Des Moines, Iowa, in 2010. For a two-week period, claimant was self-employed performing trim work. During this time, he earned $10.00 to $15.00 per hour. He then began work at defendant-employer in 2010. His duties involved residential construction, specifically framing and roofing houses. Claimant testified he averaged 45 to 50 hours per week and earned $14.00 per hour. Claimant denied any difficulties with his right shoulder or clavicular region at the time of his hire by defendant-employer. (Claimant's testimony; Exhibit 6, pp. 85-86)

Claimant was hospitalized at Mercy Hospital in August 2012 for alcohol poisoning/intoxication. On the day in question, claimant testified he consumed 10 to 12

beers between 5:00 p.m. and 11:00 p.m. He was taken to the hospital after losing consciousness. (Claimant's testimony; Ex. B, p. 5)

On Sunday, November 11, 2012, claimant and coworker, Medardo Alvarez, drank alcohol at claimant's home. Claimant testified he drank beer from approximately 5:00 or 6:00 p.m. until midnight. During this time, claimant estimated he drank approximately 12 beers. He testified it was possible he also consumed some harder alcohol as well, but indicated he did not specifically recall. Claimant testified he then went to sleep. (Claimant's testimony)

The following day, Monday November 12, 2012, claimant testified he woke at approximately 5:00 a.m. He testified he arrived at work and commenced work at around 7:00 or 7:30 a.m. On this day, claimant worked with Mr. Alvarez and foreman, Otoniel Fernandez. Claimant testified the men worked approximately four hours and then took a lunch break. After lunch, the men began work to set the roof of the home. Claimant testified he was required to climb to the top of a wall and wait for Mr. Fernandez to drive the trusses over with a forklift. Claimant explained when Mr. Fernandez brought the trusses closer, claimant would swing the trusses into place upon the wall. He estimated the trusses were each 35 to 40 feet in length. (Claimant's testimony)

Claimant testified he climbed to the top of the wall and stood upon the wall measuring 5 ½ inches wide and 10 feet above the ground. Claimant testified he stood atop the wall for 15 or 20 minutes waiting for trusses to arrive without losing balance, despite there being nothing in place to support him. Claimant testified Mr. Fernandez then brought the trusses toward him, suspended by a forklift. As Mr. Fernandez got closer, with the trusses approximately 2 to 3 feet from claimant, the front tire of the forklift sunk into a hole. Claimant testified the trusses then moved and struck him in his left rib area, leading him to fall to his right off the wall. Claimant testified the accident happened so quickly he was unable to avoid the trusses and unable to catch his balance. (Claimant's testimony)

Claimant testified he fell onto his right side, primarily his right arm, on a wood floor. He also struck his head. Claimant testified he felt immediate pain, primarily in the right shoulder and clavicle. Claimant testified Mr. Fernandez took him home, but later in the afternoon, his companion drove claimant to the hospital. (Claimant's testimony)

Records from Mercy Hospital Medical Center – Des Moines (Mercy) indicate claimant arrived at the hospital at 2:07 p.m. (Ex. 1, pp. 13, 15) Claimant then underwent blood and alcohol screening. Toxicology results found 259 mg/dL of ethanol

in claimant's urine. The lab report denotes the level of alcohol present as critical. (Ex. D, p. 2)

In the emergency department, claimant was evaluated by Cass Franklin, M.D. Dr. Franklin's history of injury states claimant was helping roof a building when "he lost his balance when he reached to grab something and fell off the roof." The history further states claimant struck his head when he fell on the grass below. (Ex. 1, p. 1) Dr. Franklin noted claimant denied drinking alcohol since the prior day, but his blood alcohol level was 259. (Ex. 1, pp. 1, 6) Claimant underwent CTs of his head and cervical spine; both yielded negative results. (Ex. 1, pp. 17-18) He also underwent a series of x-rays. One x-ray revealed a nondisplaced right mid-shaft clavicle fracture. (Ex. 1, pp. 2, 20)

Dr. Franklin assessed a nondisplaced right mid-shaft clavicular fracture, closed head injury, and alcohol intoxication. (Ex. 1, p. 2) Dr. Franklin admitted claimant to the hospital for observation, pain control, IV fluids, and an orthopedic consult. Claimant was placed in a right arm sling, as well as an Aspen collar on his neck. Dr. Franklin noted claimant's cervical spine would be cleared "in the morning when the patient is sober." (Ex. 1, p. 3) Following admission, claimant was evaluated by Joshua Kimelman, D. O., who opined claimant only required use of a sling from an orthopedic standpoint. Dr. Kimelman directed claimant to follow-up in two weeks for a repeat x-ray. (Ex. 1, pp. 4, 25)

Claimant testified he did not inform the doctors at Mercy he lost his balance while attempting to grab something, causing him to fall. Claimant maintained he stated the truss pushed him and caused him to lose his balance. A friend translated for claimant at the hospital. (Claimant's testimony)

Claimant denied consuming any alcohol between midnight the evening of November 11, 2012, and his admission to the hospital the afternoon of November 12, 2012. He specifically denied drinking on the way to work or while at work on November 12, 2012. Claimant testified he was not under the influence at the time of the fall. Claimant admitted it would be unsafe to work, especially construction work, while intoxicated. Claimant testified he did not believe his alcohol level played any role in his fall because the accident happened so suddenly. (Claimant's testimony)

Medardo Alvarez testified at evidentiary hearing. In the years 2011 and 2012, Mr. Alvarez worked for defendant-employer as a laborer. He currently works as a landscaper for a new employer. During his employment at defendant-employer, Mr. Alvarez worked with claimant and Mr. Fernandez. (Mr. Alvarez's testimony)

On the evening of November 11, 2012, Mr. Alvarez was at claimant's residence drinking alcohol with claimant. He admitted feeling a little drunk, but did not recall how much he drank. Mr. Alvarez testified he left claimant's residence before midnight and walked home. (Mr. Alvarez's testimony)

Mr. Alvarez testified he was present on the date of claimant's fall and witnessed the accident. Mr. Alvarez testified on November 12, 2012, he picked claimant up and drove the men to work. The men began work at approximately 7:30 a.m. Mr. Alvarez testified claimant had no difficulty working the morning of November 12, 2012. Mr. Alvarez testified he did not drink alcohol with claimant on the jobsite on November 12, 2012. (Mr. Alvarez's testimony)

Mr. Alvarez testified he believed claimant fell between noon and 1:00 p.m. At that time, Mr. Alvarez testified he was walking toward claimant holding a rope to help guide the trusses into place. Mr. Fernandez drove a forklift carrying the trusses and claimant was standing upon the wall waiting for the trusses to arrive. Mr. Alvarez did not observe claimant climb onto the wall, but estimated he had been on the wall for perhaps a minute at the time of the accident. Mr. Alvarez testified he was approximately 15 feet from claimant's location with a clear view of claimant. Mr. Alvarez testified in the matter of a second, the trusses shifted position, struck claimant, and knocked him from the wall onto a plywood floor below. Mr. Alvarez testified the trusses struck claimant on the front of his body, in his chest region, and pushed claimant backward. Mr. Alvarez testified claimant fell almost face down from the wall. (Mr. Alvarez's testimony)

Mr. Alvarez testified there was nothing claimant or any other person could have done to prevent himself from falling. He explained the incident happened in a second, there was no time to react and nothing available to hold onto for support. Mr. Alvarez testified no person could have withstood being struck by the trusses and not fallen off the wall. Mr. Alvarez testified he does not believe claimant fell because he was intoxicated, but because the trusses knocked him from the wall. Mr. Alvarez testified the amount of alcohol in claimant's system had no bearing on the fall as it happened so quickly. However, he admitted if he were intoxicated, he would never attempt to perform the task claimant was doing at the time of the accident, as he believed he would fall from the wall. (Mr. Alvarez' testimony)

Mr. Alvarez's testimony was clear and consistent with the statement of Mr. Fernandez and testimony of claimant. His demeanor gave the undersigned no reason to doubt his veracity. Mr. Alvarez is found credible.

On November 13, 2012, Dr. Franklin discharged claimant from Mercy. At that time, Dr. Franklin removed claimant from work for two weeks pending follow up and imposed activity restrictions of no pushing or pulling with right arm. He also prescribed Vicodin and Lidoderm patches. (Ex. 1, pp. 12, 26; Ex. D, p. 7)

Claimant returned to the Mercy emergency department on November 26, 2012. Staff refilled claimant's prescriptions and removed claimant from work for a minimum of six weeks. (Ex. 1, pp. 34, 39; Ex. D, p. 7)

On December 6, 2012, claimant presented to Dr. Kimelman in follow-up. Dr. Kimelman ordered a repeat x-ray of claimant's clavicle, which he opined revealed the prior minimal displacement was now nondisplaced. Dr. Kimelman prescribed Vicodin and released claimant to modified work under the restriction of no use of the right arm. He directed claimant to return in six to eight weeks. (Ex. 2, pp. 41, 43)

On January 3, 2013, claimant returned to Dr. Kimelman with complaints of pain in the clavicle region with heavy lifting. However, Dr. Kimelman described the pain as substernal or epigastric in origin and opined such symptoms were not generally related to a fractured clavicle. Accordingly, he advised claimant to follow-up with his family physician on that complaint. Dr. Kimelman ordered x-rays and performed an examination. He imposed a restriction of no manual labor with the right arm and advised claimant to follow up in one month. (Ex. 2, pp. 46-47)

Claimant testified Dr. Kimelman thereafter did not agree to see claimant due to his lack of insurance. (Claimant's testimony)

On February 11, 2013, claimant presented to Primary Health Care, Inc. Bery Engebretsen Clinic (Primary Health Care) and was evaluated by Elizabeth Coyte, PA. Claimant complained of pain on right side of his chest, through to his back. (Ex. 3, p. 49) Claimant described the pain as constant, with a duration of about 1 ½ months. (Ex. 3, p. 50) PA Coyte noted claimant had broken his collar bone in November 2012 and had not returned to work. She noted claimant demonstrated good use of his right arm, but suffered with occasional pain with movement. (Ex. 3, p. 51) PA Coyte prescribed ibuprofen 600 mg and released claimant to return to work on February 12, 2013, with no restrictions noted. (Ex. 3, p. 53; Ex. C, p. 1)

Claimant testified he then returned to work for defendant-employer in a light-duty role, picking up garbage and light wood. At this time, claimant's hourly wage was reduced to $13.00 per hour. (Claimant's testimony)

Claimant returned to Primary Health Care on March 26, 2013, and was evaluated by Uma Palakurthy, M.D. Claimant reported complaints of chest pain radiating to the right flank and continued right arm pain following a fall from a roof. (Ex. 3, p. 56) Dr. Palakurthy assessed improved chest pain, right shoulder pain, and hypertension. Dr. Palakurthy renewed claimant's prescription for ibuprofen 600 mg and recommended claimant remain on light duties for four weeks. (Ex. 3, pp. 58, 59)

Claimant testified he did not return to Primary Health Care as staff did not want to see him due to his inability to pay. (Claimant's testimony)

Defendants secured Blue Eagle Investigations in order to obtain the recorded statement of Mr. Fernandez, as well as any other coworkers onsite at the time of claimant's alleged injury. (Ex. 7, p. 95; Ex. F, p. 1) Mr. Fernandez's recorded statement was secured on April 29, 2013, via a translator. Mr. Fernandez stated he did not observe claimant fall, but was advised of the fall by another employee. Following the fall, claimant refused an ambulance at the job site and Mr. Fernandez drove claimant home. (Ex. 7, pp. 96, 100; Ex. F, pp. 2, 3) Mr. Fernandez stated claimant then returned to work approximately three weeks after the accident. (Ex. 7, p. 100; Ex. F, p. 3)

Mr. Fernandez indicated he did not know if claimant had been drinking on the date of the injury. He stated on occasional Mondays claimant would smell of "old alcohol" from drinking over the weekend. (Ex. 7, pp. 95, 100; Ex. F, pp. 1, 3) Mr. Fernandez indicated he personally did not observe any sign of alcohol on the jobsite on the date of claimant's accident. (Ex. 7, p. 96; Ex. F, p. 2) However, he stated his boss, Mr. Chandler, mentioned "something about [claimant] being intoxicated at work." (Ex. 7, p. 100; Ex. F, p. 3) Mr. Chandler also reportedly observed alcohol in the dumpster. (Ex. 7, pp. 96, 100; Ex. F, pp. 2, 3)

At the arranging of claimant's attorney, on May 10, 2013, claimant presented for independent medical examination (IME) with board certified occupational medicine physician, Sunil Bansal, M.D. Claimant reported he was injured when he was "pushed" forward by a truss and fell from a wall, landing on his right side on the ground. Dr. Bansal wrote: "There was a co-worker who witnessed his fall, and can attest to the fact that he was pushed by the movement of the truss and the forklift, and not because he was intoxicated." (Ex. 4, p. 63) By the record, it is unclear whether this statement represents a history reported by claimant or Dr. Bansal's conclusion.

Dr. Bansal indicated claimant reported he drank alcohol the night prior to the accident, but ceased drinking by approximately 10:00 p.m. Claimant reported he presented to work the following morning at 6:00 a.m. and fell sometime between 11:00

a.m. and 12:00 p.m. Claimant also stated he "was not intoxicated by the time he arrived to work, and had been working fine up until his fall." (Ex. 4, p. 63)

Claimant complained of continued pain in the area of his right clavicle and the right side of his chest. Dr. Bansal noted a visible and palpable lump in claimant's chest. Claimant reported feeling a sensation of pressure in his chest when lifting anything over chest level and which results in difficulty breathing. Claimant also reported frequent headaches since the accident, occasional dizziness, memory difficulties, increased irritability, and easily becoming distracted. (Ex. 4, pp. 64-65)

Claimant reported an average pain in his right shoulder and clavicle as a level 6 on a 10-point scale. The pain can reach a level 10 on a bad day. Claimant reported chest pain averaged a level 8, but could reach a level 10 following a hard day at work. (Ex. 4, p. 65) He reported an ability to lift up to 40 to 45 pounds to chest height without difficulty, but only 25 pounds above chest level and with pain. (Ex. 4, p. 65)

Dr. Bansal performed a physical examination and a mini mental status examination. He observed a large palpable mass 3 x 4 centimeters over the manubrium area. He also found full range of motion and no tenderness of the neck. With respect to the right shoulder, Dr. Bansal found full range of motion, but positive impingement and 20 percent strength deficits in flexion, abduction, internal and external rotation. He noted tenderness over the mid clavicle and AC joint area and evidence of callus formation over the mid clavicle. (Ex. 4, p. 67) Dr. Bansal also noted decreased strength on right as compared to left. (Ex. 4, p. 68)

Following records review, history, and examination, Dr. Bansal assessed: closed head injury with traumatic brain injury, including post concussive syndrome, cognitive/memory impairment, dizziness, and headaches; resolved cervical strain; and a nondisplaced right clavicular fracture, mid shaft. Dr. Bansal opined claimant had achieved maximum medical improvement (MMI) for the neck and clavicular fracture as of the date of examination. With regard to chest complaints, Dr. Bansal opined claimant likely sustained an injury to his manubrium, which was not initially x-rayed, yet opined claimant had achieved MMI nonetheless. (Ex. 4, pp. 68-69)

On the question of causation, Dr. Bansal indicated claimant had been pushed from a wall by a truss, landing on his right side, striking his shoulder and head. Dr. Bansal opined the impact to claimant's head and shoulder was "certainly capable" of causing a clavicle fracture and traumatic brain injury. He further opined claimant subsequently developed symptoms potentially reflective of a traumatic brain injury. (Ex. 4, p. 69) Dr. Bansal indicated claimant had no problems related to his head, shoulder, or chest prior to the work injury and opined:

> Thus, from both a chronological and mechanistic standpoint it is clear that his current head, chest, and right shoulder pathology is related to his work injury on November 12, 2012.

(Ex. 4, p. 69)

With respect to the extent of permanent impairment, if any, sustained by claimant, Dr. Bansal opined claimant sustained no ratable impairment for his neck complaints. Dr. Bansal opined a permanent impairment of 5 percent whole person was warranted by claimant's traumatic brain injury as evidenced by concentration problems, headaches, occasional dizziness, memory problems, and slowness to answer questions. Finally, he opined claimant demonstrated full range of motion in the right shoulder but an appreciable loss of strength, warranting a rating of 4 percent whole person. (Ex. 4, pp. 70-71)

Dr. Bansal recommended permanent restrictions of no lifting greater than 45 pounds occasionally or 30 pounds frequently; no lifting greater than 25 pounds over shoulder level or away from the body; no frequent lifting, pushing or pulling; and no pushing or pulling greater than 20 pounds with the right arm. He also recommended x-rays of the chest and sternum to evaluate the chest area lump and a neurology referral for supportive care related to his brain symptomatology. (Ex. 4, pp. 71-72)

In June 2013, defendant-employer was purchased by Mr. Fernandez. Claimant continued to work for Mr. Fernandez in a light duty capacity until November 2013. While in Mr. Fernandez's employ, claimant worked 45 to 50 hours per week and earned $15.00 per hour. In November 2013, claimant voluntarily left this employment and took a position with Jomar Construction. Jomar Construction performs framing, but claimant is not required to perform heavy tasks. Rather, claimant picks up garbage, carries lighter wood, and was provided a special saw which weighs less than traditional saws and a lighter nail gun with a smaller hose. Claimant receives assistance with heavy tasks and attempts to perform most lifting with his left arm. Claimant continued in this employment at the time of evidentiary hearing; he believes he is capable of continuing this type of work. Claimant works full time and earns $16.00 per hour. (Claimant's testimony)

Defendants secured forensic toxicologist Michael Rehberg to review claimant's records and complete a forensic toxicology report. Mr. Rehberg issued a report of his findings on June 23, 2014. Mr. Rehberg possesses a bachelor's degree in chemistry and master's degree in physiological chemistry. (Ex. A, p. 10) He is also certified by the American Board of Forensic Toxicology. (Ex. A, p. 12) He retired in 2000 after 30 years as administrator of the Iowa Criminalistics Laboratory, the laboratory used by the

Iowa Department of Criminal Investigations. Since that time, he has worked as a consultant. He has provided expert testimony in the court system in excess of 1,300 times. (Mr. Rehberg's testimony) In his report, Mr. Rehberg refers to claimant as a "recognized alcoholic" based upon history, past medical treatment, and admitted drinking patterns. Mr. Rehberg noted claimant had been treated for alcohol poisoning in the past. (Ex. A, p. 1)

Mr. Rehberg recited claimant's version of his drinking activities on November 11 and November 12, 2012. Specifically, claimant reportedly drank alcohol from 5:00 or 6:00 p.m. to midnight, consuming 12 beers. He also noted claimant's height and weight as 5'4" tall and 135 pounds. (Ex. A, p. 1) If this information were presumed true, Mr. Rehberg indicated he could calculate claimant's alcohol concentration levels as 20 to 30 milligrams per decileter (mg/dL) at the time of his fall at approximately 12:20 p.m., and 0 mg/dL at the time of his testing at approximately 2:15 p.m. (Ex. A, p. 1) Mr. Rehberg testified claimant's actual blood alcohol concentration level was found to be 259 mg/dL at 2:15 p.m. Based upon this level, Mr. Rehberg calculated claimant's alcohol concentration at 278 mg/dL at the time of the fall. (Ex. A, p. 2)

Based upon this information, Mr. Rehberg opined claimant had not been forthcoming and truthful in regard to his alcohol consumption. He explained in order to reach the level of alcohol concentration present at the time of the fall, claimant would have needed to drink approximately 24 beers the night prior. Furthermore, in order to reach the intoxication level present at the time of his test, Mr. Rehberg opined claimant would have needed to consume alcohol the morning of the accident. According to Mr. Rehberg, "toxicological common sense" dictated claimant either arrived at work intoxicated and added upon this level throughout the morning or built this level of intoxication during work hours. (Ex. A, p. 2) Mr. Rehberg opined:

> Either way, he was intoxicated at the time of his fall and injury. His state of intoxication (inebriation and impairment) was a major, important, contributing, proximate and primary cause of his fall and injury. Indeed, the intoxication may have been the most important and/or only cause of the fall and injury of [claimant].

(Ex. A, p. 2)

> [Claimant's] intoxication would have caused him to exhibit alcohol symptoms that, to his detriment, would/could cause him to fall and be injured. He would have been clumsy, inattentive, lackadaisical, desensitized, sedated and fatigued by the alcohol in his system. [Claimant] would not have been able to exercise due diligence, protect himself, exercise proper care and self-preservation. He

> would have been desensitized, sedated and extremely mentally impaired by the alcohol load in his body. He would have had decreased visual, tactile, auditory and other sensory decrements. His intoxication, alcohol consumption and drunkenness caused his fall and injury. Other factors could, of course, be contributing/mitigating causes.

(Ex. A, p. 3)

In addition to completing a written report, Mr. Rehberg also testified at evidentiary hearing. Mr. Rehberg explained claimant underwent blood and urine testing on November 12, 2012. While done to assist in medical treatment, Mr. Rehberg indicated the tests are reliable from a toxicological standpoint and he has relied upon such reports hundreds of times. Mr. Rehberg explained the urine test revealed 259 mg of alcohol per 100 milliliters of urine. This amount of alcohol concentration is deemed a critical level, denoting overuse of alcohol and intoxication. (Mr. Rehberg's testimony)

He equated this level of concentration to a blood alcohol level of .200, an "extremely high level" of alcohol. Mr. Rehberg explained this concentration equates to the presence of 8 to 10 drinks in one's system at the time of testing. He also noted the testing was performed at 2:15 p.m. and the accident reportedly occurred around noon. Mr. Rehberg extrapolated claimant's blood alcohol level at the time of the fall was higher, likely around a .230, the equivalent of 9 to 11 beers in his system. Mr. Rehberg indicated the threshold level for legal drunkenness is .08; claimant's levels were .200 at the time of the test and an extrapolated .230 at the time of the fall. (Mr. Rehberg's testimony)

Claimant's stated history maintains claimant drank 12 beers before midnight on November 11, 2012. Mr. Rehberg opined it would be impossible for claimant to demonstrate the alcohol concentration levels present in his test results if claimant's scenario of 12 beers was accurate. Mr. Rehberg testified if claimant's scenario were true, claimant's alcohol level would have been zero at the time of his testing. In order to have stopped drinking by midnight the night before and have the alcohol concentration present at the time of testing, Mr. Rehberg testified claimant would have had to consume an "astronomical" amount of drinks. Mr. Rehberg testified this scenario is not reasonable to consider, however, as claimant would have "passed out" the prior night before he was capable of consuming the requisite number of drinks. (Mr. Rehberg's testimony)

Mr. Rehberg testified given claimant's test results, claimant was most assuredly intoxicated at the time of the test and accordingly, the time of the fall. He explained this level of alcohol concentration detrimentally effects all faculties, as alcohol serves as a

sedative and the consumer would be on the verge of passing out. Due to the sedative effects, brain function is slowed and a person cannot react to a new situation. One's senses and reaction abilities are affected: hearing, touch, color vision, tunnel vision, ability to gather information, ability to react, agility, coordination, and dexterity. Claimant's alcohol level would have caused him to lose the ability to respond, impacted his decision making, and slowed his reaction time. Mr. Rehberg testified most individuals would have either gone to sleep or become unconscious at this level of alcohol. He therefore opined it was "remarkable" claimant was able to stand on the top of a wall. (Mr. Rehberg's testimony)

Mr. Rehberg admitted he is not an accident reconstructionist and never went to the scene of the fall. He conceded it possible that no one could have avoided falling off the wall based upon the reported timeline of the accident. However, based upon his expertise and "common sense," Mr. Rehberg opined claimant's intoxication was a meaningful, proximate, and substantial factor in causing claimant's fall. He further opined there was no other conclusion than claimant's intoxication was the major reason for claimant's fall. (Mr. Rehberg's testimony)

Claimant testified he continues to suffer with symptoms of his right shoulder and clavicle region. Specifically, he complained of pain with movement and lifting of heavy objects. Claimant self-treats with use of Advil an average of twice per week. He denied any ongoing problems related to his head injury. (Claimant's testimony)

CONCLUSIONS OF LAW

The primary question submitted for determination is whether the employer has established a valid intoxication defense under Iowa Code section 85.16(2).

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

As an affirmative defense, it is the employer's burden to prove the elements of this defense. The intoxication defense is found at Iowa Code section 85.16(2), which provides:

> No compensation under this chapter shall be allowed for an injury caused:
>
> 2. By the employee's intoxication, which did not arise out of and in the course of employment but which was due to the effects of alcohol or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury.

To be successful in such a defense, defendant has the burden to prove by a preponderance of the evidence that claimant was intoxicated at the time of the injury and that such intoxication was a substantial factor in causing the injury . Reddick v. Grand Union Tea Co., 230 Iowa 108, 115, 296 N.W. 800, 803 (1941); Everts v. Jorgensen, 227 Iowa 818, 289 N.W. 11 (1939). A person is under the influence of alcohol and considered intoxicated for purposes of section 85.16(2) when any of the following are true:

> (1) the person's reason or mental ability has been affected; (2) the person's judgment is impaired; (3) the person's emotions are visibly excited; and (4) the person has, to any extent, lost control of bodily actions or motions.

Garcia v. Naylor Concrete Co., 650 N.W.2d 87, 90 (Iowa 2002) (quoting and adopting legal standard from Benavides v. J.C. Penney Life Insurance Co., 539 N.W.2d 352 (Iowa 1995)). The weight and credit to be given evidence of results of clinical tests for intoxication is for the trier of fact . Rigby v. Eastman, 217 N.W.2d 604 (Iowa 1974).

The intoxication defense requires a showing not only that the worker was intoxicated at the time of the injury, but also that the intoxication was a substantial factor in bringing about the injury. Intoxication must be shown not to just be a possible factor, but a probable substantial factor. Stull v. Truesdal Coop Elevator Co., File No. 780309, (App. Dec. 14, 1987); Lafferty v. Four Sons Handy Shops, Inc., File No. 943974, (Remand March 23, 1994).

A factor is substantial when reasonable persons considering that factor would regard it as a cause, that is, as being in some pertinent part responsible for the result produced. See Pedersen v. Kuhr, 201 N.W.2d 711 (Iowa 1972).

A factor is substantial when it is material in producing a result. A factor may be substantial without being either exclusively or even predominantly the determinant of the result, however. See, Jones v. City of Des Moines, 355 N.W.2d 49 (Iowa 1984); Montgomery Properties v. Economy Forms, 305 N.W.2d 470 (Iowa 1981).

As an initial matter, defendants must prove claimant was intoxicated at the time of the fall on November 12, 2012. Defendants offered toxicology reports conducted at the emergency room at least two hours post-fall. At the time of this testing, claimant's urine alcohol concentration was at a "critical" level, 259 mg/dL. Forensic toxicologist, Mr. Rehberg equated this figure to a blood alcohol level of .200. Mr. Rehberg also extrapolated the test results backwards to the level which would have been present in claimant's system at the time of the fall. He computed claimant's blood alcohol level at

the time of the fall as .230, the equivalent of 9 to 11 beers in claimant's system at the moment of the fall. Given the threshold level for legal drunkenness of .08, claimant's blood alcohol level at the time of the fall was nearly three times the legal limit.

Mr. Rehberg opined claimant was highly intoxicated at the time of his testing and accordingly, the fall. He opined claimant's alcohol concentration levels would have affected his mental abilities, including claimant's ability to gather information, ability to react and respond, and decision making. Mr. Rehberg further opined this level of alcohol would have affected claimant's senses of hearing, touch, and vision, as well as his agility, coordination, and dexterity.

Claimant's intoxication was also noted in the contemporaneous medical records. In fact, emergency room staff was unable to clear claimant for a cervical injury on the date of his fall and were required to wait until the next day to do so, in order to allow claimant to become "sober."

Claimant's only evidence which could be used to counter this evidence is the testimony of claimant and Mr. Alvarez. In substance, claimant asserts he did not feel intoxicated and had been able to work that morning. This assertion is supported by the testimony of Mr. Alvarez. Without addressing the question of claimant's credibility, which will be addressed *infra*, the undersigned finds claimant's evidence is insufficient to counter the expert medical and toxicological opinions and toxicology reports regarding the state of claimant's inebriation. It is therefore found claimant was intoxicated at the time of the fall on November 12, 2012.

Having proven claimant was intoxicated at the time of the fall, defendants now must prove the intoxication was a substantial factor in causing the fall. Claimant argues his intoxication at the time of the fall was irrelevant, as the accident would have occurred irrespective of claimant's intoxication. Specifically, claimant argues the trusses shifted and made contact with claimant so quickly that no person would have been able to avoid falling from a 5 ½ inch wide wall. Claimant testified to this belief, as did Mr. Alvarez. This testimony was unrebutted; even Mr. Rehberg conceded it possible no one could have avoided falling.

Defendants urge reliance upon the expert opinion of Mr. Rehberg, as well as upon a level of common sense. Common sense would suggest any individual with an alcohol concentration nearly three times the legal limit would have impaired physical faculties and ability to react.

Claimant urges reliance upon the opinions of claimant and Mr. Alvarez, in that the event occurred so quickly that no person would have been able to avoid it.

However, these opinions are only the opinions of laypersons and the undersigned is uncomfortable accepting the layperson opinions over forensic testimony which could lead to a different conclusion. This is especially true given my doubts regarding claimant's credibility.

Claimant testified he ceased drinking at midnight on November 11, 2012, and to the best of his recollection, drank approximately 12 beers. Mr. Rehberg questioned the accuracy of claimant's statements. He opined if claimant's statements were true, claimant's alcohol concentration would have been zero at the time of testing. Instead, claimant's alcohol levels were 2 ½ to 3 times the legal limit for drunkenness at the time of the fall. Mr. Rehberg explained in order to reach the level of alcohol concentration present at the time of the fall, claimant would have needed to drink approximately 24 beers the night prior, twice the amount admitted by claimant. Additionally, in order to maintain the level of intoxication present at the time of the test, Mr. Rehberg opined claimant would have needed to consume alcohol on the date of his fall. According to Mr. Rehberg, toxicological common sense dictated claimant either arrived at work intoxicated and continued drinking to increase his alcohol concentration or built his level of intoxication throughout the morning work hours. Mr. Rehberg essentially found claimant's statement he ceased drinking at midnight the night before the fall to be toxicologically impossible, as a person would have been required to drink such an astronomical amount that the body would have gone unconscious before the requisite amount of drinks could have been consumed.

Based upon Mr. Rehberg's opinions on the scientific and toxicological possibility of claimant's statements and test results, the undersigned finds claimant did not provide credible testimony at evidentiary hearing, nor truthful statements to his medical providers. While the claimant's demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity, the lack of objective support for claimant's statements leads the undersigned to find claimant not credible.

The undersigned finds claimant was not a credible witness and thus, his testimony regarding the suddenness of the accident and his ability to avoid the impact of the trusses is entitled to little weight. Furthermore, in accordance with Mr. Rehberg's opinions, claimant's level of intoxication at the time of the accident would have impacted claimant's ability to observe, comprehend, and remember details. Therefore, the intoxication diminishes the value of claimant's testimony, as claimant would have been unable to comprehend and recall the accident at the same level as would a sober individual.

Claimant's testimony received support from the credible testimony of Mr. Alvarez as to the suddenness of the accident and a person's ability to avoid falling from the wall. However, the undersigned provides only limited weight to Mr. Alvarez's testimony on this matter. There is no evidence Mr. Alvarez has any specialized knowledge which would render him an expert in body mechanics or accident reconstruction. Quite simply, how is a layperson qualified to opine as to whether the accident would have occurred regardless of claimant's intoxication given the variables present in this case?

Furthermore, defendants need not prove claimant's intoxication was the exclusive cause of claimant's fall. Rather, defendants must prove by a preponderance of the evidence the intoxication was a substantial cause of the fall. A factor is considered substantial when a reasonable person would consider the factor to be a cause of the result produced.

I believe there can be little doubt that a reasonable person would consider a blood alcohol level of nearly three times the legal limit to be a factor in an individual falling from a wall measuring only 5 ½ inches wide. Claimant acknowledged it would be unsafe to work, especially construction work, while intoxicated. Even claimant's witness, Mr. Alvarez, testified he would not have climbed onto the wall in question if he were intoxicated, as he believed he would surely fall. Mr. Rehberg opined the intoxication was a major, important, contributing, proximate and primary cause of claimant's fall. It is therefore determined claimant's intoxication was a substantial factor in his fall on November 12, 2012.

As defendants have proven by a preponderance of the evidence that claimant was intoxicated at the time of his injury on November 12, 2012, and his intoxication was a substantial factor in causing claimant's fall, claimant is not entitled to indemnity or medical benefits in connection with the accident of November 12, 2012.

The final issue for determination is claimant's entitlement to reimbursement of an independent medical examination pursuant to Iowa Code section 85.39.

Claimant seeks reimbursement for Dr. Bansal's IME in the amount of $2,695.00. At the time of Dr. Bansal's IME, no employer-retained physician had offered an opinion regarding the extent of claimant's permanent impairment, nor offered an opinion which would otherwise trigger claimant's right to a section 85.39 IME. Therefore, claimant has not met the prerequisite steps for reimbursement of an IME pursuant to section 85.39 and accordingly, is not entitled to reimbursement of Dr. Bansal's IME.

ORDER

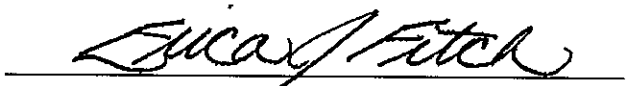
THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to claimant pursuant to 876 IAC 4.33.

Signed and filed this 10th day of August, 2015.



ERICA J. FITCH
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.