BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEYATTA SHAW, Claimant, vs. AMERICAN INCOME LIFE INSURANCE COMPANY, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5061293 A P P E A L D E C I S I O N Head Notes: 1100, 1108, 1803, 2001, 2002; 2501; 3001

Defendants American Income Life Insurance Company (hereinafter AIL), employer, and its insurer, Zurich American Insurance Company, appeal from an arbitration decision filed on August 7, 2020. The case was heard on March 12, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 30, 2019.

In the arbitration decision, the deputy commissioner found claimant was an employee of AIL and was not acting as an independent contractor for AIL at the time of claimant's January 11, 2018, motor vehicle accident, which occurred during claimant's training period with AIL. The deputy commissioner then found claimant sustained an injury that arose out of and in the course of her employment and sustained 20 percent industrial disability as a result of the work-related injury. The deputy commissioner found claimant's average weekly wage for the work injury to be $600.00, resulting in a weekly benefit rate of $403.05. The deputy commissioner found claimant is not entitled to receive penalty benefits. The deputy commissioner found claimant is entitled to reimbursement from defendants for her requested past medical expenses itemized in claimant's Exhibits 1 and 2. The deputy commissioner found that pursuant to Iowa Code section 85.39, claimant is not entitled to reimbursement from defendants for the cost of the independent medical evaluation of claimant performed by Sunil Bansal, M.D., on January 30, 2019. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding.

Defendants assert on appeal that the deputy commissioner erred in finding claimant was an employee of AIL when the accident occurred and not an independent contractor. Defendants alternatively assert the deputy commissioner erred in finding claimant sustained a work-related injury, or that claimant is entitled to permanency benefits and medical benefits. Defendants also assert the deputy commissioner erred in calculating claimant's weekly benefit rate.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on August 7, 2020, is respectfully reversed.

I affirm the deputy commissioner's finding that claimant proved she was rendering services for AIL at the time of the January 11, 2018, motor vehicle accident, meaning the burden appropriately shifted to defendants to establish claimant was an independent contractor. However, for the reasons that follow, I reverse the deputy commissioner's finding that claimant was an employee at the time of the January 11, 2018, motor vehicle accident.

The deputy commission relied heavily on two factors in finding claimant was an employee: the level of control exercised over claimant by AIL during claimant's training period and the compensation arrangement in place.

Turning first to the control exercised over claimant, the deputy commissioner stated as follows:

> During the training period, claimant was required to, at minimum, coordinate her work hours to match those of her mentor, Ms. Acker. While claimant may have possessed the ability to state she could not attend certain meetings or presentations, Ms. Acker controlled whether claimant progressed through her training program and progress could not be made without claimant attending appointments scheduled by Ms. Acker. Under the facts of this case, it can more accurately be stated that Ms. Acker set claimant's hours and duties.

(Arbitration Decision, p. 13)

I acknowledge that as part of her training with AIL, claimant was paired with another agent, Ms. Acker, to shadow. That, in turn, meant claimant was following Ms.

Acker's schedule. In that sense, claimant did not "choose" her hours. (See Hearing Transcript, pp. 23-24) But, claimant was not required to attend all of Ms. Acker's meetings, nor was claimant required to attend any specific meetings held at particular times or on particular days. To the contrary, claimant could pick and choose which of Ms. Acker's meetings she wanted to attend based on what was convenient for claimant. (See Hearing Transcript, pp. 63-64, 71)

Thus, it was ultimately claimant who had control over her "suggested schedule." (See Hrg. Tr., pp. 63-64, 71) As noted by Eric Cochran, one of AIL's state general agents, "[W]hen we do the interview and I show them what our proposed and suggested schedule is, they say they can't do it, they control it, I don't. They can give me what they want, and then I will work around it." (Hrg. Tr., p. 100)

In other words, while Ms. Acker's meetings were on set days at fixed times, claimant had control over which of those meetings she attended. Claimant's control over which of the meetings she attended meant claimant also had control over the progress and speed of her training. As explained by Mr. Cochran, if a new agent had regular conflicts with training, it might take that new agent additional time to become comfortable and "fluent" enough to sell AIL's products independently, but the speed at which claimant progressed was claimant's prerogative. (See Hrg. Tr., pp. 63-64, 71, 121-122)

Furthermore, there was not even a specific or predetermined number of meetings claimant had to shadow to complete her training. The determining factor was whether claimant possessed the requisite knowledge to represent AIL's products accurately. Mr. Cochran explained as follows at hearing:

> Q. Would [claimant] have been able to tell you . . . "I don't want to go to anyone's house with anyone, I'm going out on my own"?
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> A. If she can present to me the products and show me how she can present the products so they're represented correctly, absolutely.

(Hrg. Tr., p. 100)

I also recognize claimant, had she continued with AIL, would have had to pass a "release meeting" with Mr. Cochran before Mr. Cochran would have been comfortable sharing with claimant his purchased client leads. However, Mr. Cochran explained the purpose of this meeting was not to control the message new agents would take into clients' homes, but instead to ensure new agents would not make illegal misrepresentations to clients. (See Hrg. Tr., pp. 85-86) Importantly, Mr. Cochran also testified that new agents were not required to use any specific or set presentation of AIL's products. (Hrg. Tr., p. 89) While a prepared presentation is provided to new agents, it is provided for ease and convenience, not as a requirement. (Hrg. Tr., p. 89)

Furthermore, claimant could have sold insurance even without passing through the release meeting with Mr. Cochran. Claimant simply may not have been privy to Mr.

Cochran's client leads as an agent under the Cochran Agency umbrella. (Hrg. Tr., p. 117)

The deputy commissioner also referenced the office space and supplies offered by Mr. Cochran. Claimant, however, was not required to use Mr. Cochran's office space, or be there at certain times or on certain days, nor was claimant required to use Mr. Cochran's supplies. New agents were free to set up their offices in their own homes, again suggesting claimant had significant control even during the training period. (Hrg. Tr., p. 92)

Ultimately, consistent with the agent contract in this case, Mr. Cochran provided a framework for training, but claimant had the opportunity to manipulate that framework into a personalized training plan specific to claimant's availability. Claimant was given information on the products and services sold by AIL, but it was up to claimant to present the products and services as she saw fit. The only oversight was for purposes of ensuring claimant was not misrepresenting AILs' products and services to clients. Unlike the deputy commissioner, therefore, I find claimant had significant control over her training.

Turning to the compensation arrangement in this case, the deputy commissioner, relying on what she characterized as claimant's unrebutted testimony, found claimant was to be paid a set amount of $600.00 per week during her training period. Claimant's own testimony was contradictory, however, and it was rebutted both by Mr. Cochran's testimony and the commission ledger statements in evidence.

Claimant acknowledged she never received a $600.00 check from AIL. (Hrg. Tr., p. 58) Claimant likewise did not receive a prorated portion of $600.00 for the days she actually worked prior to her injury. To the contrary, the records indicate claimant received only advance commissions, consistent with the agency contract. (Def. Ex. A, pp. 1-2; Def. Ex. B) Claimant was given several advances, and when claimant sold her lone insurance policy, the commissions from that sale were credited against the advances. (Def. Ex. B, pp. 8-10) This is also consistent with Mr. Cochran's testimony that new agents in training were not paid wages or salaries. (Hrg. Tr., p. 73).

The deputy commissioner found both claimant and Mr. Cochran to be credible witnesses. While I performed a de novo review, I give considerable deference to findings of fact that are impacted by the credibility findings, expressly or impliedly made, by the deputy commissioner who presided at the arbitration hearing. There is no indication claimant was intentionally lying about her compensation agreement, nor is there anything in the record to make me question the deputy commissioner's determination regarding the credibility of claimant or Mr. Cochran. It appears claimant simply misunderstood the arrangement in place.

Unlike the deputy commissioner, therefore, I find there was no fixed compensation agreement in place during claimant's training period.

Finally, with respect to intent, I agree with the deputy commissioner:

> The contracts signed by claimant specifically state an agent is an independent contractor, not an employee. They further state agents are paid on a commission basis. Claimant acknowledged that, as an agent, she understood she would be an independent contractor and paid on a commission basis. These factors strongly support a conclusion that an employer-employee relationship is not applicable to agents of defendant-employer.

(Arb. Dec., p. 13)

"When the issue is whether an individual is an employee or an independent contractor, many factors are relevant." Iowa Mut. Ins. Co. v. McCarthy, 572 N.W.2d 537, 542 (Iowa 1997); see Nelson v. Cities Serv. Oil Co., 146 N.W.2d 261 (1966). The Iowa Supreme Court has considered numerous factors through a series of "rather elusive tests or indicia by which an employer-employee relationship and status as an independent contractor may be determined." Nelson, 146 N.W.2d at 264.

In Nelson, the Iowa Supreme Court stated:

> The often cited case of Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 234 N.W. 254, 256, contains this statement: "An independent contractor under the quite universal rule may be defined as one who carries on an independent business and contracts to do a piece of work according to his own methods, subject to the employer's control only as to results. The commonly recognized tests of such a relationship are, although not necessarily concurrent or each in itself controlling: (1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer." See also Usgaard v.Silver Crest Golf Club, 256 Iowa 453, 456, 127 N.W.2d 636.
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> And as revealed in Hassebroch v. Weaver Construction Co., 246 Iowa 622, 628, 67 N.W.2d 553: "The principal accepted test of an independent contractor is that he is free to determine for himself the manner in which the specified results shall be accomplished."
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> Then in Hjerleid v. State, 229 Iowa 818, 826-827, 295 N.W. 139, 143, this court pointed out the accepted criteria by which to determine whether an employer-employee relationship exists, are as follows: '* * * (1) (t)he right to selection, or to employ at will; (2) responsibility for the payment of wages

> by the employer; (3) the right to discharge or terminate the relationship; (4) the right to control the work; and (5) is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed.' See also section 85.61(2), Code, 1962, and Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 455-456, 127 N.W.2d 636.
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> Also, in Schlotter v. Leudt, 255 Iowa 640, 643, 123 N.W.2d 434, 436, we said: 'The most important consideration in determining whether a person giving service is an employee or an independent contractor is the right to control the physical conduct of the person giving service. If the right to control, the right to determine, the mode and manner of accomplishing a particular result is vested in the person giving service he is an independent contractor, if it is vested in the employer, such person is an employee.'
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> Finally, in this connection we called attention in the Usgaard and Hassebroch cases, both supra, to another possible element which, when applicable, might be used with others as an aid in determining whether one person is or is not the employee of another, to-wit: the intention of the parties as to the relationship created or existing. Standing alone this may be somewhat misleading.
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> But as explained in Restatement, Agency 2d, comment m., under section 220: 'It is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control by the other. However, community custom in thinking that a kind of service, such as household service, is rendered by servants, is of importance.'

(146 N.W.2d at 264-265)

Thus, while not necessarily determinative, control is a substantial factor in the employment relationship analysis. As discussed above, unlike the deputy commissioner, I found claimant had significant control over her training. Claimant was not working under the direction of Ms. Acker; claimant was shadowing Ms. Acker based on a suggested schedule that claimant helped personalize for herself. While claimant was given pre-prepared training materials, she was free to present AIL's products and services as she saw fit so long as she represented them accurately. Claimant was receiving advice and assistance from other agents, but she was not under their control. It was claimant who ultimately controlled the progression of her training. As such, that control by claimant weighs against a finding of an employer-employee relationship.

Also relevant is whether there was to be payment of wages at a fixed amount. I found there was no guarantee of fixed payments. I found that all compensation claimant received during her training period was to be based on commissions. This also weighs against the finding of an employer-employee relationship. Furthermore,

even if claimant's understanding that she was to be paid a set $600.00 per week during her training period was correct, this is only one factor in the multi-factored analysis and that one factor, by itself, is not dispositive. See, Iowa Mut. Ins. Co. v. McCarthy, 572 N.W.2d 537, 542 (Iowa 1997); Nelson v. Cities Serv. Oil Co., 146 N.W.2d 261, 264 (Iowa 1966); Mallinger v. Webster City Oil Co., 211 Iowa 847, 234 N.W. 254, 256-57 (1931).

The evidence in this case establishes it was the clear understanding and intent of the parties that claimant would be an independent contractor, not an employee, during her training period. There is no evidence in the record of anything which should have caused claimant to believe she was an employee of AIL during her training period. Again, this weighs against the finding of an employer-employee relationship.

After considering these and all relevant factors, I conclude defendants proved claimant was acting as an independent contractor at the time of the January 11, 2018, motor vehicle accident. The deputy commissioner's determination that claimant was an employee of AIL is therefore respectfully reversed.

Having determined claimant was acting as an independent contractor, I conclude claimant was not an employee at the time of the January 11, 2018, motor vehicle accident, meaning claimant is not eligible to receive workers' compensation benefits from defendants. Iowa Code sections 85.3(1); 85.61(11)(c)(2).

This finding renders all remaining issues moot, including whether claimant is entitled to receive weekly benefits, medical benefits and penalty benefits.

I agree with the deputy commissioner that this is a fact-specific result which should not be construed as controlling precedent for other cases regarding insurance agents or other prospective agents participating in training programs.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 7, 2020, is respectfully reversed.

Claimant shall take nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 17th day of February, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Randall P. Schueller (via WCES)

Jason A. Kidd (via WCES)

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