BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HERIBERTO PEREZ,

Claimant,

vs.

TIMBERLINE LAND AND CATTLE, L.L.C.,

Employer,

and

NATIONWIDE AGRIBUSINESS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5055660

ARBITRATION DECISION

Head Note Nos.: 1402.10, 1402.40, 1403.30, 1504, 1601, 1802, 1803, 2501, 2907

STATEMENT OF THE CASE

Heriberto Perez, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, Timberline Land and Cattle, L.L.C. (hereinafter referred to as "Timberline"), as his employer and Nationwide Insurance Company as the insurance carrier. Hearing was held on August 4, 2016. The live evidentiary testimony could not be completed during the allotted time on August 4, 2016. Therefore, the evidentiary hearing was suspended. Hearing was completed on September 22, 2016.

Claimant offered testimony and utilized the services of a Spanish to English interpreter to present his testimony. Claimant also called his significant other, Jeanie Chacon, to testify. Defendants called Steve Heitshusen to testify.

The evidentiary record also includes claimant's Exhibits 1 through 3. Joint Exhibits A though D were offered and received at the live hearing. Claimant also asked to offer joint Exhibit E after conclusion of the live evidentiary hearings. Defendants did not object to the proposed exhibit being added after the hearing. Therefore, Exhibit E was received and is admitted into the evidentiary record in this case.

The parties submitted a hearing report prior to the commencement of the evidentiary hearing. On that hearing report, the parties entered into certain stipulations.

Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

Counsel requested the opportunity to file post-hearing briefs. Their request was granted. All parties filed their post-hearing briefs on October 24, 2016, at which time the case was considered fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether an employer-employee relationship existed at the time of the alleged injury.

2. Whether claimant sustained an injury that arose out of and in the course of his employment on October 23, 2015.

3. Claimant's entitlement to temporary total disability benefits, including the proper commencement date for temporary disability benefits.

4. Whether claimant is entitled to payment of past medical expenses.

At the commencement of hearing, counsel stipulated that, if claimant is determined to be an employee at the time of the stipulated injury, the injury would also be found to have arisen out of and in the course of claimant's employment. Therefore, only an analysis, findings, and conclusions pertaining to claimant's status as an employee will be made with respect to these issues.

The parties stipulated that claimant remains in a healing period, if the claim is determined to be compensable. Therefore, the issue of entitlement to permanent disability benefits, if any, was bifurcated and may be raised via a petition for review-reopening. Claimant sought payment of past medical expenses but the parties did not put medical bills into evidence. There remains a potential dispute regarding past medical expenses, but the claim was bifurcated for future determination if this case is determined to be compensable. Therefore, the only remaining factual and legal disputes are whether claimant was an employee of Timberline on October 23, 2015 and claimant's entitlement to temporary disability benefits, including the proper commencement date for such benefits.

FINDINGS OF FACT

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

Heriberto Perez sought work at Timberline beginning in November 2014. (Transcript II, page 41) Mr. Perez presented to Timberline twice while its owner, Steve

Heitshusen, was absent. On his third visit, claimant was able to discuss the possibility of working at Timberline with Mr. Heitshusen. (Tr. II, p. 41)

Mr. Perez does not speak English and his significant other, Janie Chacon, went with him and interpreted all conversations between claimant and Mr. Heitshusen. (Tr. I, pp. 22-23; Tr. II, pp. 16-17, 41) The initial conversation included a discussion of claimant's abilities and the terms of compensation. (Tr. II, pp. 18-19, 42-45) I find that Timberline did not explain its intention to retain claimant as an independent contractor. I find that Timberline did not explain the difference between an independent contractor and an employee. I further find that due to the language barrier, claimant did not understand the difference between an employee and an independent contractor. I also find that there was not a mutual intention to create an independent contractor status or relationship between Mr. Perez and Timberline.

All parties concur that Timberline agreed to pay claimant $12.00 per hour for all work he performed at Timberline. (Tr. I, p. 23; Tr. II, pp. 43-44) Claimant recorded his daily hours worked in a notebook. He turned in his hours every Monday and was paid by Timberline every Tuesday. (Tr. I, p. 27)

Mr. Perez began working at Timberline on November 14, 2014. (Tr. II, p. 16) The initial project assigned by Timberline to claimant was to varnish the wood ceiling at the Timberline residence. (Tr. I, p. 23) Timberline provided all tools and supplies to complete this project. Tr. I, pp. 24-25) Claimant has never owned or operated a painting or construction business. (Tr. I, pp. 25, 41-42)

Although they disagree as to what the length of the period was, all parties concur that claimant began working at Timberline under a probationary period to determine his skills and quality of work. (Tr. I, pp. 23-24; Tr. II, pp. 17, 43, 45) All parties concur that there were no written contracts as to claimant's employment status or agreements, other than some notations on the checks issued by Timberline designating claimant as "contract labor." (Tr. I, p. 24; Tr. II, p. 74; Ex. D)

After demonstrating his skills and work ethic, Mr. Perez was assigned additional duties at Timberline. Ultimately, claimant performed yard work, tended cattle, performed residential remodeling tasks, installed a cupola on the Timberline barn, deconstructed, transported, and reconstructed some grain bins onto the Timberline farm, and removed trees and brush from the Timberline properties. Mr. Perez has never owned or operated a landscaping or yard work type business. (Tr. I, p. 34) He has never owed a cattle ranch. (Tr. I, p. 29) He has never owned or operated a tree cutting or removal business. (Tr. I, p. 48)

On the other hand, Timberline is a grain and cattle farm. Its normal or typical business pursuits included raising cattle, operating a farm, including maintenance of a barn, maintenance of grain bins, and maintenance of a farm house and yard on the

property. (Tr. II, p. 40) I find that the duties performed by Mr. Perez were clearly within the regular business pursuits of Timberline.

For some projects, such as building fences and yard work, claimant worked with another individual. However, the additional worker was employed through Timberline. Claimant never retained any of his own employees or workers to perform the tasks assigned by Timberline. (Tr. I, pp. 25-26, 32, 36, 41, 44-45) Mr. Perez has never owned or operated a fencing company. (Tr. I, p. 48)

Mr. Perez was instructed to arrive at Timberline each morning at a time before Mr. Heitshusen went to his daily job in town and was instructed to arrive earlier than normal from time to time at Mr. Heitshusen's discretion. (Tr. II, pp. 20-21, 60) Claimant worked generally unsupervised throughout the day at Timberline. However, Mr. Heitshusen provided the instructions as to what needed to be done and determined which projects were to be completed. (Tr. I, p. 77) From time to time, claimant was expected to work late or was called back to tend to the cattle. (Tr. II, pp. 26-27) In this sense, I find that Timberline controlled the start, stop, and work hours of claimant. I also find that Timberline had the right of control over claimant and could require him to return to the farm even "after hours."

Claimant never provided bids for the various tasks he was assigned. (Tr. I, pp. 32-33) Instead, he worked hourly and was paid for his hourly services throughout his work at Timberline. (Tr. I, p. 27)

There is some dispute in the record about whether claimant provided some of the tools he used during his work at Timberline. Mr. Heitshusen testified that claimant used some of his own tools and even left some tools at the employer's premises after his employment was terminated. Claimant testified that he did not use his own tools while working at Timberline.

Ultimately, I find the debate to be less than definitive in this case. Even if claimant used some of his own hand tools, it is apparent that Timberline provided all supplies, such as paint, nails, screws, varnish, and medications for cattle. Timberline clearly provided all large saws, chain saws, ladders, tractors, and other major equipment necessary to perform claimant's work at Timberline. (Tr. I, pp. 28-32, 34-39, 47) Even if claimant used some of his own smaller, hand tools, it is apparent that Timberline had similar tools available for claimant's use and that Timberline provided any larger equipment. Similarly, Timberline provided claimant overalls to work outside in the cold and mud boots for working on the farm. (Tr. I, pp. 28-29)

One good example of Timberline providing necessary tools to complete claimant's work is when clamant traveled to Nebraska to deconstruct grain bins and transport those back to Timberline's farm. Claimant owned a pickup. However, he did not use his personal vehicle to transport these items. Instead, he used Timberline's

pickup to travel to and from Nebraska to transport the grain bin materials. (Tr. I, pp. 37-39)

Another good example that establishes claimant's working relationship with Timberline is the purchase of a cell phone by Timberline for Mr. Perez. Timberline wanted a means of communicating with claimant during the day and evening. Therefore, Timberline purchased a cell phone for his use. (Tr. II, pp. 25-26, 56-57) Timberline clearly provided this "tool" in an effort to maintain its communications and control over claimant.

On October 23, 2015, claimant sustained an injury to his right shoulder. (Hearing Report; Claimant's testimony; Ex. A, p. 1; Ex. E, p. 1) Timberline concedes that claimant sustained an injury while performing work activities at Timberline. (Hearing Report; Tr. I, p. 9) They also concede that claimant requires additional medical treatment for the condition and that he has not achieved maximum medical improvement. (Hearing Report)

At the end of claimant's work relationship with Timberline, he was struggling to perform the work required. Claimant testified that his shoulder was experiencing increasing symptoms. Ultimately, he did not feel as though he could continue working at Timberline. (Tr. I, p. 56)

At the point in time when claimant indicated he could no longer continue working due to symptoms, Timberline did not assert that claimant was an independent contractor responsible for the completion of assigned tasks, whether personally or through someone Mr. Perez hired. Instead, Timberline told claimant that if Mr. Perez could not do the work, Timberline was going to hire someone else do the work. (Tr. I, p. 58) Rather than insist that claimant complete a contracted job by any means necessary and within claimant's discretion, Timberline instead indicated it would terminate the relationship with claimant and hire someone else to do the work. I find that Timberline clearly intended to and did retain the right to terminate the relationship and that it maintained a relationship of at will employment with Mr. Perez more than that of a contractor, who would have been expected to complete work under the contract.

Claimant contends that he should qualify for temporary disability benefits commencing on January 18, 2016. Claimant contends this is the date that he quit his employment at Timberline due to ongoing symptoms and an inability to continue his work activities. Defendants contend that claimant was not under a medical restriction preventing ongoing work until June 13, 2016.

It is undisputed that claimant terminated his employment on January 18, 2016. (Tr., p. 56) Claimant testified that he quit his job at Timberline because he could no longer stand the pain in his shoulder while performing work activities at Timberline. (Tr., p. 58)

Defendants correctly note that no specific written medical restrictions were imposed upon claimant that precluded ongoing employment until June 2016. However, on November 5, 2015, Jonathan E. Buzzell, M.D., indicated that claimant was to "[w]ork as tolerated." (Ex. B, p. 8) Claimant testified that Dr. Buzzell told him he needed an operation and should not work. (Tr. I, p. 84-86)

I interpret Dr. Buzzell's restrictions on November 5, 2015 to indicate that claimant may not be capable of continuing work without restrictions but that the physician allowed claimant to try to continue to work due to financial circumstances as long as he was able. Clearly, by January 18, 2016, claimant was not capable of tolerating further work at Timberline.

The parties stipulate that claimant is entitled to ongoing temporary disability benefits. (Hearing Report) Claimant proved he was off work for a period of five weeks from January 19, 2016 through February 22, 2016. Claimant then returned to work for another employer. (Tr. I, pp. 58-59)

Claimant has provided unrebutted evidence, though not terribly precise evidence, as to his subsequent earnings. Claimant has established that he works up to 22 hours per week, earning $10.00 per hour in his subsequent job. (Transcript I, pp. 58-59)

I find that claimant has proven he earns $220.00 per week working for a subsequent employer. Claimant earned $582.15 per week prior to the date of injury according to the parties' stipulations. Claimant has proven a reduction in his weekly earnings of $382.15 per week since February 23, 2016 and continuing at the time of the arbitration hearing.

CONCLUSIONS OF LAW

The primary disputed issue in this case is whether the claimant was an employee of Timberline on October 23, 2015, when the claimant was injured. Claimant contends that he was an employee while Timberline contends that claimant was an independent contractor.

Section 85.61(11) provides in relevant part:

> "Worker" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer . . . .

It is claimant's duty to prove, by a preponderance of the evidence, that he was an employee within the meaning of the law. Where claimant establishes a prima facie case, defendants then have the burden of going forward with the evidence which rebuts claimant's case. The defendants must establish, by a preponderance of the evidence, any pleaded affirmative defense or bar to compensation. Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1967).

Factors to be considered in determining whether an employer-employee relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McClure v. Union et al., Counties, 188 N.W.2d 283 (Iowa 1971); Nelson, 259 Iowa 1209, 146 N.W.2d 261; Lembke v. Fritz, 223 Iowa 261, 272 N.W. 300 (1937); Funk v. Bekins Van Lines Co., I Iowa Industrial Commissioner Report 82 (App. December 1980). In Mallinger v. Webster City Oil Co., 234 N.W. 254, 211 Iowa 847 (1931), the Iowa Supreme Court outlined similar factors to determine whether a worker is an independent contractor or an employee. Specifically, the Mallinger Court identified the following factors:

> (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 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 the 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. If the workman is using the tools or equipment of the employer, it is understood and generally held that the one using them, especially if of substantial value, is a servant.

Mallinger, 234 N.W. at 257.

Even if both parties by agreement state they intend to form an independent contractor relationship, their stated intent is ignored if the agreement exists to avoid the workers' compensation laws. Likewise, the test of control is not the actual exercise of the power of control over the details and methods to be followed in the performance of the work, but the right to exercise such control. Also, the general belief or custom of the community that a particular kind of work is performed by employees can be considered in determining whether an employer-employee relationship exists. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McClure v. Union et al., Counties, 188 N.W.2d 283 (Iowa 1971); Nelson, 259 Iowa 1209, 146 N.W.2d 261; Lembke v. Fritz, 223 Iowa 261, 272 N.W. 300 (1937); Funk v. Bekins Van Lines Co., I Iowa Industrial Commissioner Report 82 (App. December 1980).

I found that Timberline furnished all major tools necessary to perform claimant's work. I found that Timberline directed claimant's work as to the time, location, means, and manner of work to be performed each day. Mr. Perez did not hire his own assistants and he was paid by the hour. I found that Mr. Perez had no intention or understanding of being an independent contractor. Therefore, I found that the parties

were not under a mutual intention that Mr. Perez was working as an independent contractor.

I found that Timberline retained the right to terminate the working relationship and that it treated claimant more as an at will employee than as a contractor. I found that the work performed by claimant was within the normal business venture of Timberline. However, claimant never owned or operated businesses in farming, construction or tree removal. Claimant worked for several months, through several different jobs for Timberline.

Under the vast majority of the common law indicia of an employment relationship, the claimant was an employee of Timberline. At the very least, claimant produced sufficient evidence to establish a prima facie case that he was an employee. Timberline did not carry its burden of proof to establish otherwise. Therefore, I conclude that Heriberto Perez was an employee of Timberline on October 25, 2013.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

In this instance, defendants conceded at the commencement of hearing that, if the undersigned found claimant is an employee, claimant's alleged injury also arose out of and in the course of employment.

Mr. Perez seeks temporary total disability, or healing period, benefits from January 18, 2016 through the date of the arbitration hearing and continuing into the future until one of the criteria to end a healing period is met. Defendants concede that claimant is entitled to a running healing period into the future. However, defendants contend that claimant did not qualify for temporary total, or healing period, benefits until June 2016.

At this juncture, the parties stipulate that the case is not ripe for determination of whether claimant has sustained permanent disability. This issue has been bifurcated. Therefore, it is not clear at this juncture whether claimant is entitled to temporary total

disability benefits or healing period benefits. Temporary disability benefits are payable if the injured worker sustains no permanent disability as a result of the injury. Healing period benefits are essentially the same type of benefit as temporary disability but are paid when permanent disability has been sustained as a result of the work injury. It is not possible to determine whether claimant is entitled to temporary total disability or healing period at this point in time. However, he is clearly entitled to an ongoing award of payment of either temporary disability or healing period benefits at this time.

Section 85.33(1) provides that temporary total disability benefits are payable to an injured worker until (1) the worker has returned to work, or (2) the worker is medically capable of returning to substantially similar employment. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Whether the benefits are ultimately categorized as temporary disability or healing period is irrelevant at this juncture. Claimant is entitled to one or the other. The question presented for determination is when claimant first qualified for temporary disability or healing period benefits.

Claimant contends that he qualified for temporary disability benefits, or healing period, on January 18, 2016. Claimant left his employment with Timberline on that date due to ongoing symptoms and has not worked since. He asserts that he has not been medically capable of working since that date.

Defendants contend that claimant has not proven entitlement to temporary disability or healing period benefits until June 13, 2016. Defendants properly note this is the first date when a medical provider specifically ordered claimant to be off work. However, as noted in the findings of fact, I found that Dr. Buzzell actually ordered claimant capable of continuing to "[w]ork as tolerated" on November 5, 2015.

Claimant provided unrebutted testimony that he was no longer able to tolerate his work duties at Timberline as of January 18, 2016. (Transcript I, p. 57-58) According to Dr. Buzzell's release on November 5, 2015, claimant was not medically capable of substantially similar employment if he could no longer tolerate the symptoms. Therefore, pursuant to the November 5, 2015 release, claimant was no longer working and was not medically capable of performing substantially similar employment as of January 18, 2016. Claimant has proven entitlement to either temporary total disability benefits or healing period benefits from January 19, 2016 through February 22, 2016.

Neither party briefed the issue of claimant's subsequent earnings. However, the undisputed evidence establishes that five weeks after leaving Timberline, claimant began working for another individual building fences. (Transcript I, pp. 58-59) Claimant has established entitlement to five weeks of temporary total disability, or healing period, benefits from January 18, 2016 through February 22, 2016.

However, as of February 23, 2016, claimant began working another job. I found that claimant proved he earned $220.00 per week in his subsequent employment. According to the parties' stipulations, claimant earned $582.15 per week prior to the injury date.

Iowa Code section 85.33(3) provides that if an employee "elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits." Temporary partial disability benefits are calculated as "sixty-six and two-thirds percent of the difference between the employee's weekly earnings at the time of injury . . . and the employee's actual gross weekly income from employment during the period of temporary partial disability." Iowa Code section 85.33(4).

In this instance, claimant proved a $362.15 reduction in earnings per week from February 23, 2016 through the date of the arbitration hearing. Therefore, I conclude that claimant proved entitlement to temporary partial disability benefits totaling $241.45 per week from February 23, 2016 through the date of the arbitration hearing.

Claimant has not yet achieved maximum medical improvement, is not earning wages at the same rate he earned prior to the date of injury, and has not yet become medically capable of performing substantially similar work. Therefore, I conclude that his entitlement to temporary partial, temporary total, or healing period benefits continues into the future until such time as one of the factors outlined in Iowa Code section 85.33(1) or section 85.34(1) is met.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's entitlement to permanent disability benefits, if any, is bifurcated for future determination if and when one of the parties files an original notice and petition for review-reopening.

Claimant's entitlement to past medical expenses, if any, is also bifurcated for determination in any subsequent review-reopening proceeding.

Defendants shall pay claimant five (5) weeks of temporary total disability, or healing period, benefits from January 19, 2016 through February 22, 2016.

Defendants shall pay claimant temporary partial disability benefits at the rate of two hundred forty-one and 45/100 dollars ($241.45) per week from February 23, 2016 through the date of the arbitration hearing.

Claimant's entitlement to temporary partial, temporary total, or healing period benefits shall continue into the future until one of the factors outlined in Iowa Code section 85.33(1) or Iowa Code section 85.34(1) is met.

All future weekly benefits shall be paid at the rate of three hundred sixty-three and 39/100 dollars ($363.39), unless claimant is working and entitled to only temporary partial disability benefits during his period of recovery.

Defendant shall pay interest on all accrued benefits pursuant to Iowa Code section 85.30.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 19th day of January, 2017.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/srs

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.