

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GERMAN PORTILLO,

Claimant,

vs.

MALMIN CONSTRUCTION,

Employer,

and

IOWA MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

FILED

APR 26 2017

WORKERS COMPENSATION

File No. 5053429

ARBITRATION DECISION

Head Note Nos.: 1402.10, 1504,
2001, 2002

STATEMENT OF THE CASE

Claimant, German Alfredo Portillo, filed a petition in arbitration seeking workers' compensation benefits from Malmin Construction, employer, and Iowa Mutual Insurance Company, insurance carrier, both as defendants, as a result of an alleged injury sustained on August 29, 2014. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on September 1, 2016, in Des Moines, Iowa.

The record in this case consists of claimant's exhibits 1 through 19, defendants' exhibits A through D, and the testimony of the claimant, Michael Malmin, Fidel Puente Damian and Steven Ferch. The proceedings were translated by Karen Deters. The parties submitted post-hearing briefs, the matter being fully submitted on October 21, 2016.

ISSUES

The parties submitted the following issues for determination:

1. Whether an employer-employee relationship existed at the time of the alleged injury;
2. Whether claimant sustained an injury on August 29, 2014 which arose out of and in the course of employment with defendant-employer;
3. Whether claimant remains in a period of healing or has sustained permanent disability;
4. If claimant has sustained permanent disability, the extent of permanent disability;

5. The commencement date for permanent disability benefits;
6. The rate of compensation;
7. Whether defendants are responsible for claimed medical expenses;
8. Whether defendants are responsible for interest under Iowa Code section 85.30;
9. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much; and
10. Specific taxation of costs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record and his deposition testimony. His demeanor at the time of evidentiary hearing was excellent and gave the undersigned no reason to doubt claimant's veracity. The undersigned observed claimant utilize a cane with ambulation, in addition to use of bilateral lower leg braces. Claimant is found credible.

Claimant was 26 years of age at the time of hearing. (Claimant's testimony) Claimant is a native of El Salvador, where he attended school through the 9th grade. (Exhibit 9, page 3; Ex. 11, Deposition Transcript p. 21) In El Salvador, claimant worked for a short period cleaning filters at a water company; otherwise, he performed odd jobs such as house painting. (Ex. 11, Depo. Tr. pp. 21-23) Claimant arrived in Houston, Texas in 2013. (Claimant's testimony; Ex. 11, Depo. Tr. p. 5) While in Houston, claimant mowed lawns, earning \$70.00 per day. (Claimant's testimony; Ex. 11, Depo. Tr. pp. 21-23)

Claimant moved to Albert Lea, Minnesota in March 2014 and shortly thereafter, relocated to Mason City, Iowa. (Ex. 11, Depo. Tr. pp. 6, 8) During this period, claimant worked for Faustino Gonzalez (Faustino) performing roofing work. He lived with Faustino and a coworker, Fidel Fuentes Damian (Fidel). (Claimant's testimony; Ex. 11, Depo. Tr. pp. 7-8, 21-23) Claimant described his work for Faustino as his "normal" job; he earned approximately \$11.50 per hour and was paid in cash. (Claimant's testimony)

In late August 2014, claimant testified there were a few days Faustino did not have work for claimant and Fidel to perform. Claimant testified he learned of an

opportunity to perform additional work when Faustino's brother, Jose Luis Gonzales (Jose Luis) telephoned Fidel. Jose Luis informed Fidel that Michael Malmin (Michael) had requested help on a project. Jose Luis inquired if Fidel and claimant were interested in working on that job, removing tin from a roof. (Claimant's testimony; Ex. 11, Depo. Tr. pp. 12-13) Claimant testified Jose Luis indicated they would be paid \$100.00 per day. Claimant and Fidel agreed to perform the work. (Claimant's testimony)

By claimant's testimony, on August 29, 2014, Jose Luis met claimant and Fidel at one of Michael's companies, a lumberyard/warehouse. (Claimant's testimony; Ex. 11, Depo. Tr. p. 14) Claimant testified Michael greeted the men and from there, claimant and Fidel followed Michael to the job site. Claimant and Fidel rode in Fidel's vehicle. (Ex. 11, Depo. Tr. pp. 13-14) Jose Luis also referred Jose Martinez to the job site. He arrived at the location at a later time than claimant and Fidel. (Ex. 11, Depo. Tr. p. 24)

Claimant testified at the job site, Michael and a worker named Andres gave claimant and Fidel directions to remove old roofing from an area of the building. Claimant testified Michael also informed the men he would pay them \$100.00 cash at the end of each work day and he anticipated approximately 2 to 4 days of work. Claimant testified he did not discuss details directly with Michael prior to beginning work, as he does not speak English. (Claimant's testimony; Ex. 11, Depo. Tr. pp. 13-14, 16) Claimant described the work as an "extra" job, but testified he believed he was working for Malmin Construction on that date. (Claimant's testimony)

While working on the roof of an implement building on August 29, 2014, claimant fell through a skylight and sustained significant injuries to his spine. (Claimant's testimony)

Fidel Puentes Damian (Fidel) testified at evidentiary hearing. Fidel confirmed he and claimant worked most days for Faustino. He also testified he worked with claimant on the date of his injury and indicated the two were performing an "extra" job. Fidel testified on that day, Jose Luis sent he and claimant to work for Michael. Fidel explained that Faustino did not have work for he and claimant on that date, so they agreed to go to work upon receiving a call from Jose Luis. Fidel testified Jose Luis telephoned him personally to offer a couple days of work removing steel/tin from a roof. Fidel testified Jose Luis informed him when and where to go to meet Michael, as well as stated that Michael would pay the men \$100.00 per day at the conclusion of the job. (Fidel's testimony)

Fidel indicated he had worked for Jose Luis in the past, including on jobs for Malmin Construction. He testified on these jobs, he considered himself an employee of Jose Luis. Fidel testified Jose Luis would receive calls from Michael regarding roofing work and the men would perform the jobs. (Fidel's testimony)

Once the men arrived at the job site on August 29, 2014, Fidel indicated Michael and Andres came to speak with them. Fidel testified Andres informed them where to work and what tasks to do. Fidel testified the men began working and utilized tools they had personally brought, including a ladder, hammers and flat bars. The men continued

to work and when the workers from Malmin Construction took lunch, so did they. After lunch, the men resumed work and claimant fell through the skylight approximately 30 minutes to 1 hour after they returned to the roof. Fidel testified on that day, he considered Michael to be his "boss," because he considers the person giving the orders to be in charge, even if only for one day. Fidel testified he was never paid for the work he performed on August 29, 2014. (Fidel's testimony)

Fidel's testimony was direct and consistent with the evidence in the record. His demeanor gave the undersigned no reason to question his veracity. Fidel is found credible.

Michael Malmin (Michael) testified at evidentiary hearing. Michael testified he is an owner of four companies: the defendant-employer in this proceeding, Michael A. Malmin Construction, LLC (Malmin Construction); a lumberyard, Malmin, LLC; an apartment company; and an investment company. Malmin Construction is a residential general contractor, performing construction labor, mowing, roofing, concrete and framing. Michael testified on August 29, 2014, Malmin Construction employed 9 employees; on the date of hearing, it employed 7 employees. Michael testified some employees are salaried and others are paid hourly; his wife, Jill, handles payroll activities. (Mr. Malmin's testimony)

In late August 2014, Malmin Construction was working on a job installing a new steel/tin roof to an implement building. Michael assigned three employees to work on top of the building to perform the installation. As this was a larger job than Malmin Construction was accustomed to performing, Michael testified he required additional laborers. As a result, Michael testified he telephoned Jose Luis to requested additional laborers to help on the job. He did not request particular workers. (Michael's testimony)

Michael testified that in the past, he had retained LMG Construction as a subcontractor; LMG Construction is run by Jose Luis and his wife, Michelle. While he utilizes other subcontractors in his projects, Michael testified the only roofing subcontractor he utilizes is LMG Construction. On this occasion, Michael explained he telephoned Jose Luis in order to speak to Michelle. He indicated Michelle's English-language skills are better than those of Jose Luis; Michael does not speak any Spanish. Michael provided Michelle with basic information, such as the type of work, the number of workers needed, and the duration of the job. Michael testified he expressed a need for four people on two days, but they did not discuss any specific work hours. (Michael's testimony)

He testified he and Jose Luis did not discuss any payment details. Michael disputed any reference to his responsibility for payment of \$100.00 per day to the workers. In other projects, Michael testified he had paid Jose Luis for work performed by the square of shingles; yet this project was different in nature and he simply needed manual laborers. Michael testified that following prior projects, Michelle would send Malmin Construction an invoice and following negotiation, if needed, Michael would submit payment to Jose Luis. In those instances, Michael did not pay the workers arranged by Jose Luis. Malmin Construction completed 1099 tax forms for LMG

Construction. Michael testified he believed this job would be handled in the same fashion. (Michael's testimony)

Michael testified Jose Luis and four workers showed up at the lumberyard following his request for help. He met the individuals at his lumberyard; the workers he considered employees of Malmin Construction had already presented to the job site by the time of their arrival. Michael testified when he observed Fidel, he believed Fidel remained an employee of Jose Luis. He testified no one informed him the men were not employees of Jose Luis. (Michael's testimony)

None of the four individuals who presented for work, including claimant, completed a job application. None of the individuals were interviewed or completed tax documentation. Michael testified he did not discuss benefits with these individuals, while employees of Malmin Construction receive benefits. He also testified none of the men possessed office mail boxes, personnel files, or were required to complete timesheets, as done by employees of Malmin Construction. Michael testified he did not consider these individuals to be employees of Malmin Construction. (Michael's testimony)

Michael testified Jose Luis and the workers followed Michael from the lumberyard to the job site. Michael admitted he interacted with the workers at the job site, but denied he asked Andres to explain duties to Jose Luis and/or the workers. Michael testified he and Andres simply provided Fidel and Jose with some direction as to where to work. Michael testified he did not assign start time, break time, lunch time, or quitting time for the men referred by Jose Luis. He also provided no tools or harnesses for use by these workers. Michael denied speaking with claimant personally. (Michael's testimony)

Although Jose Luis accompanied the men to the job site, Jose Luis left the site when the workers began work on the implement building. Michael also left the job site after work commenced. He testified Andres later telephoned and advised him of claimant's fall. Michael then returned to the job site and learned claimant fell through a skylight on the implement building. Following claimant's injury, work resumed on the implement building. Michael testified he, the men he considers employees of Malmin Construction, and two of the workers referred by Jose Luis returned to work. After leaving the job site, Michael did not complete an injury report form. Michael testified his position is that Jose Luis was a subcontractor on the project. The injury occurred on a Friday and Michael testified he anticipated the workers referred by Jose Luis would return to work on Tuesday, following the Labor Day holiday. The men did not return. (Michael's Testimony)

Michael's testimony was direct and consistent with the majority of evidence in the record. His demeanor gave the undersigned no reason to question his veracity. Michael is found credible.

Steven Ferch (Steve), an employee of Malmin Construction, testified at evidentiary hearing. Steve testified he is a laborer, is paid \$12.75 per hour, and generally works 40 hours per week. Steve testified he was present at the job site on the

date of claimant's fall. Steve testified Michael was present the morning to direct the workers what to do and he returned at lunch to check-in. (Steve's testimony)

Steve explained that throughout the day, he and two other employees were working on the south end of the building, attaching the new roofing material. He testified claimant and two other workers were working on the roof at the north end of the building, with one worker performing tasks on the ground. Steve testified he did not believe these workers were employees of Malmin Construction, as he had never met or spoken with these individuals. He expressed belief the workers were brought in simply to assist with a large job, as Michael occasionally did with projects. Mr. Ferch testified he personally provided no direction to the workers and the individuals used their own tools. He testified Michael provides supplies and tools for use by employees, yet acknowledged he also brings some of his personal tools to job sites. (Steve's Testimony)

Steve's testimony was direct and consistent with the evidentiary record. His demeanor gave the undersigned no reason to question his veracity. Steve is found credible.

Claimant was taken by ambulance from the job site to the emergency room at Mitchell County Regional Health Center in Osage, Iowa. (Ex. A, pp. 3-4) He was subsequently transferred via EMS from the Mitchell County Regional Health Center to the Mayo Clinic Emergency Department. (Ex. 1, pp. 1-2; Ex. 3, pp. 1-3) At the Mayo Clinic Emergency Department, claimant was examined and underwent a series of imaging, including CTs, MRIs and x-rays. Staff assessed an unstable L1 burst fracture with retropulsion; bone fragments, disc material and hematoma extending into the spinal canal, resulting in significant effacement of the thecal sac; and right T9 through L4 transverse process fractures, with displacement. Claimant was admitted to the hospital with plans for immediate surgical intervention. (Ex. 5, pp. 4-5)

On August 29, 2014, claimant underwent surgical intervention performed by orthopedic spine surgeon, A. Nassr, M.D. of the Mayo Clinic. Dr. Nassr performed a number of procedures, including: posterior arthrodesis of T11 to L3; posterior segmental spinal instrumentation at T11 to L3; local autogenous bone grafting; decompressive laminectomy at T12 through L1; repair of traumatic dural deficiency; allograft bone grafting; and open reduction of fracture dislocations at T12 through L2. Dr. Nassr issued postoperative diagnoses of fracture dislocation of T12-L1 with suspected complete spinal cord injury, suspected dysfunction of bowels and bladder, and bilateral lower extremity weakness; and a significant posterior right-sided chest wall injury. (Ex. A, pp. 1-3)

The following day, August 30, 2014, surgical assistant Jonathan Duncan, M.D., authored a post-procedure note. He described the procedures performed as a T11-L3 posterior spinal fusion, instrumentation, reduction of dislocation at L12-L1, and repair of dural tear. Dr. Duncan noted findings of a severe spinal cord injury and severe right-sided rib/transverse process fractures. (Ex. A, p. 4) Claimant was hospitalized under the care of the Mayo Clinic Trauma Service.

On September 3, 2014, claimant met with a representative from the Mayo Clinic Social Work department, Sarah Burke, LICSW, MSW. The purpose of the interaction was a psychosocial assessment and discussion of discharge planning. (Ex. 5, p. 16) During the interaction which utilized an interpreter, Ms. Burke noted claimant reported he did not have health insurance. Claimant also indicated at the time of the injury, he was performing "a 'side job' for a friend" and he does not believe there was a workers' compensation insurance policy. (Ex. 5, p. 17) Claimant expressed willingness to proceed with all rehabilitation options. He expressed belief he would ultimately return to Texas, where family was available to assist him. (Ex. 5, pp. 17-18)

Due to persistent wound drainage, on September 12, 2014, B.L. Currier, M.D. performed surgical irrigation and debridement, as well as repair of traumatic dural deficiency and re-bone grafting. (Ex. A, p. 6-7) A culture was taken, which was positive for Streptococcus mitis. (Ex. A, p. 11)

On September 16, 2014, claimant was discharged from the Mayo Clinic Trauma Service to the Mayo Clinic Physical Medicine & Rehabilitation Service, for inpatient rehabilitation. During this inpatient rehabilitation, claimant also continued to follow up with the trauma, orthopedic spine, and infectious disease clinics. Claimant remained on an extended course of antibiotics. (Ex. 5, pp. 29-30, 40, 43, 45-46, 70) Claimant was also provided with a wheelchair, commode, transfer bench, walker and hand-held shower. (Ex. 5, p. 79)

On October 13, 2014, claimant was discharged from the Mayo Clinic Hospital to the Mayo Clinic Post-Acute Care Hospital in Lake City, Minnesota. (Ex. 5, p. 88, 110, 115, 120; Ex. A, pp. 22, 25) Claimant was discharged from the Lake City rehabilitation facility on October 31, 2014. At the time of discharge, claimant was noted as having progressed in therapy, with an ability to do solo transfers and walk with a walker while bracing. Claimant had completed the course of IV antibiotics, but continued on a course of oral antibiotics which were thought to be needed for a minimum of six months, if not indefinitely. Claimant remained on the following medications: ferrous sulfate, revaroxaban, cefadroxil, hydrocodone-acetaminophen, lactobacillus, melatonin, psyllium and Vancomycin. Claimant was discharged home, with staff noting claimant intended to travel to Houston, Texas with family. Claimant was advised to establish a course of care with a primary care provider upon arrival in Houston. Claimant was also advised to wear his TLSO brace except when lying flat in bed, and to wear his AFO braces with ambulation. (Ex. 6, pp. 1-3)

Claimant incurred medical expenses due to ambulance services and the care received at the Mayo Clinic facilities. These expenses are detailed in Exhibit 8.

Claimant testified following discharge, he moved to Houston to live with his aunt and grandmother. He has not received any medical treatment since arriving in Houston. Claimant testified he cannot afford to pursue additional medical care. (Claimant's testimony)

During the course of discovery, defendants argued claimant was not an employee of defendant-employer on August 29, 2014. On September 9, 2015,

defendants' counsel authored email correspondence indicating defendants denied existence of an employer-employee relationship. (Ex. C, p. 30) By responses to interrogatories served November 20, 2015, defendants agreed an injury occurred on August 29, 2014, but denied claimant was an employee of defendant-employer on that date. Rather, defendants outlined a position that defendant-employer did not employ claimant and argued claimant was an employee of an independent contractor, LMG Construction, on the date of injury. (Ex. 10, pp. 4-5, 9-10, 24)

Defendants retained surveillance services and claimant was the subject of video surveillance on June 22, June 23 and July 20, 2016. (Ex. D)

At the arranging of defendants, on July 20, 2016, claimant presented to orthopedic surgeon, James Hood, M.D., for independent medical examination. Dr. Hood authored a report containing his findings and opinions dated July 27, 2016. (Ex. B, p. 26) During interview, claimant reported he had not received any medical care since leaving the Mayo Clinic facilities. He described numbness and tingling of his feet; back pain; bowel and bladder incontinence; and an inability to walk without external supports, including bilateral AFOs and a cane. (Ex. B, p. 27)

Dr. Hood opined claimant suffered an acute compression fracture at L1 with cord injury of extreme significance. Due to a lack of recent imaging to determine the status of the arthrodesis and surrounding levels, Dr. Hood opined he was unable to provide a more current diagnosis. Dr. Hood opined claimant had not achieved MMI due to "unknown features." He opined claimant "absolutely" needed to be under the care of a physical medicine and rehabilitation specialist, as well as an orthopedic surgeon. (Ex. B, p. 28)

Dr. Hood opined claimant required studies to determine claimant's status and future treatment. He specifically recommended CT myelopathy to determine the status of the fusion and surrounding levels, and blood studies to evaluate claimant's kidney and liver function. Dr. Hood also noted claimant potentially required new orthoses. (Ex. B, p. 28) Dr. Hood opined he was unable to determine claimant's impairment level without further studies and further described claimant as "100% 'temporarily'" disabled. (Ex. B, p. 29)

Claimant testified he was originally confined to a wheelchair, but essentially re-learned to walk during his stay at the Lake City facility. Since his discharge, claimant does not believe he has improved noticeably. Claimant testified he is able to walk, but must use a cane for stability and bilateral leg/ankle braces. Claimant testified he lacks strength in his ankles, which results in poor balance. Due to nerve damage, claimant is also unable to move the toes on either foot. Claimant testified he is able to feel the regions directly below his knees, but lacks sensation of his calves and the outer portions of his ankles. (Claimant's testimony)

Claimant continues to use the assistive devices provided to him at the Mayo Clinic. Claimant also relies upon the assistance of his aunt and grandmother, with whom he resides. Claimant testified he may require assistance with bathing and/or toileting, as he continues to experience bowel and bladder incontinence. Claimant

testified the Mayo Clinic physicians told him there was no cure for his condition, as the nerves were significantly damaged in the fall. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether an employer-employee relationship existed at the time of the injury on August 29, 2014. Claimant contends he was an employee of Malmin Construction, while defendants contend claimant was an independent contractor or the employee of an independent contractor, LMG Construction.

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 Rule of Appellate Procedure 6.14(6).

Section 85.61(11) provides in part:

"Worker" or "employee" means a person who has entered into 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 claimant or claimant's decedent 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 Serv. 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. Where 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, however. 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 County, 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., the Iowa Supreme Court identified eight factors to consider in determining whether a worker is an independent contractor. The Court stated:

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. 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 v. Webster City Oil Co., 211 Iowa 847, 234 N.W. 254, 256–57 (1931).

Claimant bears the burden of proving he is properly considered an employee of defendant-employer. In order to determine if claimant has met his burden, each of the five factors identified in consideration of the existence of an employer-employee relationship should be considered individually.

The first factor requires consideration of the right of selection or to employ at will. In this instance, defendant-employer did not select claimant personally, nor select any of the other workers referred by Jose Luis on August 29, 2014. Michael selected Jose Luis in connection with the work to be performed but, at most, simply acquiesced to the workers selected by Jose Luis. It is also doubtful that defendant-employer controlled whether the working situation continued, as Michael testified he anticipated the workers would return to work following the long weekend, but none returned. The fact none of the three remaining workers returned to the project following claimant's injury leads to an inference that a decision impacting all of the men was made not to return; this decision was not made by defendant-employer.

The second factor for consideration is responsibility for payment of wages. In this instance, Fidel testified he was never paid by any party for the work the men performed on August 29, 2014. There is no evidence claimant was paid for his work. It is also unclear which entity would have ultimately been responsible for compensation of the workers. The evidentiary record contains some contradictory testimony on this question, I suspect due in large part to the number of intermediaries involved and the language barriers in place. Claimant testified Michael was to pay the men; however, claimant does not speak English, admittedly did not personally speak with Michael, and learned the majority of information regarding this side job through Fidel. Fidel testified Jose Luis informed him that Michael would pay the men at the conclusion of the work. Michael testified he did not discuss compensation with the workers or with Jose Luis. He noted the workers did not complete employment paperwork, as is expected of employees. This question is further complicated by defendant-employer's history of

hiring LMG Construction and thereby, Jose Luis, as an independent contractor, as evidenced by issuance of 1099s. In these past instances, LMG Construction submitted invoices to defendant-employer following completion of projects; it is therefore not unreasonable to assume this project would be handled in the same fashion.

The third factor for consideration is the right to discharge or terminate the relationship. The analysis of this factor is in similar to the analysis of factor (1), in that the workers brought on at the same time as claimant did not return to the job site following the date claimant was injured. This election not to return was seemingly coordinated or controlled by some other individuals or entities; it most certainly does not demonstrate control over the employment relationship by defendant-employer.

The fourth factor for consideration is the right to control the work performed. In this instance, claimant and the other workers were present to perform simple, manual labor. The duties did not require detailed, skilled or technical work. As a result, the question of control over the performance of tearing off roofing materials is of somewhat questionable actual importance. Defendant-employer did control the location or area of the building to which the workers for assigned for demolition. However, defendant-employer did not exercise any control over the manner in which the demolition was completed, did not assign specific workers to perform specific tasks, and did not assign working hours or break times.

The fifth factor for consideration is the identity of the employer as the authority in charge of the work or for whose benefit it is performed. The manual labor performed by the workers on the roof undoubtedly was designed to benefit defendant-employer. Defendant-employer commonly performs roofing tasks. In order to complete its obligation of installing new roofing for this customer, the old roofing must have first been removed. Therefore, the removal of the roofing by claimant and the other workers benefited defendant-employer.

However, this same form of reasoning could be applied to every task performed by a legitimate subcontractor on behalf of a general contractor. A general contractor is responsible for delivering a finished product to a customer. It is common for general contractors to utilize subcontractors to complete various aspects of the finished product, whether it be electrical, plumbing, carpentry or roofing. The general contractor benefits from performance of the subcontracted work, yet the general contractor is not legally the employer of each subcontractor or the employees of those subcontractors.

An independent contractor, such as a true subcontractor, is not an employee of the general contractor. Nor is an employee of that independent contractor an employee of the general contractor. It is, therefore, helpful and instructive, to analyze the eight factors outlined for consideration in whether a worker is an independent contractor. In this case, there was no written contract between any of the involved parties and entities regarding payment. LMG Construction carried on a roofing business and upon contact from defendant-employer, selected workers and directed the workers on when and where to appear for work. The workers utilized their own tools in performance of the work, while defendant-employer furnished supplies for individuals it considered employees. Defendant-employer did not exert control over the manner in which the job

was performed and simply indicated the old roofing was to be removed in a specific area. The job was short in duration, admittedly designed to last only two to four days. For this work, the workers were to be paid on a per day basis, yet it is unclear who was directly responsible for remittance of wages to the workers.

Upon analysis of the five enumerated factors in evaluating existence of an employer-employee relationship, as well consideration of the similar factors analyzed in an independent contractor relationship, I find claimant has failed to carry his burden of proving an employer-employee relationship existed between claimant and defendant-employer on August 29, 2014. As claimant has failed to carry his burden regarding the existence of an employer-employee relationship, claimant is not entitled indemnity or medical benefits related to the fall on August 29, 2014.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

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 26th day of April, 2017.


ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EJF/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.