

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ERNESTO CERDA,

Claimant,

vs.

THE R & A'S CONSTRUCTION LLC,
RAFAEL ALVAREZ,

Employer,

and

RIVERPORT INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5051992

ARBITRATION
DECISION

Head Note No.: 1402.10



STATEMENT OF THE CASE

Ernesto Cerda, claimant, filed a petition in arbitration seeking workers' compensation benefits from employers, R & A Construction, LLC, Rafael Alvarez and the insurance carrier, Riverport Insurance Company. The arbitration hearing was held on October 17, 2016. The parties filed post-hearing briefs on December 2, 2016 and the matter was considered fully submitted at that time.

The evidentiary record includes: Claimant's Exhibits 1 and 3 through 15; Defendant R & A Construction's Exhibits AA through CC; and, Defendant Rafael Alvarez's Exhibit AAA. At the hearing, the following provided testimony: Ernesto Cerda, claimant; Thelma Chavira, the owner of defendant R & A Construction and wife of Rafael Alvarez; and, defendant Rafael Alvarez.

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.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The existence of an employer/employee relationship at the time of the alleged work injury.

2. Whether the alleged injury of August 27, 2013, arose out of and in the course employment.
3. Entitlement to healing period/temporary total disability from August 27, 2013 through April 1, 2014
4. Entitlement to permanent partial disability.
5. Commencement date of permanent partial disability.
6. Rate, including determinations of: marital status; number of exemptions; and, gross weekly earnings.
7. Entitlement to Medical Reimbursement identified in Exhibit 13.
8. Entitlement to 85.39 Independent Medical Examination.
9. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 29 years old at the time of the hearing. (Transcript page 25) He completed ninth grade in Mexico and had no additional formal education. (Tr. p. 26)

Claimant's work history primarily involves employment in construction, and most of that work has been in roofing. (Tr. pp. 27-28)

On August 27, 2013, claimant was working on a roofing job in Waterloo, Iowa. He was standing on a 2 x 4 on the roof when it broke, causing him to fall from the roof to the ground. (Ex. 1, p. 2; 3b, p. 18) He hit his head causing injury. (Tr. pp. 28-29) Claimant has no memory of the events at the job site after the fall occurred. (Tr. p. 30)

After the fall, claimant was taken by ambulance to Allen Memorial Hospital. He was in and out of consciousness. (Ex. 3a, p. 1) The treating physician assessed claimant with a massive closed head injury with "poor prognosis." (Ex. 3a, p. 11) He was transferred by LifeFlight to the University of Iowa Hospitals and Clinics. (Id.) Claimant was immediately taken to surgery for "bifrontal craniectomy and cranialization of the frontal sinus." (Ex. 3b, p. 15) The surgery also included "[h]arvesting of pericranial graft with repair of traumatic CSF leak with pericranium and dural allograft," and "[t]emporalis muscle grafting." (Ex. 3b, p. 25) Claimant was discharged from in-patient care following extensive medical care on September 27, 2013. (Ex. 3b, p. 14)

Claimant describes his surgeries as involving a removal of a piece of his skull, removing a piece of his nose, skin grafting, and replacing pieces of bone in his skull. (Tr. pp. 35-36) He stated that his last surgery was in December, 2013, when the

portion of his skull that was initially removed, was replaced. (Tr. p. 36; Ex. 3b, p. 57) Claimant indicated that he lacks financial resources to continue with treatment, although he still has some medical concerns. (Tr. p. 37)

Following treatment, claimant has noted dizziness. (Ex. 3b, p. 48) He has also been concerned about a noise that he hears when tilting his head, along with asymmetry of the skull plate placement, and visual problems. (Ex. 3b, p. 59)

Claimant was seen by Erwin Cruz, M.D., of Preston Neurological Center for an independent medical examination (IME), who issued a report on August 12, 2015. (Ex. 1) Dr. Cruz found that claimant had difficulty with orientation, and his assessment indicated that claimant had lost his sense of smell and he had problems with balance. (Ex. 1, pp. 3-4) Dr. Cruz also recommended additional treatment including: evaluation for plastic surgery to address the frontal flap irregularity; treatment of post-concussive symptoms; further evaluation of gait imbalance, dizziness; and, an EEG study. (Ex. 1, p. 4) Dr. Cruz concluded that claimant's injuries were consistent with his August 27, 2013 fall and stated that due to the significant neurological issues, claimant would be prevented from driving, operating heavy equipment, and he should avoid exposure to extreme temperatures, heavy lifting and heights. (Ex. 1, p. 5)

In January, 2016, claimant had a seizure that resulted in medical treatment. (Ex. 3d, p. 6) Claimant had not had seizure episodes prior to the work injury. (Tr. p. 42)

The defendants do not deny that claimant was injured on August 27, 2013. Rather, the dispute is whether claimant was an employee of either of the defendant employers at the time of the injury. Claimant asserts in his brief that "the most appropriate finding is that Rafael Alvarez [individually] was Ernesto's employer . . ." (Claimant's Brief, p. 7).

When claimant fell, he was working on a crew led by Rene Cardona ("Rene"). (Tr. p. 32) However, claimant testified at hearing that he understood that Rafael Alvarez ("Rafael") was his employer. (Tr. p. 30) Rafael is the husband of Thelma Chavira ("Thelma") and worked for the benefit of R & A Construction. In response to discovery, Rafael denied being an employee, subcontractor or owner of R & A Construction. (Tr. pp. 64, 85-86) Thelma is the sole owner of R & A Construction. (Tr. p. 65) Claimant testified that around the time of his fall and injury in August, 2013, he had not heard of R & A Construction. (Tr. p. 30) Claimant also did not know Thelma. (Tr. p. 51; Ex. 8, p. 12)

R & A Construction contracted roofing work from a general contractor, Magee Construction. (Tr. p. 67) At the time claimant fell, he was working on a roof that was a Magee Construction project. (Tr. p. 96) In August 2013, R & A Construction had written subcontracts with Michael Taylor ("Michael") to perform roofing work in Waterloo, Iowa. (Ex. 7, pp. 127-128) There was no evidence of any written subcontracts or agreements with Rene or claimant. Claimant testified at hearing that he was uncertain if he had ever met Michael. He said that about 15 days before he fell, he might have met

him, when he was with Rafael. (Tr. p. 31) Claimant had never seen Michael before, and never saw him without Rafael. (Id.) In his deposition, claimant described talking with the person that he understood to be Michael and stated that "I don't think he knew anything about roofing." (Ex. 8, p. 11)

Claimant began doing roofing work in the United States in about 2003. (Tr. p. 53) In about 2009 he returned to Mexico for a few months during the winter. He then came back to the United States to do roofing work in the spring of 2010 and worked through that summer and fall and returned to Mexico again for the winter. He continued this pattern of working in the United States during the summer roofing season and wintering in Mexico each year until the work injury in August, 2013. (Id.)

Claimant found roofing work through Rene or other friends. (Ex. 8, pp. 5-6) Claimant is from the same town in Mexico as Rene and has known Rene all his life. (Tr. p. 46)

Prior to 2011, claimant had worked with Rene on roofing jobs, but it was not until 2011, that Rene was in charge of the crew. (Tr. p. 54)

In 2011, claimant did roofing work in Kansas City and in Iowa on a crew led by Rene. (Ex. 8, p. 5; Tr. pp. 50, 54) Claimant met Rafael in 2011 through Rene. (Ex. 8, p. 5) Claimant stated in 2011 Rafael would pay Rene for the work the crew performed and Rene paid claimant. He stated that "Rene Cardona was in charge of the group." (Ex. 8, p. 6) When asked how Rene would determine how much to pay claimant, he stated that it was based on the size of the homes they were working on. (Ex. 8, p. 7) Rene gave claimant daily instructions at the job site and paid him in cash. (Ex. 8, pp. 7-8) Rafael would provide the address of the home to be roofed to Rene and Rene would take the crew to the home to do the work. (Ex. 8, p. 8) Claimant did not work on any roofing jobs in 2011 beyond the jobs that came through Rafael to Rene. (Ex. 8, p. 6) Rene would tell the crew what time to start work and provided the tools to the crew to do the work. (Ex. 8, pp. 7-8) The crew rode together in a vehicle owned by Rene. (Id.)

In 2012, claimant was again working on a crew led by Rene, but this time, the crew was working in Indiana. (Tr. p. 55) Rene obtained roofing jobs through a person named Omar Coral, who claimant described as the contractor. (Tr. pp. 55-56; Ex. 8, p. 8) Again, Rene provided the tools and the transportation for the crew as he had in the past. Rene owned the tools and the vehicle. (Tr. pp. 55-56) Claimant testified in his deposition that he considered Rene to be his employer. (Ex. 8, p. 26) The questions and answers were as follows:

Q. And when you were working for Rene and Omar Coral and some unnamed company, who did you consider your employer to be?

A. Rene. The person in charge of the group was Rene. The person with the -- in charge of the company was Omar Coral

Q. I understand that. Who did he [claimant] consider his employer?
Who did Mr. Cerda consider to be his employer?

A. Mine?

Q. Yeah.

A. Rene Cardona.

(Ex. 8, p. 26) Claimant also testified at hearing as follows:

Q. So it's my understanding in 2012 you considered your employer to be Mr. Cardona?

A. He was the same that he was in 2013 or 2011. You know, he was in charge of the group. He was the owner of the tools and owner of the truck that we were using to work.

(Tr. p. 56)

In 2013, claimant worked part of the year in Mexico building homes and then came to Iowa in June, 2013. (Ex. 8, p. 9) Rene contacted claimant while he was in Mexico and told him that there was work available in Iowa. (Tr. p. 60) Rene was already working in Iowa when claimant arrived. Claimant came to Iowa to work with the roofing crew led by Rene. Rene helped claimant find lodging in a home, where he lived with others on the roofing crew. (Id.) Rafael testified that he had nothing to do with claimant joining Rene's crew in Iowa in 2013. (Tr. p. 81) Rafael further stated that he did not direct Rene to hire anyone for Rene's crew, and he did not tell Rene what days the crew was expected to work. (Tr. p. 82) There was no evidence that Rafael was involved in the decision to hire claimant.

Rene was paid by Rafael for the jobs that his crew completed. From those funds, Rene first paid himself for gas, and for the use of his vehicle and tools that he provided to the crew. (Ex. 8, pp. 9-10; Tr. pp. 47-48) He then paid claimant and others on the crew. (Ex. 8, pp. 9-10) Claimant was paid in cash. (Tr. p. 51)

Claimant stated in his deposition that Rene was in charge of the crew and that Rene made the decision about how much each person on the crew would be paid. Rene paid different amounts for different people in the group. He paid more to the skilled workers and less to the general laborers. (Ex. 8, p. 20) Claimant stated that Rafael had nothing to do with determining how much each person on the crew got paid. He stated that "the decision was made by Rene." (Ex. 8, p. 21) Rafael agreed that he had nothing to do determining how much claimant would be paid. (Tr. p. 81) Claimant was paid every week or every two weeks, but was only paid when Rafael was in town and available to pay Rene for the work the crew had done. (Tr. p. 62) Claimant understood that Rafael paid Rene based on the number, size and difficulty of the homes that the crew worked on. (Ex. 8, p. 25)

Claimant asserted in his deposition that Rafael provided safety equipment to the crew, including ropes. However, claimant stated that Rafael gave the ropes to Rene in 2011, and they had been in Rene's vehicle since that time. (Ex. 8, p. 10) He stated concerning the safety ropes that in 2013, "at that point they were Rene's," and "Rene had them in his van." (Id.)

Concerning the ordinary course of the work claimant performed, Rene would take the crew to the job site and Rene worked on the roof alongside the others on the crew. (Tr. p. 62) Claimant received daily direction from Rene. However, claimant believed that Rene took his orders from Rafael. (Ex. 8, p. 26)

Rafael provided the address of the houses that needed to be roofed to Rene. (Ex. 8, p. 11) Rafael told Rene which houses to work on each day. (Ex. 8, p. 26) Rafael would come to some of the job sites when the crew was there, but not all. He would tell Rene if something was not being done correctly, and tell Rene to fix it. (Id.)

Claimant was asked in his deposition, "who provided the roofing materials?" He responded: "I don't know. When we got to the home the materials were already present." (Id.) However, at hearing, claimant agreed that the roofing materials were provided by Magee Construction, the general contractor. (Tr. p. 58) Thelma also testified that the roofing materials were provided by the general contractor that hired R & A Construction. (Tr. p. 67) Claimant was not aware of any arrangements R & A Construction had with Magee Construction. (Id.) Claimant also was unaware of any relationship between Rafael and R & A Construction. (Tr. p. 59; Ex. 8, p. 26)

When the crew ran out of materials, claimant testified in his deposition that Rafael would provide additional materials to the crew to complete the job. (Ex. 8, p. 26) Rafael also provided the brackets and boards to Rene that the crew would use when the pitch of the roof was too steep to safely stand on without this equipment. (Ex. 8, p. 27) Claimant was injured when he was standing on a board provided by Rafael, when it snapped in half causing him to fall. (Tr. pp. 28-29)

Claimant was not aware of any documentation that would show his employment status in 2013. (Ex. 8, p. 11)

R & A Construction had no signed contracts or subcontracts with Rene. (Tr. p. 73)

Concerning Michael Taylor, as noted above, R & A Construction had written subcontracts with him to perform the roofing work in Waterloo, Iowa, in August 2013, including the date on which claimant was injured. (Ex. 7, pp. 127-128) The contracts were signed by Michael and Thelma, of R & A Construction. (Ex. 7, pp. 112-131) Claimant was only somewhat familiar with Michael and only saw him with Rafael. (Tr. p. 31) Thelma, the sole owner of R & A Construction, testified that Michael "was our subcontractor." (Tr. p. 67) She testified that Michael was the one responsible for handling the roofing work, which included being in charge of hiring laborers and paying

them for their work. (Tr. pp. 68-69) Yet, there was no evidence that Michael provided any laborers or gave any directions or instructions to anyone at the job sights. Michael's precise role is not at all clear. He appears to have been more of a pass through entity, as he apparently provided no laborers, no tools, no instruction to workers and no materials.

To add to the confusion, Rafael, on multiple occasions, has denied that he was an owner, an employee or subcontractor of R & A Construction. (Tr. pp. 85-86) He did not indicate in response to discovery that he was any of these things. (*Id.*) But, Rafael then agreed at hearing, that he was an employee of R & A Construction, but he did not recall ever receiving a W-2 from them. (Tr. p. 84) Nevertheless, he agreed that in 2013 he was "supervising" the roofing jobs of R & A Construction. (Tr. p. 86) Also, Thelma referred to Rafael as an employee of R & A Construction in her deposition. (Ex. 7, p. 24) She also stated that Rafael was the one that decided what contracts R & A Construction would take, how much to charge per job, and how much to pay subcontractors. (Ex. 7, p. 30) Rafael's involvement also included receiving the subcontractor payment checks from Thelma and delivering them to the subcontractor. (Ex. 7, p. 42) The subcontractor in 2013 was Michael, whose only participation seemed to be cashing the check and presumably returning the cash to Rafael, who then distributed cash to Rene. Rene then paid the wages to claimant and others on the crew in cash. (Ex. 8, pp. 28-30)

Thelma stated that she did not know who Rene was and Michael never told her that he was hiring another subcontractor. (Tr. pp. 73, 74) She also stated that she did not know who claimant was until a few days after he fell and was injured and that R & A Construction never paid claimant directly. (Ex. 7, pp. 8, 18)

Despite the hazy uncertainties of the relationships between the other participants, it would appear that claimant is an employee or worker as defined in Iowa Code section 85.61(11) because he was working at the direction of another. Claimant did not find his own place to live. He did not provide his own transportation to and from the job site. Claimant worked on a crew that he did not lead, he did not provide his own tools or the materials necessary to accomplish the job. Claimant was told what to do at the job site, he was told by virtue of the transportation provided when to start and end the work day. He was paid in cash for the labor he provided. Claimant was an employee and not a subcontractor.

However, the question is who was his employer? Claimant has identified defendants R & A Construction and Rafael, individually as potential employers. His brief focuses on Rafael, acting individually, as his employer.

Considering first whether R & A Construction might be claimant's employer, I note that Thelma, the sole owner of R & A Construction, testified that she did not know claimant until after he fell and was injured. (Ex. 7, p. 8) Claimant testified that in August 2013, he had not heard of R & A Construction and he did not know Thelma. (Tr. pp. 30-31) To the extent that Rafael is an employee or agent of R & A Construction, I

find that Rafael did not recruit or hire claimant to work with Rene's roofing crew. Claimant met Rafael only through Rene. (Ex. 8, p. 5) There was no evidence that Rafael ever disciplined claimant regarding his job performance or had authority to do so. Rafael did not hire or fire anyone on Rene's crew, nor did he direct or influence Rene to hire or fire anyone on his crew. (T. 82) I cannot find from the evidence presented that R & A Construction had the right of selection or to employ at will or the right to discharge or terminate claimant.

Regarding the responsibility for payment of wages, Thelma testified that R & A Construction never paid claimant a wage. Claimant did not assert he was paid wages directly by R & A Construction. To the extent that Rafael is an employee or agent of R & A Construction, I find that Rafael did not make any direct payment to claimant for wages, neither did R & A Construction directly pay claimant's wages. Further discussion of the payment of wages below also supports this conclusion.

Concerning the right to control the work, I find that R & A contracted with Magee Construction to perform the roofing work. (Ex. 7, pp. 112-131) It is clear, that Thelma, the owner of R & A Construction, did not give instructions at the work site or exercise any control of the work that was performed. Thelma testified that it was the responsibility of Michael to get the roofing work completed. However, as discussed above, it is not at all clear how Michael was involved in actually completing the work. Nevertheless, it is clear that R & A Construction, through Thelma, the owner, did not control the work.

To the extent that Rafael is an agent or employee of R & A Construction, he testified that he did not give any specific work instructions to claimant. (Tr. p. 81) There was no evidence that claimant received any specific work instructions or direction from Rafael either directly or through Rene. From the undersigned's observations at the time of the hearing, I note that Rafael and claimant speak Spanish and there would not appear to be any language barrier between Rafael and claimant, such that it would be necessary to pass instructions through another person. In other words, nothing would have prevented Rafael from giving directions to claimant or other individual members of the crew, if he was the employer of the crew members. However, the evidence does not indicate that such instructions were given. I find that any direction given by Rafael was to Rene.

I find under the evidence presented and the specific facts of this case, that R & A Construction did not have the right to control the work, meaning that they did not determine the mode and manner in which the work would be performed.

Considering whether R & A Construction was the authority in charge of the work and whether it was performed for their benefit, I find that R & A Construction had the authority to critique and demand corrections to errors or deficiencies and that R & A Construction therefore maintained the authority in charge of the work, which was clearly done for the benefit of R & A Construction.

Based on the evidence as a whole, I find that the majority of the evidence leads the undersigned to find that R & A Construction was not the employer of claimant in August, 2013.

Considering whether Rafael, individually might be claimant's employer, I note that he did not personally recruit or hire claimant to work, rather Rene recruited claimant to work on his crew in Iowa. As discussed above, there was no evidence that Rafael ever disciplined claimant regarding his work performance, or had any influence or control over Rene regarding the hiring, firing or discipline of claimant. I cannot find from the evidence presented that Rafael had the right of selection or to employ at will or the right to discharge or terminate claimant.

Regarding the responsibility for payment of wages, the evidence indicates that Rafael paid Rene for the work performed by the crew. This is complicated by the insertion of Michael who apparently received payment in the form of a check from R & A Construction and his only role seemed to be cashing the check and presumably returning some or all of the cash back to Rafael. Obviously, R & A Construction would not have paid both Michael and Rene for the same work.

After turning the check into cash, Rafael paid Rene, who then independently determined how much money to pay himself for gas, the use of his tools, and the use of his vehicle. Rene then made the decision about how much each member of the crew would be paid. Claimant stated that Rafael had nothing to do with determining how much each person on the crew got paid. He stated that "the decision was made by Rene." (Ex. 8, p. 21) There was no evidence that Rafael paid wages directly to claimant. Although claimant testified that Rene and the crew would not be paid unless Rafael was in town, which meant that the crew was sometimes paid weekly and sometimes biweekly. From the totality of evidence concerning wages and particularly the fact that it was Rene who determined how much claimant would be paid and that Rafael had nothing to do with determining how much claimant would be paid, I cannot find that Rafael had the responsibility for payment of wages to claimant.

Concerning the right to control the work I find that Rafael was physically present at some, but not all of the work sites. Thelma testified that Rafael's responsibility was to "supervise the contracts of the houses that we take." (Tr. p. 66) Rafael agreed that he was "in Iowa to supervise roofing work that Magee Construction had hired R & A to do." (Tr. p. 83) I find that Rafael had the ability to give instructions to Rene regarding the various projects, including instructions to correct certain work as needed. However, Rafael did not, from the evidence provided, give instructions to claimant. Nor did he give instructions directly to claimant via Rene to pass along to claimant. I find that although Rafael did critique the work of the crew as a whole from time to time on some job sites and instruct Rene to fix the problems, he did not specifically control the work of claimant or have any apparent right to do so. However, I find that he, on behalf of R & A Construction retained the authority in charge of the work performed such that R & A Construction would receive the product (an appropriate roofing job) that they paid for. Also, the work was performed for the benefit of R & A Construction. However, the

relationship between Rafael and R & A Construction is so poorly documented and intertwined, that I also find the work was performed for Rafael's individual benefit as well.

Claimant testified that he understood his employer to be Rafael. (Tr. p. 30) However, claimant had worked in previous years on a crew led by Rene who located roofing jobs not only with Rafael, but with others, for example in 2012, Rene found work for his crew with a person named Omar Coral in Indiana. (Ex. 8, p. 26) At that time, claimant considered his employer to be Rene. (Id.) There does not appear to be any significant difference between claimant's relationship to Rene in 2012 and 2013. It is unclear why claimant changed his understanding of who his employer was from 2012 to 2013. Particularly when claimant testified that Rene, in 2012, "was the same that he was in 2013 or 2011. You know, he was in charge of the group. He was the owner of the tools and owner of the truck that we were using to work." (Tr. p. 56)

Rafael did not give directions or instructions to claimant regarding his work. Neither did Rene appear to be an intermediary for instructions from Rafael to claimant. Rafael did not instruct Rene to hire or recruit claimant. Rafael did not discipline claimant. Rafael was not involved in the determination of how much claimant would be paid for his work. Rafael provided no tools to claimant.

Based on a review of the totality of the evidence, I cannot find that Rafael, individually was claimant's employer.

I was not asked to decide whether Rene was claimant's employer. However, I note that it was Rene that: 1) recruited claimant to come to the United States in 2013 to work on his roofing crew in Iowa; 2) provided claimant with tools to do the work; 3) provided claimant with transportation to and from the work site and therefore instructed claimant when to begin and end the work day; 4) gave claimant direction and instructions at the work site; 5) was the sole decision maker regarding how much claimant would be paid; 6) and had authority to hire and discharge claimant; and, 7) the jobs benefited Rene, who personally profited from the work being performed.

This is a troubling case. The vagaries and questionable business practices of the entities involved cast a disreputable haze over this matter. As I have found above, claimant, is not a subcontractor and has all the earmarks of an employee, who now finds himself, with mountainous medical debt, a substantial period of time during which the injury prevented employment and likely permanent impairment. However, claimant has failed to carry his burden of proof that he was an employee of the named defendants. Therefore, I am unable to move forward to the remaining issues in this case, which are now moot.

CONCLUSIONS OF LAW

The first issue is whether claimant was an employee of R & A Construction or Rafael Alvarez, or both on August 27, 2013, when he was injured.

Iowa Code section 85.61(11) defines an “employee” as “a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer.”

The Iowa Supreme Court has identified five factors to be considered for the determination of an employer-employee relationship, which are:

1) The right of selection, or to employ at will; 2) Responsibility for payment of wages; 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, 505 (Iowa 1981), see also McClure v. Union, et al, Counties, 188 N.W.2d 283, 285 (Iowa 1971).

In Mallinger v. Webster City Oil Co., 234 N.W. 254, 211 Iowa 847 (1929), 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).

It is also remembered that the workers' compensation statute is to be liberally interpreted with a view toward providing benefit to the worker and the worker's dependents insofar as the statute permits. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980). Irish v. McCreary Saw Mill, 175 N.W.2d 364, 368 (Iowa 1970).

In addition, it is noted that an individual may be the employee of more than one employer. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503, 505 (Iowa 1981), citing Jones v. Workmens' Compensation Appeals Board, 20 Cal. App. 3d 124, 97 Cal Rptr. 554 (1971)

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).

I have found above that under the specific facts of this case as presented, I am unable to find that either R & A Construction or Rafael individually was the employer of claimant at the time of his fall on August 27, 2013.

As stated above, I was not asked to determine whether Rene Cardona was claimant's employer. However, I note that claimant had a long standing working relationship with Rene Cardona and had worked on a roofing crew led by Mr. Cardona in the years prior to his injury. During those years, claimant worked in different locations and Rene found work through different sources, not just through Rafael Alvarez. In 2012, claimant worked for Rene in Indiana and considered Rene to be his employer. Claimant testified that Rene was the same in 2012 as he was in 2011 and 2013, providing tools, transportation, etc. There was not a reasonable explanation for why claimant no longer considered Rene to be his employer in 2013 when the injury occurred.

I considered above whether giving corrective instructions to ensure a proper final product is "controlling the work." Having the "right to control the work," means having the "right to determine, the mode and manner of accomplishing a particular result." Schlotter v. Luedt, 123 N.W.2d 434, at 436, 255 Iowa 640, at 643 (Iowa 1963) In the present case, I conclude that the authority Rafael Alvarez exercised to point out deficiencies in the work and instruct Rene Cardona to fix them, is not equivalent to having the authority to "determine the mode and manner" in which the work was to be performed. (Id.) For example, Rafael did not instruct claimant either directly or through Rene concerning the steps or instructions of how the job was to be performed. Rafael's supervision of the work as he described it, I conclude was to ensure the quality of the final product, not to give particular or specific instructions regarding how to create an acceptable final product.

As mentioned above, this is a troubling case. Claimant, was severely injured. However, as stated above, under the unique facts of this particular case, I am unable to find that claimant has carried his burden of proof to establish that either named defendant was his employer at the time of the injury.

I conclude that the remaining issues are moot.

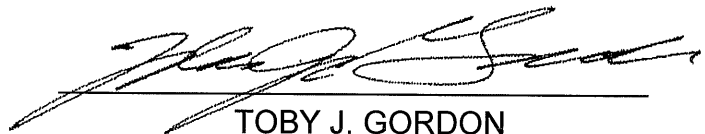
ORDER

IT IS THEREFORE ORDERED:

Claimant shall take nothing.

Each party shall pay their own costs.

Signed and filed this 26th day of October, 2017.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Emily Anderson
Laura Seelau
Attorneys at Law
425 – 2nd St. SE, Ste. 1140
Cedar Rapids, IA 52401-1848
eanderson@fightingforfairness.com
lseelau@fightingforfairness.com

Jean Z. Dickson
Attorney at Law
1900 E. 54th St.
Davenport, IA 52807
jzd@bettylawfirm.com

TJG/kjw

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.