BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JASON LEE TYER, Claimant, vs. B-20 AUTO, INC., Employer, Defendant.	File No. 20007729.01 ARBITRATION DECISION Head Notes: 2001, 2002

I. STATEMENT OF THE CASE.

Claimant Jason Lee Tyer seeks workers' compensation benefits from the defendant-employer, B-20 Auto, Inc. (B-20). The undersigned presided over an arbitration hearing on May 27, 2022, held using internet-based video by order of the Commissioner. Tyer participated personally and through attorney Richard R. Schmidt. The defendant participated by and through attorney D. Brian Scieszinski.

II. ISSUES.

Under rule 876 IAC 4.19(3)(*f*), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

1) Did an employer-employee relationship exist between Tyer and B-20 at the time of the alleged injury?

2) Did Tyer sustain an injury arising out of and in the course of his employment with B-20 on July 10, 2018?

3) What is the nature and extent of permanent disability, if any, caused by the alleged injury?

4) What is the commencement date for permanent partial disability benefits, if any are awarded?

5) Is Tyer entitled to recover the cost of an independent medical examination (IME) under Iowa Code section 85.39?

6) Is Tyer entitled to taxation of the costs against the defendant?

III. STIPULATIONS.

In the hearing report, the parties entered into the following stipulations:

1) The alleged injury is a cause of temporary disability during a period of recovery, but Tyer's entitlement to temporary or healing period benefits is no longer in dispute.

2) If Tyer is entitled to permanent partial disability benefits, the weekly rate of compensation is the statutory minimum of two hundred eight and 78/100 dollars ($208.78).

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

IV. FINDINGS OF FACT.

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 6;
- Claimant's Exhibits (Cl. Ex.) 1 through 12;
- Defendant's Exhibit (Def. Ex.) A; and
- Hearing testimony by Tyer and Gene Baker, president and owner of B-20.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

As an initial matter, B-20 argues Tyer's testimony about his brushes with the law undermines his credibility. Tyer confirmed during testimony that he had a criminal history that had not given him trouble when finding employment. (Hrg. Tr. pp. 46–52) The record shows this to be true. (Hrg. Tr. pp. 51–52) Further, the undersigned draws no negative inference against Tyer for currently pending criminal charges that had not resulted in convictions or the fact that he did not consider such charges when testifying about his history of criminal convictions. (Hrg. Tr. pp. 50–53) It is a truism under American law and culture that a person is innocent until proven guilty and there is an insufficient basis in the evidence from which to conclude the State of Iowa had proven Tyer guilty at the time of hearing. Further, Tyer maintained his innocence with respect to the allegations against him. (Hrg. Tr. pp. 50–53)

Tyer was fifty years of age at the time of hearing. (Hrg. Tr. p. 11) In 2013, he achieved his GED. (Hrg. Tr. p. 11) Tyer obtained his welding certification in 1987. (Hrg.

Tr. p. 16) As of the time of hearing, he had not participated in any other postsecondary training or education program.

After leaving high school, Tyer's primary employment for about thirty-four years was seasonal work building and repairing docks in Clear Lake, Iowa. (Hrg. Tr. p. 12) Each year, he would work between April and June placing docks in the lake and remove them from September through November, in accordance with Iowa Department of Natural Resources regulations. (Hrg. Tr. pp. 15–16) Tyer earned between sixteen and eighteen dollars per hour when working on docks and claimed unemployment insurance benefits while on layoff due to lack of work during the off-season. (Hrg. Tr. p. 16)

B-20 is a salvage yard for car parts located outside of Clear Lake. (Hrg. Tr. pp. 20–21) Gene Baker is the president of B-20. (Hrg. Tr. p. 56) There are no other corporate officers at B-20. (Hrg. Tr. p. 64) Baker classifies every B-20 worker as an independent contractor and gives them 1099 forms for tax purposes. (Hrg. Tr. pp. 64, 67–68) Baker testified B-20 did not have a workers' compensation insurance policy because all of the corporation's workers were independent contractors. (Hrg. Tr. p. 59) There is an insufficient basis in the record from which to make findings with respect to how many workers other than Tyer B-20 had working for it at the time in question or their job titles and duties.

Tyer had acquired car parts from B-20 in the past but had never considered working there until he saw a job posting by B-20. (Hrg. Tr. pp. 19–20, 56) After Tyer completed an online application, an individual contacted Tyer on behalf of Baker and set up a meeting with Baker. (Hrg. Tr. pp. 19–20) Tyer had a meeting with Baker and began working for B-20 afterwards. The parties dispute the agreement Tyer and Baker reached regarding Tyer's work for B-20.

Tyer testified Baker hired him to pull parts and strip tires off wheel rims. (Hrg. Tr. p. 21) He averred they agreed his work week would be five or six days per week. (Hrg. Tr. p. 22) While Tyer cautioned he could not remember what exactly his hourly rate of pay was, he also testified he thought his wage was about sixteen dollars per hour. (Hrg. Tr. pp. 21, 54)

When Tyer started working for B-20, he was behind on paying child support. (Hrg. Tr. p. 37) Tyer gave conflicting testimony about how B-20 paid him. On direct examination, Tyer averred he and Baker agreed that B-20 would pay him in cash and that he received pay once per week. (Hrg. Tr. p. 21) On cross-examination, Tyer testified B-20 paid him via check. (Hrg. Tr. pp. 53–54) Tyer further testified B-20 did not withhold any taxes from his pay. (Hrg. Tr. p. 54)

Baker testified the "help wanted" ad did not specify whether B-20 was seeking an employee or independent contractor to work for it. He averred he concluded Tyer did not have the mechanic skill to pull parts without damaging the part or other components of the vehicle from which it was pulled. Consequently, Baker offered Tyer work as an independent contractor "spinning tires," which entailed removing rubber wheels from aluminum rims so the aluminum rims could be sold. (Hrg. Tr. pp. 56–57)

According to Baker's testimony, he hired Tyer solely to remove tires from wheels; he did not hire Tyer to pull parts from vehicles for customers. (Hrg. Tr. p. 62) He testified that if Tyer were pulling a part at B-20, he would be a customer and would be paying for the part, the same as when he pulled parts in the past. (Hrg. Tr. p. 63) Baker further testified that he told Tyer that he could work whenever he wanted removing rubber tires from aluminum tire rims so B-20 could sell the rims, which had value because they were made of aluminum. (Hrg. Tr. pp. 56–57) No B-20 representative directed his actions while he was working. (Hrg. Tr. pp. 59–60)

However, there was one exception to the general rule that B-20 did not direct Tyer's actions. According to Baker's testimony, B-20 hired two workers that it allowed to use loaders owned by B-20 to lift vehicles. (Hrg. Tr. p. 61) Baker only wanted those two workers to use the loaders to lift vehicles and directed Tyer not to use them in that way. (Hrg. Tr. pp. 61–62) Baker testified Tyer could drive the loader but that he instructed him not to use it to lift vehicles. (Hrg. Tr. pp. 62–63)

Baker testified he agreed to pay Tyer one dollar per tire. (Hrg. Tr. pp. 57–58) He further testified that he may have paid Tyer using a check, but he does not remember doing so, and the majority of the time he paid him in cash. (Hrg. Tr. pp. 57–58) Baker agreed with Tyer's testimony that B-20 did not withhold any taxes from Tyer's pay. (Hrg. Tr. pp. 54, 59) The weight of the evidence establishes B-20 paid Tyer in cash to help him avoid possible wage garnishment for child support he owed his ex-wife that was past due.

There is no evidence in the record other than Tyer's testimony that B-20 paid him via check. Tyer presented no check stubs or written evidence that he deposited or cashed a check from B-20. This undermines the credibility of Tyer's testimony that B-20 paid him by check. The weight of evidence establishes B-20 paid him in cash.

Tyer testified he would bring his own tools to perform the work so that he would not have to go through any other workers' gear. (Hrg. Tr. p. 22) There is no indication in the record that B-20 provided him with any tools. Thus, the weight of the evidence establishes Tyer provided his own tools when performing work for B-20.

Tyer testified B-20 hired him to work full time, five or six days per week. There is no documentary evidence supporting this claim, such as time sheets or a work schedule. Nor is there any documentary evidence of communication between Tyer and B-20 regarding his hours worked. And there is only general testimony regarding the timing of B-20 paying Tyer for his work, with no evidence establishing the dates of his paydays or the amount B-20 paid him.

Baker testified he agreed to pay Tyer by the tire and Tyer was free to work when and as often as he wanted. In Baker's estimation Tyer completed work on between three hundred and four hundred tires over the course of his three weeks working at the scrap yard and that B-20 paid him in cash for the work. The lack of evidence to the contrary and Tyer's unreliableness as a historian make Baker's testimony most persuasive.

Both Tyer and Baker testified about a written document that expressly stated B-20 would not be responsible for any injuries Tyer sustained while performing work for the corporation. (Hrg. Tr. pp. 54, 58–59) The document is not in evidence. Baker categorized the document as a way to give Tyer notice that he was responsible for getting medical care for any injury he might sustain on B-20 property. (Hrg. Tr. pp. 58–59) Tyer did not describe the document and testified he did not remember signing anything. (Hrg. Tr. p. 54) There is an insufficient basis in the evidence from which to make findings of fact about the substantive contents of the document and its nature.

On July 10, 2018, Tyer needed to remove a part from a vehicle in the scrap yard. (Hrg. Tr. p. 25) He testified he "got an order" for the part but did not describe the method by which he received the order or identify the person who gave it to him. (Hrg. Tr. p. 25) As discussed above, Baker contends B-20 did not direct Tyer to remove parts and that if he was removing a part, it was as a customer, not a B-20 worker because the activity was outside the scope of his job duties. (Hrg. Tr. pp. 61–62) Baker's testimony is more specific and therefore more persuasive. The weight of the evidence establishes Tyer was acting in a personal capacity, outside the scope of the work B-20 hired him to do, when he was pulling a part on the date in question.

Tyer could not remember whether the part he needed to pull was a starter or alternator, but he did recall that he needed to lift the vehicle up in the air to remove it. (Hrg. Tr. p. 25) Tyer was not authorized to use the loader at the time, but he nonetheless drove it toward the vehicle from which he needed to extract a part. Something went wrong with the brakes, which caused a crash. (Hrg. Tr. pp. 25–26) The crash knocked Tyer unconscious. (Hrg. Tr. pp. 26–27)

Coworkers came to his assistance and summoned an ambulance, which took him to the emergency room at Mercy Medical Center – North Iowa. (Hrg. Tr. p. 27; Jt. Ex. 2, pp. 13–15; Jt. Ex. 5) Pictures taken after the incident show multiple points of impact around the area of his right eye. (Hrg. Tr. p. 27) Tyer required stitches in his head to close wounds. (Hrg. Tr. p. 27; Jt. Ex. 2, pp. 13–15; Jt. Ex. 3, pp. 16–20) He sustained a traumatic brain injury from the impact. (Hrg. Tr. p. 27; Jt. Exs. 3, 4, 5)

Tyer applied for disability benefits from the federal Social Security Administration (SSA). (Hrg. Tr. pp. 24–25, 32) The SSA found Tyer eligible for benefits. (Hrg. Tr. pp. 24–25, 32) Tyer collects disability benefits from the SSA each month. (Hrg. Tr. pp. 24–25, 32)

At the time of hearing, Tyer suffered from memory loss, general fatigue, and anger issues. (Hrg. Tr. p. 28) He credibly testified his biggest problem after the injury is the loss of balance he continues to experience. (Hrg. Tr. p. 28) Tyer also endures a constant headache and will also occasionally blackout. (Hrg. Tr. pp. 28, 34–35)

Tyer continued to treat with Dr. Shah at the time of hearing. (Hrg. Tr. pp. 27–28) Tyer periodically goes to Dr. Shah to undergo a procedure in which they withdraw blood, mix it with medicine, and transfuse the blood with medicine back into his body. (Hrg. Tr. pp. 30–31) They are hopeful that her care will help Tyer to ultimately be able to

return to work. (Hrg. Tr. p. 30) Tyer is also taking anti-depressant medication. (Hrg. Tr. p. 31)

Tyer's brain injury has not impacted his long-term memory; in particular, he still has extensive knowledge about working on docks due to his past training and experience in the field. (Hrg. Tr. pp. 23, 33) Even though he cannot physically perform the work involved in building, repairing, and removing docks, he is a useful resource for those who can do the work. (Hrg. Tr. p. 33) At the time of hearing, Tyer was providing advice voluntarily to people working on docks. (Hrg. Tr. p. 33) Most of the time, he fields phone calls seeking his advice on building, repairing, and removing docks. (Hrg. Tr. p. 33)

V. CONCLUSIONS OF LAW.

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

Under the Iowa Workers' Compensation Act, an injured employee is entitled to benefits relating to injuries arising out of and in the course of the workers' employment. See Iowa Code § 85.3(1). Without an employer-employee relationship between the injured worker and defendant-employer, the employee is not entitled to workers' compensation benefits for the disability caused by an injury. See Rouse v. State, 369 N.W.2d 811, 813–14 (Iowa 1985). In the present case, the parties dispute whether an employer-employee relationship existed at the time of the injury.

The legislature has defined "worker" and "employee" for purposes of workers' compensation to mean "a person who has entered into employment of, or works under contract of service, express or implied, or apprenticeship, for an employer. . . ." Iowa Code § 85.61(11). "No legal distinction exists between the disjunctive phrases in this definition. For employment to be found, there must be a 'contract on the part of the employer to hire and on the part of the employee to perform service.'" Rouse, 369 N.W.2d at 814 (quoting Henderson v. Jennie Edmundson Hosp., 178 N.W.2d 429, 431 (Iowa 1970)).

Under the Iowa Workers' Compensation Act, employment is

> a mutual arrangement between the employer and employee under which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. To thrust upon a worker an employee status to which he has never consented . . . might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common-

> law damages. This reasoning applies not only to the question whether there is any employment relationship at all, but also to the question whether one of two or more persons is an employer. In such cases, with all the elements of employment having been established as to *some* employer, the issue may be solely whether the particular defendant made a contract with the particular employee.

Parson v. Procter & Gamble Mfg. Co., 514 N.W.2d 891, 893 (Iowa 1994) (quoting Rouse, 369 N.W.2d at 814) (alterations in Rouse).

"Thus, the threshold determination in deciding whether a worker falls into the workers' compensation scheme is whether the worker entered into a contract of hire, express or implied." Id. "The intent of the parties is the overriding element in determining whether an employment contract existed." Rouse, 369 N.W.2d at 814. However, the parties' intent is not always dispositive because the Iowa Supreme Court has held the parties' stated intent must be ignored if their agreement exists to avoid our workers' compensation laws.

The Iowa Supreme Court has articulated a five-factor test to aid in the determination of whether an employer relationship existed between a workers' compensation claimant and defendant-employer:

1) 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 being performed.; Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503, 505 (Iowa 1981); see also Parson v. Procter & Gamble Mfg. Co., 514 N.W.2d 891, (Iowa 1994); Rouse, 369 N.W.2d at 814.

When applying the test,

> "The most important consideration in determining whether a person giving service is an employee or an independent contractor is the right to control the physical conduct of the person giving service. If the right to control, the right to determine, the mode and manner of accomplishing a particular result is vested in the person giving service he is an independent contractor, if it is vested in the employer, such person is an employee."

Nelson v. Cities Serv. Oil Co., 259 Iowa 1209, 1216, 146 N.W.2d 261, 265 (1966) (quoting Schlotter v. Leudt, 255 Iowa 640, 643, 123 N.W.2d 434, 436 (1963)).

The factor of control is the one that most supports the conclusion that Tyer and B-20 did not form an employer-employee relationship. There is an insufficient basis in the evidence from which to conclude B-20 hired Tyer as a full-time employee and paid him hourly. The weight of the evidence shows B-20 hired Tyer to remove wheels from aluminum tire rims so the rims could be sold and paid him on a per tire basis. B-20 did not set his work schedule or control how he performed the work. Tyer worked when he wanted and used his own tools when spinning tires. B-20 asserted little control over Tyer's work. These facts make it more likely than not Tyer was an independent contractor at the time of injury.

As found above, Tyer has failed to meet his burden of proof on the question of intent. There is an insufficient basis in the evidence from which to conclude the parties intended to create an employer-employee relationship. Rather, the weight of the evidence shows the parties intended to create an independent contractor relationship.

Because Tyer has failed to prove by a preponderance of the evidence that he and B-20 had an employment relationship, his July 10, 2019 injury is outside the purview of the Iowa Workers' Compensation Act. B-20 is therefore not responsible for providing care for the injury or paying for an independent medical examination. Nor is Tyer entitled to workers' compensation benefits for any disability caused by the injury.

VI. ORDER

Based on the above findings of fact and conclusions of law, it is ordered:

1) Tyer shall take nothing more from this case.

2) The parties shall be responsible for paying their own hearing costs. Each party shall pay an equal share of the cost of the transcript.

Signed and filed this 26th day of October 2022.

BEN HUMPHREY
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Richard R. Schmidt (via WCES)

D. Brian Scieszinski (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.