BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID DICUS, Claimant, vs. WINDOWS AMERICA, Employer, and IOWA MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5042736 APPEAL DECISION Head Note Nos.:

STATEMENT OF THE CASE

Defendants Windows America, employer, and Iowa Mutual Insurance Co., insurer, filed a notice of appeal on November 10, 2014. This case was heard on January 7, 2014. It was considered fully submitted before the deputy workers' compensation commissioner on March 18, 2014. The arbitration decision was filed on October 20, 2014. On April 27, 2016, this matter was delegated to the undersigned to issue the final agency decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 17A.15 and 86.24, I affirm the proposed arbitration decision of October 20, 2014. I provide the following analysis:

ISSUES ON APPEAL

1) Whether the deputy commissioner erred in finding the claimant was an employee of the defendant employer;
2) Whether claimant is entitled to a running healing period award;
3) Whether the rate was properly calculated.

FINDINGS OF FACT

The findings of fact made by the deputy commissioner are adopted herein with the following additional findings:

The claimant is David Dicus and the employer is Windows America, insured by Iowa Mutual Insurance Company. The primary issue on appeal is whether there is an employee/employer relationship between Mr. Dicus and Windows America.

The claimant had been working for defendant since at least late 2005 installing windows. The parties agreed that he would be paid on a per-window basis for window installation and other work, mostly gutter installation, at an hourly rate. Another worker, Nicholas Wayne Faulk, was paid in the exact same way. (Ex. 3) Both sides made credibility arguments. The deputy commissioner made one specific credibility finding: "I find the testimony by defendants' witnesses that claimant was not always punctual and at times difficult to reach credible." (Arbitration Decision, page 9) The deputy made an oblique credibility finding against the defendants in that the owners testified that claimant turned down many jobs and worked for several other businesses. In rejecting these claims, the deputy commissioner wrote that there wasn't "convincing evidence that claimant rejected a large number of jobs" or that "claimant was engaged in any substantial work for anyone other than Windows America." (Arb. Dec., p. 8)

Ms. Beller, one of the co-owners of Windows America, did not appear credible. Her testimony was vague and evasive and she contradicted herself frequently. For instance she claimed that the claimant worked only two days a week but when confronted with his 1099s which showed fairly steady earnings between 2005 and 2009 of anywhere between $22,000 and $17,000 a year, she then modified her testimony to indicate that he may have worked more days per week. She also indicated that in the beginning the claimant was much more reliable and that his work attendance became increasingly erratic. However the 1099s reveal claimant had earned approximately $20,000 in 2006 and in 2009 he made $22,000. In 2011, he made $14,000.

She claimed that he often worked other jobs and would refuse to come to work because of these other jobs. When confronted in cross-examination about what details and/or evidence she had to confirm this, she admitted that she knew nothing about these other jobs other than that which she had heard.

An example of her testimony is as follows:

Q: What else was he doing on the side?

A: I -- I'm not sure. I think there's Dykes -- Dykes Construction, Irwin Painting, the snow removal, siding and deck jobs. That's what I would have been familiar with.

Q: Let's talk about Dykes Construction. I don't know anything about it. What do you know about it?

A: Nothing.

Q: Well you know Dave was working there.

A: That's what we would -- he would either tell us, or he would tell Nick and Nick would tell us or -- And I don't even know that that's the name, but it's a relative's business is what I understand.

Q: How often would he work there?

A: I don't know.

(Ex. 4, p. 60-61)

At one point the claimant did leave to work at Porsche.

Q: But he left you because -- In fact, he left you, did he not, at that time because he was concerned about you not deducting taxes and considering him an employee?

A: That was a conversation.

(Ex. 4, p. 64-65)

In the job service exhibits, Ms. Beller claimed that Dave had injured himself while golfing and was "quite vocal about it." When questioned about it, she was unable to identify what year he was injured, what arm was injured, and remembered only that it was "he was throwing a ball, and he felt a recoil in his elbow" while playing golf. (Ex. 4, p. 67)

The testimony of Mr. Faulk was relied upon in part by the deputy. Mr. Faulk worked for the defendant seven or eight years beginning in 2005 or 2006. He was hired to install windows in addition to gutters. He was paid for the window installation by the piece or by the window. He never had any discussion with his employer regarding his status as an independent contractor versus an employer.

He was not explicitly told that he needed to be at work at any time but he would show up between 8:00 and 8:30 to begin work. In contrast, the claimant showed up when he wanted to and worked when he wanted to. Both workers would continue on the job until it was completed.

Mr. Faulk believed he was an employee. He also believed that he was expected to install whatever orders they had received. He did not pick or choose nor did he work for any other employer. He acknowledged that he worked with the claimant on several occasions and that they often helped one another out.

He further corroborated the claimant's statements that the cargo vans that they drove to the jobs were the property of the defendant employer and that those vans contained an air compressor as well as a ladder that would assist them in performing these jobs.

When asked about whether claimant was working at the same time for another company, Mr. Faulk testified that claimant had done some work with a few golfing buddies but it was infrequent and "after hours" or "off hours" from when the regular installation of windows for the defendant occurred. He also did not recall any time in which the claimant refused to do a job.

Ms. Beller testified the claimant did beautiful work but that he was difficult because he was often leaving the job site to attend to errands, that he would attend concerts and it would be difficult to contact him afterwards, that he preferred to work outdoors and that he would work on the jobs in the order that he wanted.

During her deposition, she identified three instances in which claimant refused to do particular jobs: one involved a window that was very high off the ground and another involved an individual that he didn't personally like.

According to the statute, an employee is "a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer . . . ." Iowa Code Section 85.61(11). Factual disputes are resolved in favor of finding employment status. See Daggett v. Nebraska-Eastern Exp., Inc., 107 N.W.2d 102, 105 (Iowa 1961).

In Nelson v. Cities Service Oil Co., 146 N.W. 2d 261, 265 (Iowa 1967), the Iowa Supreme court pointed to the following five factors in determining whether an employee /employer relationship existed. The test is as follows: (1) the right of selection, or to employ at will, (2) responsibility for the payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) the identity of the employer as the authority in charge of the work or for whose benefit it is performed. Id.

Defendants urge a finding that claimant is an independent contractor.

When the issue is an individual's status as an employee versus an independent contractor, the Nelson court has set forth an eight factor test. Id. (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. Id. at 264-65.

A factual table of the Nelson factors is as follows:

FOR EMPLOYMENT	FOR INPENDENT CONTRACTOR
	No written contract.
He was paid on an hourly basis for assisting Mr. Faulk and when unloading trucks.	Claimant was paid by the piece. Initially claimant was paid $35.00 per window and he then bargained it up to $50.00 per window depending on the project. Claimant would request and receive pay at different times during his employment. Payment was not always made on a regular basis. He did not always turn in his timesheets. However, claimant was generally paid on a Friday.
	No direct supervision. Claimant was given control as to how to carry out the installation of the window and when the installation occurred.
Claimant did not hire assistants. When he needed help, as was often the case, he would be assisted by Nick Faulk, another worker retained by the defendant.	
Claimant used his hand tools but defendant provided all the materials including the windows, the wrapping, the break (a metal bending machine). Claimant testified that he owned his own break but always used the defendant employer's. Ms. Beller admitted that the break was an essential component to finishing any job. Claimant also drove a van owned by the defendant employer and wore shirts and	Claimant wore his company attire off the job as well, while drinking and socializing.

sweatshirts with the logo of the company while on the job. Claimant began driving his own vehicle in 2011 and Mr. Faulk began driving the company van.	
	Defendant did not control the progress of the work except as to the final results. Claimant was often late to work, difficult to get a hold of, and would sometimes refuse to do certain jobs for individuals he did not like or if the installation was more difficult than he preferred.
Sales and installation of windows was the primary purpose of the defendant. The claimant was injured while installing a window. When he did work for the defendant, he either installed windows, assisted another worker in installing windows, performed gutter installation at the request of the defendant, and assisted in the loading and unloading of the company van.	
	Claimant installed windows for family members and friends.

The Nelson court also suggests that the fact-finder examine the intent of the parties. Defendant adamantly maintains that claimant was hired as a subcontractor and it was because he was a subcontractor that he was allowed to pick and choose the jobs he wanted to do, that they allowed him to bargain for a higher per piece rate, and that they tolerated his tardiness and absences because he wasn't an employee.

Both claimant and defendant agree that claimant requested taxes to be withheld from his paycheck and that at least once the claimant quit for a period of time because the defendant refused. It was also illuminating that in 2012 the defendant began to treat Mr. Faulk as an employee, withholding employer-related taxes from his paycheck. Ms. Beller also acknowledged that Mr. Faulk was made into an employee when "this craziness came and we started looking at things". (Ex. 4, p. 41) Ms. Beller claimed that they made this change because he was using their company van and it made sense for him to be an employee and because he was so dependable. The primary difference between claimant and Mr. Faulk was Mr. Faulk's dependability. After his tax status change with the defendant employer, Mr. Faulk continued doing the same work that he had done before with the same obligations and the same requirements with the same freedoms.

I affirm the finding that claimant was an employee of the defendants rather than an independent contractor.

The remaining issues are rate and benefits.

The deputy commissioner found that claimant was disabled from work on July 24, 2012, and that he has not returned to work or substantially similar work nor has he reached maximum medical improvement. The defendants appeal this finding. The medical records show that claimant suffered a left elbow bursistis and left shoulder long head biceps tendinitis. An MRI revealed a partial subscapularis tear consistent with claimant's fall. Raymond M. Sherman, M.D. has recommended surgical repair. (Ex. 1, p. 6) Claimant has not undertaken the surgical repair because of lack of insurance. He remains off work. Defendants assert that claimant has worked since his fall. He testified that he returned to work the following Friday to finish the installation of two windows on the job he was injured on. He also did one or two jobs following that return to work but he was in significant enough pain that he could not continue.

The injury occurred on July 24, 2012, and the records show he was paid $725.00 on July 27, 2012, and $7000 on August 3, 2012, which would be consistent with claimant's testimony that he did one or two jobs following his injury.

Defendants also assert that claimant was working elsewhere, "possibly for a family member" for many months after his injury. The defendants' proof was an email sent by Ms. Beller to someone in IWD in response to an inquiry about claimant's work status. "I wanted to point out, we are quite confused by the request, since he has been working elsewhere (I believe for his family member) for many months, since his absence with Windows America. (I have staff and customers who can confirm this)." (Ex. E, p. 8) This self-serving hearsay statement was not corroborated by statements from staff and customers at hearing. It was accepted practice for their employees to work on other projects after hours. Mr. Faulk testified that he did this and that he ordered supplies through the defendant employer to fulfill these other jobs. Exhibit D reveals that claimant did the same from time to time, documenting purchases of materials in 2008, 2010, 2011, and 2012.

Claimant has also helped his brother with snow removal since the injury. He does not do this on a regular basis.

Claimant did return to substantially similar work following the injury but after the pain became too great, he did not return. He has not had shoulder surgery and has only been able to find temporary, occasional work with his brother.

While the defendants argue that some shoulders are not operable, and that individuals with shoulder injuries are not necessarily temporarily disabled, there is no expert evidence to support their assertions. Dr. Sherman is the only medical expert in

evidence. His records indicate claimant has a shoulder injury necessitating surgical repair. There's no medical evidence that claimant is not currently in need of surgery or that he could work in the same capacity as he was prior to his injury or at a substantially similar position.

Claimant testified that because of his shoulder injury, the pain keeps him from working. Lay testimony that buttresses expert testimony is permitted.

Therefore, claimant is entitled to a temporary, running award beginning August 3, 2012, the date of his last paycheck with defendants. '

The last issue is one of rate. Claimant proposed a gross weekly wage of $514.17 and a benefit rate of $323.65 based on claimant's single, no dependent status.

The deputy rejected this argument, finding that there were actual wages for the thirteen weeks predating the injury. Defendants argue that the gross weekly wages should either be claimant's proposed wage rate or pursuant to 85.36(9).

Section 85.36(9) provides

> If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

Defendants testified that they have over 40 plus workers that work similarly to the claimant. There isn't much evidence, if any, that claimant's wages were out of line with even that of Mr. Faulk's, their ostensible sole employee.

There is a significant history of wages included in Exhibit B. While the previous thirteen weeks aren't consecutively represented, taking the actual wages is more consistent with the statute.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36 (6).

During a full pay period, claimant would earn, on average, between $500 and $700 a week. There were some variations in which he would earn as low as $300 or as high as $1200.00. Therefore, taking in the thirteen weeks he was paid prior to his injury results in a benefit rate of $442.22. This is consistent with the statute which requires that non representative weeks, in this case weeks claimant did not earn a wage, would be excluded.

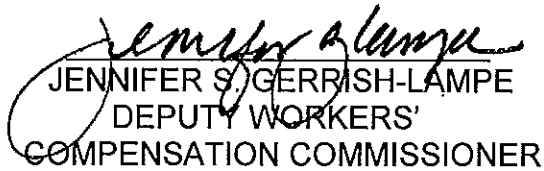
ORDER

THEREFORE IT IS ORDERED:

The arbitration decision of October 20, 2014, is affirmed.

Defendant-employer shall pay the costs of this matter and the appeal, including the preparation of the hearing transcript.

Signed and filed this 6th day of May, 2016.



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