

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VERNE DUDLEY,

Claimant,

vs.

DUDLEY BROTHERS CO., INC.,

Employer,

and

WEST BEND MUTUAL INS. CO.,

Insurance Carrier,
Defendants.

File No. 5067344.01

ARBITRATION DECISION

Head Note Nos.: 1402.10, 1402.30,
2001, 2002, 2907

Claimant Verne Dudley filed a petition in arbitration on May 14, 2020, alleging he sustained an injury to his body as a whole while working for Defendant Dudley Brothers Co., Inc. ("Dudley Brothers") on July 20, 2018. Dudley Bros. and its insurer, Defendant West Bend Mutual Ins. Co. ("West Bend"), filed an answer on May 19, 2020.

An arbitration hearing was held *via* CourtCall video conference on June 21, 2021. Attorney Anthony Olson represented Dudley. Dudley appeared and testified. Attorney James Peters represented Dudley Brothers and West Bend. Lorin Dudley appeared and testified on behalf of Dudley Brothers and West Bend. Joint Exhibits ("JE") 1 through 5, and Exhibits 1 through 8 and A through J were admitted into the record. The record was held open through August 23, 2021, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

The parties submitted a Hearing Report, listing stipulations and issues to be decided. The Hearing Report was approved at the conclusion of the hearing. Dudley Bros. and West Bend alleged Dudley was an independent contractor and waived all other affirmative defenses.

STIPULATIONS

1. Although entitlement to temporary benefits cannot be stipulated, Dudley was off work from October 6, 2018, to October 8, 2019 (52.571 weeks) and from June 29, 2020, to October 31, 2020 (17.857 weeks).

2. The commencement date for permanent partial disability benefits, if any are awarded, is November 1, 2020.

3. At the time of the alleged injury, Dudley's gross earnings were \$714.00 per week, he was married and entitled to two exemptions, and the parties believe his weekly rate is \$477.05.

4. The costs listed in Exhibit 7 have been paid.

ISSUES

1. Did an employer-employee relationship exist between Dudley Bros. and Dudley at the time of the alleged injury?
2. Is Dudley an employee or independent contractor of Dudley Bros?
3. Did Dudley sustain an injury, which arose out of and in the course of his employment with Dudley Bros. on July 20, 2018?
4. Is the alleged injury a cause of temporary disability during a period of recovery?
5. Is the alleged injury a cause of permanent disability?
6. Is Dudley entitled to temporary benefits from October 6, 2018, to October 8, 2019 (52.571 weeks) and June 29, 2020, to October 31, 2020 (17.857 weeks)?
7. What is the nature of the injury?
8. Did Dudley sustain a right arm/shoulder sequela injury as a result of the July 20, 108 work injury?
9. What is the extent of disability?
10. Is Dudley entitled to payment of medical expenses set forth in Exhibits 5 and 6?
11. Is Dudley entitled to alternate care under Iowa Code section 85.27?
12. Is Dudley entitled to recover the cost of the independent medical examination?
13. Should costs be awarded to either party?

FINDINGS OF FACT

Dudley is married and lives in Lisbon, Iowa. (Transcript, page 7) Dudley graduated from high school in 1973. (Tr., pp. 7-8) He did not attend any additional schooling after high school. (Tr., p. 8) At the time of the hearing he was 67. (Tr., p. 7)

On July 20, 2018, a Friday, Dudley was working on a rental property owned by his brother, Lorin Dudley, when he slipped and fell on a small bridge in the backyard while it was raining. (Tr., pp. 8-9, 11) Dudley testified he fell on his back and tore his left shoulder "out of place." (Tr., p. 9) Dudley continued to work that day repairing drywall and later sought medical treatment, which included multiple surgeries.

Dudley avers at the time of the alleged injury he was an employee of Dudley Brothers, a company owned by his brother, Lorin Dudley. Dudley Brothers denies Dudley was an employee at the time of the accident, and alleges Dudley was an independent contractor and that he is not entitled to workers' compensation benefits.

Lorin Dudley and Ed Dudley owned a business called Dudley Brothers Siding. (Tr., pp. 40-41) Dudley started working for Dudley Brothers Siding around 1980. (Tr., p. 40) Dudley was not an owner of the business. (Tr., p. 41) Lorin Dudley testified Dudley was an independent contractor for Dudley Brothers Siding. (Tr., p. 86)

Dudley testified he left Dudley Brothers Siding in 1992 because he was losing money and his wife thought he should work on his own as an independent contractor. (Tr., pp. 41-42) Dudley started his own business, purchased his own tools, and worked for his own clients. (Tr., p. 42)

When questioned how long he worked for Dudley Brothers, Dudley responded, "[o]h well, I worked for him previously doing siding. Let's see, this time working for him I believe it was five years. Not exactly sure. I was off – I did my own work for around 20 years, but before that I worked for him for 10, 11 years." (Tr., p. 32) Dudley testified around 2012, he worked for a powder coating company for a short time, where he received a W-2 and he was an employee. (Tr., p. 33) The business let Dudley go and he reported he went back to work for Lorin Dudley because he needed work. (Tr., p. 33)

Dudley acknowledged for the past 40 years he has been aware some people are employees and others are independent contractors. (Tr., pp. 39-40) Dudley stated he understood independent contractors purchase their own insurance, decide their own hours, and complete their own taxes. (Tr., p. 40) Dudley testified he has worked as an employee for several businesses where he received W-2 forms, and he worked as an independent contractor for HACAP. (Tr., pp. 44-45)

Dudley testified in 2011, he started performing services for Lorin Dudley again. (Tr., p. 46) Dudley had registered as a contractor in Iowa with the Division of Labor Services. (Tr., p. 46; Ex. C) Dudley performed 30 hours of services per week for Dudley Brothers. (Tr., p. 56)

Dudley Brothers offers residential home construction services and repairs. Dudley testified when working for Dudley Brothers he replaced decks and windows, rebuilt porches, remodeled bathrooms and kitchens, hung drywall, textured ceilings, painted, chalked, performed trim work, repaired railings, and installed floors. (Tr., pp. 30, 46) Dudley testified in 2018 he was earning \$21.00 per hour. (Tr., pp. 22-23) Dudley testified Lorin Dudley paid him once per week on Friday. (Tr., p. 22)

Dudley testified Lorin Dudley provided him with a 1099 form every year. (Tr., p. 30) Dudley has never been an equity member of Dudley Brothers. (Tr., p. 40) Dudley relayed he never bid any jobs for Lorin Dudley. (Tr., pp. 22, 59)

On direct exam, Dudley testified, "[i]t always seemed like I was an employee, according to the specifications of what an employee is." (Tr., p. 31) Dudley denied signing any paperwork stating that he was an independent contractor. (Tr., p. 31)

Dudley stated he could not recall having a conversation with Lorin Dudley as to whether he would be an employee or an independent contractor. (Tr., p. 49)

Exhibit B is a 2011 Master Subcontract Agreement between Dudley Brothers and Verne Dudley. The first page of the Master Subcontract Agreement states the contractor is Dudley Brothers and Verne Dudley is the subcontractor. (Ex. B, p. 18) Dudley testified he did not recall ever signing the document. (Tr., p. 48) The last page lists Dudley Construction as the subcontractor and Verne Dudley as its president. (Ex. B, p. 20) Dudley acknowledged on the last page, he printed his name, testifying "[i]t looks like my printing." (Tr., p. 50)

Under the Master Subcontract Agreement, Dudley agreed to perform services for Dudley Brothers after executing individual work orders. (Ex. B, p. 18) The document provides Dudley "shall perform all Work and shall furnish all supervision, labor, plant, hoisting, scaffolding, tools, equipment, supplies, and all other things necessary for the construction and completion of the Work described in each individual Work Order." (Ex. B, p. 18) Dudley agreed to indemnify and hold harmless Dudley Brothers from all claims, damages, liabilities and losses arising out of the work performed by Dudley and to maintain insurance to provide a defense and to indemnify Dudley Brothers for all damages and injuries caused by Dudley's acts or omissions and to name Dudley Brothers as an additional insured on the policy. (Ex. B, p. 18) Exhibit D contains two certificates of liability insurance for Dudley Construction. Dudley agreed he listed Dudley Brothers as a named insured on his insurance. (Tr., p. 63)

Dudley set his own hours when he worked for Dudley Brothers. (Tr., p. 55) He normally worked between 9:00 a.m. and 5:00 p.m., but he if he wanted to start earlier or later, he could. (Tr., p. 55) If he wanted to take off a day, he could, without asking for permission from Lorin Dudley. (Tr., p. 55) Dudley worked independently from Lorin Dudley. (Tr., pp. 60-61) Lorin Dudley would not be at the job site every morning or evening to see what Dudley was doing. (Tr., p. 61) Dudley agreed Lorin Dudley would show up and look at something "maybe once a year." (Tr., p. 60)

Dudley reported Lorin Dudley would give him a work order and tell him to go to a property to perform a job. (Tr., p. 24) If he had any questions, Dudley would ask Lorin Dudley. (Tr., p. 24) Dudley stated a work order he would receive would tell him "repair a deck, tear it off and then replace it or replace just the boards on it. . . ." (Tr., p. 24) Dudley relayed he worked for Dudley Brothers at multiple locations and that he would leave one job site and go to a different job site. (Tr., p. 25) Dudley reported Lorin Dudley would send him a text message if he wanted him to go to another job site. (Tr., p. 25)

Exhibit F is a "Subcontract Agreement," which Dudley relayed was what he was calling a work order. (Tr., p. 58) Dudley acknowledged he would sign these types of documents "[m]ost of the time." (Tr., p. 58)

Lorin Dudley acknowledged Dudley would occasionally ask him questions about jobs. (Tr., pp. 89-90) Lorin Dudley gave an example, as follows,

[w]ell, a good example would be if he was going to replace just the boards on the surface of the deck, and once the old ones were taken off, if there

was some rotten wood that I wasn't aware of, he might ask me about what should we do here, because then I would have to talk to the customer in order to advise them it was going to be additional money to do hidden repairs.

(Tr., p. 90-91) Lorin Dudley relayed Dudley normally worked alone. (Tr., p. 91)

Dudley testified he has always done work for other people if he could, and that is why he carried contractor insurance. (Tr., p. 34) Dudley has carried his own liability insurance for 40 years. (Tr., p. 31) At the time of the hearing he still carried his own liability insurance. (Tr., p. 31) Dudley acknowledged nothing prevented him from doing work for other people on the side when he performed services for Dudley Brothers. (Tr., p. 51)

Dudley testified approximately 10 years ago, before he worked for Lorin Dudley "... I did one painting job for him and I hired this friend of mine to help. And I'm not sure if Lorin paid him. That's the only time I remember that ever happened. I'm not sure." (Tr., p. 23) During cross-examination, Dudley acknowledged that he hired or engaged other people to work on Dudley Construction projects from time to time, but stated he only asked one friend to help him paint. (Tr., pp. 46-47) Dudley acknowledged he paid the man by the hour and he treated the man as an independent contractor, noting "I've worked for him. He did jobs. I helped him also." (Tr., p. 47)

When working on a project for Dudley Brothers, Dudley would put a sign in the yard that said "Dudley Brothers Company," and listed the telephone number for the business. (Tr., p. 28) Dudley also had a logo on the side of his van that said Dudley Brothers Construction. (Tr., pp. 29-30) Dudley owns a van. (Tr., p. 29) He testified he told Lorin Dudley he wanted the logo painted on his van because the magnet Lorin Dudley gave him did not stay on well. (Tr., p. 29) Dudley Brothers did not pay Dudley mileage, he owned his own van, and he paid his own insurance and maintenance costs. (Tr., p. 52) Dudley Brothers paid Dudley a separate fee each month to display the logo on his van. (Tr., p. 54) Dudley wore a shirt every day that said "Dudley Brothers Company" on it. (Tr., p. 29)

If Dudley needed more lumber when tearing off a deck, he would go to Menards and purchase the lumber using Dudley Brothers's account. (Tr., p. 27) Dudley testified he used the account to pay for supplies for projects. (Tr., p. 27)

Dudley relayed when he worked for Dudley Brothers, he worked some with Jamake Dudley and Terry Martin. (Tr., pp. 23-24) Dudley testified Jamake Dudley and Martin were employees of Dudley Brothers. (Tr., p. 24)

Lorin Dudley testified in 2018 he only had two employees, Jamake Dudley, and Derek Jennings. (Tr., pp. 84-85) Jamake Dudley was a salaried employee and Jennings was paid by the hour. (Tr., p. 85) Lorin Dudley relayed from time to time carpenters and laborers worked for him as independent contractors and he paid them by the hour. (Tr., p. 85)

Dudley testified at hearing he told Don Townsend, who he worked with quite a bit that he was an employee of Dudley Brothers. (Tr., pp. 42-43) During his deposition,

counsel for Dudley Brothers and West Bend asked “in the last 30 years have you ever told anybody that you consider yourself an employee of Dudley Brothers Siding and/or Dudley Brothers Construction and not an independent contractor,” and he replied “no,” that he had no recollection of every telling anyone that. (Tr., p. 43)

Dudley relayed in 2017 the 1099 form he received from Dudley Brothers showed he made \$31,706.00, which is the total income he reported on his income tax return. (Tr., p. 34) In 2018, Dudley completed a remodeling project for his in-laws and he earned \$5,000.00 or \$6,000.00 for the project. (Tr., p. 35) In 2018, Lorin Dudley gave him a 1099 in the amount of \$31,429.00 and he reported \$37,164.00 in total income. (Tr., pp. 35-36) In 2015, he received a 1099 from Lorin Dudley of \$29,475, and he reported total income of \$30,326. (Tr., p. 36)

In 2018, Lorin Dudley paid Dudley a \$100.00 tip in cash for work he performed on his rental property. (Tr., p. 99) Lorin Dudley testified he had tipped other independent contractors in the past if they went out of their way for him. (Tr., pp. 99-100)

Exhibit G is Dudley’s 2018 individual income tax return. Dudley used an accountant to file his taxes. (Tr., p. 66) Page 32 of Exhibit G is the Schedule C, and is titled “Profit or Loss From business Sole Proprietorship,” listing his business, Dudley Construction. Dudley listed income on the Schedule C he received from Dudley Brothers and income from any other work he did. (Tr., p. 67) Dudley deducted expenses on his return, including his van, mileage, insurance, and other costs of running his own business, Dudley Construction. (Tr., p. 67)

Dudley testified after his work injury, Lorin Dudley sent him a text message asking him to return a rotary hammer that belonged to Lorin Dudley and the garage keys. (Tr., p. 25) Dudley reported he used Lorin Dudley’s tools on jobs, but also used his own tools. (Tr., pp. 26, 51-52) Dudley also had access to a key code at a warehouse in Iowa City. (Tr., pp. 26-27)

Following the accident, Dudley filed a damages claim with the insurer for the property where he was injured. (Tr., p. 70) Exhibit J is a statement he gave to Holly Carlson with the insurer on November 7, 2018, after he filed the claim. (Tr., p. 70) At page 41, Carlson asked Dudley if he was self-employed or if he worked for a company and he responded he was self-employed. (Tr., pp. 70-71) On cross-examination, Dudley admitted he was referring to his business, Dudley Construction. (Tr., p. 71)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves the issues of arising out of and in the course of employment, nature and extent of disability, recovery of medical bills, entitlement to alternate care, recovery of the cost of the independent medical examination, and recovery of costs. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers’ compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the

changes to Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring after July 1, 2017, therefore, the provisions of the new statute involving the nature and extent of disability and recovery to the cost of the independent medical examination under Iowa Code sections 85.34 and 85.39 apply to this case.

The calculation of interest is governed by Deciga-Sanchez v. Tyson Foods, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. Arising Out of and in the Course of Employment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

. . . it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

Whether a claimant's injury arises out of the claimant's employment is a "mixed question of law and fact." Lakeside Casino v. Blue, 743 N.W.2d 169, 173 (Iowa 2007). The Iowa Supreme Court has held,

[t]he factual aspect of this decision requires the [trier of fact] to determine “the operative events that [gave] rise to the injury.” Meyer v. IBP, Inc., 710 N.W.2d 213, 218 (Iowa 2006). Once the facts are determined, a legal question remains: “[W]hether the facts, as determined, support a conclusion that the injury ‘arose out of . . . [the] employment,’ under our workers’ compensation statute.”

Id.

Dudley avers he was an employee of Dudley Brothers at the time of his alleged injury. Dudley Brothers and West Bend reject his assertion and contend Dudley was an independent contractor at the time of his alleged injury, and thus he is not entitled to workers’ compensation benefits in this case. Dudley bears the burden of establishing the existence of an employer-employee relationship at the time of the alleged injuries. D & C Express, Inc. v. Sperry, 450 N.W.2d 842, 844 (Iowa 1990).

The workers’ compensation statute 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” Iowa Code § 85.61(11) (2018). The statute provides certain persons “shall not be deemed ‘workers’ or ‘employees,’” including independent contractors. Id. The statute does not define the term “independent contractor.” The Iowa Supreme Court has held the term “‘independent contractor’ does, despite the liberal interpretations of the act, retain its common-law meaning, and is still to be given the meaning that courts have always given the term.” Mallinger v. Webster City Oil Co., 211 Iowa 847, 234 N.W. 254, 256 (1931).

The Iowa courts have adopted a multifactor test for determining whether an individual is an employee or an independent contractor. Nelson v. Cities Serv. Oil Co., 259 Iowa 1209, 1215, 146 N.W.2d 261, 264-65 (1966). Factors consistent with an independent contractor relationship include: (1) a contract for the performance of a certain piece or kind of work at a fixed price; (2) the “independent nature of [the person’s] business or of his [or her] distinct calling;” (3) the right to employ assistants with the right to supervise the assistants’ activities; (4) the requirement to furnish necessary materials, supplies, and tools; (5) the “right to control the progress of the work, except as to final results;” (6) “the time for which the work[er] is employed;” (7) whether the method of payment is by time or by the job; and (8) whether the work is part of the employer’s regular business. Id. Factors used to determine whether an employer-employee relationship exists include:

(1) [t]he right to 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) is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed.

Id. at 1216, 265. While no factor is controlling, “the right to control the physical conduct of the person giving service” is the most important consideration. Id. “If the right to control, the right to determine, the mode and manner of accomplishing a particular result is vested in the [individual] giving [the] service [the individual] is an independent contractor, if it is vested in the employer, [the individual] is an employee.” Id.

Considering the totality of the evidence, I find Dudley was an independent contractor of Dudley Brothers.

At hearing Dudley testified he could not recall speaking with Lorin Dudley about whether he was an independent contractor or employee, but testified Lorin Dudley treated him like he was an employee. This raises an issue of credibility. During the hearing I assessed Dudley's credibility by considering whether his testimony was reasonable and consistent with other evidence I believe, whether he had made inconsistent statements, his "appearance, conduct, memory and knowledge of the facts," and his interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Dudley has an obvious interest in the outcome of this case. I had the opportunity to observe Dudley testify under oath. I do not find his testimony reasonable or consistent with the other evidence I believe.

After the accident, Dudley filed an insurance claim with insurer for the property. Dudley gave a statement to the insurer. At page 41, Carlson, the insurer's representative, asked Dudley if he was self-employed or if he worked for a company and he responded he was self-employed. (Tr., pp. 70-71) On cross-examination, Dudley admitted he was referring to his business, Dudley Construction. (Tr., p. 71) Reporting he was self-employed at the time of the accident is inconsistent with his testimony at hearing that he believed he was an employee. Additional facts support Dudley was an independent contractor, despite this credibility problem.

Dudley testified he has been aware of the difference between an employee and an independent contractor for many years. He has received W-2 forms as an employee and 1099 forms as an independent contractor.

The services Dudley performed for Dudley Brothers are the same services he has performed for his own business, Dudley Construction. Dudley Brothers paid Dudley by the hour, which is consistent with an employer-employee relationship. Dudley Brothers issued Dudley 1099 forms on an annual basis. Dudley filed income tax returns reporting income from the services he performed for Dudley Brothers as his business income as a sole proprietor of Dudley Construction. When he completed his annual income tax returns Dudley did not claim he was an employee of Dudley Brothers.

Dudley has operated his own business, Dudley Construction for many years. Dudley filed a contractor registration for his separate business with the Division of Labor.

Dudley procured insurance for Dudley Construction before he started performing services for Dudley Brothers in 2011, and he has continued to maintain insurance for his separate business since he stopped performing services for Dudley Brothers. He named Dudley Brothers as an insured on his general liability policy, consistent with an independent contractor relationship.

During the hearing Dudley testified he could not recall signing the Master Subcontract Agreement, but agreed the document contains his handwriting where he printed his name. Dudley and Dudley Brothers executed a Master Subcontract Agreement, listing Dudley Brothers as the contractor and Dudley, who was doing business as Dudley Construction, as the subcontractor. (Ex. B) The Master

Subcontract stated Dudley did not have to accept any particular work order and that he would only agree to perform work upon executing a given work order. Dudley acknowledged he executed the subcontract agreements most of the time, consistent with an independent contractor relationship.

Dudley wore a shirt with Dudley Brothers's logo, which is consistent with an employer-employee relationship. While Dudley had Dudley Brothers's logo painted on his van, Dudley Brothers paid Dudley to display the logo. Dudley Brothers did not pay Dudley mileage or for any expenses for his van. Dudley deducted expenses for his van he used to perform services for Dudley Brothers on his individual tax return, consistent with an independent contractor relationship.

Dudley testified at hearing after his injury, Lorin Dudley asked him to return the garage keys and a rotary hammer that belonged to Lorin Dudley. (Tr., p. 25) The evidence supports Dudley supplied most of his own tools. Lorin Dudley supplied the materials for the job, including lumber and hardware. Dudley was able to charge materials to an account Dudley Brothers held with Menards. At hearing Dudley did not testify Lorin Dudley supplied any other carpentry or building tools other than the rotary hammer. Lorin Dudley provided building supplies or materials for each project. I find Dudley supplied his own tools, consistent with an independent contractor relationship.

Dudley admitted during the hearing he employed an assistant on one occasion, which is consistent with an independent contractor relationship. While he contacted Lorin Dudley occasionally when working on a project, Lorin Dudley did not direct his work on a daily basis; Dudley worked independently. Dudley did not have assigned hours, he did not have to accept a given project, and he could take a day off if he chose to do so without Lorin Dudley's permission. Dudley could also work on separate projects if he chose to do so. Dudley controlled the pace of his work.

Based on all the record evidence, I find Dudley maintained the right to control, the right to determine the mode and manner of accomplishing the services he performed for Dudley Brothers, consistent with an independent contractor relationship. Given this finding, the remaining issues, other than costs are moot.

III. Costs

Dudley seeks to recover the \$100.00 filing fee, the cost of an independent medical examination performed on February 24, 2020, totaling \$1,227.99, the cost of an independent medical examination performed on April 5, 2021, totaling \$1,834.80, bills for medical records totaling \$142.00, and \$233.85 for a deposition transcript. (Ex. 7)

Dudley seeks to recover the cost of two independent medical examinations. Iowa Code section 85.39(2), provides:

[i]f an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the

employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted. retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

I did not find Dudley was successful in proving he was an employee of Dudley Brothers. Therefore, under the statute, he is not entitled to recover the cost of either independent medical examination.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers' compensation commissioner for: (1) the attendance of a certificated shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioner's deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes. The rule does not allow for the recovery of the cost of medical records. The rule allows for the recovery of filing fees, deposition costs, and the reports from two doctors or practitioners. Dudley was not successful in proving he was an employee of Dudley Brothers. I find the parties should bear their own costs.

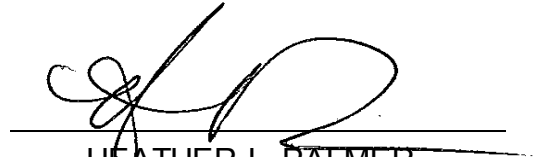
ORDER

IT IS THEREFORE ORDERED, THAT:

Claimant shall take nothing in this case.

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

Signed and filed this 14th day of January, 2022.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Anthony Olson (via WCES)

James Peters (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.