BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD RAY TOLER, Claimant, vs. MIDWEST CORNERSTONE PROPERTY MANAGEMENT, Employer, Uninsured Defendant.	File No. 5066128 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.30, 1402.40, 1802, 1803, 1803.1

STATEMENT OF THE CASE

Donald Toler, claimant, filed a petition for arbitration against Midwest Cornerstone Property Management, as an uninsured employer. This case came before the undersigned for an arbitration hearing on September 12, 2019, in Des Moines.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 14 and Defendant's Exhibits A and B.

Claimant testified on his own behalf and called Brian Anderson to testify. Defendant called Michael McGee to testify. All evidentiary testimony was completed on September 12, 2019.

However, changes were made to the hearing report and stipulations were withdrawn by defendant at the commencement of trial, specifically issues related to past medical expenses. Claimant relied upon the prior anticipated stipulations and did not offer medical evidence related to past medical expenses. Therefore, claimant requested and was given an additional seven (7) days to submit additional evidence related to past medical expenses.

On September 19, 2019, claimant filed a second amended joint exhibit list to add and include Joint Exhibits 12 through 14. Joint Exhibits 12 through 14 are now formally

received into the evidentiary record. The evidentiary record closed as of September 19, 2019, and the case was fully submitted to the undersigned as of that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether an employer-employee relationship existed between claimant and Midwest Cornerstone Property Management on January 19, 2018.

2. Whether claimant sustained an injury on January 19, 2018, which arose out of and in the course of his employment.

3. Whether any recovery under this claim is barred pursuant to an affirmative defense of intoxication pursuant to Iowa Code section 85.16(2).

4. Whether the alleged injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary total, or healing period, benefits.

5. Whether the alleged injury caused permanent disability.

6. Whether the alleged injury should be compensated as a scheduled member injury or with industrial disability benefits, if claimant has proven a permanent disability.

7. The extent of claimant's entitlement to permanent disability, if any.

8. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses.

9. Whether claimant is entitled to reimbursement of an independent medical examination fee.

FINDINGS OF FACT

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

Donald Toler, claimant, is a 46-year-old gentleman, who fell approximately 10-12 feet while painting at a rental home owned by Midwest Cornerstone Property Management (hereinafter referred to as "Midwest Cornerstone") on January 19, 2018. (Joint Exhibit 2, page 16) As a result of that fall, Mr. Toler sustained a T12 fracture and required significant medical treatment. (Joint Exhibits 1-2)

The initial fighting issue in this case is whether Mr. Toler was an employee or an independent contractor for Midwest Cornerstone. I find that Mr. Toler was hired as an

hourly worker. More than half of Midwest Cornerstone's workers were hired on an hourly basis. Mr. Toler received no written employment contract or agreement when he started working for Midwest Cornerstone. He was not hired for a specific job or a specific project, but instead paid by the hour.

Mr. Toler took instruction on the job site from a foreman or supervisor appointed by Midwest Cornerstone. Mr. Toler was required to text his start and ending times for purposes of calculating his earnings on the job. He provided none of the tools necessary for his job and Mr. Toler made none of the decisions about what order a project or projects were completed or in what manner.

Midwest Cornerstone purchased rental houses. Prior to rental of the homes, or after a renter moved out, Midwest Cornerstone would hire workers to renovate the homes so they could be rented at premium rates. The sole owner of Midwest Cornerstone, Brian Anderson, approved hires and fired workers that did not perform to expected standards. (Testimony of Claimant, Brian Anderson and Michael McGee)

Mr. Toler did not operate an independent contracting business and would not have been permitted to hire a subcontractor to perform his assigned work at Midwest Cornerstone. (Testimony of Claimant and Michael McGee) Rather, all workers appearing on Midwest Cornerstone properties had to be approved by Brian Anderson. I find that Mr. Toler believed he was an employee and I find that Midwest Cornerstone has not proven by a preponderance of the evidence that it was the intent of the parties that Mr. Toler would work as an independent contractor.

As a result of the January 19, 2018 accident at work, Mr. Toler sustained significant injuries, including the referenced T12 compression fracture in his spine. He required medical care for the injuries, including hospitalization at the University of Iowa Hospitals and Clinics after being air-lifted from the accident scene.

However, as part of his medical care at the University of Iowa Hospitals and Clinics, his physician ordered drug testing. The drug testing occurring immediately after the injury demonstrated positive results for THC, a residual of marijuana. (Defendant's Exhibit A, p. 2; Defendant's Exhibit B) Mr. Toler admitted in his deposition that he smoked marijuana prior to the date of injury. However, in his deposition, Mr. Toler estimated that he last smoked marijuana one and a half weeks prior to the date of injury. (Joint Exhibit 6, p. 9) In his deposition, Mr. Toler testified that he had smoked marijuana "here and there" to help with pain. However, he denied being a regular user of marijuana prior to January 19, 2018. (Joint Ex. 6, pp. 8-9, 20)

At trial, Mr. Toler testified that he last smoked marijuana two weeks prior to the injury date. Interestingly, at the emergency room on January 19, 2018, Mr. Toler reported to the physician that he was "a current marijuana user." (Joint Exhibit 2, p. 11) Admittedly, it is several months after the injury date, but on August 14, 2018 and again on August 16, 2018, claimant reported to medical providers that he used marijuana seven times per week. (Joint Ex. 2, pp. 23, 30)

With respect to claimant's marijuana use, I find that he tested positive for marijuana on the date of injury. I acknowledge that Mr. Toler testified that he did not smoke marijuana on the date of the injury and that he did not feel the effects of marijuana at the time of his injury. However, his testimony is not entirely consistent between his deposition and trial testimony, nor with the medical records.

Mr. Toler's medical records suggest he may have been a more frequent user of marijuana than he estimated or volunteered in his deposition or at trial. Mr. Toler offered no expert testimony and no convincing evidence to establish that he was not under the influence of marijuana or that the intoxication was not a substantial factor in causing his fall and injuries.

CONCLUSIONS OF LAW

The first disputed issue in this case is whether the claimant was an employee of Midwest Cornerstone Property Management on January 19, 2018, when the claimant was injured. Claimant contends that he was an employee while Midwest Cornerstone contends that claimant was an independent contractor.

Section 85.61(11) provides in relevant part:

> "Worker" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer. . . .

It is claimant's duty to prove, by a preponderance of the evidence, that 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).

Factors to be considered in determining whether an employer-employee relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. 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).

The primary purpose of Iowa's workers' compensation statute is to benefit the worker. The statute is intended to be interpreted liberally to achieve the goal of the statute. Shook, 313 N.W.2d 503, 506 (Iowa 1981). The intent of Iowa's workers' compensation statue is "to cast upon the industry in which the worker is employed a share of the burden resulting from industrial accidents." Id.

Any worker whose services form a regular and continuing part of the cost of the product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channeled, is within the presumptive area of intended protection. Shook, 313 N.W.2d at 506 (quoting 1C A. Larson, The Law of Workmen's Compensation § 43.51 at 8- 18 (1980)).

The statute is interpreted liberally in favor of the employee so that "the ultimate cost is borne 'by the consumer as part of the cost of the product.'" Shook, 313 N.W.2d at 506 (quoting 1C A. Larson, The Law of Workmen's Compensation § 43.51 at 8-17 and 18 (1980)).

In this case, I conclude that Mr. Toler presented a prima facie case to establish that he was an employee of Midwest Cornerstone Property Management on January 19, 2018. He was paid by Midwest Cornerstone on an hourly basis. He worked where Midwest Cornerstone's appointed supervisor told him to work. Mr. Toler provided no tools for his work. Midwest Cornerstone retained all right to decide who was hired and fired. I conclude that claimant established a prima facie case that he was an employee on the date of hire. Therefore, it was incumbent upon Midwest Cornerstone to prove its affirmative defense that claimant was an independent contractor on the date of injury.

An independent contractor is generally considered someone who carries on an independent business, contracts to do a specific piece of work according to the independent contractor's own methods, and that is subject to the control of the employer only as to determination of the final results to be obtained. Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 234 N.W. 254, 257 (1931). Generally, if an employer provides the necessary tools and equipment to perform the job, the worker is understood to be an employee. Id.

There are eight factors to be considered in determining whether a worker is an independent contractor:

(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) Whether the worker is engaged in an independent business or a distinct calling;

(3) The worker's employment of assistants, with a right to supervise their activities;

(4) The worker's obligation to provide necessary tools, supplies, and materials;

(5) The worker's right to control the progress of the work, except as to final results;

(6) Whether there is a definitive time or the length of time for which the worker is employed;

(7) The method of payment, whether by time or by the job; and

(8) Whether the work is part of the regular business of the employer.

Id.

In this situation, I found that a written agreement did not exist for claimant to perform a specific piece or kind of work. Mr. Toler was paid by the hour and not by the project. He was required to text his start and stop times to a local supervisor to document his work times and obtain payment. Therefore, the first and seventh factors of the above test strongly suggests that claimant was an employee and not an independent contractor.

Similarly, I found that Mr. Toler did not operate his own business. I also found that the work performed by Mr. Toler was part of the regular business of Midwest Cornerstone. Again, I conclude that these facts weigh heavily in favor of Mr. Toler being an employee at the time of his injury pursuant to factors two and eight.

Defendant's witness, Michael McGee, clarified that the work of Mr. Toler or similar workers was not subcontracted to other contractors. Rather, such an arrangement, or work by others, would have to be approved by Brian Anderson, the sole owner of Midwest Cornerstone. This fact establishes that the third factor in Mallinger also weighs heavily in favor of finding Mr. Toler to be an employee on the date of injury.

Factor number four of the legal test inquires about whether the worker provided his or her own tools. Although Mr. McGee testified that he and others provided their own tools for the work they performed, he also noted that some items were purchased on a company account at a local hardware store. Mr. Anderson acknowledged that he owns and that his workers use some of his tools, including ladders. He also acknowledges that he may purchase things such as paint brushes if a worker does not own or bring one. Although this factor has mixed evidence in this record, I conclude

that it weighs slightly in favor of a conclusion that Mr. Toler was an employee because he provided no tools for the work he performed for Midwest Cornerstone.

Factor five in Mallinger focuses upon the worker's ability to control the progress and means of performing the work. In this instance, Mr. McGee clarified that Brian Anderson determined the order of work to be performed. Although not the strongest of factors, I conclude this factor also weighs in favor of claimant being an employee on the date of injury.

Finally, factor six of the Mallinger test requires a determination of whether the worker was hired for a definitive time or definitive project. Mr. McGee testified that workers could come and go as they pleased and that they sometimes worked for other contractors as well. Yet, Mr. McGee also conceded that Brian Anderson decides who to hire and that he would fire workers at times if they were not doing a good job. Ultimately, Mr. Anderson admitted during his deposition that Midwest Cornerstone hired most of its workers on an hourly basis, not for definitive periods of time or specific projects. The company retained the right to hire and fire individuals as it saw fit. Once again, this factor weighs heavily in favor of Mr. Toler being an employee on January 19, 2018.

Overall, the vast majority of the legal factors to determine employment status as an employee or an independent contractor weigh in favor of Mr. Toler being an employee. Mr. Anderson also testified that he has never had any employees in his company and that he has not investigated the cost of worker's compensation for his workers. Quite honestly, I believe that Midwest Cornerstone has simply attempted to establish a system in which it misclassifies its workers to avoid the cost of worker's compensation without regard to the above legal factors that suggest its workers are, indeed, employees.

I conclude that Mr. Toler established he was an employee of Midwest Cornerstone on January 19, 2018. Midwest Cornerstone has not established its affirmative defense or assertion that claimant was an independent contractor. Therefore, I conclude that an employer-employee relationship existed between Midwest Cornerstone and Mr. Toler on January 19, 2018.

The employer also denies liability for Mr. Toler's injury, asserting that his injury does not arise out of and in the course of his employment. The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler

Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Having found that Mr. Toler proved he fell from a height while painting for Midwest Cornerstone on January 19, 2018 and having found that he established he sustained a T12 compression fracture as a result of that fall, I conclude that Mr. Toler established he sustained an injury that arose out of and in the course of his employment with Midwest Cornerstone.

Midwest Cornerstone asserts another affirmative defense. Specifically, it asserts an intoxication defense pursuant to Iowa Code section 85.16(2). During the 2017 legislative session, the Iowa legislature made a significant change to Iowa Code section 85.16(2). The statute now provides in relevant part:

> No compensation under this chapter shall be allowed for an injury caused:
>
> ...
>
> (2) (a) By the employee's intoxication, which did not arise out of and in the course of employment but which was due to the effects of alcohol or another narcotic, depressant, stimulant, hallucinogenic,

> or hypnotic drug not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury.
>
> (b) For the purpose of disallowing compensation under this subsection, both of the following apply:
>
> (1) If the employer shows that, at the time of the injury, or immediately following the injury, the employee had positive test results reflecting the presence of alcohol, or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug which drug either was or was not prescribed by an authorized medical practitioner or was not used in accordance with the prescribed use of the drug, it shall be presumed that the employee was intoxicated at the time of the injury and that intoxication was a substantial factor in causing the injury.
>
> (2) Once the employer has made a showing as provided in subparagraph (1), the burden of proof shall be on the employee to overcome the presumption by establishing that the employee was not intoxicated at the time of the injury, or that intoxication was not a substantial factor in causing the injury.

In this case, I found that Mr. Toler had a positive drug test immediately after the injury, which demonstrated the presence of marijuana (THC) in claimant's system. Mr. Toler conceded at his deposition and at trial that he smoked marijuana prior to the date of injury. However, Mr. Toler testified at trial that he had last smoked marijuana two weeks before the injury date. (Claimant's testimony) In his deposition, Mr. Toler testified it had been a week and a half before the injury date when he last smoked marijuana. (Joint Exhibit 6, p. 9) However, I found some potentially conflicting evidence that suggested Mr. Toler smoked marijuana seven times a week and found that he likely smoked marijuana much more frequently than he conceded either in his deposition or at trial.

Ultimately, I found that Mr. Toler's drug test was positive for marijuana. This finding results in a presumption that Mr. Toler was intoxicated at the time of the injury and that the intoxication was a substantial factor in causing the injury. Iowa Code section 85.16(2)(b)(2). Mr. Toler failed to overcome that presumption and carry his burden of proof to establish that he was not intoxicated and/or that the intoxication was not a substantial factor in causing his injury. Therefore, I conclude that any recovery of weekly or medical benefits is barred by Iowa Code section 85.16(2). I conclude that Mr. Toler's petition should be dismissed without an award of benefits.

Iowa Code section 87.14A requires an employer to obtain worker's compensation insurance or obtain waiver of the obligation to do so as a self-insured employer before engaging in business within the State of Iowa. The employer acknowledged on the record that he has never purchased worker's compensation insurance. Therefore, referral of the file to the Iowa Workers' Compensation Commissioner for potential further investigation or referral to appropriate authorities is appropriate.

ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing.

A copy of this decision shall be provided to the workers' compensation commissioner to determine whether further action should take place under Iowa Code section 87.14A for failure to have workers' compensation insurance.

Signed and filed this 4th day of November, 2019.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Steven Ort (via WCES)
Nicholas Pothitakis (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 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.