BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LONNIE OSTERMYER,

Claimant,

vs.

KEN LESS, Individually, (insured by GRINNELL MUTUAL INSURANCE CO.); MITCHELL LESS, Individually; FROGGY BOTTOM, INC.; LESS FARMS PARTNERS, (insured by GRINNELL MUTUAL INSURANCE CO.); PLYMOUTH FEEDS CO., (insured by NATIONWIDE AGRIBUSINESS),

Defendants.

File No. 5025837

APPEAL

DECISION

Head Note No.: 1803

Defendants Ken Less, Grinnell Mutual Insurance Co., Less Farms Partners, Plymouth Feeds Co. and Nationwide Agribusiness separately appeal from an arbitration decision filed February 14, 2014.

The case was heard on September 6, 2013, in front of the deputy workers' compensation commissioner and considered fully submitted on November 12, 2013. On February 20, 2015, the case was delegated to the undersigned to issue the final agency decision of the intra-agency appeal.

The suit was filed against Ken Less, Individually (insured by Grinnell Mutual Insurance Co.); Mitchell Less, Individually; Froggy Bottom, Inc.; Less Farms Partners (insured by Grinnell Mutual Insurance Co.); Plymouth Feeds Co. (insured by Nationwide Agribusiness). The deputy commissioner determined all but Foggy Bottom was an employer under the factors set out in Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981) and therefore Ken Less, individually, Mitchell Less, Less Farms Partners, Plymouth Feeds Co. and the insurers, Grinnell Mutual Insurance Co. and Nationwide Agribusiness, were jointly and severally liable for claimant's permanent disability. The deputy commissioner awarded claimant fifty-two (52) weeks of healing period benefits and one hundred fifty (150) weeks of permanent partial disability benefits along with medical expenses. Penalty benefits were also awarded. A nunc pro tunc filed on March 5, 2014, corrected the amounts of the medical benefits and penalty benefits awarded.

Defendant Less Farms Partners asserts on appeal that the deputy commissioner

erred in finding Less Farm Partners was an employer of claimant, that Less Farm Partners was responsible for penalty benefits, and that claimant sustained a work-related injury which caused permanent industrial disability and loss of earning capacity.

Defendants Ken Less, individually, and Grinnell Mutual Insurance Co. assert on appeal that the deputy commissioner erred in finding Ken Less, individually, was an employer of claimant, that Ken Less, individually, was jointly and severally liable, that claimant sustained a work-related injury resulting in permanent industrial disability, that Ken Less was responsible for medical expenses, that Ken Less was responsible for penalty benefits, and that costs were improperly assessed.

Defendants Plymouth Feeds Co. and Nationwide Agribusiness assert on appeal that the deputy commissioner erred in finding Plymouth Feeds Co. was an employer, that the claimant sustained any permanent industrial disability, that the claimant was entitled to medical expenses and that the claimant was entitled to penalty benefits.

Claimant asserts the findings of the deputy commissioner should be affirmed on appeal. The detailed arguments of the parties have been considered and the record of evidence has been reviewed de novo.

Pursuant to Iowa Code sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the arbitration decision filed on February 14, 2014, that relate to issues properly raised on intra-agency appeal with the following additional comments, except for the award of costs which is reversed in part.

The parties agree that claimant was an employee of some entity but all defendants disclaim responsibility.

Both Plymouth Feeds Co. and Less Farms assert essentially the same argument and that is that Ken Less acted independently and without authority by those two companies. Because he was not an authorized agent, he cannot create an employment relationship.

All parties acknowledge that there is no express employment contract and the court has recognized that express written agreements are rare, which is why we're charged with examining the intent of the parties along with a five factor test enumerated in Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981). As the claimant asserts in his brief, the intent of the parties is unclear both by lack of a written agreement and conflicting statements. It is in cases such as these that the five factor test is most helpful and illuminating because there is not sufficient evidence to find, as a matter of law, that an implied contract of employment did not exist.

Only by examining the five factor test can the parties' intent truly be divined.

As to Ken Less, individually, he asserts he acted as an agent for Plymouth Feeds Co. Plymouth Feeds Co. argues that Ken Less acted by himself for his own profit and benefit and Less Farms asserts that the only relationship between Ken Less and Less Farms was an accidental assertion made by Ken Less at the Mercy Medical Hospital in Sioux City.

The evidence supports the deputy commissioner's finding that all three defendants were joint employers of the claimant.

Dave Hoffman and his wife, Mary Hoffman, are co-owners of Plymouth Feeds Company, a feed mill. In 2008, Plymouth Feeds operated two grain trucks and employed several drivers who utilized those trucks. Randy Madsen was the manager of the feed mill. In the ordinary course of business, feed mill orders would be received in the office and then transmitted to the feed mill. Randy would make the arrangements for how much feed was to be delivered, where and by which drivers. Plymouth Feeds would bill the farmers at the end of the month and was paid directly by those farmers.

Plymouth Feeds paid its drivers by the hour and drivers would keep time cards at the Plymouth Feeds office.

David Hoffman wanted to pursue other business ventures and began to explore the idea of selling the feed hauling operation. Ken and Mitchell Less expressed interest in it. The parties met and it was determined that there would be a trial run to see if the business would be profitable for both parties.

No written agreement existed. During this trial period, all the feed would come from the Plymouth Feeds Company's mill. Plymouth Feeds would pay all the expenses including fuel and maintenance for the truck.

Ken Less approached claimant about driving the truck. At the time of claimant's hire, he was told that there would not be any insurance in the interim period but that if claimant was hired full time after the test period that there may be the possibility of health insurance and workers' compensation coverage.

Ken Less approached David Hoffman about hiring claimant and about the per hour amount claimant would be paid. Plymouth Feeds wanted the claimant to have a CDL, which he did. Plymouth Feeds agreed to the terms of the claimant's employment. Ken Less provided the hospital with information that Less Farms was the responsible employer. After Ken Less paid claimant's wages, Less was reimbursed by Plymouth Feeds Co. with a check payable to "Less Farms." Ken Less endorsed this check and deposited it in his personal account. Ken Less had his own checkbook for the Less Farms account. Less' authority to write checks on the corporate account was never challenged. Defendant Less Farms argues that this factor is so unimportant that it did not come up in testimony at hearing, yet the ability to bind a principal financially is a

factor in determining whether there is an agency relationship. See Fort Dodge Creamery v. Com. State Bank, 417 NW2d 245, 247 (Iowa App. 1987), (citing Iowa Code section 554.3403(1) "which provides that an agent's authority to sign for another may be established as in other cases of representation."). By allowing claimant to write checks on its account, Less Farms led persons, such as the claimant, to believe that Ken Less had authority to bind it.

Mitchell Less testified his father was acting on his behalf "to go find a driver." (Joint Exhibit. 39, pp. 69-70) Defendants argue that this testimony was taken out of context and that Ken Less was acting on Mitchell's behalf, not on Less Farm's behalf. However, Mary Hoffman was led to believe "We understood Ken Less and Mitchell were Less Farms." (Jt. Ex. 40, p. 42) Again, defendants argue that this is based on what David Hoffman must have told Mary because Mary wasn't present at the initial meeting. But if David Hoffman believed it, it would also be a factor in favor of finding an apparent agency relationship. Vischering v. Kading, 368 N.W.2d 702, 711 (Iowa 1985); see also Frontier Leasing v. Links Engineering, LLC, 781 N.W.2d 772, 776 (Iowa 2010) ("Apparent authority is authority the principal has knowingly permitted or held the agent out as possessing.").

Claimant testified that he was hired by Ken Less to drive a truck for Plymouth Feeds. At various times he referred to his employer as Ken Less or Less Farms Partnership. At hearing, claimant testified "you hired me to drive the truck for Plymouth Feeds. I didn't know who I was employed by." (Transcript, p. 79)

Wages

Claimant was paid at one time by Ken Less and at another time by Plymouth Feeds Co. via a check made payable to Less Farms. (Jt. Ex. 32) After claimant was injured, Plymouth Feeds Co. paid Mitchell Less to drive the truck and route for the claimant. (Jt. Ex. 39, p. 36)

Right to discharge

Ken Less and Plymouth Feeds Co. had the authority to discharge claimant and terminate the employment. (Tr., pp. 149-150)

Right to control work

David Hoffman directed when claimant's job would begin. Plymouth Feeds mill manager provided claimant with weight tickets (work orders) that directed claimant's routes. A Plymouth Feeds Co. employee trained claimant. Claimant drove a Plymouth Feeds Co. truck and Plymouth Feeds Co. paid for the fuel.

Plymouth Feeds argues that it was only providing direction, not control. However, by engaging in the training, issuing weight tickets, directing the route, paying for the fuel, providing the truck, Plymouth Feeds went beyond mere direction.

Authority in charge or work and for whose benefit it is performed.

Plymouth Feeds Co. agreed that it received a profit but that this profit wasn't really a benefit since it was part of the determination of the viability process. Plymouth Feeds argued that the benefit in the relationship with Ken Less and Mitchell Less and Less Farms had to do with the knowledge gained rather than any money.

This is a parsing of the word benefit. Profits are not excluded from the term benefit and in fact could be considered the primary benefit of any relationship.

Claimant drove a truck he believed to be owned by Plymouth Feeds, was trained by an employee of Plymouth Feeds, Plymouth Feeds would receive the profits and money made from the grain hauling business and had the ability to fire the claimant if he was not qualified or if he did not perform the work as required.

All the parties benefited from the arrangement.

In conclusion, the similarities between Albers v. Gentry, No. 6-081/05-0696, (Ct App., Mar. 29, 2006) and the present case are greater than any differences and as the commissioner is charged with executing the law, rather than interpreting it, the Albers v. Gentry case is controlling.

Ken Less argues that employers cannot be held jointly and severally liable under the workers' compensation statute. Further, it argued that while the Albers v. Gentry case upheld the commissioner's finding of joint employers, the case did not stand for a joint and several liability even though the underlying agency decision found the employers to be jointly and severally liable and that the agency decision was affirmed by the district court and the court of appeals.

Until and unless Albers v. Gentry is overturned by a higher appellate court, the agency is bound by the appellate court's affirmation of a joint employer finding as well as the order of joint and several liability.

Defendants also assert that the deputy commissioner erred when he awarded a full 50 percent penalty on untimely paid healing period benefits for the defendants failure to use Iowa Code section 85.21.

85.21 Payments concerning liability disputes.

1. The workers' compensation commissioner may order any number or combination of alleged workers' compensation insurance carriers and alleged employers, which are parties to a contested case or to a dispute which could culminate in a contested case, to pay all or part of the benefits due to an employee or an employee's dependent or legal representative if any of the carriers or employers agree, or the commissioner determines after an evidentiary hearing, that one or more of the carriers or employers is liable to the employee or to the employee's dependent or legal representative for benefits under this chapter or under chapter 85A or 85B, but the carriers or employers cannot agree, or the commissioner has not determined which carriers or employers are liable.

2. Unless waived by the carriers or employers ordered to pay benefits, the workers' compensation commissioner shall order an employer, which is not ordered to pay benefits and which does not have in force a policy of workers' compensation insurance issued by any carrier which is a party to the case or dispute and covering the claim made by the employee or the employee's dependent or legal representative, to post a bond or to deposit cash with the commissioner equal to the benefits paid or to be paid by the carriers or employers ordered to pay benefits. If any employer is ordered by the commissioner to post bond or to deposit cash, the employers or carriers ordered to pay benefits are not obligated to pay benefits until the bond is posted or the cash is deposited. The commissioner may order the bond or cash deposit to be increased.

3. When liability is finally determined by the workers' compensation commissioner, the commissioner shall order the carriers or employers liable to the employee or to the employee's dependent or legal representative to reimburse the carriers or employers which are not liable but were required to pay benefits. Benefits paid or reimbursed pursuant to an order authorized by this section do not require the filing of a memorandum of agreement. However, a contested case for benefits under this chapter or under chapter 85A or 85B shall not be maintained against a party to a case or dispute resulting in an order authorized by this section unless the contested case is commenced within three years from the date of the last benefit payment under the order. The commissioner may determine liability for the payment of workers' compensation benefits under this section.

Iowa Code section 85.21 was designed to deal with issues such as the case at hand. There are multiple joint employers with each one pointing the finger at the other, disavowing any responsibility. Therefore, the claimant went a significant period without any benefits.

The Iowa Practice Workers' Compensation, 2014-2015, agrees that when there is a dispute between carriers and employers as to who is liable for compensation and the claimant goes unreimbursed, claimant can be awarded penalty benefits.

In Curry v. Zooks Harley Davidson, File No. 5013418, February 6, 2007, then Commissioner Godfrey found that both potential insurers were required to pay penalty benefits. In Curry, as in this case, the insurers pointed to the other as the responsible party.

> Penalty benefits were not imposed against Federated based upon the same reasoning. In essence, both insurance carriers were found to be immune from penalty benefits because they had evidence to point a finger at each other. Herein we have a substantially disabled worker asked to shoulder the cost of the dispute between two insurance carriers – one of whom is certain to have liability on behalf of their customer, Zook's Harley Davidson. The injured worker is, without saying, the least capable of assuming the economic burden of such a dispute. The dispute between the two carriers also placed the employer in the undesirable position of having workers' compensation insurance coverage from a carrier unwilling to pay out benefits to which its disabled worker is entitled.

Id.

The claimant is entitled to compensation and it was the responsibility of one of the insurers or employers to step up and accept the responsibility or request that the commissioner resolve the issue of responsibility via section 85.21. Failure to do that is an unreasonable delay in payment of benefits. To find otherwise would allow a claimant's case to be wholly ignored simply because of cross defendant arguments and that would undermine the purpose of the Workers Compensation Act. See also Groeneweg v. Total Component Solutions Corp., File No. 5009377 (App. January 1, 2007).

Finally, Ken Less argues that the assessment of full costs is inappropriate. Specifically, Mr. Less disputes the reimbursement of requesting medical records and for more than one IME.

There are three costs on the IME identified as IMEs for Dr. Michael O'Neil. Defendant argues that IME costs are chargeable only under Iowa Code section 85.39. However, the Iowa Court of Appeals in John Deere Dubuque Works v. Caven, 804 N.W.2d 297, 301 (Iowa App. 2011) approved of awarding reimbursement for medical reports under Iowa Code section 86.40. The recent Iowa Court of Appeals case of Des Moines Area Regional Transit Authority v. Young does not overturn Caven as the Young case deals with the timing of the IME rather than whether IMEs can be awarded under 86.40. The report of Dr. O'Neil falls squarely under the provisions of rule 876 IAC

4.33 which allows for the recovery of the reasonable costs of doctors reports and therefore all three are allowable.

Medical records have been awarded in past cases under the rubic of "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." See Glenn Sturm, 5039784, July 7, 2013.; Marion Cooper, File No. 5036217, June 6, 2013; Shane Mikles, File No. 5027215D, February 2, 2011; but see Samka Hopovac, 5019583, March 3, 2008, wherein records were disallowed under rule 876 IAC 4.33.

The agency is granted broad discretion in determining what costs can be assessed. Iowa Code section 86.40 states "All costs incurred in the hearing before the commission shall be taxed in the discretion of the commissioner." Id. Medical records contain doctors and practitioners reports and therefore, the costs associated with obtaining one of the medical records are approved. The costs associated with Hegg Memorial records in the amount of $24.00 are allowed.

The arbitration decision is reversed as to costs and modified to reflect an award of $1,724.00 in costs.

ORDER

IT IS THEREFORE ORDERED that the decision of February 14, 2014, is AFFIRMED in part and MODIFIED in part, and that the following modification is ordered:

Defendants Ken Less, individually (insured by Grinnell Mutual Insurance Co.); Mitchell Less, Individually; Froggy Bottom, Inc.; Less Farms Partners (insured by Grinnell Mutual Insurance Co.); Plymouth Feeds Co. (insured by Nationwide Agribusiness) shall pay costs of $1,724.00 pursuant to rule 876 IAC 4.33.

Defendants shall pay the costs of this appeal including preparation of the hearing transcript.

Signed and filed this 13th day of March, 2015.

JENNIFER GERRISH-LAMPE
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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