BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD RAY TOLER, Claimant, vs. MIDWEST CORNERSTONE PROPERTY MANAGEMENT, Employer, Uninsured Defendant.	:	File No. 5066128 A P P E A L D E C I S I O N Head Notes: 1403.20; 1504; 1601; 1801; 1803; 2001; 2002; 2501; 2907; 5-9999

Claimant Donald Ray Toler appeals from an arbitration decision filed on November 4, 2019. Defendant Midwest Cornerstone Property Management, uninsured employer, cross-appeals. The case was heard on September 12, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 19, 2019.

In the arbitration decision, the deputy commissioner found claimant sustained a work-related injury on January 19, 2018. The deputy commissioner found claimant was an employee of defendant and not an independent contractor, but the deputy commissioner found because there was a positive drug test, claimant had the burden to rebut the presumption raised by Iowa Code section 85.16(2) that he (1) was intoxicated at the time of the injury and (2) that the intoxication was a substantial factor in causing the injury. The deputy commissioner found claimant failed to rebut the presumption and found claimant was barred from receiving benefits.

On appeal, claimant asserts the deputy commissioner erred in finding the section 85.16(2) presumption was raised because claimant asserts the presumption requires multiple positive drug test results and there was only a single test with a positive result. Claimant asserts that even if only one positive test result is required to raise the section 85.16(2) presumption, he asserts he rebutted the presumption because he asserts he proved the injury would have occurred regardless of whether he was mentally impaired at the time the injury occurred.

Defendant asserts on cross-appeal that the deputy commissioner erred in finding claimant was an employee of defendant and not an independent contractor. Defendant asserts claimant therefore was not entitled to receive benefits under any circumstance.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties and I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on November 4, 2019, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues with the following additional analysis:

Defendant operates a number of residential rental properties. In preparation for a new rental, defendant hires workers to renovate the houses so they can be re-rented. Brian Anderson, the owner of defendant, hires and fires workers who do not perform to expected standards. (Hearing Transcript pages 105-106, 116-117).

Claimant and another coworker were assigned to paint the interior of a house. In one of the bedrooms, there was a space that could only be reached via a ladder. The space was approximately three feet high and claimant was required to do most of the painting while in a seated position. Mr. Anderson testified that claimant should not have been in the lofted space and that it was not designed to hold the weight of an individual. (Tr. pp. 125-126)

Initially claimant was asked whether he could move around on his knees. Claimant testified he maneuvered around the space on his butt or his side. (Tr. pp. 43-44) Two pages later in the transcript he described himself as kneeling:

"Because it was on the edge, and I - I don't want to, like - you know, I was kneeling down on some of the painting, and it - it was right there on the edge. And I didn't want to be leaning over so I sat down." (Tr. p. 46) Claimant testified the floor gave way and he fell backwards through the ceiling/floor onto the floor below. The drop was approximately ten feet.

As a result of the fall, claimant sustained injuries including but not limited to a T12 compression fracture and a concussion.

I affirm the deputy commissioner's finding that claimant was an employee of defendant. The factors to be weighed when assessing the work relationship between a worker and a potential employer include the right of selection or to employ at will, responsibility for payment of wages by the employer, the right to discharge or terminate

the relationship, the right to control the work, and identity of the employer as the authority in charge of the work or for whose benefit it is performed. Caterpillar Tractor Co. v Shook, 313 N.W.2d 503 (Iowa 1981).

Claimant was paid by the hour and he had no written contract or agreement. (Tr. pp. 31- 32) He was not hired for a specific job or specific project. He did not operate his own business and all the work he performed was part of the regular business of defendant. Claimant could not hire or subcontract his work as all work was approved by Mr. Anderson. All the tools were provided by defendant. (Tr. pp. 33-35) Mr. Anderson determined the order of the work, and when and where the work would take place. (Tr. pp. 94, 98)

Based on all of these factors, I affirm the deputy commissioner's finding that claimant was an employee of defendant and not an independent contractor.

I further affirm the deputy commissioner's finding that claimant failed to overcome the presumption that he was intoxicated at the time of the injury and that the intoxication was a substantial factor in causing the injury. This finding is based on the statutory defense contained in Iowa code section 85.16. As the arbitration decision states, the statute 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 other 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.
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> (b) for the purpose of disallowing compensation under this subsection, both of the following apply;
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> > (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.

Iowa code section 85.16 (2) (2017).

Claimant argues there must be multiple test results under the statute. Iowa Code Section 85.16(2) uses the word "results" in reference to tests.

Unless otherwise specified, Iowa Code statutes have been interpreted such that the singular includes the plural and the plural includes the singular. *See* Iowa Code section 4.1(17) (quoted with approval in State v. Matthias, No. 18-1119, Dec 6, 2019 (Iowa Sup. Ct). Thus, in this instance, the word "results" includes both the plural and singular form.

Claimant admitted he probably had both hydrocodone and marijuana in his system on the day he was hurt. (Tr. p. 72) The medical records from UIHC showed positive traces of marijuana chemicals directly following the fall. At various times, claimant reported to medical providers that he used marijuana seven times per week. (Joint Exhibit 2, pp. 11, 23, 30) He testified at hearing he had not ingested or inhaled marijuana on the date of the injury nor was he feeling the effects of the drug at the time of his injury.

Regardless of claimant's testimony, the existence of the positive drug test creates a rebuttable presumption that claimant 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) The burden then shifts to the employee to prove that the employee was not intoxicated at the time of the injury *or* that the intoxication was not a substantial factor in causing the injury.

There are no medical records that support claimant's testimony that he was not intoxicated or under the influence of marijuana. His own testimony regarding usage was inconsistent and suggestive of daily usage close to the time of the injury. Even if he had not ingested marijuana on the day of the injury, it is possible, and based on his testimony, even probable he had ingested the day before. Claimant lacked medical testimony on the issue of impairment and how long drugs in the system would impact his ability to perceive space and depth. Thus claimant failed to carry his burden of proof to establish he was not intoxicated at the time of the incident.

The other alternative was for claimant to show that intoxication was not a substantial factor in causing the injury. Claimant argues that since he fell through the floor, the level of intoxication could not have been a substantial factor in causing the fall and the subsequent injuries. Claimant argues his intoxicated state would not have impacted the integrity of the floor and thus his intoxication could not have caused the injury. The THCU test does not measure the level of intoxication but serves only to

indicate whether the substance was present or not present. Claimant testified he was at the edge when he fell, suggesting that the floor collapsed underneath him and he fell through a hole or opening. While an ambulance report notes claimant had fallen through the ceiling, it is unclear whether that medical note was the result of the claimant's own version and history of how the incident occurred or if it was the result of the emergency medical technicians' observations. It is only claimant's testimony that supports his version of how the incident occurred. There were no witnesses present during the fall.

Furthermore, claimant presented no evidence to rebut Mr. Anderson's testimony that claimant should not have been in the lofted space and that it was not designed to hold the weight of an individual. (Tr. p. 125) Claimant therefore failed to rebut the section 85.16(2) presumption because Mr. Anderson's testimony raises the question of whether a non-intoxicated individual would have determined through routine observation that the area was not safe and therefore, in the exercise of sound judgment, would not have entered that area. In other words, claimant failed to dispel the question of whether his decision to enter the area where he was injured was a reasonable decision not impacted by intoxication.

Given the lack of eyewitness testimony, given claimant's conflicting testimony regarding his use of marijuana, and given the issue of whether claimant exercised sound judgment in entering the area where the injury occurred, I affirm the deputy commissioner's finding that claimant failed to overcome the section 85.16(2) presumption that he was intoxicated at the time he was injured and that the intoxication was a substantial factor in causing the injury.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed November 4, 2019, is affirmed in its entirety.

Claimant shall take nothing from these proceedings

Pursuant to rule 876 IAC 4.33 claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed on this 15th day of June, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Nicholas Pothitakis Via WCES

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