BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAUL MARTINEZ YANEZ, Claimant, vs. RIUMALDO VAZQUEZ, Employer, Defendant.	File No. 5066714 ARBITRATION DECISION

RAUL MARTINEZ YANEZ, Claimant, vs. HUMBERTO TOLENTINO, Employer, Defendant,	File No. 5066714.01 ARBITRATION DECISION Head Note Nos.: 1402.10, 1402.30, 1403.30, 1802, 1803, 2001, 2501, 2907, 3001, 3002

STATEMENT OF THE CASE

Raul Martinez Yanez, claimant, filed petitions in arbitration and seeks workers' compensation benefits from defendants, Riumaldo Vazquez and Humberto Tolentino as the alleged employers. Evidentiary hearings were held on October 23, 2020, and June 9, 2021, via CourtCall. Counsel filed post-hearing briefs on December 14, 2020, and July 16, 2021, at which time the cases were deemed fully submitted.

In File No. 5066714, the evidentiary record includes Joint Exhibits 1 through 4, Claimant's Exhibits 1 through 4, and Defendant Vazquez's Exhibits A and B. All exhibits were received without objection.

Claimant called three witnesses to testify, including Christine Martinez, Javier Perez, and claimant. Defendant called Riumaldo Vazquez Mendez. Mr. Martinez Yanez, Mr. Perez, and Mr. Vazquez Mendez testified using the services of a Spanish to English interpreter, Ernest Murcia. The evidentiary record was left open for receipt of Defendant's Exhibit C, Humberto Tolentino's deposition transcript.

The parties submitted a hearing report prior to the commencement of the evidentiary hearing. On that hearing report, the parties entered into various stipulations. Those stipulations were accepted and relied upon in this decision without further comment or factual findings.

In File No. 5066714.01, the evidentiary record includes Claimant's Exhibit 1. Claimant's Exhibit 1 was received without objection. The exhibits offered by Defendant Tolentino were not accepted into the evidentiary record. This is because Defendant Tolentino's Exhibits A through C were select portions of the December 14, 2020, hearing transcript. Instead of accepting Exhibits A through C into the evidentiary record, the undersigned agreed to take official notice of the December 14, 2020, transcript. File Nos. 5066714 and 5066714.01 were consolidated on June 9, 2021, without objection.

Claimant testified on his own behalf. Defendant called Humberto Tolentino. Mr. Martinez Yanez and Mr. Tolentino testified using the services of a Spanish to English interpreter, Perla Alarcon-Flory.

The parties submitted a hearing report prior to the commencement of the evidentiary hearing. On that hearing report, the parties entered into various stipulations. Those stipulations were accepted and relied upon in this decision without further comment or factual findings.

On the June 23, 2021, hearing report, claimant and defendant Tolentino stipulated that on July 5, 2018, Humberto Tolentino was not the employer of Raul Martinez Yanez.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant was an employee of Riumaldo Vazquez on July 5, 2018, when he was injured;

2. Whether claimant's injury arose out of and in the course of his alleged employment with Riumaldo Vazquez on July 5, 2018;

3. Whether claimant is entitled to an award of temporary total disability, or healing period benefits between July 6, 2018, and August 31, 2018;

4. The extent of claimant's entitlement to permanent partial disability benefits, if any;

5. The proper weekly rate of compensation, including the claimant's gross weekly earnings;

6. Whether claimant is entitled to an award of medical expenses as outlined and summarized in Claimant's Exhibit 1; and

7. Costs.

FINDINGS OF FACT

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

Claimant, Raul Martinez Yanez, is a 44-year-old gentleman. Claimant attended school in Mexico until he was 17 years old. Mr. Martinez is able of read, write, and speak English; however, his English skills are limited. He moved to the United States in 1999 or 2000. Since moving to the United States, Mr. Martinez has largely worked in the roofing industry. (Hearing Transcript, pages 13-17)

Mr. Martinez first worked with Riumaldo Vazquez in approximately 2004. (Hr. Tr., p. 14) He worked with or for Mr. Vazquez, intermittently, for the next 14 years. (See Hr. Tr., p. 16) For his most recent stint, Mr. Martinez and his crew approached Mr. Vazquez in April of 2017 and asked him for work. (Hr. Tr., p. 16) The crew consisted of claimant, Humberto Tolentino, Javier Perez, Abraham Cruz, and an individual that went by "Santos." (Hr. Tr., p. 17) Mr. Martinez and Mr. Perez both considered Mr. Vazquez to be their boss. (Hr. Tr., pp. 36, 71) I find that claimant and Mr. Perez genuinely believed Mr. Vazquez was their boss.

Mr. Martinez and his crew replaced shingles on two or three-story homes, and business buildings. (Hr. Tr., p. 21) The crew typically worked Monday through Saturday. The crew would also work Sundays if weather prevented them from working any of the other days of the week. (Hr. Tr., p. 25)

Between April, 2017 and July 5, 2018, Mr. Martinez and his crew worked almost exclusively for Mr. Vazquez. Likewise, Mr. Vazquez only utilized claimant's crew during this period of time. (See Hr. Tr., p. 23) There was a single instance in which Mr. Martinez performed work for another subcontractor. (Hr. Tr., p. 23) Mr. Martinez and his crew accepted work from the other subcontractor because Mr. Vazquez "didn't have the next house ready." (Id.) Upon hearing that Mr. Martinez was handling work for another individual, Mr. Vazquez became angry. (Id.) According to Mr. Martinez and Mr. Perez, Mr. Vazquez was angry because he only wanted claimant and his crew to work for him. (Id.) I find this testimony to be credible. Mr. Perez testified that he had the freedom to work for other subcontractors if he wanted; however, "Humberto and Raul would have to wait for Riumaldo." (Hr. Tr., p. 73) According to Mr. Perez, Mr. Martinez and Mr. Tolentino were at Mr. Vazquez's "beck and call." (Hr. Tr., p. 74)

Mr. Martinez asserts that he was paid on a weekly basis. The amount of compensation, however, was calculated on a job-by-job basis. (Hr. Tr., pp. 72-73) The

amount of pay the crew got was determined by Mr. Vazquez. At the end of each week, Mr. Vazquez would issue a check to Mr. Tolentino. This was because Mr. Tolentino was the only crewmember with an active bank account, not because Mr. Tolentino was the foreman or leader of the crew. (Hr. Tr., p. 22) Mr. Tolentino would cash the check each week and distribute the money amongst the crewmembers. (Id.) Claimant estimated that he received, on average, $900.00 per week. (Hr. Tr., p. 26)

Mr. Martinez and his crew performed the work in the manner in which they were told to perform said work. (See Hr. Tr., pp. 20-21, 30, 72) The crew received job assignments from Mr. Vazquez. (Hr. Tr., pp. 17-19) Claimant's crew was the only crew Mr. Vazquez worked with in the summer of 2018. Claimant testified that his crew had the right to accept or reject assignments from Mr. Vazquez. (Hr. Tr., p. 51) Claimant also testified that Mr. Vazquez could offer job assignments to other crews; however, according to claimant, no one wanted to work with Mr. Vazquez. (Id.) The crew did not agree to separate contracts for each assignment. (See Hr. Tr., p. 40) The crew was directed to jobsites by Mr. Vazquez. (Hr. Tr., p. 17) The crew would ride to jobsites in Mr. Tolentino's van. (Hr. Tr., pp. 42, 76) Mr. Vazquez would present to the jobsite in the morning with the crew and instruct the crew as to how the owners/contractors wanted each roof done. (Hr. Tr., p. 38) Mr. Vazquez would, at times, instruct the crew that he needed various homes completed in one day. (Hr. Tr. p. 39) Mr. Vazquez would stay on the jobsite and help if he was needing to meet a deadline. (See Hr. Tr. pp. 39-40)

In addition to directing the crew, Mr. Vazquez handled various on-site tasks, such as putting in a chimney or installing solar panels, while Mr. Martinez and his crew handled the roofing. (Id.) If the crew ran into any issues with the job assignment, Mr. Vazquez would resolve them. (Hr. Tr., p. 24) At times, this meant Mr. Vazquez would have to contact the people who retained his services to resolve problems. (Hr. Tr., p. 23; see Hr. Tr., p. 95) ("Paul Butterfield would call me and then I would call Humberto about the job.")

The crew, as a group, purchased the tools that they used for roofing; however, Mr. Vazquez supplied the materials needed to complete each roofing job. (Hr. Tr., p. 29) Mr. Vazquez provided the roofing materials for every job. If the crew ran out of supplies, they would report the same to Mr. Vazquez and he would obtain more supplies. (Hr. Tr., p. 25) Mr. Vazquez testified that he would obtain the materials from the companies or individuals that hired him.

On July 5, 2018, Mr. Martinez was injured when a nail he was hammering deflected off a piece of ply board and hit him in the left eye. (Hr. Tr., p. 29) After sustaining the injury, the crew called Mr. Vazquez. (Hr. Tr., pp. 30-31) Mr. Vazquez had recently left the jobsite, after sending claimant up to work with the plywood. (Hr. Tr., p. 31) An ambulance eventually presented to the jobsite and took claimant to Mercy North Hospital in Mason City, Iowa. (See JE1, pp. 1-2) The injury was initially diagnosed as a left ocular injury with probable lens displacement or fracture, posterior chamber hemorrhage and retinal detachment. (JE3, p. 7) Mr. Vazquez drove home to pick up his

wife before presenting to the hospital. (Hr. Tr., p. 31) According to Mrs. Martinez, while at the hospital, Mr. Vazquez told her husband that he would take care of everything. (Hr. Tr., pp. 60-61) Mr. Martinez was subsequently transferred to Iowa City, Iowa. (See JE3, p. 14)

Once in Iowa City, Iowa, claimant was immediately taken into surgery. Mark A. Greiner, M.D. performed a repair of the open globe and corneal laceration. (JE4, p. 24) Stephen R. Russell, M.D. performed a pars plana vitrectomy, anterior chamber reconstruction, PFO, endolaser, air-fluid exchange, and placement of silicone oil on the left eye on July 17, 2018. (JE4, pp. 36-38) Unfortunately, claimant's vision did not drastically improve with surgery. (See JE4, p. 28) Dr. Russell opined it was unlikely claimant's vision would return in the left eye. (JE4, p. 46)

Brenda Vazquez, Mr. Vazquez's wife, drove claimant to his medical appointments. (See JE4, p. 31)

Claimant incurred significant medical expenses as a direct result of his injury. Claimant's medical expenses are summarized and contained in Exhibit 1. Those expenses are found to be reasonable, necessary, and causally related to claimant's work injury.

Mr. Martinez was limited by restrictions between July 5, 2018, and August 31, 2018. (See JE4, p. 45) Mr. Martinez was not medically capable of returning to substantially similar work prior to August 31, 2018. Mr. Martinez eventually returned to roofing work; however, he never returned to work for Mr. Vazquez. (See Hr. Tr., p. 33) He remained employed on the date of the evidentiary hearing. (Hr. Tr., p. 33) I find claimant was in a healing period and under restrictions from July 5, 2018, through August 31, 2018.

Mr. Vazquez testified he is the sole owner of his roofing business. (Hr. Tr., pp. 80-81) When discussing his business structure, Mr. Vazquez explained, "So people give me jobs, my bosses, the people who I know, and they pay for the materials." (Hr. Tr., p. 82) He would later provide, "I know a lot of contractors who are kind of big contractors. I know a lot of farmers who also hire me. People with businesses, people who have properties also know me here I get jobs from." (Hr. Tr., p. 84) Mr. Tolentino testified to his belief that Mr. Vazquez worked for Butterfield & Associates. (Ex. C, Depo. pp. 17-18) Mr. Tolentino further testified that Mr. Vazquez would, "talk to the companies and give [the crew] work." (Ex. C, Depo. p. 19) Mr. Vazquez admitted Mr. Martinez's crew was the only crew he was working with in 2018. (Hr. Tr. p. 94)

In terms of payment, Mr. Vazquez told Mr. Martinez's crew how much they would be paid for each job. (See Ex. C, Deposition Transcript, page 19) Mr. Vazquez testified that he was paid by the number of squares, the number of layers, and the slope of the roof, and that's how he ultimately paid Mr. Tolentino and his crew. (Hr. Tr., p. 87) For the July 5, 2018 job, Butterfield & Associates paid Mr. Vazquez $3,250.00. (Ex. A) The

check provides that the client paid $2,750.00 for roofing and $500.00 for a "trip charge." (Id.) Mr. Vazquez paid Mr. Martinez and his crew $2,760.00. (Ex. B; See Hr. Tr., p. 92) ("The check from Paul Butterfield was for $3,250. Paul Butterfield would pay me; and when he would pay me, Humberto and I would do the figures and then I would pay Humberto by the square.")

Mr. Vazquez testified that the July 5, 2018, job was contracted to him through Paul Butterfield of Butterfield & Associates. (Hr. Tr., p. 84) ("He was the contractor.") In terms of control over the July 5, 2018 job, Mr. Vazquez admitted that he told claimant's crew, "what they were going to do because the owners sometimes want things done a certain way." (Hr. Tr., p. 85) During discovery, Mr. Vazquez asserted that he subcontracted the July 5, 2018, job to Humberto Tolentino, and that claimant was an employee of Mr. Tolentino. (Ex. 3, pp. 13, 15) In Paragraph 10 of the hearing report for File No. 5066714.01, the parties stipulated that on July 5, 2018, Mr. Tolentino was not the employer of Mr. Martinez.

Overall, Mr. Vazquez did not present as a credible witness. When referring to Mr. Martinez and the other members of the crew, Mr. Vazquez appeared to assert he was only involved with, or worked closely with, Mr. Tolentino. (See Id.) Mr. Vazquez testified, "I only speak to Humberto. I don't talk to these other people. I didn't hire them. I didn't know how they came to be working with Humberto. Humberto is the one I hired." (Id.) He further testified, "I don't know how they came to be with him or how they communicated." (Hr. Tr., p. 88) However, several other individuals testified that Mr. Vazquez knew, and worked with, Mr. Martinez for multiple years prior to the date of injury. Additionally, according to Mr. Martinez, Mr. Vazquez placed Mr. Tolentino in the crew in 2018, sometime after he was released from jail. (6/9/2021 Hr. Tr., pp. 22-23, 31) Mr. Vazquez also made several statements that would indicate that he was relatively uninvolved once he assigned work to claimant's crew. Such an assertion is not supported by the evidentiary record.

The primary factual disputes in this case revolve around whether Riumaldo Vazquez was claimant's employer. In this respect, I find that Butterfield & Associates, LLC was the general contractor for the roofing project where claimant was injured on July 5, 2018. I find that Butterfield & Associates, LLC hired Riumaldo Vazquez as a subcontractor and that Butterfield & Associates, LLC paid Mr. Vazquez an agreed upon fee for his roofing services.

Mr. Vazquez, through Butterfield & Associates, LLC provided the roofing materials but did not provide the tools necessary to install the roof. Mr. Martinez and his crew supplied all necessary tools for the roofing project where he was injured. The crew also provided their own transportation. All communications, wages, and instructions to claimant were provided by Mr. Vazquez.

I find that claimant was an employee of Mr. Vazquez on July 5, 2018.

The parties submitted a factual and legal dispute pertaining to the claimant's average gross weekly earnings of claimant. Claimant asserts an average weekly wage of $950.00. Claimant's assertion is based solely on his own testimony that he made between $900.00 and $1,000.00 each week. Defendant(s) did not submit an alternate average weekly wage calculation. The only other evidence in the record that could establish claimant's average weekly wage is the paycheck from Mr. Vazquez to Mr. Tolentino. According to claimant, this check would have been split equally between the five members of his crew. In such a scenario, each crewmember would have received $552.00 ($2,760.00/5).

According to Mr. Martinez and Mr. Perez, the crew was paid on a weekly basis. (Hr. Tr., pp. 25, 72) Mr. Martinez testified that the pay he received varied each week, but it was typically around $900.00 per crewmember. (Hr. Tr., p. 26) At the first hearing, no one individual provided a definitive answer to the question of how the crew was paid. However, at the second hearing, claimant testified,

> He will gather us when the season is started, like in April. And in April he will always tell us how much we were going to make. He will say that he will pay us $45 per square and then $10 more if we were working on two roofs. If the roofs were tall, he was going to pay us ten more dollars.

(6/9/2021 Hr. Tr., pp. 17-18) It is unclear as to whether the above-mentioned numbers were purely an example, or if they were the actual numbers provided by Mr. Vazquez. Mr. Vazquez testified that he paid the crew by the square. (Hr. Tr., p. 92) Mr. Martinez and Mr. Tolentino testified that the money was divided evenly amongst the crewmembers. (Hr. Tr., pp. 43-44; Ex. C, Depo. Tr., p. 8)

In this case, there is very little evidence of claimant's average weekly wage. The parties did not submit any tax returns or documentation of the payment claimant earned on a weekly basis. Claimant provided testimony estimating his average weekly wage. While the only check in the evidentiary record does not support claimant's testimony, said check was representative of the wages claimant received for the week of his injury. Moreover, the check is only representative of wages claimant would have received for one job. It is unknown how many jobs claimant's crew would complete on a weekly basis. It cannot be said that such a check is representative of claimant's average weekly wage. As such, for purposes of calculating claimant's rate, I find claimant's average weekly wage to be $900.00.

Mr. Martinez asserts a claim for permanent partial disability benefits. Mr. Martinez can no longer see out of his left eye as a direct result of the July 5, 2018, work injury. (See JE4, p. 46) Dr. Russell opined it was unlikely that claimant's vision would return. As such, I find claimant has sustained a total loss of his left eye and he is entitled to 140 weeks of compensation.

Mr. Martinez also asserts a claim for temporary disability, or healing period,

benefits from July 6, 2018, through August 31, 2018. Claimant was on restrictions that limited his ability to return to substantially similar work following the date of injury. These restrictions were in place until August 31, 2018. Defendant offered no evidence to establish otherwise. Therefore, I find claimant was not medically capable of returning to substantially similar employment prior to August 31, 2018, and that he did not achieve maximum medical improvement until August 31, 2018.

Costs will be addressed in the Conclusions of Law section.

CONCLUSIONS OF LAW

The initial dispute between the parties is whether claimant has proven he was an employee at the time of the injury. Defendant contends that claimant was an independent contractor at the time of the injury.

Section 85.61(11) provides in part:

> "Worker" or "employee" means a person who has entered into 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 Serv. Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1966).

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. Where 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, however. 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 the workers' compensation statute is to benefit the worker insofar as the statute permits. The law is to be interpreted liberally to achieve that result. Additionally, the statute is intended to cast upon the industry in which the worker is employed a share of the burden resulting from industrial accidents with the ultimate cost to be borne by the consumer as part of the product cost. For that reason, "any worker whose services form a regular and continuing part of the costs of the product, and whose method of operation is not such [an] independent business that it forms in itself a separate route through which [the worker's] own costs of industrial accident can be channeled, is within a presumptive area of intended protection." Shook at 506.

The employer-employee relationship comes up in two scenarios in this case. The first is whether Riumaldo Vazquez was an employee of Butterfield & Associates, LLC such that his actions brought claimant within an employee-employer relationship with Butterfield & Associates, LLC as well. The second scenario is whether claimant was an employee of Riumaldo Vazquez.

"In cases presenting a choice between categorizing a person as an employee or an independent contractor, the primary focus is on the extent of control by the employer over the details of the alleged employee's work." Iowa Mutual Ins. Co. v. McCarthy, 572 N.W.2d 537, 542 (Iowa 1997). When these factors and Iowa Supreme Court precedent are applied to the facts of this case, it becomes evident that Riumaldo Vazquez was not an employee of Butterfield & Associates, LLC.

Mr. Vazquez controlled the manner and method of the work to be performed by Mr. Martinez and his crew. Mr. Vazquez would stop at the work site to ensure that all materials were delivered and ensure that the roofers were able to proceed. He would also obtain any additional materials, if additional materials were needed. Mr. Vazquez also monitored the crew's work directly, and, at times, remained on the jobsite and handled various tasks. Mr. Vazquez was the identified authority in charge of the work. There is no indication that Butterfield & Associates supervised or monitored Mr. Vazquez or the crew's work. Mr. Vazquez has not asserted that he was an employee of Butterfield & Associates, LLC. I conclude that Mr. Vazquez was an independent contractor and not an employee of Butterfield & Associates, LLC. Having reached that conclusion, I also conclude that Raul Martinez Yanez was not an employee of Butterfield & Associates, LLC.

The next legal question to be answered is whether Raul Martinez Yanez was an employee of Riumaldo Vazquez. Under several of the common law indicia of an employment relationship, the claimant was an employee of Riumaldo Vazquez.

Claimant was performing roofing duties on the house in question because Mr. Vazquez had contracted with Butterfield & Associates, LLC to provide the house with a new roof. Claimant and his crew had no separate contract with Butterfield & Associates

to replace the roof and no authority from Mr. Vazquez to perform other specialized services at the house. Claimant had to perform the roofing services in accordance with Mr. Vazquez's contract with Butterfield & Associates.

Mr. Vazquez solely utilized claimant's crew for his roofing jobs. There is evidence that Mr. Vazquez would become angry if Mr. Tolentino or claimant worked for other individuals. Mr. Vazquez obtained all of the roofing jobs and directed where claimant and his crew should present for work. In this respect, Mr. Vazquez would stop at the work site to ensure that all materials were delivered and ensure that the roofers were able to proceed. Mr. Vazquez monitored the crew's work directly, and, at times, remained on the jobsite and handled various tasks. Mr. Vazquez was the authority in charge of the work.

Mr. Vazquez was responsible for the payment of wages. Mr. Vazquez collected the entire fee for the roofing job and distributed a portion of those funds to claimant's crew. Mr. Vazquez made the check out to Mr. Tolentino because he was the only individual in the crew with a bank account. Mr. Vazquez calculated the funds on a per square basis.

While it is unclear the extent to which Mr. Vazquez was able to hire and fire the roofing workers, it is evident that Mr. Vazquez placed Mr. Tolentino into the original crew that Mr. Martinez worked with. The roofing work claimant performed was for the benefit of Mr. Vazquez and helped to maintain Mr. Vazquez's commitments to his customers.

Claimant and his crew's ability to remain employed and paid for work performed depended on Mr. Vazquez's continuing willingness to engage the crew to perform services. From this is can be inferred that claimant was an at-will employee of Mr. Vazquez.

These facts are consistent with claimant being an employee of Mr. Vazquez and not a subcontractor for Mr. Vazquez. At the very least, claimant produced sufficient evidence to establish a prima facie case that he was an employee of Riumaldo Vazquez.

Defendant asserts claimant was an independent contractor. Intent is gleaned from the actual facts of the relationship not simply a party's statement of intent. The affirmative defense that claimant was an independent contractor is now addressed.

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., 234 N.W. 254, 257 (Iowa 1931).

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 case, there is no evidence the parties entered into a written contract. There are no written documents to support the notion that claimant was a subcontractor. However, it is clear the parties entered into a verbal agreement that claimant and his crew would perform work for Mr. Vazquez. Both claimant and Mr. Perez understood Mr. Vazquez to be their boss. This factor weighs against a finding that Mr. Martinez was an independent contractor.

Similarly, Mr. Vazquez testified he operated his own roofing business. That business solely utilized Mr. Martinez's crew in the summer of 2018. Mr. Martinez did not operate his own, independent business; rather, he performed roofing services for the benefit of Mr. Vazquez. This factor also weighs against a finding that Mr. Martinez was an independent contractor.

With respect to the third Mallinger factor, the crew, presumably as a collective unit, maintained the ability to bring on additional members or assistants. That being said, Mr. Martinez was not even supervising his own work on the date of injury; rather, he was working on a roof that he was directed to by Mr. Vazquez. Moreover, Mr. Vazquez instructed claimant to work on the ply wood so he could leave the jobsite. (Hr. Tr., pp. 29, 31) This factor reveals mixed results in determining whether claimant was an employee or independent contractor on the date of injury.

Factor number four of the Mallinger test inquires about whether the worker provided his or her own tools. Claimant provided his own tools; however, it is undisputed that Mr. Vazquez provided claimant's crew with the necessary supplies and materials to complete each roofing job, including, presumably, the nail that injured claimant's eye. One suspects that claimant provided only minimal tools of the trade. I conclude that the general tools supplied by claimant were commonly supplied by employees within the construction industry. The fact that Mr. Vazquez provided the supplies and materials weighs against a finding that Mr. Martinez was an independent

contractor.

The undersigned has previously discussed the claimant's right to control his work. Mr. Vazquez directed claimant's crew to various jobsites. Mr. Vazquez directed the crew on the specifics of each job. If there were problems with the work, Mr. Vazquez would work with the individual who retained him to resolve the problems. Mr. Vazquez would also direct members of claimant's crew to complete repairs. While it does not appear as though there were set deadlines for every project, Mr. Martinez credibly testified that there were instances in which Mr. Vazquez set deadlines. Given the type of work being performed, it is highly likely deadlines were implied. Having worked with claimant and his crew for some time, it can reasonably be assumed Mr. Vazquez knew approximately how long a project would take claimant and his crew to complete. Any deviations from the standard amount of time would undoubtedly inconvenience Mr. Vazquez's interests. I conclude this factor weighs against a conclusion that Mr. Martinez was an independent contractor.

Factor six of the Mallinger test requires a determination of whether the worker was hired for a definitive time or definitive project. Again, there is no evidence of an initial written contract for a specified period of time or a specified project. That being said, roofing is a seasonal job, and it is clear both parties operated under the assumption that claimant's crew would work for Mr. Vazquez throughout the 2018 season as long as work was available. There is evidence that claimant's crew was the only crew Mr. Vazquez worked with throughout the 2018 season. On the other hand, it could just as easily be argued that claimant was hired by the project. While claimant was paid on a weekly basis, his pay was derived from the projects his crew completed during said week. This factor reveals mixed results in determining whether claimant was an employee or independent contractor on the date of injury.

With respect to factor seven outlined in Mallinger, Mr. Martinez's pay was directly tied to the jobs he and his crew completed each week. In other words, Mr. Martinez's compensation was based upon the completion of individual jobs. That being said, claimant was paid on a weekly basis, not upon the completion of each job. This factor reveals mixed results in determining whether claimant was an employee or independent contractor on the date of injury.

The eighth and final factor to be considered is whether the work performed by Mr. Martinez was part of the regular business of Mr. Vazquez. Mr. Vazquez testified that he owned and operated a roofing business. Claimant was performing roofing services for Mr. Vazquez, at a location he was directed to by Mr. Vazquez, at the time of his alleged injury. The work claimant performed was part of the regular business of Mr. Vazquez and clearly furthered his interests. I conclude this factor weighs strongly in favor of a conclusion that Mr. Martinez was an employee on the date of injury.

Considering all of the factors noted above, I conclude that the employer did not prove its independent contractor defense. Despite claimant's pay being based on the

completion of a job or project, and a few other facts that could weigh in favor of a finding that Mr. Martinez was an independent contractor, I conclude that defendant failed to carry its burden of proof to establish that claimant was an independent contractor at the time of his injury.

The issue of whether claimant's injury arose out of and in the course of his employment was disputed at the time of hearing. 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" refer 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.

In this instance, claimant's injury came as a direct result of a nail ricocheting and hitting claimant in the eye while he was performing roofing duties for Mr. Vazquez. Mr. Martinez was expected to be performing roofing duties at the time of his injury. He was at a location and performing duties at a time where he was expected to be at the time of his injury. Therefore, I find his accident and injuries also occurred in the course of his employment. Having concluded that Mr. Martinez was an employee of Riumaldo Vazquez, I further conclude that his injury arose out of and in the course of his employment with Mr. Vazquez.

Mr. Martinez asserts a claim for healing period benefits during a period of recuperation.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981).

I found that Mr. Martinez proved lost time from work from July 6, 2018, through August 31, 2018. I also found that claimant was not medically capable of returning to substantially similar employment prior to August 31, 2018, and that he did not achieve maximum medical improvement until August 31, 2018. Given these findings, claimant proved entitlement to healing period benefits from July 6, 2018, through August 31, 2018.

Claimant asserts that he has sustained a permanent disability as a result of this work injury. Mr. Martinez has proven that he sustained permanent disability as a result of his injury. Specifically, he has proven a permanent injury to his left eye resulting in permanent disability in some amount.

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(u), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. See Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995) (under earlier version of Iowa Code section 85.34). "The compensation allowed for a scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code § 85.34(2)(v). "Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547. Under the schedule, the compensation for loss of an eye is 140 weeks. Iowa Code § 85.34(2)(q).

Iowa Code section 85.34(2)(x) provides when determining functional disability under Iowa Code section 85.34(2)(q), "the extent of loss or percentage of permanent impairment shall be determined solely by utilizing" the AMA Guides adopted by the Commissioner in rule 876 Iowa Administrative Code 2.4. The statute prohibits use of agency expertise or lay testimony in determining functional disability under the schedule. Iowa Code § 85.34(2)(x).

No physician provided an impairment rating in this case. This alone creates an issue with the express wording of Iowa Code section 85.34(2)(x). On one hand, Iowa Code section 85.34(2)(x) specifically provides that the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the AMA Guides. On the other hand, it is clear the claimant in this case has sustained a total loss of the scheduled member. While the undersigned is not a medical doctor, it stands to reason that a total loss of the left eye would garner a 100% impairment rating under the AMA Guides. A finding that claimant receives nothing simply because he did not obtain an impairment rating for what is clearly a total loss, would be a harsh and unjust result. As such, I find claimant sustained a total loss of the left eye, or 100% left eye impairment.

Healing period benefits terminated on August 31, 2018. Therefore, I conclude

that permanent partial disability benefits commence on September 1, 2018, as stipulated by the parties. Iowa Code section 85.34(2).

The parties disputed the proper weekly rate at which benefits should be awarded. Claimant asserts a rate of $646.36. Claimant contends that his rate should be calculated utilizing his testimony that he received $900.00 to $1,000.00 per week working as a roofer for Mr. Vazquez. Defendant offers no argument with respect to claimant's average weekly wage or the correct rate to be applied in this case. Rather, defendant's post-hearing brief primarily focuses on the factors relating to the employee versus independent contractor analysis.

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.

While claimant received his payment at the end of each week, his payment was based on output. Theoretically, his wages could be calculated using subsection six of Iowa Code section 85.36. However, claimant did not submit 13 weeks of wages. There is not an established earning history in this record prior to the date of injury. Alternatively, Iowa Code section 85.36(8) could apply, since claimant's earnings cannot be ascertained; however, the parties did not introduce any specific or significant evidence on this issue. The evidentiary record does not include evidence of the usual earnings for similar services where such services are rendered by paid employees.

Arguably, the best and most credible evidence in this record about claimant's average weekly wage is the check from Mr. Vazquez to Mr. Tolentino in the amount of $2,760.00. (Exhibit B) That being said, the check contained in Exhibit B is dated July 7, 2018, or two days after claimant's injury. It cannot be said that the week in which claimant was injured is representative of his normal, average week. While speculative, it is likely claimant and the crew would have completed additional work had claimant not sustained an injury.

Instead, I find the best and most credible evidence in this record about the usual earnings of a similar roofer is claimant's testimony that he typically earned nine hundred dollars ($900.00) per week. I decline to accept claimant's later testimony that he typically earned $1,000.00 per week. Such testimony followed the initial $900.00 estimate and was the result of leading questions from claimant's attorney.

Relying upon claimant's testimony in this regard, I found that claimant's applicable gross average weekly earnings immediately preceding this injury would be nine hundred dollars ($900.00). The parties stipulated that claimant was married and

entitled to six exemptions on the date of injury. Utilizing the Iowa Workers' Compensation Manual with effective dates of July 1, 2018, through June 30, 2019, I find claimant's applicable weekly worker's compensation rate is six hundred sixteen and 27/100 dollars ($616.27).

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant introduced his unpaid medical bills at Exhibit 1. Having found those medical bills to be medically reasonable and necessary and having found those medical expenses to be causally related to claimant's work injury on July 5, 2018, I conclude that the medical expenses contained in Exhibit 1 are the responsibility of claimant's employer, Riumaldo Vazquez.

Claimant seeks an assessment of costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Claimant has proven his claims against Mr. Vazquez. Exercising the agency's discretion, I conclude that claimant's costs should be assessed against Mr. Vazquez.

Claimant seeks assessment of his filing fee ($100.00) as a cost of this proceeding. Agency rule 876 IAC 4.33(7) specifically permits the assessment of the filing fee. Claimant's filing fee shall be assessed against Mr. Vazquez.

ORDER

THEREFORE IT IS ORDERED:

Defendant, Humberto Tolentino is dismissed with prejudice and owes no benefits to claimant.

Defendant Riumaldo Vazquez shall pay healing period benefits to claimant from July 6, 2018, through August 31, 2018.

Defendant Riumaldo Vazquez shall pay one-hundred forty (140) weeks of permanent partial disability benefits to claimant commencing on September 1, 2018.

All weekly benefits shall be paid at the rate of six hundred sixteen and 27/100 dollars ($616.27).

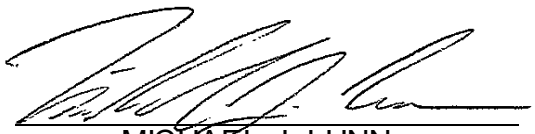
All accrued weekly benefits shall be paid in lump sum with applicable interest due pursuant to Iowa Code section 85.30.

Defendant Riumaldo Vazquez shall be responsible for paying to claimant, to the medical providers, or otherwise satisfying and holding claimant harmless for all medical expenses contained in Claimant's Exhibit 1.

Claimant's costs totaling one hundred dollars ($100.00) are assessed against Riumaldo Vazquez.

Defendant Riumaldo Vazquez shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2), and 876 IAC 11.7.

Signed and filed this 6th day of December, 2021.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Mary Hamilton (via WCES)

William Habhab (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.