BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERTO ANDRADE RAMIREZ, Claimant, vs. LUIS FERNANDO GONZALEZ CASTRO, Employer, Defendant.	:	File No. 5064860 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.10, 2001, 2502

STATEMENT OF THE CASE

Claimant, Roberto Andrade Ramirez, filed a petition in arbitration seeking workers' compensation benefits from defendant, Luis Gonzalez Castro (Castro), defendant employer. This matter was heard in Des Moines, Iowa on February 14, 2020 with a final submission date of March 17, 2020.

Prior to hearing, All's Done, Inc., employer and Farm Bureau Property & Casualty Insurance Company, insurer, settled with claimant, leaving Castro as the sole defendant in this matter.

The record in this case consists of Joint Exhibits 1-3, Claimant's Exhibits 1-6, Defendant's Exhibits G-P, and the testimony of claimant. The record in this case is somewhat confusing as the defendant filed multiple sets of exhibits. For clarity of the record, defendant filed Exhibits G through P on February 24, 2020 in this case. After hearing, defendant filed an amended Exhibit P, on February 17, 2020, which is claimant's answers to interrogatories.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

Whether an employer/employee relationship existed at the time of injury.

The extent of claimant's entitlement to permanent partial disability benefits.

Whether there is a causal connection between the injury and the claimed medical expenses.

Whether claimant is due reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

Costs.

Credit.

FINDINGS OF FACT

Claimant was 43 years old at the time of hearing. Claimant went up to the sixth grade in Mexico. Claimant has lived in the United States for approximately 20 years.

Claimant testified at hearing that he has mostly done construction work since living in the United States.

Castro testified in deposition that he first met claimant in 2016. Claimant then worked in 2017 at a job in Pella. (Exhibit M, Deposition page 41)

Castro testified he contacted claimant for a job with All's Done on Facebook after the owner of All's Done, Cody Hutton (Hutton), told Castro to get more workers. (Ex. 3, p. 44) Claimant testified he responded to the Facebook ad and Castro offered claimant the job. (Transcript pp. 30-31)

Claimant testified that Castro's ad on Facebook did not mention All's Done Construction. (Ex. M, Deposition pp. 42-43)

Claimant testified at hearing that when he was hired, Castro told him he was to work ten hours a day. (Tr. p. 31) Claimant testified Castro directed him what work needed to be performed at the job site. (Tr. p. 37) Claimant said he was paid $18.00 an hour and was paid weekly by Castro. (Tr. pp. 33, 37) Claimant said he gave his hours to Castro and Castro paid him based upon that report. (Tr. p. 37)

Claimant said he provided his own basic tools like a hammer, knife, and tape measure. Claimant said larger tools were delivered in boxes labeled "All's Done." He said the materials were provided by All's Done. (Tr. p. 35; Ex. M)

Claimant said Castro assigned him to all his work duties. (Tr. p. 42) He said occasionally Castro told him to work another job run by a man named Kyle (no last name given). Claimant said Kyle was another person who worked for All's Done. (Tr. p. 40)

Castro testified in deposition that he worked for All's Done and Cody Hutton. (Ex. 3, pp. 32, 36, 38) He said Hutton gave directions for work to be performed by texts and by phone calls. (Ex. 3, p. 33; Ex. J, pp. 12, 39) Castro said Hutton told him where and when to work, how many hours to work, and the hourly rates to be paid for work. (Ex. 3, pp. 34-35, 40-45; Ex. J, pp. 12-39) Castro said that any overtime hours had to be approved by Hutton. (Ex. 3, p. 48)

Castro testified that Hutton approved any raises. (Ex. 3, p. 41)

Castro said Hutton provided all materials and large tools for work. He said Hutton would rent equipment for work. He said Hutton conducted all meetings. Castro testified that Hutton would hire other workers or would tell him which workers he wanted at which jobs. (Ex. 3, pp. 34-37, 40, 43; Ex. G, pp. 1-2; Ex. H, p. 4)

Castro said Hutton had final approval over who worked and who did not work at a job site. He said Hutton would fire people assigned to work with Castro. (Ex. 3, pp. 34-35) Castro testified he was not allowed to hire new workers without Hutton's approval. (Ex. 3, pp. 35, 43-44)

Castro said Hutton would periodically check job sites and direct the work at a job site. Castro said Hutton would not tell him how to perform work, but would tell him to redo work if Hutton thought the work was done incorrectly. (Ex. 3, pp. 37, 39, 42)

Castro testified that he did not fill out timesheets for other workers. He said he gave Hutton's instructions to workers as Castro spoke English. Castro said he did this because he was the crew's supervisor. Castro did not believe the workers on the job site were his employees. (Ex. 3, pp. 36, 40-41, 45; Ex. J; Ex. K, pp. 41-42; Ex. P, pp. 54, 56, 70)

Castro said he told Hutton of the total number of hours worked by a work crew. He said Hutton paid him in one check. Castro said he paid himself and then crew members from that check. (Ex. 3, p. 15) At the end of the year, Hutton gave Castro a 1099 Form and Castro knew he was required to pay his own taxes. (Ex. 3, p. 33; Ex. 6)

Hutton testified in deposition that he is the owner of All's Done. (Ex. 2, p. 4; Ex. O, p. 8) All's Done provides labor and materials for building projects. (Ex. O, p. 17)

Hutton said he uses Castro and two other subcontractors to do drywalling on various construction projects. Hutton said he hired Castro to do framing and drywalling on the project site where claimant was injured. (Ex. 2, pp. 18, 22)

Hutton said All's Done is ultimately responsible for how a job is completed. (Ex. 2, pp. 34, 38) He said the subcontractors, like Castro, invoice him for work and he pays the subcontractor. (Ex. 2, p. 42) Hutton said he paid Castro with one check based on invoices. He said Castro used that check to pay the workers on his work crew. (Ex. O, p. 118)

Hutton said Castro determined how to do the work on a work site. Castro determined who to hire. Castro determined what jobs each worker was to perform. He said Castro decided what to pay workers on his crew. (Ex. 2, pp. 44, 53-54; Ex. O, p. 60) Hutton said Castro determined the size of his crew. (Ex. 2, p. 59) He said normally subcontractors fire members of their own crews. (Ex. 2, pp. 60-61) Hutton said Castro did not work exclusively for All's Done. (Ex. 2, pp. 59-60)

Hutton said he was never Castro's employer. He said Castro was his own independent contractor. (Ex. O, p. 39)

In requests for admissions from Castro, claimant admitted he worked for All's Done and that Castro was a co-worker. (Ex. G, pp. 1-3; Ex. H, pp. 4-5) In deposition, claimant testified that he never said Castro was his employer, but that Castro was the one who paid him. (Ex. N, Deposition p. 27)

In answers to interrogatories, claimant indicated he worked for All's Done. (Ex. L, p. 44; Ex. P, p. 56) He indicated Castro was his supervisor. (Ex. P, p. 56) Claimant indicated he understood All's Done was his employer, that Castro was his supervisor and that Hutton oversaw all the work that was done. (Ex. P, p. 54)

In answers to interrogatories, claimant indicated Hutton had the ability to hire and fire and assign job duties. (Ex. L, p. 45; see also, Ex. P, p. 57 identifying Castro as a co-worker; Ex. P, p. 70)

At hearing, claimant testified he was unsure if he was employed by Castro or All's Done. (Tr. p. 57, 61, 63)

On December 11, 2017, claimant was working on an All's Done job site when he fell approximately 12 feet from scaffolding. Claimant's fall resulted in a bilateral intra-articular wrist fracture. Claimant also sustained numerous bruises and lacerations to his knee, chin, and cheek. (Joint Ex. 2, pp, 8, 11-19) Claimant was taken by an ambulance to Pella Regional Health Center. (Jt. Ex. 1)

On December 13, 2017, claimant underwent surgery consisting of open reduction internal fixation of bilateral distal radius fracture. (Jt. Ex. 2, pp. 36-37; Jt. Ex. 3, p. 54) The surgery was performed by Christopher Vincent, M.D.

Claimant was discharged from Pella Regional Hospital on December 14, 2017. (Jt. Ex. 2, pp. 7-10)

On December 22, 2017, claimant was evaluated by Dr. Vincent. Claimant was given work restrictions and bilateral wrist splints. (Jt. Ex. 3, pp. 43-44)

Claimant returned to Dr. Vincent on January 19, 2018. Claimant was found to have acceptable range of motion in the wrists. He was referred to physical therapy. (Jt. Ex. 3, pp. 49-50) Dr. Vincent evaluated claimant on March 2, 2018. Claimant was

doing well. Claimant was limited to lifting up to five pounds with each arm. (Jt. Ex. 3, pp. 51-54)

Claimant returned to Dr. Vincent in follow up on April 13, 2018. Claimant was doing well and had acceptable range of motion. Claimant was returned to work with no restrictions. (Jt. Ex. 3, pp. 58-60)

Dr. Vincent saw claimant on May 25, 2018. Claimant was found to be at maximum medical improvement (MMI). Dr. Vincent had no recommendations for further treatment. (Jt. Ex. 3, pp. 61-63)

Claimant testified that several weeks after Dr. Vincent released him to return to work, claimant began working as a carpenter with Villva Construction. Claimant was still working for Villva Construction at the time of hearing. (Tr. pp. 27-28)

In a May 6, 2019 letter, Dr. Vincent found that claimant had no limitations on strength. Based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he found that claimant had a three percent impairment to the right upper extremity and a four percent permanent impairment to the left upper extremity. He found claimant had no permanent restrictions. He also found that claimant had no need for further medical care. (Jt. Ex. 3, pp. 64-65)

In a July 13, 2019 report, Theron Jameson, D.O., gave his opinions of claimant's condition following an IME. He found that based on the Guides, claimant had an 8 percent permanent impairment to the right upper extremity and an 11 percent permanent impairment to the left upper extremity. This resulted in a combined 15 percent permanent impairment to the upper extremities. (Ex. 1, pp. 8-10)

Dr. Jameson restricted claimant to no repetitive gripping on the left and no pushing, pulling or lifting more than 30 pounds bilaterally. Dr. Jameson believed claimant had underlying carpal tunnel syndrome and recommended EMG testing on the right. (Ex. 1, pp. 10-11)

Claimant testified he continues to have pain in his hands. He says he has difficulty bending his wrists and lifting things. Claimant believes he has loss of strength and has dropped tools. (Tr. p. 23, 26-27)

CONCLUSIONS OF LAW

The first issue to be determined is whether an employee-employer relationship existed at the time of injury. Claimant contends Castro was his employer. Castro argues that he was not claimant's employer.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

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 claimant or claimant's decedent 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 (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. 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 County, 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).

Factors used to determine whether an independent contractor relationship exists are: 1. The existence of a contract for the performance of a certain piece or kind of work that affects price. 2. Whether the worker has a separate business apart from the work he is performing for the employee. 3. The employment of assistants and the right to supervise their activities. 4. The obligation of the worker to furnish necessary tools, supplies, and materials. 5. The right of the worker to control the progress of the work, except as to the finished result. 6. The method of payment, whether by time or by job. 7. The intention of the parties to create a particular relationship. Crane v. Meier, 332 N.W.2d 344 (Iowa App. 1982).

In Stark Const. v. Lauterwasser, No. 13-0609. (unpublished) (Iowa Ct. App., April 16, 2014) (Table) 847 N.W.2d 612, the Iowa Court of Appeals also addressed the intent of the parties as a potential factor in analyzing the existence of an employee-employer relationship: The court in Lauterwasser noted:

The Nelson court also called attention to "another possible element which, when applicable, might be used with others as an aid in determining whether one person is or is not the employee of another, to-wit: the intention of the parties as to the relationship created or existing." Id. at 265. The Nelson court warned that looking at intent "standing alone" could be "somewhat misleading." Id. The court then quoted comment m, under section 220 of the Restatement (Second) of Agency, which explained:

> It is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control by the other. However, community custom in thinking that a kind of service, such as household service, is rendered by servants, is of importance.

Id. Nelson stated the trier of fact may, where appropriate, use the subjective standard of the parties' intent "to the extent it serves to shed light upon the true status of the parties concerned." Id.

Our supreme court discussed the parties' intention again in Henderson v. Jennie Edmundson Hospital, 178 N.W.2d 429 (Iowa 1970). There, the court said "in addition to the five . . . elements we recognize the overriding element of the intention of the parties as to the relationship they are creating may also be considered." Henderson, 178 N.W.2d at 431. Henderson cited Nelson and Usgaard as supporting that conclusion. Id.

"With [those] rules in mind," the Henderson court focused on the commissioner's finding that the second factor—payment of some compensation by the employer—had not been proved by Henderson, who was injured while enrolled in a nurse's aide training course for which she did not receive any wages. Id. at 431–33. The court also noted: "[I]t did not appear under the entire record it was the intention of the claimant or the hospital authorities to enter into the relationship of employer-employee." Id. at 433.

In an appeal involving unemployment benefits, the supreme court discussed workers' compensation cases appearing to hold "the intent of the parties is conclusive in determining whether an employment relationship exists." Gaffney v. Dep't of Emp't Servs., 540 N.W.2d 430, 434 (Iowa 1995) (reviewing Nelson and Usgaard).

The Gaffney court suggested the parties' intent remained just one of several factors to be considered, and primarily only to settle the question whether the would-be employee has submitted to the control of the would-be employer. Gaffney, 540 N.W.2d at 435.

Castro put an ad on Facebook and hired claimant for his work crew. The ad did not mention All's Done. (Ex. M, Deposition pp. 42-43) Castro got a check from All's Done and out of that check paid claimant. (Ex. O, p. 118) Hutton testified Castro hired and paid and supervised his crew without the involvement of All's Done. (Ex. O, p. 118) Claimant testified, at hearing, that Castro was his boss and instructed claimant what work needed to be performed. (Ex. M, pp. 43-44; Tr. pp. 36, 42) Castro instructed claimant the work to do each morning on the job. (Tr. p. 36) Occasionally Castro directed claimant to work for another crew. (Tr. p. 40) Hutton said that while he oversaw a job, Castro decided how to do the work on a job. Castro also supervised the workers on his crew. Castro decided what to pay crew members. (Ex. 2, pp. 44, 53-54; Ex. O, p. 60)

Castro hired claimant. Castro set the hours claimant would work. Castro had the right to fire claimant. Castro set the amount that claimant was paid per hour. Castro instructed what work claimant was to do. Occasionally, Castro would loan claimant out to other work crews. These factors might suggest that Castro, and not All's Done, was the employer in this case.

However, claimant has responded to requests in discovery indicating that All's Done was his employer and that Castro was his supervisor. In requests for admissions, claimant admitted he worked for All's Done and that Castro was a co-worker. (Ex. G, pp. 1-3; Ex. H, pp. 4-5) In deposition, claimant testified that he never said Castro was his employer, but that Castro was the one who paid him. (Ex. N, p. 47; Depo. p. 27)

In the answers to interrogatories, claimant indicated he worked for All's Done. He also indicated Castro was his supervisor. (Ex. P, p. 56) Claimant indicated he understood All's Done was his employer, Castro was his supervisor and that Hutton oversaw all the work that was to be performed. (Ex. P, p. 54) Claimant indicated in the answers to interrogatories that Hutton had the ability to hire, fire, and assign job duties. (Ex. L, p. 45; see also, Ex. P, p. 57, 70)

Rule 876 Iowa Administrative Code 4.35 makes the Iowa Rules of Civil Procedure 1.501 through 1.517, that govern discovery, applicable before this agency.

Iowa R. Civ. P. 1.511 states that any matter admitted under the rule 1.510 is conclusively established in the pending action unless the court on motion permits withdrawal or amendment of the admission.

No motion was made to withdraw or amend the responses to requests for admissions indicating that All's Done was the employer and that Castro was claimant's supervisor.

Iowa R. Civ. P. 1.511 indicates that claimant's response to requests for admissions conclusively establishes that All's Done was claimant's employer and that Castro was only a job supervisor. Claimant has responded to numerous requests in discovery indicating All's Done was the employer and that Castro was only a job

supervisor. Given this record, claimant has failed to carry his burden of proof that there was an employer-employee relationship between claimant and Castro at the time of injury.

As claimant has failed to carry his burden of proof establishing the existence of an employer-employee relationship at the time of injury between claimant and Castro, all other issues, except that regarding reimbursement of the IME, are moot.

The next issue to be determined is whether claimant is due reimbursement for Dr. Jameson's IME.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Defendants did not retain an expert to give an opinion regarding claimant's permanent impairment. As such, claimant's entitlement to reimbursement for the IME is

not triggered under Iowa Code section 85.39. Given this record, claimant has failed to carry his burden of proof he is due reimbursement for Dr. Jameson's IME.

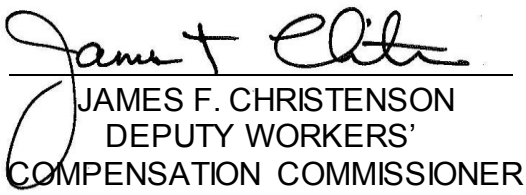
ORDER

THEREFORE, IT IS ORDERED:

That claimant shall take nothing from this proceeding.

That both parties shall pay their own costs.

Signed and filed this 17th day of June, 2020.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mary K. Hoefer (via WCES)

John Q. Stoltze (via WCES)

James W. Russell (via WCES)
A. Zane Blessum (via email azb@blessumlaw.com)

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.