TEMPORARY AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 15-064900

Employee: Gerald McClain

Employer: Birnamwood Condominium Association
Markel Insurance Company

Efthim Company Realtors, Inc. (dismissed)
Travelers Casualty & Surety Company

Meyers Trees & More, LLC
Uninsured

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. We find that the temporary award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Preliminaries
The parties asked the administrative law judge to resolve the following two issues: (1) whether Meyers Trees & More, LLC, (Meyers Trees) was properly insured pursuant to the Missouri Workers' Compensation Law; and (2) whether Efthim Company Realtors, Inc. (Efthim), and/or Birnamwood Condominium Association (Birnamwood) are statutory employers.

The administrative law judge concluded as follows: (1) Meyers Trees was not properly insured; and (2) that Birnamwood was a statutory employer pursuant to § 287.040.1, RSMo, while Efthim was not liable as Birnamwood's agent.

On November 14, 2019, employer Birnamwood filed an application for review alleging that the administrative law judge erred in determining Birnamwood to be a statutory employer because tree trimming was not in Birnamwood's usual business. Alternatively, Birnamwood argued that Efthim should be an intermediary employer and therefore liable before Birnamwood. In its brief, Birnamwood abandoned this alternative argument. Accordingly, we do not address that alternative argument.

We adopt the findings of fact and conclusions of law from the temporary award of the administrative law judge, to the extent they are not inconsistent with the following supplemental facts and conclusions of law.

Findings of Fact
Birnamwood was a condominium association that ensured that common areas of a condominium complex were maintained, including the property's trees. Birnamwood contracted with Efthim to be a management agent in order to obtain bids for necessary

maintenance and present the bids to Birnamwood. In its contract with Efthim, Birnamwood gave Efthim the authorization to hire and pay employees on behalf of Birnamwood "to properly operate and maintain" Birnamwood. *Tr.*, p. 1048. The contract also stated that such employees would be employees of Birnamwood and not "the Management Agent" Efthim. *Id.* The contract then stated, "Association to have no Employees." *Id.* (emphasis in original). Regardless of the last sentence just quoted, we find that the terms of the contract contemplated the hiring of employees on behalf of Birnamwood to perform the maintenance of the condominium complex property, including all tree trimming services.

Instead of hiring employees on Birnamwood's behalf, Efthim presented a bid from Meyers Trees to provide landscaping and tree trimming for the year at issue. Birnamwood awarded the contract to Meyers Trees, as it had done so for several previous years. It appears that Meyers Trees was the only company that Efthim contacted for a bid for several years.

All of the parties stipulated that employee, a direct employee of Meyers Trees, was injured when he slipped off of a roof during a tree-trimming job performed by Meyers Trees. Meyers Trees had previously presented a certificate of workers' compensation insurance to Birnamwood, but such certificate was actually not valid on the date of injury.

Conclusions of Law

Statutory Employer and Usual Business

Section 287.040, RSMo, provides the statutory definition of an employer for workers' compensation matters and provides:

> 1. Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.
>
> 2. The provisions of this section shall not apply to the owner of premises upon which improvements are being erected, demolished, altered or repaired by an independent contractor but such independent contractor shall be deemed to be the employer of the employees of his subcontractors and their subcontractors when employed on or about the premises where the principal contractor is doing work.
>
> 3. In all cases mentioned in the preceding subsections, the immediate contractor or subcontractor shall be liable as an employer of the employees of his subcontractors. All persons so liable may be made parties to the proceedings on the application of any party. The liability of the immediate employer shall be primary, and that of the others secondary in their order, and any compensation paid by those secondarily liable may

> be recovered from those primarily liable, with attorney's fees and expenses of the suit. Such recovery may be had on motion in the original proceedings. No such employer shall be liable as in this section provided, if the employee was insured by his immediate or any intermediate employer.
>
> 4. The provisions of this section shall not apply to the relationship between a for-hire motor carrier operating within a commercial zone as defined in section 390.020 or 390.041 or operating under a certificate issued by the Missouri department of transportation or by the United States Department of Transportation, or any of its subagencies, and an owner, as defined in section 301.010, and operator of a motor vehicle.

Here, Birnamwood does not challenge the progression of liability from Meyers Trees to itself pursuant to § 287.040.3, RSMo. However, it argues that it could not be a statutory employer pursuant to § 287.040.1, RSMo, because tree trimming is not part of its usual business.

The Supreme Court of Missouri has "defined 'usual business' as 'those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement.'" *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 480 (Mo. 2009) (quoting *Bass v. Nat'l Super Mkts., Inc.*, 911 S.W.2d 617, 619 (Mo. banc 1995)).

The court in *McCracken* continued,

> This definition is designed to exclude "specialized or episodic work that is essential to the employer but not within the employer's usual business as performed by its employees."

McCracken, 298 S.W.3d at 480 (quoting *Bass*, 911 S.W.2d at 621).

Birnamwood argues that the administrative law judge failed to focus on the specific work of rooftop tree trimming, instead of the general tree trimming of the entire complex. Birnamwood argues that it only performed rooftop tree trimming work once a year, which was not frequent enough to constitute routinely done on a regular and frequent schedule. Birnamwood also pointed out that such rooftop tree trimming was only performed when requested by a resident, and was therefore, not a regularly scheduled event.

Efthim disagreed with Birnamwood's limitation to rooftop tree trimming and argued that tree trimming, more generally speaking, was performed on a weekly basis by Meyers Trees. Efthim also pointed out that Birnamwood allotted an amount in its budget for tree trimming. In the temporary award, the administrative law judge found employee's testimony credible that he trimmed trees at least once a week, including climbing a roof related to tree trimming tree services six times a year. We do not see a reason to

disturb the credibility finding of the administrative law judge and also find employee's testimony credible on this point. We also conclude that it appears that when awarding the contract to Efthim, the parties contemplated tree trimming to include all aspects of such work, including rooftop tree trimming.

The last prong in analyzing whether a task is in the employer's usual business is the ultimate question: would the employer need to hire an employee if it could not contract out the work? Birnamwood argues that it would not have hired an employee, but merely would have found another contractor to perform the work. This argument presents a pragmatic approach, but does not apply the question. If there were no contractors, then would the statutory employer need to hire an employee to perform the work?

We agree with the administrative law judge that the answer would be yes. As we found above, the terms of the contract between Birnamwood and Efthim already contemplated hiring employees to perform the essential maintenance of the property's grounds. Accordingly, we conclude that Birnamwood would have hired an employee to trim trees if it could not have contracted out the work and it would have used Efthim to hire and pay employees on behalf of Birnamwood. We further agree that the tree trimming services performed by Meyers Trees over the years of service to Birnamwood was not merely specialized or episodic work, but was within Birnamwood's usual business.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

The temporary award and decision of Administrative Law Judge Karla Ogrodnik Boresi is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 15th day of December 2020.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

Robert W. Cornejo, Chairman

Reid K. Forrester, Member

Shalonn K. Curls, Member

Attest:

Secretary

Issued by DIVISION OF WORKERS' COMPENSATION

TEMPORARY OR PARTIAL AWARD

Employee: Gerald L. McClain

Injury No.: 15-064900

Dependents: N/A

Employer: Meyers Trees & More, LLC;
Birnamwood Condominium Association; and
Efthim Company Realtors/
Efthim Company Realtors, Inc.

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Uninsured;
Markel Insurance Co.; and
Travelers Casualty & Surety Co.

Hearing Date: July 29, 2019

Checked by: KOB

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.

2. Was the injury or occupational disease compensable under Chapter 287? Yes.

3. Was there an accident or incident of occupational disease under the Law? Yes.

4. Date of accident or onset of occupational disease: April 8, 2015.

5. State location where accident occurred or occupational disease contracted: on or about unit 1577 of the condominium complex located at 4177 Crescent Drive, St. Louis, Missouri 63129.

6. Was above employee in employ of above employer at time of the alleged accident? See Award.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? Yes.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? See Award.

11. Describe work employee was doing and how accident happened or occupational disease contracted: Claimant was standing on the roof of the Complex, using pruning poles to push tree branches away, when he slipped off the roof, falling to the ground.

12. Did accident or occupational disease cause death? No.

13. Parts of body injured by accident or occupational disease: To be determined.

14. Compensation paid to-date for temporary disability: No entity has paid temporary disability benefits.

15. Value necessary medical aid paid to date by employer/insurer? No entity has provided medical aid.

16. Value necessary medical aid not furnished by employer/insurer? To be determined.

17. Employee's average weekly wages: N/A

18. Weekly compensation rate: N/A

19. Method wages computation: N/A

COMPENSATION PAYABLE

20. Amount of compensation payable: See Award.

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Richard K. Johnson and Crista R. Johnson

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gerald L. McClain

Injury No.: 15-064900

Dependents: N/A

Employer: Meyers Trees & More, LLC;
Birnamwood Condominium Association; and
Efthim Company Realtors/
Efthim Company Realtors, Inc.

Additional Party: Second Injury Fund

Insurer: Unimsured;
Markel Insurance Co.; and
Travelers Casualty & Surety Co.

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Hearing Date: July 29, 2019

Checked by: KOB

PRELIMINARIES

The matter of Gerald L McClain ("Claimant") proceeded to hearing. Claimant appeared in person and by counsel, Attorneys Richard K. Johnson and Crista R. Johnson. The purported employers were represented as follows: Attorney Michael Donnell represented Birnamwood Condominium Association ("Birnamwood" or "Birnamwood Association") and its insurer, Markel Insurance Co. ("Markel"); Attorneys David Ware and Mary Ann Lindsey represented Efthim Company Realtors and Efthim Company Realtors, Inc. ("Efthim") and its insurer, Travelers Casualty & Surety Co. ("Travelers"); Assistant Attorney General David Drescher represented the Second Injury Fund. Attorney Mark R. Bahn represented Meyers[1] Trees & More, LLC ("Meyers Trees"), but chose not to appear (Stipulation 84).[2]

Claimant sustained an injury while working for an alleged uninsured employer, and there is a dispute as to whether either of the two other purported employers are responsible for providing benefits under the Missouri Workers' Compensation Act ("Act"). The parties have agreed to limit the issues submitted for determination at this hearing to two: 1) whether Meyers Trees was insured on the date of the accident; and 2) whether any entity was Claimant's statutory employer at the time of the accident. Thus, this award is partial and limited in scope, and the remaining issues are deferred.

STIPULATED FINDINGS OF FACT

The parties offered eighty-four factual stipulations. Stipulations of fact are generally binding in Missouri... and courts are bound to enforce them. *Bull v. Excel Corp.*, 985 S.W.2d 411, 415 (Mo. Ct. App. 1999). Therefore, I make the following findings of fact:

[1] Although basic rules of grammar suggest an apostrophe is appropriate, the pleadings and Division of Workers' Compensation file refer to the purported direct employer as "Meyers," and the parties have adopted that designation throughout the stipulations and briefs. For consistency's sake, I will not use an apostrophe in the employer's name.
[2] Further references to the stipulations will simply consist of the number in parentheses without the designation "Stipulation."

1. On 4-8-15, Meyers Trees & More, LLC ("Meyers Trees"), was an employer, operating within the state of Missouri, under the Missouri Workers' Compensation Law.
2. On 4-8-15, Meyers Trees was uninsured for its workers' compensation liability.
3. On 4-8-15, at the time of the accident in question, Gerald McClain was directly employed by Meyers Trees.
4. On 4-8-2015, Gerald McClain and Meyers Trees were subject to the Missouri Workers' Compensation Law.
5. Meyers Trees has paid $0.00 for medical aid.
6. Meyers Trees has not paid any temporary total disability benefits to Gerald McClain.
7. Venue for hearing is appropriate in St. Louis City, Missouri.
8. Gerald McClain provided timely notice of the 4-8-15 accident and injury, pursuant to RSMo §287.420.
9. The Claim for Compensation was timely filed, pursuant to RSMo §287.430.
10. The Birnamwood Condominium Association ("Birnamwood Association") is responsible for managing the Birnamwood Condominium Complex ("Condominium Complex") located at 4177 Crescent Drive, Suite A, St. Louis, Missouri 63129.
11. This includes paying bills, handling the complaints of unit owners, taking care of the common grounds of the Condominium Complex, and handling maintenance issues, through the hiring of contractors or vendors.
12. On 4-8-15, the Birnamwood Association operated within the State of Missouri under the Missouri Workers' Compensation Act.
13. On 4-8-15, Birnamwood Association's Workers' Compensation liability was insured by Markel Insurance Company.
14. On 4-8-15, Birnamwood Association and Markel Insurance Company were subject to the Missouri Workers' Compensation Act.
15. Birnamwood Association and Markel Insurance Company have paid $0.00 for medical aid.
16. Birnamwood Association and Markel Insurance Company have not paid any temporary total disability benefits to Gerald McClain.
17. On 4-8-15, Birnamwood Association had no direct employees.
18. On 4-8-15, Efthim Company Realtors, Inc. ("Efthim") was an employer, operating within the state of Missouri under the Missouri Workers' Compensation Act.
19. On 4-8-15, Efthim's Workers' Compensation liability was fully insured by Travelers Casualty and Surety Company ("Travelers").
20. On 4-8-15, Efthim and Travelers were subject to the Missouri Workers' Compensation Act.
21. Efthim and Travelers have paid $0.00 for medical aid.
22. Efthim and Travelers have not paid any temporary total disability benefits to Gerald McClain.
23. On 10-11-02, Birnamwood Association entered into a Management Agreement ("Management Agreement") with Efthim.
24. The Management Agreement between Birnamwood Association and Efthim was effective for the initial contract period of 1-1-03 to 12-31-03.
25. Since 1-1-04, the Management Agreement between Birnamwood Association and Efthim has renewed annually for similar terms.
26. On 4-8-15, the Birnamwood Association had a 3-member Board of Directors.

27. On 4-8-15, the Board of Directors for the Birnamwood Association was comprised of Tom Gorski, Ed Shields, and Lana Stoeckl.
28. The Birnamwood Association maintains a bank account to pay the expenses of the Association.
29. Efthim, as management agent, has authority to sign checks and pay the normal bills of Birnamwood Association.
30. When Efthim hired contractors or vendors, it paid for the services of the contractors or vendors with a Birnamwood Association check, drawn on the Association's bank account.
31. Efthim made no payments on its own account for any services performed by contractors or vendors at the Birnamwood Condominium Complex.
32. Budgeting for landscaping at the Condominium Complex included mowing lawns, snow removal, tree trimming, and cleanup of leaves and branches in the fall and spring.
33. Efthim, on behalf of Birnamwood Association, would obtain bids for budget items and costs, such as landscaping, lawn mowing, and tree trimming.
34. The Birnamwood Association Board of Directors then selected the vendor or contractor to provide landscaping and tree trimming services for the upcoming year.
35. The Birnamwood Association Board of Directors then selected the vendor or contractor to provide landscaping and tree trimming services for the upcoming year.[3]
36. Meyers Trees submitted a Certificate of Insurance to Birnamwood Association that was, following claimant's 4-8-15 accident, determined … not to be valid.
37. In situations where a large tree trimming project was involved, such as removing a tree, Efthim would ask Meyers Trees to provide an estimate for that project.
38. Once Efthim obtained an estimate for the project from Meyers Trees, Efthim would submit the estimate to the Birnamwood Association Board of Directors for its approval.
39. If the Birnamwood Association Board of Directors approved the estimate for the project submitted by Meyers Trees, Meyers would then perform the work, and send a bill for its services.
40. In addition to trimming trees at the Condominium Complex, Meyers Trees cut grass, pruned bushes, and performed snow removal in the winter at the Complex.
41. Efthim would pay the bill or invoice for the Meyers Trees project by a check drawn on Birnamwood Association's bank account.
42. The Birnamwood Association did not require Efthim to have tree trimmers on its staff.
43. The Birnamwood Association never had a direct employee, who performed tree trimming or tree services of the nature performed at the Condominium Complex by Meyers Trees.
44. Efthim never had a direct employee who performed tree trimming or tree services of the nature performed at the Condominium Complex by Meyers Trees.
45. Meyers Trees issued 100 invoices for work performed at the Condominium Complex for the period from 1-5-10 to 4-7-15.
46. Meyers Trees continued to perform tree trimming and landscape maintenance services at the Condominium Complex following the 4-8-15 accident, until 3-11-16.
47. Meyers Trees submitted a 3-23-15 estimate to Birnamwood Association, through Efthim, for the removal of a portion of a tree over Unit 1577 at the Condominium Complex.
48. The Board of Directors of Birnamwood Association approved that estimate.

[3] Duplication in original.

49. Meyers Trees submitted an invoice, No. 2770, dated 4-7-15, for the removal of the tree over Unit 1577 at the Condominium Complex.
50. The work for which Meyers Trees issued invoice No. 2770 entailed removing a portion of a tree which was hanging over Unit 1577 at the Condominium Complex.
51. On 4-8-15, claimant and three other employees of Meyers Trees were present at the Condominium Complex to remove parts of a tree hanging over Unit 1577.
52. This work required four people: a climber, a roper, someone on the Condominium Complex roof to protect the roof, and a ground man who took the brush away and chipped it.
53. On 4-8-15, claimant was up on the roof at the Condominium Complex, protecting the roof.
54. On 4-8-15, claimant also directed his three Meyers Trees co-workers in what to do to take down the tree.
55. On 4-8-15, Dave Meyers of Meyers Trees told claimant to get up on the roof at the Condominium Complex, and perform the work required to take the tree down.
56. On 4-8-15, claimant and his co-workers from Meyers Trees began working at the Condominium Complex at 8:00 a.m.
57. On 4-8-15, claimant was standing on the roof of the Condominium Complex, using pruning poles to push tree branches away, when he slipped off the roof, falling to the ground.
58. When he fell from the Condominium Complex roof on 4-8-15, claimant was not wearing any protective gear, such as a harness.
59. Dave Meyers of Meyers Trees never instructed claimant about wearing protective gear.
60. Prior to 4-8-15, claimant had requested protective gear from Meyers Trees, but had never been provided with any protective devices.
61. Prior to 4-8-15, claimant never asked anyone at Birnamwood Association for protective gear when he worked at the Condominium Complex.
62. As a result of the 4-8-15 accident, claimant sustained injuries.
63. When claimant performed work at the Condominium Complex, he received instructions for the work to be done from Dave Meyers of Meyers Trees.
64. Frank Efthim, of Efthim Company Realtors, never gave direction or instruction to claimant when he was performing work at the Condominium Complex.
65. No one from Birnamwood Association gave claimant instruction or direction when he performed work at the Condominium Complex.
66. No one from Birnamwood Association or Efthim ever assisted claimant in performing tree trimming activities at the Condominium Complex.
67. Claimant never received any checks from Birnamwood Association for work done at the Condominium Complex.
68. On 4-8-15, Efthim did not supervise or oversee the work claimant performed at the Condominium Complex.
69. On 4-8-15, Birnamwood Association did not supervise or oversee the work claimant performed at the Condominium Complex.
70. Efthim does not supervise or oversee work performed by vendors or contractors at the Condominium Complex.
71. Any vendor or contractor performing work at the Condominium Complex is responsible for supervising or overseeing the services being provided by its employees.

72. Frank Efthim of Efthim Realtors never instructed or directed Dave Meyers of Meyers Trees or employees of Meyers Trees how to perform work done at the Condominium Complex, including tree trimming and tree removal.
73. Frank Efthim of Efthim Realtors did not tell vendors or contractors providing services at the Condominium Complex how to perform their jobs.
74. On 4-8-15, Birnamwood Association did not have a maintenance department.
75. Birnamwood Association does not have a maintenance schedule for the Condominium Complex.
76. Contractors and vendors performing work at the Condominium Complex, including Meyers Trees, were paid by check drawn on Birnamwood Association's bank account, and signed by Frank Efthim and his brother Rick Efthim, who had signature authority on behalf of the Association.
77. The 3-23-15, document #514 (pg. 224), estimate and the 4-7-15 invoice, document #2770 (pg. 725), from Meyers Trees pertain to the work which claimant performed at the Condominium Complex on 4-8-15.
78. The work Meyers Trees performed at the Condominium Complex on 4-8-15 did not involve the erecting or demolishing of any structures.
79. Birnamwood Association has control of the roof of any unit in the Condominium Complex.
80. Efthim has the right to go up on the roof of any unit in the Condominium Complex.
81. Apart from Birnamwood Association and Efthim, no one else has the right to get up on the roof of any unit at the Condominium Complex, without permission from the Association.
82. The general public does not have the right to get up on the roof of any unit at the Condominium Complex.
83. On 4-8-15, the only people who had authority to be up on the roof of the Condominium Complex were Dave Meyers and the workers of Meyers Trees performing tree trimming.
84. Meyers Trees, through its attorney, has advised it will not appear at trial of the Claim.

ADDITIONAL FINDINGS OF FACT

The morning of April 8, 2015, Claimant led a four-man crew of Meyers Trees employees tasked with removing part of the tree hanging over Unit 1577 of the Birnamwood Condominium Complex (hereinafter, "Condo Complex"). In order to protect the roof, Claimant was using pruning poles to push the tree branches away, when he slipped off the roof, and fell to the ground. As a result, Claimant sustained injuries. Claimant now seeks to hold one of three purported employers liable to provide him with benefits under the Act.

Birnamwood was the beneficiary of Claimant's labors on the day he was hurt. Birnamwood was responsible for managing the Condo Complex, and was run by Board of Directors (a.k.a. Board of Managers), which in April 2015 was comprised of Tom Gorski, Ed Shields, and Lana Stoeckl. Pursuant to the terms of the Birnamwood Condominium Association Owners Handbook, "the Board of Managers is responsible for maintenance of all the common areas, and to this end approves an annual budget and sets the assessment fees for owners." (Joint

Ex. p.1003)[4]. The Board's specific responsibilities included paying bills, handling owner complaints, taking care of the common ground, and handling maintenance issues through the hiring of contractors or vendors. The Board provided for routine matters in the annual budget, including landscaping and tree trimming (Joint Ex. pp. 55-56), and maintained a bank account to pay such expenses. Budgeting for landscaping included mowing, snow removal, tree trimming, and cleanup of leaves and branches in the fall and spring.

Birnamwood had a special relationship with Meyers Trees. A resident of the Condo Complex initially recommended Meyers Trees. Landscaping and tree trimming were performed pursuant to a contract of a year or more between Birnamwood and the contractor, and for all relevant times herein, the exclusive contractor for tree trimming was Meyers Trees. (Testimony of Tom Gorski (Joint Ex. pp. 66) and Frank Efthim (Joint Ex. pp. 156 and 157)). For several years prior to Claimant's accident, Meyers Trees was the contractor submitted by Efthim and approved by Birnamwood to provide landscaping and tree trimming services at the Condo Complex. No other contractor performed tree-trimming tasks. Tom Gorski said Birnamwood would contact the vendor to provide tree-trimming services including routine tree trimming care as needs arise. Although the witnesses describe a process of soliciting bids, there is no evidence that Birnamwood or Efthim considered any contractors other than Meyers Trees during the relevant time.

Neither Birnamwood nor Efthim had tree trimmers on their staffs. However, in 2016, Birnamwood indicated a desire to bring landscaping "in-house," and sought only a snow-removal bid from Meyers Tree. (Joint Ex. p. 80). With respect to large tree trimming projects, Efthim would ask Meyers Tree to provide an estimate for that project, and would then obtain approval for the work from the Birnamwood Board of Directors. Meyers Trees would then perform the authorized work, and invoice Birnamwood for its services. From January 2010 through April 7, 2015, Meyers Trees issued 100 invoices[5] for work performed at the Condo Complex, and continued to provide such services through March 2016. Although all contractors were required to carry insurance, at some time prior to Claimant's accident, Meyers Trees submitted a certificate of insurance that was determined to be invalid.

Efthim coordinated the work performed by Meyer Trees on the day Claimant was injured. On October 11, 2002, Efthim contracted to serve as Birnamwood's Management Agent for the 2003 calendar year. This Management Agreement (see Joint Ex. #7, pp. 1087-1102) has since been renewed annually for similar terms. The Management Agreement outlined the services provided by Efthim, included the obligation to supervise the maintenance of common areas, improvements...of the Association, under section (3)(J), the subsections of which read:

> 1) Service Contracting. The Management Agent shall solicit, analyze and compare bids, and negotiate contracts for execution by the Board for the services of contractors for any requisite ground maintenance, landscaping,...required by the Association.
> 2) Employees of the Association. The Management Agent shall hire, supervise, pay, and discharge all personnel necessary to properly operate and maintain the Association,

[4] The parties submitted four bound volumes of exhibits, which were Bates-stampeded. The reference to the Joint Ex. is to the number affixed by the parties prior to submission.

[5] Meyers Trees submitted tree-work invoices to Birnamwood as follows: five in 2011, nine in 2012, ten in 2011, thirteen in 2014, and twelve in 2015 (three of which predated Claimant's accident).

> consistent with the approved budget. All such personnel shall be employees of the Association (not the Management Agent) and all compensation for the services of such employees, including all fringe benefits and pension contributions shall be considered an expense of the Association. Association to have no Employees.

Efthim, as Management Agent, had authority to sign checks and pay normal bills of Birnamwood through Birnamwood's bank account. Efthim made no payments on its own account for any services performed by contractors or vendors at the Condo Complex.

Meyers Trees was a tree-trimming contractor for Birnamwood who directly employed Claimant on the day he was injured. Meyers Trees employed Claimant on a fulltime basis for approximately nine years, from 2006 through April 8, 2015 and paid his salary. Claimant had worked as a tree trimmer since the age of 15, and was essentially self-taught. As a full-time employee of Meyers Trees, Claimant was hired to, "climb trees, landscape... [w]hat [Meyers Trees] does, everything, you know." In the months leading up to his accident, Meyers Trees assigned Claimant to work at the Condo Complex two to three days a week, or 50% of the time, cutting grass, landscaping, bush trimming, tree trimming and laying mulch. Claimant specifically trimmed trees at least once a week. Claimant estimated the tree trimming requirements at the Condo Complex required him to climb on a roof approximately six times per year.

The work on April 8 was being done pursuant to an estimate submitted by Meyers Trees to Birnamwood through its Management Agent Efthim, approved by Birnamwood Board of Directors, and billed via invoice number 2770. No one from Efthim or Birnamwood provided oversight, instructions, or assistance directly to Claimant for how the tree trimming was to be performed. Both Birnamwood and Efthim controlled access to the roof, and the only people with authority to be on the roof on April 8, 2015 were the employees of Meyers Trees. Claimant testified if he had been provided with safety equipment, the accident would have been prevented.

RULINGS OF LAW

This matter proceeded to hearing for the limited purpose of identifying which purported employer, if any, is responsible for providing Claimant with benefits pursuant to the Act. Under §287.030.1(1), an "employer" is any entity "using the service of another for pay." Such entity is deemed to be an "employer" for workers compensation purposes if he or it: 1) is a particular type of construction industry employer[6] and has at least one employee; 2) is any other type of employer and has at least five[7] employees; or 3) has voluntarily elected to become subject to the workers' compensation law pursuant to section 287.090.2, which is usually accomplished by purchasing a qualifying workers' compensation insurance policy. *Davidson v. Missouri State Treasurer as Custodian of Second Injury Fund*, 327 S.W.3d 583, 588 (Mo. Ct. App. 2010). The parties have stipulated, and I find, Meyers Trees & More, LLC was operating under the Act (1) and, on the date in question, was Claimant's direct employer (3).

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[6] The work Meyers Trees & More LLC performed at the Condo Complex did not involve the erecting or demolishing of any structures (78).

[7] There is evidence of at least five employees: Claimant, Meyers, and the three Grupenberger brothers, Alex, Steve and James (Joint Ex. p. 21).

One of the obligations of employers under the Act is to carry workers' compensation insurance. Section 287.280.1 provides: Every employer subject to the provisions of this chapter shall... insure his entire liability thereunder. *Harman v. Manheim Remarketing, Inc.*, 461 S.W.3d 876, 881 (Mo. Ct. App. 2015). Meyers falsely represented it had insurance. A fraud complaint against Meyers Trees was referred for prosecution (Joint Ex. pp.1050-1052). The parties have stipulated (1, 2 & 4), and I find, Meyers Trees & More, LLC was operating under the Act but was uninsured for its workers' compensation liability on April 8, 2015.

The Legislature has provided for situations where, as here, a direct employer has failed to comply with the Act's insurance mandate. A contractor or employee of a contractor may be entitled to compensation under certain circumstances as a statutory employee under section 287.040. *Chouteau v. Netco Const.*, 132 S.W.3d 328, 333 (Mo. Ct. App. 2004). "Section 287.040.1 ...[defines] third parties as **statutory employers**, even though they are not actual employers." *Looper v. Carroll*, 202 S.W.3d 59, 62 (Mo.App. 2006)(emphasis added). Section 287.040.1 provides:

> Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

The purpose of the so-called statutory employment statute is "to prevent employers from circumventing the requirements of the [Workers' Compensation] Act by hiring independent contractors to perform work the employer would otherwise perform." *Bass v. National Super Markets, Inc.*, 911 S.W.2d 617, 619 (Mo. banc 1995). When an immediate employer does not carry insurance, the obligation to provide compensation falls to the insured statutory employer who bears secondary liability. *See Bunner v. Patti*, 343 Mo. 274, 121 S.W.2d 153, 155 (1938); *Sexton v. Jenkins and Associates, Inc.*, 41 S.W.3d 1, 6 (Mo.App.2000); *Wilson v. C.C. S., Inc.*, 140 S.W.3d 115, 119 (Mo. Ct. App. 2004)

Section 287.040.3 determines the order of liabilities when more than one party is potentially liable to pay worker's compensation benefits to an employee. *Thornsberry v. Thornsberry Investments, Inc.*, 295 S.W.3d 583, 585 (Mo. Ct. App. 2009). Moreover, section 287.040.3 deals with the determination of who pays under the worker's compensation act, not the determination of statutory employment. *Shaw v. Mega Indus., Corp.*, 406 S.W.3d 466, 472 (Mo. Ct. App. 2013). Section 287.040.3 reads as follows:

> In all cases mentioned in the preceding subsections, the immediate[8] contractor or subcontractor shall be liable as an employer of the employees of his subcontractors. All persons so liable may be made parties to the proceedings on the application of any party. The liability of the immediate employer shall be primary, and that of the others secondary

[8] In *Bunner v. Patti*, 343 Mo. 274, 121 S.W.2d 153 (1938), the Supreme Court was required to interpret language identical to that now contained in § 287.040.3. The court determined the phrase "immediate contractor" referred to the direct employer of the injured employee, and the general contractors, as remote employers, would have been secondarily liable. *Thornsberry v. Thornsberry Investments, Inc.*, 295 S.W.3d 583, 585–86 (Mo. Ct. App. 2009).

> in their order[9]....No such employer shall be liable as in this section provided, if the employee was insured by his immediate or any intermediate employer.

Having already determined Claimant's direct or "immediate" employer, Meyers Trees, is uninsured, the cornerstone question becomes, as between the remaining parties, which, if any, qualifies as a statutory employer under the Act.

The party asserting the existence of statutory employment bears the burden of proving that an injured worker comes within § 287.040.1. *In re Brito-Pacheco,* 400 S.W.3d 817, 821–22 (Mo. Ct. App. 2013). One is a statutory employee if (1) the work is performed pursuant to a contract; (2) the injury occurs on or about the premises of the alleged statutory employer; and (3) the work is in the usual course of the alleged statutory employer's business. *Id.* (citations omitted). Birnamwood contracted with Efthim to manage maintenance for their property, including lawn care (Joint Ex. pp 1087-1102). Efthim presented contracts from Meyers Trees for tree trimming services to Birnamwood, whose Board of Directors approved the allocation of funds for the project (Joint Ex. p. 54). In this case, Estimate No. 514, dated March 23, 2015, with the corresponding Invoice No. 2770 dated April 7, 2015, was the contract for the tree trimming job under which Claimant was working at the time of his injury. (Joint Ex. pp. 224 & 725). Thus, Claimant was performing work pursuant to a contract regarding the removal of the tree at the time of his injury. The first element of the statutory employment test is met.

The next element requires the injury in question to have occurred on the premises of the purported employer. Claimant was injured on the roof of a Birnamwood condominium. Birnamwood and Efthim as Birnamwood's agent, exercised control over the roof of the condominiums to an extent that was not shared with the general public. In *Richter v. Union Pacific R. Co.,* 265 S.W.3d 294 (Mo. App. E.D. 2008), the Court held that "premises contemplates any place under the exclusive control of the statutory employer where his usual business is being carried on or conducted." *Id.* at 300-01. The Court stated that "exclusive control" means that the statutory employer exercises a control over the premises that the general public does not share with the employer and the independent contractor. *Richter* at 301; *see also Boatman v. Superior Outdoor Advertising Company,* 482 S.W.2d 743, 745 (Mo.App.1972).

Birnamwood had the control of the roof of any unit in the Condo Complex (79). Efthim had the right to go up on the roof of any unit in the Condo Complex (80). Owners of the condominiums were not allowed to be on the roof of their unit without Birnamwood's permission (81) and the general public did not have the right to get up on the roof of any unit (82). On the day of injury, Birnamwood and Efthim gave authority to Meyers Trees to be on the roof. (83 and Joint Ex. p. 153) By providing access to the roof to one entity at the exclusion of others, Birnamwood and Efthim had control over the premises upon which the claim arose and therefore, the claim arose on or about the premises of the statutory employer. The second element of the statutory employment test is met.

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[9] The redacted portion of this section reads, "and any compensation paid by those secondarily liable may be recovered from those primarily liable, with attorney's fees and expenses of the suit. Such recovery may be had on motion in the original proceedings." The issue of recovery, if any, is deferred. The instant proceedings are limited in scope, and any remaining issues will be determined in later proceedings or by compromise.

Existing case law offers little guidance for applying the "usual business" element of the statutory employment test in cases such as this. Whether a particular sort of work is within a party's usual course of business is a fact-driven inquiry; there is no "'litmus paper' test." *Ferguson v. Air–Hydraulics Co.*, 492 S.W.2d 130, 135 (Mo.App.1973) overruled on other grounds in *McGuire v. Tenneco, Inc.*, 756 S.W.2d 532, 535 (Mo. 1988), which was subsequently overruled by *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473 (Mo. 2009). As the inquiry is fact-driven, the facts surrounding each purported statutory employer will be reviewed separately, beginning with Birnamwood.

Before analyzing Birnamwood's usual business, it is important to note that as a condominium association, Birnamwood is not a for-profit entity, unlike the grocery stores, manufacturers, or other commercial enterprises involved in most of the guiding statutory employment case law. Furthermore, much of the precedent flows from situations where the remote employer seeks statutory employment as a shelter from civil liability, as when a delivery driver is hurt on their premise.[10] This distinction complicates reliance on the existing precedents.

However, the prime responsibility of Birnamwood and its Board of Directors/Managers is to provide for the maintenance of all the common areas. This is accomplished by approving an annual budget and setting the assessment fees for owners. The Board's specific responsibilities included paying bills, handling owner complaints, taking care of the common ground, and handling maintenance issues, through the hiring of contractors. Thus, in a general sense, it is the purpose of Birnamwood to address its common areas and concerns.

The analysis is not quite that simple. In determining whether the work is within the **usual business** of the putative employer, the routine/frequent test[11] is applied. *Nichols v. Overnight Express, Inc.*, 156 S.W.3d 406, 409 (Mo. Ct. App. 2005). Under the test, focus is placed on the routine and frequent nature of the independent contractor's activities rather than whether the activities are essential and integral to the putative employer's business. *Id.* "Usual business" is defined as activities: (1) routinely done (2) on a regular and frequent schedule (3) contemplated in a contract or agreement between the contractor and the alleged statutory employer which will be repeated over a short span of time, and (4) performance of which without the contract would require the statutory employer to hire permanent employees. *Barger v. Kansas City Power & Light Co.*, 548 S.W.3d 424, 428 (Mo. Ct. App. 2018), *reh'g and/or transfer denied* (May 29, 2018).

We examine the work that was being performed and that led up to the incident that caused the injury to determine if that work was part of the general contractor's "usual business." *Anders v. A.D. Jacobson, Inc.*, 972 S.W.2d 612, 613 (Mo.App.1998). Meyers Trees, Claimant's immediate employer, assigned him to fulfill the terms of a specific agreement to remove the tree overhanging Unit 1577. Meyers Trees was the exclusive[12] tree-trimming contractor for the

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[10] See, i.e., *Parker v. National Super Markets, Inc.*, 914 S.W.2d 30 (Mo.App.1995) *and McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 481 (Mo. 2009), where National and Wal-Mart sought the cloak of statutory employment to avoid civil liability when a delivery person was injured on their premises.

[11] The essential/integral test was applied in older cases. *See Nichols at* 409.

[12] Both Tom Gorski and Frank Efthim testified landscaping in general and tree trimming in particular was performed pursuant to a contract of a year or more between Birnamwood and the contractor, and for all relevant times herein, the exclusive contractor for tree trimming was Meyers Trees. See Joint Ex. pp. 66, 156 & 157. Although the

Condo Complex. Over the five years prior to Claimant's accident, Meyers Trees submitted hundreds of invoices to Birnamwood, including forty specifically for tree trimming. The Board provided for routine landscaping and tree trimming in the annual budget. Claimant spent 50% of his week working at the Condo Complex, and although he performed other landscaping tasks, he trimmed trees once a week, and climbed on a roof half a dozen times a year. This is all compelling and persuasive evidence the work performed by Meyers Trees at the Condo Complex was done so on a routine, regular, and ongoing basis.

There is some evidence suggesting the pattern of the work at issue was fluid. For example, Mr. Gorski said it only occurred when a request for tree trimming was conveyed to Meyers Trees by a resident, board member, or the managing agent. It is also true that tree trimming was seasonal, and there was no formal schedule distributed evenly across the calendar. However, when considering all the credible evidence, I find there is sufficient evidence to support a finding the work is routinely done on a regular and frequent schedule contemplated in an agreement between the contractor and the alleged statutory employer, which will be repeated over a short span of time.

Finally, I find that without a contract as it had with Meyers Trees, Birnamwood would have to hire permanent employees to perform the activities contemplated by the contract. The primary responsibility of Birnamwood and its Board is to maintain the common areas. Maintenance of the common areas includes landscaping, and tree trimming is part of landscaping. By failing to provide for tree trimming, Birnamwood would fail to fulfill its primary responsibility and purpose. If Birnamwood did not contract out for tree trimming, it would have to bring the duties "in-house" and hire its own employees, even if it had never followed that business model before. In the fall of 2016, Birnamwood actually did decide to "handle mowing, weeding, etc. in-house this year, so they [did] not need a bid for lawncare.[13]" Birnamwood hired Meyers Trees in lieu of handling the tasks itself. Tree trimming falls within the usual business of Birnamwood.

Based on the substantial and competent evidence, I find Birnamwood, as the intermediate employer, is the statutory employer of Claimant.

Pursuant to §287.040.3, no employer shall be liable, if the employee was insured by his immediate or any intermediate employer. Based on the finding Birnamwood is the statutory employer, no further analysis is necessary regarding Efthim purported status as a statutory employer. Efthim is not an intermediate employer in the chain to Claimant; rather Efthim is the agent of Birnamwood – it acted on behalf of its principal but never entered into a contract or hired workers in general or Claimant in particular on its own accord. An agent is not liable for lawful acts done within the scope of his authority for and on behalf of a disclosed principal. The liability, if any, is that of the principal. *Austin v. Trotters Corp.*, 815 S.W.2d 951, 958 (Mo. Ct. App. 1991).

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witnesses describe a process of soliciting bids, there is no evidence that Birnamwood or Efthim considered any other provider of tree trimming services other than Meyers Trees. See *Nichols v. Overnight Express, Inc.*, 156 S.W.3d 406, 410 (Mo. Ct. App. 2005), where the Court suggested the presence of an exclusivity agreement contemplating repeated work over a short span of time suggests the contractor is performing the usual business of the employer.

[13] See Joint Ex. p. 804, a letter dated February 18, 2016 from Frank Efthim, Managing Agent, to Meyers Trees requested a snow service only bid from Meyers Trees for the Condo Complex.

Furthermore, pursuant to the Management Agreement, Efthim and Birnamwood specifically agreed all service personnel "shall be employees of the Association (not the Management Agent) and all compensation for the services of such employees, including all fringe benefits and pension contributions shall be considered an expense of the Association." Efthim has no liability as a statutory employer, and is hereby dismissed.

CONCLUSION

Claimant suffered a compensable injury while in the employ of an uninsured immediate employer. Birnamwood is Claimant's statutory employer. As such, Birnamwood is liable to Claimant for benefits under the Missouri Workers' Compensation Act. Furthermore, Birnamwood is immune from any civil liability[14] that might otherwise be associated with Claimant's accidental injury. Finally, Birnamwood retains all rights and remedies it may have against Meyers Trees under the Act and pursuant to §287.040.3.

The claim against Efthim is dismissed. All other issues remain open pending final resolution by trial or compromise.

I certify that on 10-30-19, I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

By _____

Made by: _____
Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

[14] See, *Shaw v. Mega Indus., Corp.*, 406 S.W.3d 466, 474 (Mo. Ct. App. 2013)(immunity from suit "applies … to those who qualify as an 'employer' under the Act.")