

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOSE AYALA)	
Claimant)	
V.)	
)	AP-00-0464-601
ALPHA ROOFING, LLC)	CS-00-0459-273
Respondent)	
AND)	
)	
KANSAS BUILDERS INSURANCE GROUP)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (Respondent) request review of the March 24, 2022, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

Thomas R. Fields appeared for Claimant. Matthew S. Crowley appeared for Respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Preliminary Hearing held March 15, 2022, with exhibits attached; the evidentiary Depositions of Jose Ayala, Ramiro Renteria, Bryan Abrego, Yvonne Ruder and Darin Lutz with exhibits attached and all taken on February 10, 2022; and the documents of record filed with the Division.

ISSUES

1. Is Claimant an independent contractor or an employee of Respondent?
2. What is Claimant's average weekly wage (AWW)?
3. What is the prevailing factor causing Claimant's injury, medical condition, and need for medical treatment?

4. Is Claimant entitled to temporary total disability compensation (TTD) from June 12, 2021, and ongoing?

5. Did the ALJ exceed his authority in ordering Respondent to pay prior medical bills as authorized medical treatment and in ordering Respondent to provide authorized treatment?

FINDINGS OF FACT

Claimant owns Rama Roofing (Rama), a business which exclusively installs residential roofing and shingles. Claimant works alongside a small crew he employs. Claimant provides his own tools and safety equipment. Rama contracts with Respondent, which provides the only work Rama performs. Rama received projects from Respondent for approximately 2.5 years.

Respondent, a roofing company, is owned by Darin Lutz and has been in business since 2004. Respondent provides both residential and commercial roofing construction. Respondent has 15 employees who work for the commercial roofing department. All residential roofing work is performed by approximately 4 to 8 subcontracting companies, including Rama, with which Respondent does regular business.

Respondent requires subcontractors to follow its company policies, including keeping normal Monday through Friday working hours and performing the proper quality of work. Respondent requires subcontractors to complete and sign a written "Independent Contractor Agreement" each year. The agreement includes information about payment, maintenance of tools and equipment, taxes, compliance with laws, and insurance. Respondent requires its subcontractors to be covered with property and personal injury insurance, as well as workers compensation insurance, and to provide proof of same.

Claimant testified he purchased a workers compensation policy from Liberty Mutual Insurance, which was kept current while working with Respondent. However, Claimant was unaware his policy provided coverage for his work crew and not himself as owner of Rama. Claimant stated he did not know if anyone filed an election for him with the Division to accept coverage under the Kansas Workers Compensation Act (Act). The Certificate of Insurance submitted into evidence indicates Claimant chose to remain excluded from the Act. Claimant did not discover he was not covered under his company's workers compensation policy until after the accident.

Claimant was paid by Respondent "by the square," meaning Rama was paid by the finished job and not by the amount of time necessary to complete a job. Claimant was responsible for paying his employees and other expenses from the monies earned. Respondent did not withhold taxes from the payment. Claimant and his crew were responsible for their own taxes. Respondent provided the roofing materials at job sites and inspected the work performed by Rama.

On June 11, 2021, Claimant and his crew finished their shingling in Lawrence and were traveling home to Topeka. Claimant received a message from Clint Bradley, Respondent's production manager, asking them to put protective roofing paper on a new addition of a house in Lawrence. Due to the forecasted rain, Respondent was concerned with keeping the new addition dry. Claimant and his crew were 15 to 20 minutes from the construction site. He agreed to travel to the construction site and put protective roofing paper, or felt, over the roof of the new room addition.

Mr. Bradley met Claimant and his crew at the job site and explained the need to apply the protective paper. Claimant's crew got onto the roof and began the project. Claimant was working on a stepladder. He fell from the ladder and sustained serious injuries to his head, neck, ribs, kidneys, and low back. Claimant was transported, unconscious, to the hospital by ambulance. Claimant incurred medical expenses in an amount approaching \$70,000 as a result of the accident. Claimant has not worked since the accident.

Yvonne Ruder, Respondent's chief operating officer, testified Respondent is a certified roofing company. Its work must be completed according to specifications of the manufacturers and standards of the industry. She testified, "We monitor each job. We pay attention."¹ Ms. Ruder confirmed Mr. Bradley instructed crews when to arrive at a job site and inspected job sites at various times throughout the day. He did so to ensure materials were present at the job site, workers were present at the start of the day, to convey specific instructions/needs of the job, procure additional materials if needed, ensure the house/yard was picked up, and the work performed met with manufacturer specifications and warranty requirements.

Ms. Ruder also testified she visited job sites two to three times per week. Workers were required to attend weekly safety meetings, wear safety and fall protection equipment and to put on safety and fall protection equipment immediately upon arrival to the job site.

Bryan Abrego and Ramiro Renteria worked for Rama as part of the roofing crew and were present during the accident. They both confirmed Claimant's testimony regarding the incident and the level of Respondent's control over Rama. Mr. Abrego and Mr. Renteria confirmed the work assigned to Rama at the time of the accident involved synthetic paper and not roofing shingles.

After the accident, Rama's crew discontinued applying the felt and stopped work for the day, despite being asked to continue by Mr. Bradley. Rama, as a company, has not worked since June 11, 2021. Ms. Ruder testified since the accident, she reached out to

¹ Ruder Depo. at 51.

Claimant to see how he was doing; to see if he and his crew were working; and to see if Claimant wanted to return to work for Respondent.²

The ALJ found Claimant was an employee of Respondent at the time of the accident and not an independent contractor, and the accident was the prevailing factor causing Claimant's injuries and need for medical treatment. The ALJ determined Claimant's AWW is \$1,153.84, qualifying him for the maximum applicable weekly compensation rate of \$687.00. The ALJ ordered Respondent to provide medical care and designate an authorized treating physician; Respondent to pay Claimant's medical expenses as submitted in the record; and, pay TTD at the weekly rate of \$687.00 from June 12, 2021, until Claimant is released to return to work, has been offered accommodated work with temporary work restrictions, has attained maximum medical improvement, or until further order of the court.

Respondent argues this claim should be denied because Claimant, a self-employed contractor, did not elect to come under the Act, is therefore excluded from the Act, and has no standing to obtain benefits from Respondent. Alternatively, Respondent argues payment of any or all prior medical bills should be denied because there is no medical opinion indicating Claimant's accident was the prevailing factor for the medical treatment necessary to cure or relieve Claimant from the effects of his injuries. Claimant's recovery of medical bills should be limited to the unauthorized medical cap of \$500. Respondent maintains Claimant's entitlement to TTD should be denied for lack of credible evidence he is restricted from working, for failing to establish the work accident was the prevailing factor for the time he was off work, for refusing accommodated work, and for failing to establish an AWW.

PRINCIPLES OF LAW AND ANALYSIS

According to K.S.A. 44-501b(c), the burden of proof shall be on the claimant to establish his or her right to an award of compensation and to prove the various conditions on which the Claimant's right depends. The trier of fact shall consider the whole record.

K.S.A 44-508(h) defines "burden of proof" as the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

² See *id.* at 33.

1. Claimant was an employee of Respondent and not an independent contractor.

There is no absolute rule for determining whether an individual is an independent contractor or an employee.³ The relationship of the parties depends upon all the facts, and the label they chose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.⁴

The primary test to determine whether the employer/employee relationship exists is whether the employer had the right to control and supervision over the work of the alleged employee. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control which renders one a servant, rather than an independent contractor.⁵

Some factors point to Claimant being an independent contractor:

1. Payment was paid “by the square” upon completion of the job and not by the hour;
2. Claimant hired his own workers and supplied his vehicles and tools;
3. Respondent did not train Claimant how to perform work.

These considerations are insufficient to outweigh factors showing Claimant was Respondent’s employee.

Respondent bid all jobs and completed billing and collection. Claimant worked exclusively for Respondent for a period of two and one-half years. Respondent provided all materials and was responsible for providing additional materials if necessary. Respondent instructed Claimant when and where to be to begin a job. Claimant was instructed not to start a job until he was given instruction by Mr. Bradley. Respondent checked Claimant’s work at various times throughout the day. Respondent was always present at the completion of the job to ensure the job was completed in a satisfactory manner and the work area was cleaned to Respondent’s satisfaction. Claimant was required to attend weekly safety meetings. The record indicates Respondent clearly possessed the right to control how Claimant performed his work. The weight of the evidence establishes Claimant was an employee of Respondent, not an independent contractor.

³ See *Wallis v. Secretary of Kansas Dept. of Human Resources*, 236 Kan. 97, 102, 689 P.2d 787 (1984).

⁴ See *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

⁵ See *Wallis*, 236 Kan. at 102-03; (citing *Jones v. Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965)).

2. Claimant's June 11, 2021 injury is the prevailing factor causing Claimant's injury, medical condition and need for medical treatment.

To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.⁶ The accident must be the prevailing factor in causing the injury. "Prevailing factor" is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.⁷

There is no dispute Claimant fell off a stepladder on June 11, 2021, and was taken by ambulance, while unconscious, to the hospital. Claimant was where he was instructed to be performing work he was asked to do in furtherance of completing the job. Medical evidence is not required in establishing prevailing factor. Respondent did not provide any defenses to the prevailing factor issue. Claimant met his burden to prove the prevailing factor causing his injury, medical condition and need for treatment is the June 11, 2021, accidental injury.

3. The Board does not have jurisdiction to address the ALJ's order regarding AWW, TTD, authorization of medical treatment and payment of medical bills.

The Board's authority to review preliminary orders is limited to questions of whether the employee suffered an accident, repetitive trauma or resulting injury; whether the injury arose out of and in the course of employment; whether timely notice was given; or whether "certain defenses" apply.⁸ Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision, but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁹

The determination regarding AWW, TTD, authorization of medical treatment and payment of medical bills are within the ALJ's discretion and not reviewable by the Board. When it is determined the Board does not have jurisdiction over an issue or issues preliminarily determined by the ALJ, the Board's only recourse is to dismiss the appeal. The order remains in full force and effect.¹⁰ Respondent's request for the Board to review

⁶ See K.S.A. 44-508(d).

⁷ See K.S.A. 44-508(d), (g).

⁸ See K.S.A. 44-534a(a)(2).

⁹ See *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 522, rev. denied 221 Kan. 757 (1977).

¹⁰ See *Bibbs v. Pawnee Mental Health Services*, No. 1,035,339, 2015 WL 6776991 (Kan. WCAB, Oct. 16, 2015).

the issues of AWW, TTD, authorization of medical treatment and payment of medical bills is dismissed for lack of jurisdiction.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Steven M. Roth dated March 24, 2022, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2022.

CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR

Thomas R. Fields, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Hon. Steven M. Roth, Administrative Law Judge