BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SHELLY COBERLEY	)	
Claimant	)	
V.	)	
	)	AP-00-0468-496
SOUTHERN WINDS EQUINE RESCUE & RECOVERY CENTER	)	CS-00-0458-752
Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Workers Compensation Fund appeals the June 17, 2022, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Jordan Shaw appeared for Claimant. Terry Torline appeared for the Fund. Respondent was not represented and did not appear.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Evidentiary Deposition of Claimant, from August 18, 2021, with exhibits attached; Evidentiary Deposition of Vincent McMullen, from August 18, 2021; transcript of Preliminary Hearing from August 25, 2021, with exhibits attached; transcript of Preliminary Hearing from June 1, 2022, with exhibits attached; and the documents of record filed with the Division.

ISSUES

1. Was Respondent engaged in an agricultural pursuit and excluded from the Act?

2. Was Claimant an independent contractor and not an employee?

3. Did Respondent have sufficient payroll to be covered by the Act?

4. Did Claimant's accidental injury arise out of and in the course of her employment?

5. Did Claimant provide proper/timely notice of her accidental injury to Respondent?

FINDINGS OF FACT

Respondent (Southern Winds) is a not-for-profit horse rescue facility. It shelters, feeds, and rehabilitates abused and neglected horses with the hope of placing them with responsible owners.

Claimant worked Fridays, Saturdays and Sundays reported to work at 7:30 a.m. and worked until her tasks were completed. Claimant's tasks included cleaning stalls, feeding horses and other tasks as needed. Claimant performed a lot of groundwork, which was leading the horses, brushing them, and getting them accustomed to being handled. According to Claimant, her job duties increased when the owner became ill.

According to Respondent, Claimant was paid $50 per day. Claimant testified she was paid $75 per day for barn care and fence running and $35 per day for groundwork and riding. Claimant received a 1099 tax form for the wages she received from Respondent. Claimant has not filed her 2020 taxes yet due to a dispute with the IRS over her 2019 tax return. Claimant was paid $7,622.18 in 2020 and approximately $3,000 in 2021. Vincent McMullen, treasurer and current owner, testified in 2021, Claimant was paid $2,600 in contractor wages and a $3,000 bonus when Southern Winds closed. Claimant was paid wages from January to June in 2021, despite Claimant not working from March to June.

On March 9, 2021, Claimant injured her right hand while loading horses into a horse trailer. March 9 was not a usual work day for Claimant. Claimant and Leah Walton, the caretaker, were loading four horses into a horse trailer borrowed from Claimant's landlord. Respondent needed the four horses taken off the property, to be transported elsewhere to be housed. The property had been sold. The horses were to be taken to Claimant's home. Claimant's owned two of the horses and was fostering the other two.

Claimant stepped into the trailer to load one of the horses, the horse stopped, threw its head up and the lead rope Claimant had in her right hand wrapped around her hand, as the horse backed out of the trailer. Claimant's hand was pulled up against the trailer, pulling off three of her fingers.

Claimant was transported to the hospital and was treated by Dr. Melhorn. Three of Claimant's fingers on her right hand were amputated. Claimant was released from Dr. Melhorn's care on May 10, 2021.

Leah Walton, the caretaker was present and witnessed the event when Claimant injured her hand. Ms. Walton told Mr. McMullen, about Claimant's accident the next day. Claimant told Roxie Linden, a board member of Southern Winds, about her accident shortly after it happened. On June 30, 2021, Claimant's attorney sent a letter to Respondent notifying them Claimant had suffered a work-related injury to her right hand on March 9, 2021, and she was filing a workers compensation claim. According to Mr. McMullen, he first learned Claimant was claiming workers compensation benefits when he received the letter dated June 30, 2021, on July 3, 2021, from Claimant's attorney

Claimant testified Ms. Walton also performed services for Respondent in 2019. She rode the horses as part of their rehabilitation.

Vincent McMullen testified Southern Winds was created by his parents in 2002, as a rescue ranch where abused horses were raised, fed and cared for until adopted. Operation of the facility required horses be fed, their stalls cleaned and barns and buildings maintained. Respondent was a 501(c)(3) organization and was dissolved in May 2021.

Mr. McMullen acknowledged Claimant provided services to Southern Winds by cleaning stalls and feeding horses on the weekends. Claimant was designated as an independent contractor.

According to Mr. McMullen, Ms. Walton was the caretaker who isolated and trained the horses. As the caretaker, Ms. Walton directed the necessary work to be done and the Board Members of Southern Winds helped when needed. Mr. McMullen testified Ms. Walton was also an independent contractor. Since June 2020, Ms. Walton was paid by check every two weeks in the amount of $1,153.54 and received a 1099 at the end of the year. Ms. Walton was expected to work 40 or more hours per week. The equipment to perform the services was provided by Respondent.

To Mr. McMullen's knowledge, there have never been any employees and the money paid to the contractors was reported to the IRS on the 1099 form. According to Mr. McMullen, there were two contractors, Claimant and Ms. Walton, in 2021 and their total pay was less than $20,000.

According to Mr. McMullen, Respondent was not required to carry workers compensation insurance because they had no full-time employees. They had general liability coverage for visitors.

Roxanne Linden was a former Board Member for Respondent from around 2018 until 2019, and from the fall of 2020 until Respondent's dissolution in May 2021. Ms. Linden testified Ms. Walton was the caretaker of the horses for Respondent and produced the newsletter. She testified Ms. Walton also took care of getting the new facility established at the new location and running the facility, which included training the horses

and getting them adopted. Ms. Walton did not start working full-time until after the founder of Southern Winds, Victor McMullen could no longer handle the work alone and passed away.

According to Claimant and Ms. Linden, the horses were rehabilitated and adopted or fostered out until adoption. They did not perform any kind of ranch work at the facility. The rescue was funded by donations.

Mr. McMullen testified there were six horses on the property in 2021, three belonged to Respondent and three to Claimant. Claimant was housing her horses there until she could finish preparing her property for her horses.

A preliminary hearing was held on August 25, 2021, to determine compensability of the claim and the ALJ issued an order on September 15, 2021, finding:

1. Respondent's business consisted of taking care of, or rescuing, abused or neglected horses. Rescuing abused or neglected horses is not typical of an ordinary farmer or related to an agricultural pursuit. The Claimant's claim was not barred under K.S.A. 44-505(a)(1) as an agricultural pursuit.

2. The Court finds Claimant was an employee of the Respondent and not an independent contractor.

3. The Court concluded that the Claimant has not shown by a preponderance of the evidence that Ms. Walton is an employee and not an independent contractor.

Without evidence Ms. Walton or others in addition to the Claimant were employees of the Respondent, the record does not show there was sufficient payroll to show coverage under the Act.

4. The Court concluded Claimant’s injuries arose out of and in the course of the Claimant's employment.

5. Mr. McMullen testified he was told about the accident the day after it happened. K.S.A. 44-520(a)(4) does not require Claimant to claim workers compensation benefits within 20 days. The notice is sufficient if it is apparent that the Claimant suffered a work-related injury. The Court found that proper was timely given.

6. The Claimant's request for workers compensation benefits were denied because the Claimant failed to prove the Respondent had sufficient payroll for coverage under the Act.

No party appealed the September 15, 2021, order.

A second preliminary hearing was held on June 1, 2022, where Roxie Linden testified and four exhibits were admitted.

A second preliminary hearing order, appealed by the Fund, affirmed all findings and conclusions of the order issued on September 15, 2021, except ALJ Jones found the Respondent had sufficient payroll to be covered under the Act and the Fund was ordered to pay the medical bills presented by Claimant at the hearing held on August 25, 2021.

PRINCIPLES OF LAW AND ANALYSIS

The Fund argues the primary function of Respondent's operation and Claimant's job duties were agriculturally related, and therefore, Respondent should be found to have been engaged in an agricultural pursuit. Claimant and her coworker were independent contractors, not employees as Respondent did not exercise control over their work. Claimant's injury did not arise out of and in the course of her employment. Respondent's payroll was insufficient to fall under the Act. Claimant failed to provide proper timely notice of her injury.

Claimant argues the ALJ's Order should be affirmed. Claimant argues the general nature of Respondent's business does not fall under the traditional meaning of agriculture because the horses were not used as meat and were not prepped for return to any type of working status. Claimant also argues facts establish an employer/employee relationship between Claimant and Respondent beginning in July 2018 despite the terminology used by the parties, bringing the parties within the provisions of the Act and entitling Claimant to benefits. Respondent's payroll was sufficient with Claimant and Ms. Walton as employees. Claimant was injured in the course of employment as she was covering the shift of her son, who was fired. Finally, proper notice was provided as it was provided to Ms. Walton who was considered to be in charge and she relayed the information to Mr. McMullen. Likewise, when considering Ms. Walton was in a supervisory role and was the only person on-site daily, Ms. Walton witnessing the injury constitutes actual notice eliminating the notice requirements under K.S.A. 44-520(a).

Respondent's representative Mr. McMullen, did not file a brief. He was not present at the second preliminary hearing, but was present at the first preliminary hearing.

K.S.A. 44-501b provides:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
>
> (b) If in any employment to which the workers compensation act applies, an

> employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

1. Respondent is not engaged in an agricultural pursuit.

K.S.A 44-505(a)(1) states: "Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that the such act shall not apply to: (1) Agricultural pursuits and employments incident thereto, other than those employments in which the employer is the state, or any department, agency or authority of the state;"

In *Witham v. Parris*[1], the Kansas Court of Appeals adopted from Idaho case law a three part test in determining whether a business or pursuit is an agricultural pursuit. The three part test is (1) the general nature of the employer's business; (2) the traditional meaning of agriculture as the term is commonly understood; and (3) that each business will be judged on it own unique characteristics.

Southern Winds was engaged in a charitable enterprise involving horses. Their purpose was not raising horses but sheltering abused and neglected horses to be adopted. Their focus was a charity and a shelter. It was not agricultural pursuit within the traditional meaning of agriculture.

After considering Respondent's unique characteristics the undersigned finds Respondent was not involved in an agricultural pursuit.

2. Claimant was an employee and not an independent contractor.

Determination of whether someone is an employee or independent contractor relies on the primary test of whether the employer controls or has the right to control, manner, methods used by the worker in doing a particular task. Actual control does not matter but it is the right to control.

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[1] *Witham v. Parris*, 11 Kan. App. 2d 303, 306, 720 P.2d 1125 (1986).

The Kansas Supreme Court in the case of *McCubbin v. Walker*[2], elaborated on the analysis of the right to control and other indica of independent contractor status. The Court cited the case of *Falls v. Scott*[3] wherein the Court stated: "An independent contractor is defined as one, who in exercising an independent employment contracts to do certain work according to his own methods, without being subject to the control of his employer, except as to the results or product of his work."

The Supreme Court stated each case must be determined on its own facts. However, there are many well recognized and fairly typical indicia of the status of independent contractor, although the presence of one or more of such indica in a case is not necessarily conclusive.

> "Such indicia are important as guides to the broader and primary question of whether the worker is in fact independent, or subject to the control of the employer, in performing the work. . . . it has generally been held that the test of what constitutes independent service lies in the control exercised, the decisive question being who has the right to direct what shall be done, and when and how it shall be done. It also been held that commonly recognized tests of the independent contractor relationship, not necessarily concurrent or each in itself controlling, are the existence of a contract for the performance by a person of a certain piece of kind of work at a fixed price, the independent nature of his business or his distinct calling, his employment of assistants with the right to supervise their activities, his obligation to furnish tools, supplies and materials, his right to control the progress of the work except as to the final results, the time for which the workman is employed, the method of payment, whether by time or by job, and whether the work is part of the regular business of the employer."[4]

Applying this analysis to Claimant's employment relationship with Respondent, it is found and concluded Claimant was an employee. Claimant was required to report to work at a ceratin time and on specific days and was to work until the work was done. Claimant was to sign in and out each day she worked. Claimant's job duties were cleaning stalls, feeding horses and maintaining Respondent's property. All of these duties were an integral part of Respondent's business. Respondent furnished all the tools to do the work. Calling an individual an independent contractor and furnishing them with a 1099 form does not an independent contractor make. Respondent controlled Claimant's work as to when and what was to be done.

Analysis of Ms. Walton's employment relationship with Respondent is another issue.

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[2] *McCubbin v. Walker,* 256 Kan. 276, 886 P.2d 790 (1994).

[3] *Falls v. Scott*, 249 Kan. 64, 815 P.2d 1104 (1991).

[4] *McCubbin v. Walker,* 256 Kan. 276, 281, 886 P.2d 790 (1994), citing *41 Am. Jur.2d §5*.

If Ms. Walton is an employee her earnings are counted in the amount of Respondent's annual payroll. Applying the same analysis as above, Ms. Walton is an employee. She was the caretaker and assigned duties, such as isolating and training the horses. Ms. Walton had been working in the caretaker position since June 2020. She was expected to work 40 hours a week or more. Ms. Walton also did a newsletter at the request of Respondent. She oversaw on behalf of Respondent the setting up of the new facility. Respondent, specifically Mr. McMullen, possessed and exercised control of Ms. Walton's work by designating and prioritizing her job duties and setting her work hours. Ms. Walton was an employee and not an independent contractor.

3. Respondent had a payroll over $20,000 for the years 2020 and 2021 and is covered by the Act.

K.S.A.44-505(a)(2) states:

> (2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee, who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;

Both Claimant and Ms. Walton were employees of Respondent. Claimant was paid $7,622.18 for the year 2020. Ms. Walton began working in June 2020 (assuming June 1) as the caretaker and was paid $1,153.54 every 2 weeks. For 2020, Ms. Walton was paid $17,303.00. Respondent's payroll for 2020 was $24,925.28.

For the year 2021, it is reasonable to estimate the payroll would be the same. It is not reasonable to assume Respondent's business would close down or Claimant would be injured. It is reasonable to assume Respondent's payroll would be $20,000 or more for the year 2021.

As stated earlier, Respondent was not engaged in an agricultural pursuit, an employee/employer relationship existed between Claimant and Respondent and Respondent had a payroll over $20,00 for the years 2020 and 2021. Thus, Claimant's employment is covered by the Act.

4. Claimant's accidental injury arose out of and in the course of Claimant's employment.

In *Gould,* the Kansas Court of Appeals held:

> The standard for "arising out of" only requires a causal connection between the conditions of the work and the injury–it does not require that the injury occur at the exact moment an employee is performing a certain job task. The standard for "in the course of"requires an employee to be at work and performing job-related acts.[5]

Claimant was injured when she was engaged in activities to further the employer's interests. Respondent needed horses moved off the property where the horses were stabled because the Respondent had sold the property. Respondent argues the injury occurred on Claimant's day off and thus she was not on the job. However, Claimant would not be on Respondent's property but for Respondent needing her assistance in moving horses due to a reason created by Respondent. Caring for horses is part of Claimant's job duties. It is found and concluded Claimant's accidental injury arose out of and in the course of Claimant's employment.

5. Claimant provided proper/ timely notice to Respondent of her accidental injury.

K.S.A. 44-520 states in part:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
>
> (A) 20 calendar days form the date of accident or the date of the injury of repetitive trauma;
>
> . . .
>
> (4) The notice, whether given orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employees is claiming benefits under the workers compensation actor has suffered a work-related injury.

On March 9, 2021, Claimant was assisting Ms. Walton load horses for transport from Respondent's property because Respondent had sold the property. Ms. Walton was essentially Claimant's supervisor. In the presence of Ms. Walton, and when Claimant was loading a horse Claimant suffered an injury to her right hand requiring amputation of three fingers to her right hand. Claimant required immediate, emergency hospital treatment. Claimant did not formally seek workers compensation benefits until filing a claim on June

[5] *Gould v. Wright Tree Service, Inc.*, No. 114,482, 2016 WL 2811983 at *5 (Kansas Court of Appeals unpublished opinion filed May 13, 2016), *rev. denied* 306 Kan. 1317 (2017).

30, 2021. However, Claimant had an injury which required emergency medical treatment on Respondent's premises, assisting another of Respondent's employees in work because Respondent had sold the property. It was clear from the circumstances Claimant had suffered a work-related injury. Mr. McMullen knew of the circumstances of the accident and injury on March 10, 2021, which created actual knowledge on March 10, 2021, at the latest.

It is found and concluded Claimant provided Respondent with proper timely notice.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Gary K. Jones dated, June 17, 2022, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2022.

_____
REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR
Jordan Shaw, Attorney for Claimant
Terry Torline, Attorney for the Fund
Hon. Gary K. Jones, Administrative Law Judge

Via Mail:

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