BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ALBERTO ROMERO	)	
Claimant	)	
V.	)	
	)	AP-00-0472-313
NORBERT HORNUNG, DECEASED	)	CS-00-0243-615
Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	AP-00-0472-314
	)	CS-00-0136-599

ORDER

The Kansas Workers Compensation Fund (Fund) appealed the November 23, 2022 Award issued by Administrative Law Judge (ALJ) Steven M. Roth. The Board heard oral argument on March 23, 2023.

APPEARANCES

Peter Antosh appeared for Claimant. Travis J. Ternes appeared for the Fund.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, the documents of record filed with the Division and the following:

1. Deposition Transcript of Alberto Romero, taken 2/24/16;
2. Deposition Transcript of Norbert Hornung, taken 2/24/16;
3. Deposition Transcript of Norbert Hornung, taken 8/31/16, with exhibits;
4. Deposition Transcript of Ron Schneweis, taken 10/11/16;
5. Deposition Transcript of Alberto Romero, taken 5/31/22 with exhibits;
6. Deposition Transcript of David W. Hufford, M.D., taken 7/26/22, with exhibits;
7. Regular Hearing transcript, held on 8/5/22;
8. Deposition Transcript of Alberto Romero, taken 9/1/22, with exhibits;
9. Deposition Transcript of Ron Schneweis, taken 9/13/22, with exhibits;
10. Deposition Transcript of Steve Benjamin, taken 8/15/22,with exhibits.

ISSUE

Did Respondent have the requisite payroll threshold of $20,000 to be subject to the Kansas Workers Compensation Act (K.S.A. 44-551(a)(2))?

FINDINGS OF FACT

Respondent owned a farm and ranch operation near Offerle, Kansas. In addition, Respondent owned a manure spreading business. Sometime in 2013, Claimant was hired by Respondent to load and spread manure. This required Claimant to operate heavy equipment and drive a manure truck. When manure hauling work was slow, Claimant engaged in various activities for Respondent on his farm and ranch, such as welding, fencing and taking care of cattle. Claimant earned $10 per hour initially, but at an unknown time, was given a raise to $13 per hour. During manure season, Claimant worked many hours per week, but worked a standard number of hours otherwise (5-6 days per week/8 hours per day).

On August 29, 2013, Claimant was hauling a load of manure when a front tire blew out causing the truck to rollover. Claimant sustained injuries to his head, neck, back, left shoulder and right leg. Claimant was hospitalized and subsequently received shoulder surgery from Dr. Fleske on November 18, 2013. Dr. Fleske performed arthroscopic subacromial decompression and distal clavicle excision and open biceps tenodesis and rotator cuff repair. Claimant testified he was off work for one year and did not receive any pay or benefits while off work. He did not know who paid his medical bills.

After being off work for his injuries, Claimant returned to work for Respondent. On November 17, 2014, Claimant injured his right leg when he slipped on ice while attempting to change a tire on a company vehicle. Claimant was taken by ambulance to the Dodge City Hospital. On November 21, 2014, Dr. Alok Shah, a Dodge City orthopedic surgeon, performed open treatment of the superior pole of the patella fracture, repair of the central quadriceps tendon and the medial and lateral extensor retinaculum in the right knee. This injury required Claimant to be off work for six months. Claimant testified he did not receive any pay or benefits while off work and did not know who paid his medical bills.

Following recuperation from the second injury, Claimant returned to work for Respondent for three days checking fences and cattle. Claimant described the end of his employment with Respondent as a mutual agreement. Claimant was convicted and incarcerated on January 12, 2017. Claimant's sentence was for 24 months, but he testified

he served 16-18 months. Claimant has not returned to work since his release from prison and is currently receiving social security retirement benefits.

The evidence from the parties regarding wages paid, hours and days worked, additional compensation and/or fringe benefits is confusing, conflicting and like a Louisiana swamp, difficult to navigate. The Board echos the ALJ's sentiment the parties were "perhaps two of the poorest historians this Court has ever encountered."[1]

Prior to his death, Respondent testified by deposition twice. The highlights of his testimony include:

- by 2012, his business was divided equally between farming, ranching and manure hauling;
- Claimant was hired in 2013 and was Respondent's only employee at the time. Hour and days worked were dependent on weather, seasons and demand for work;
- Claimant was employed primarily to work in the manure hauling business;
- Claimant was primarily paid with a check, but Respondent occasionally paid him in cash;
- Claimant was provided use of a pickup truck;
- Respondent occasionally paid Claimant's monthly rent of $325-$375;
- Respondent gave Claimant money to pay attorney fees to help reinstate his driver's license;
- Respondent's auto insurance paid Claimant's medical bills on his first accident and Respondent believed the same was true for the second accident.

Claimant testified four times. His testimony highlights include:

- Claimant worked for Respondent for approximately three years;
- Claimant earned $21,000 one of the three years he worked for Respondent. After reviewing his tax returns for 2013 and 2014, he was unsure if he earned more than $20,000 in a year while employed with Respondent;
- Claimant always paid his own rent. He denied Respondent ever paid his rent.
- Claimant denied Respondent ever paid him in cash.
- Claimant was given use of a company pickup including payment of gas, but was never allowed to use it for personal use.
- Work for Respondent was limited to manure spreading.

[1] ALJ Award (Nov. 23,2022) at 12.

Claimant produced his 2013 and 2014 tax returns prepared by Becky's Income Tax Service. They reveal wages earned by Claimant from Respondent of $7,419 in 2013 and $14,692 in 2014.

Ron Schneweis is a public accountant in Dodge City. Mr. Schneweis assisted Respondent with taxes and payroll issues between 2012 and 2015. He provided Respondent's payroll records for 2012 through 2015. Respondent's gross employee wages for 2012 were $1,221, for 2013 were $11,094 ($7,419 for Claimant and $2,322 for Jose M. Holguin), for 2014 were $14,692 for claimant, and for 2015 were $16,149 for an employee named Jorge Holguin. Mr. Schneweis testified Respondent's payroll for the years 2012-2015 did not exceed $20,000 and he believed he was Respondent's only accountant during this time frame. Mr. Schneweis testified Respondent was not the most efficient in providing documentation, but he believed documents he received were accurate and true.

Mr. Schneweis created paychecks and pay stubs at Respondent's request. Respondent reported hours worked by an employee. Mr. Schneweis created the paycheck, gave Respondent a pay stub and the check which would be delivered to the employee.

Claimant saw David Hufford, M.D., a board-certified independent medial examiner, for a court-ordered independent medical examination on May 27, 2021. Dr. Hufford opined Claimant's occupational injuries were the prevailing factor causing injuries under both dates of accident. Using the *Guides to the Evaluation of Permanent Impairment*, 4th ed. (*Guides*, 4th ed.), Dr. Hufford assigned Claimant a 23% functional impairment to the whole body for the first accidental injury and a 7% functional impairment to the right lower extremity for the second accidental injury. Dr. Hufford did not impose permanent restrictions and therefore opined Claimant did not suffer any task loss. He opined future medical benefits were not warranted.

At Respondent's attorney's request Steve Benjamin, a vocation rehabilitation consultant, interviewed Claimant by phone. Mr. Benjamin prepared a list of tasks Claimant performed in the five years preceding the accidents. He opined Claimant was capable of earning $613 per week utilizing Dr. Hufford's restrictions.

The ALJ found Claimant met his burden to prove Respondent had the statutorily required payroll for application of the Kansas Workers Compensation Act. In so doing, the ALJ found Respondent provided additional compensation in the form of rent and use of a truck to exceed the $20,000 threshold. He stated:

> In the end, it comes down to this; employers set the tone and the expected norms for the employment they offer, and the manner in which they compensate their

> employees. If employers such as Mr. Hornung hover on or around the statutory pay threshold, and choose to ignore or haphazardly account for the wages they pay or the value of any non-monetary compensation they provide, then so be it. But even so, when by a preponderance of all the evidence– whether objective, subjective, or circumstantial– it collectively points to an employer stumbling across the $20,000 threshold, thereby subjecting themselves to the Workers Compensation Act, such an employer (or the Fund) cannot successfully defeat that evidence by using the fog of financial disorganization, which the employer himself has created.[2]

After finding Claimant met his burden to prove Respondent had the statutorily required payroll for application of the Kansas Workers Compensation Act, the ALJ awarded Claimant permanent partial disability compensation based upon the opinions of Dr. Hufford. For the first injury, Claimant was found to have a 23% functional impairment to the whole body and a 7% functional impairment to the right lower extremity for the second. He found Claimant's average weekly wage was $318.54 for the first injury and $340.44 for the second injury. Finally, the ALJ denied Claimant's request for permanent total disability compensation, work disability compensation and future medical benefits.

The Fund argues Claimant failed to prove Respondent had sufficient payroll to be subject to the Act thereby denying Claimant the benefits awarded by the ALJ. Claimant argues the ALJ's Award should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

Coverage under the Workers Compensation Act is excluded pursuant to K.S.A. 44-505(a)(2).

According to K.S.A. 44-501(c), the burden of proof shall be on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record. Claimant has the burden to prove coverage under the Act under K.S.A. 44-505(a)(2),[3] which states:

> (a)Subject to the provisions of K.S.A. 44-506 and amendments thereto, the worker compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
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> ...

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[2] ALJ Award (Nov. 23, 2022) at 12.

[3] *Slusher v. Wonderful House Chinese Rest., Inc.* 42 Kan. App. 2d 831, 838, 217 P.3d 11 (2009).

> (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[.]

Under the facts, the preceding calendar year is 2012 and the current calendar year is the year of the accident, 2013 for the first accidental injury. The preceding calendar year is 2013 and the current calendar year is the year of the accident, 2014 for the second injury. Based upon the testimony and exhibits provided by Mr. Schneweis, Respondent's payroll did not exceed the $20,000 threshold set forth in K.S.A. 44-505(a)(2) in any of the years at issue. The ALJ concluded Respondent was remunerating his employees in excess of the $20,000 threshold because he found payments of Claimant's rent and access to a company pickup truck should be added as additional compensation to the actual wages Claimant received.

Under these facts, the Board disagrees with the addition of additional compensation to Claimant's wages. The record is unclear regarding the value of the rent and truck use. The record is unclear when rent was paid and the truck used. Even the simplest of information, such as what kind of a truck was lent to Claimant, is absent from the record. It is difficult to find paid rent as additional compensation when Claimant denies Respondent ever paid rent. The ALJ's finding the rent and truck use should be added as additional compensation is based on speculation and is unsupported by the record. This finding requires the Board to make a leap of faith it is unwilling to make.

Absent proof of the value of rent and when it was paid, combined with the lack of evidence regarding the value of the truck use and how often it was used, the evidence does not establish, on a more probably true than not standard, Respondent had the statutorily required payroll for application of the Kansas Workers Compensation Act.

Given the record does not prove sufficient payroll for 2012, 2013 and 2014, the Kansas Workers Compensation Act does not apply. The ALJ's award is reversed. All other issues are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Steven M. Roth, dated November 23, 2023, is reversed and an award of compensation is denied.

IT IS SO ORDERED.

Dated this day of March, 2023

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: (Via OSCAR)

Peter Antosh, Attorney for Claimant
Travis J Ternes, Attorney for the Fund
Hon. Steven M. Roth, Administrative Law Judge