BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DAVID C. MILLER	)	
Claimant	)	
V.	)	AP-00-0472-343
	)	CS-00-0467-946
FAR-TECHS LLC	)	
Uninsured Respondent	)	

ORDER

The respondent and its insurance carrier (respondent), through Brent Jepson, requested review of Administrative Law Judge (ALJ) Julie A.N. Sample's preliminary hearing Order dated November 15, 2022. Zachary Kolich appeared for the claimant.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the: (1) preliminary hearing transcript, held October 26, 2022; (2) continuation of preliminary hearing by deposition of the claimant, taken October 28, 2022; (3) evidentiary deposition of Justin Kolker, taken October 28, 2022; (4) all exhibits uploaded and admitted under HE-00-0070-792; and (5) documents of record filed with the Division.

ISSUE

Was the claimant an employee of the respondent or an independent contractor?

FINDINGS OF FACT

The claimant began working for the respondent in April 2021. On December 28, 2021, the claimant fell off the fourth or fifth rung of a six-foot ladder, hitting his head, injuring his right knee and breaking his left ankle. He was transported by ambulance to Overland Park Regional Medical Center and received emergency surgery on his left ankle.

Justin Kolker is the sole owner of the respondent. He testified an integral part of the respondent's business is installing point of sale (POS) systems, digital menus, timer systems, headset systems and similar technology solutions for fast food restaurants. A vendor, often RF Technologies, contacts the respondent about installing equipment at various locations. The respondent provides the individuals to install the equipment.

After being contacted by a vendor about an installation project, Mr. Kolker reaches out to contractors in the geographical area to perform installations. He testified he rotates between 30 and 40 different independent contractors. Mr. Kolker negotiates an hourly rate with each contractor and does not provide any benefits or deduct taxes from monies earned. He does not provide uniforms and only requests the contractors dress appropriately. Mr. Kolker testified contractors have the ability to decline job offers, work outside of their contracts with respondent and come and go as they please.

Mr. Kolker testified the contractors are permitted to subcontract work to others, but it does not alter the payment terms. The contractors are responsible for paying the subcontractor. Mr. Kolker testified he has no control over how the job is performed or provide instruction, and the contractors provide their own tools. If unexpected equipment or disposable items are needed to complete the project, the respondent provides the same and reimburses the contractor for the time spent acquiring and purchasing it.

Mr. Kolker testified the respondent has no employees, no payroll and no workers compensation insurance.

On April 28, 2021, the claimant executed a contract with the respondent. The top of the document stated, "Far-Techs LLC Friendly & Reliable Technicians." Below, the document was titled "Independent Contractor, Non-Compete, Non-Solicitation Agreement" with the respondent. The document contained many provisions, including:

• a statement the respondent was in the business of installing POS systems and associated technology;

• the claimant would perform installation of POS systems for the respondent using his best efforts, ability, experience, and talents;

• in the performance of his duties, the claimant was deemed an independent contractor and not an employee of the respondent;

• the respondent was not required to deduct for social security, withholding tax, federal, state, county, and city payroll tax, federal or state unemployment deposits, or any other similar taxes, which were the claimant's responsibility;

• the parties specifically intended the claimant was an independent contractor and the claimant had no right to bind the respondent in any manner whatsoever;

• because the claimant was an independent contractor, he was not eligible for any employee benefits, such as expense reimbursement, paid vacation, sick leave, personal leave, medical benefits, or any employee benefit plans;

• the claimant would provide his own workers compensation and liability insurance;

• the contractor could not perform any services outside of the work performed by the respondent, unless previously agreed to by the respondent;

• the claimant would follow the respondent's systems for appearance, documentation of services and professionalism;

• the claimant was bound to a two-year confidentiality agreement regarding many things, including the respondent's records, customer files, technical information, business records, prospective customer lists, future plans and any information from customers in performing services;

• the claimant would not work for any competing business within a restricted area (the United States and Canada) during the contract and for a period of two years after the termination of the contract, in addition to not soliciting business of the respondent's customers;

• the claimant would perform services on an as-needed basis;

• the contract could be terminated upon mutual agreement, 14-day written notice by either the claimant or the respondent, for a violation of the contract, or the bankruptcy of the respondent.

Thereafter, the claimant worked for the respondent as a POS technician. The claimant testified he earned $16 an hour and was paid hourly, between 30 and 40 hours per week. Mr. Kolker testified the claimant negotiated a blended flat rate of payment which guaranteed pay of $15 per hour for a minimum of 1.5 hours, followed by hourly pay thereafter. Under this system, a job taking less than 1.5 hours would still pay a minimum of $22.50. Eventually, the claimant's hourly rate was increased to $16. The respondent does not make payroll or tax deductions and provides no employee benefits. The claimant was issued an IRS 1099 form.

When required to travel out of town, the respondent made the reservation, paid for lodging and sent the claimant a confirmation. The claimant used his own tools and received job assignments through an email-based platform called "Wrike." The "Wrike" system allows the respondent to check with contractors regarding job status and if any problems arise.

Mr. Kolker testified jobs have a hard start time, but the contractors work thereafter "at their own discretion."[1] He denied any control over hours worked and stated contractors could come and go at their pleasure. He denied control over the order or sequence of jobs. Mr. Kolker testified the claimant declined two jobs, one which involved work on a

[1] Kolker Depo. at 26.

roof. The contractors simply reported their hours to Mr. Kolker and got paid. However, Mr. Kolker indicated the respondent wanted contractors to call in after the first 1.5 hours of work and every 1-2 hours thereafter for jobs requiring "larger amounts of money."[2]

The claimant testified he understood he was listed as a contractor in the Independent Contractor Agreement. He understood he had an obligation and responsibility to provide his own work comp insurance under the agreement, but he did not "really think" he needed it.[3]

The claimant denied any prior experience installing POS systems. The claimant testified he was paid $16 per hour, never in a lump-sum, and would be paid for travel time, up to eight hours. He denied the ability to hire helpers. He denied being required to provide his own tools, but he did, in fact, use his own tools. He theorized he would be given tools if he showed up to work without tools, but this never happened. The claimant indicated additional tools, drill bits or a tile saw were sometimes needed, and the respondent or a lead would buy them.

The claimant denied having control over the job or the schedule. When asked about refusing jobs, the claimant testified, "I guess I could have, but I wouldn't be working."[4] He denied rejecting any jobs. The claimant testified he could install cable for other companies, but he never installed POS systems for any company apart from the respondent.

The claimant testified the lead at the job site, Geoff Estel, told him when to show up, take breaks, take lunch, and leave for the day. The claimant testified Mr. Estel told him to take a ladder and drill a hole in a wall because the customer did not want the cable where it was initially installed. The claimant was injured after falling from this ladder. Mr. Kolker testified there is no difference in contractor status between a lead and any other contractor.

The claimant has not worked anywhere since the accident. As of the date of his deposition, October 28, 2022, the claimant continues to receive medical treatment. He uses a cane to ambulate and has applied for Social Security disability due to a bad back.

The ALJ found the claimant was an employee of the respondent and under the respondent's control and direction. The ALJ concluded the claimant's injury arose out of and in the course of his employment with the respondent and awarded temporary total disability (TTD) benefits and reimbursement of out-of-pocket medical expenses. The respondent argues the claimant was an independent contractor, not an employee of the respondent. The claimant maintains the Order should be affirmed.

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[2] *Id.* at 45.

[3] Cont. of P.H. Trans. by Depo. (Claimant) at 38.

[4] *Id.* at 16; see also p. 44.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident or repetitive trauma arising out of and in the course of employment. 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 the trier of fact shall consider the whole record.

K.S.A. 44-508(b) states, in part:

> "Workman" or "employee" or "worker" means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer.

There is no absolute rule for determining whether an individual is an independent contractor or an employee.[5] The relationship of the parties depends upon all the facts, and the label they choose 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.[6]

The primary test to determine whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee, as well as the result to be accomplished. 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 that renders one a servant, rather than an independent contractor.[7]

Other commonly recognized tests of the independent contractor relationship are:

(1) The existence of a contract to perform a piece of work at a fixed price.
(2) The independent nature of the worker's business or distinct calling.
(3) The employment of assistants and the right to supervise their activities.
(4) The worker's obligation to furnish tools, supplies and materials.
(5) The worker's right to control the progress of the work.
(6) The length of time the employee is employed.
(7) Whether the worker is paid by time or by job.
(8) Whether the work is part of the regular business of the employer.[8]

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

[6] See *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 337, 510 P.2d 1274 (1973).

[7] *Wallis*, *supra,* at 102-03; citing *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[8] See *McCubbin v. Walker*, 256 Kan. 276, 281, 886 P.2d 790 (1994).

In *Hill*, the Court noted several factors other than the right of control, including:

(1) [t]he existence of the right of the employer to require compliance with instructions;
(2) the extent of any training provided by the employer;
(3) the degree of integration of the worker's services into the business of the employer;
(4) the requirement that the services be provided personally by the worker;
(5) the existence of hiring, supervision, and paying of assistants by the workers;
(6) the existence of a continuing relationship between the worker and the employer;
(7) the degree of establishment of set work hours;
(8) the requirement of full-time work;
(9) the degree of performance of work on the employer's premises;
(10) the degree to which the employer sets the order and sequence of work;
(11) the necessity of oral or written reports;
(12) whether payment is by the hour, day or job;
(13) the extent to which the employer pays business or travel expenses of the worker;
(14) the degree to which the employer furnishes tools, equipment, and material;
(15) the incurrence of significant investment by the worker;
(16) the ability of the worker to incur a profit or loss;
(17) whether the worker can work for more than one firm at a time;
(18) whether the services of the worker are made available to the general public;
(19) whether the employer has the right to discharge the worker; and
(20) whether the employer has the right to terminate the worker.[9]

ANALYSIS

The claimant was an employee of the respondent, not an independent contractor.

The undersigned finds the claimant was the respondent's employee. The mere label of "independent contractor" is not legally binding, although it is a factor to consider.

The contract signed between claimant and the respondent indicates the contractor would perform installation of POS systems – the very work of the respondent – for the respondent using his or her best efforts, ability, experience, and talents.

The contract indicated the contractor could not perform any services outside of the work performed by the respondent, unless previously agreed to by the respondent. This

[9] *Hill v. Kansas Dept. of Labor*, 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 (2009)*, aff'd in part, rev'd in part*, 292 Kan. 17, 248 P.3d 1287 (2011).

shows the respondent was in control of the work, as the claimant was not to deviate from work performed by the respondent.

The contract contained a confidentiality agreement, which would preclude the contractor from releasing information concerning the respondent considered confidential. Enforcing confidentiality is a form of control.

The contract also indicated the contractor would not be allowed to work for any competing business within a restricted area (the United States and Canada) during the contract and for a period of two years after the termination of the contract. The purpose of the non-compete clause was to avoid competition. This provision does not align well with an independent contractor agreement. A truly "independent" contractor should not be expected to agree not to work for the respondent's competitors. The right to control who the claimant works for is the essence of control. An independent contractor is free to contract with the general public.

The contract indicates the contractor would be provided training and assistance by the company. An independent contractor with a distinct calling would not be expected to ask for training, regardless of the fact the claimant did not receive any training from the respondent.

The contract requires vacation time requested by the contractor be approved by the respondent two months in advance. An independent contractor would not be expected to ask for vacation time.

The claimant was not contracted to perform a piece of work at a fixed price. Rather, he was paid by the hour. The pay system was not designed for the claimant to incur a profit or a loss. The respondent paid travel and lodging expenses for the claimant. These facts weighs in favor of an employer-employee arrangement.

The claimant was not operating an independent business or distinct calling of installing restaurant POS systems. Regardless of Mr. Kolker testifying some contractors worked for other companies, the contract precluded the claimant from working for competitors. The claimant worked exclusively for the respondent, performing work which was part of, and integral to, the regular business of the respondent. The claimant's work was not made available to the general public. These factors weigh in favor of an employer-employee arrangement.

The contract specifically allows the claimant's employment of assistants and the right to supervise their activities. This weighs in favor of an independent contractor agreement.

The claimant furnished most of the tools, supplies and materials. Still, it cannot be said the claimant invested significant investment in a hammer and a drill.

While Mr. Kolker testified the claimant refused two jobs, the claimant testified he did not decline any work. The claimant testified he was told when and where to show up to work. The claimant denied the right to control the progress of the work, but Mr. Kolker testified otherwise. The fact Mr. Kolker expected workers to call in and provide work updates, especially if jobs might require additional time and money, shows an additional degree of control.

Overall, the facts show the claimant was an employee of the respondent. The undersigned Board Member affirms the ALJ's conclusion the claimant was the respondent's employee.

WHEREFORE, the Board affirms the preliminary Order dated November 15, 2022.

IT IS SO ORDERED.

Dated this _____ day of March, 2023.

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JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
Zachary Kolich
Brent Jepson
Hon. Julie Sample