BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BROCK SHOUSE	)	
Claimant	)	
V.	)	
	)	
SCARROW PALLET PLUS LLC	)	AP-00-0473-094
Uninsured Respondent	)	CS-00-0469-862
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The respondent, through John Sill, and the Kansas Workers Compensation Fund (Fund), through David Bideau, requested review of Administrative Law Judge (ALJ) Steven Roth's preliminary hearing Order dated January 3, 2023. Kala Spigarelli 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 December 7, 2022, with exhibits A1-A8 and B1-B2;
(2) deposition transcript of the claimant, taken December 20, 2022, with exhibit A9;
(3) deposition transcript of Joshua Shouse, taken December 20, 2022, with exhibit A10;
(4) deposition transcript of the respondent, taken December 20, 2022;
(5) the parties' briefs, including the respondent's Motion to Dismiss; and
(6) documents of record filed with the Division.

ISSUES

The parties raised many issues, which are condensed as follows:

1. Was the claimant respondent's employee or an independent contractor?

2. Does K.S.A. 44-505(a)(2) or K.S.A. 44-505(a)(3) apply?

3. Should the respondent have reasonably expected to have an annual payroll over $20,000 for calendar year 2022, when it considered all workers to be contractors?

4. Did the ALJ err by ordering the respondent and/or Fund to pay unauthorized medical treatment in an amount greater than $500 in August 2022?

5. Did the ALJ err by ordering the Fund to pay medical, TTD or other workers compensation benefits to the claimant, including having the Fund "step into the shoes" of the respondent?

FINDINGS OF FACT

Preston Scarrow is the respondent's sole owner. The respondent recycles and sells pallets to businesses. Mr. Scarrow started his business in January 2022, and registered it as a limited liability company (LLC) in May 2022. At that time, Mr. Scarrow did not know how much contract labor expenses the respondent would incur in 2022. The respondent only carried general liability insurance because it considered all workers to be contract labor, which Mr. Scarrow defined as individuals who work their own hours and make their own decisions.

The claimant, 17 years old, first learned of a possible job with the respondent from a co-worker at Sonic. Mr. Scarrow and the claimant first communicated by text message. Mr. Scarrow asked if the claimant was interested in working for him. They set up an interview. Mr. Scarrow testified:

> A. We just -- I invited [the claimant] into my house and we just sat in the living room and I just asked him what his previous work experience was, because I knew he had worked at Sonic, but I didn't know if he had ever done any kind of manual labor.
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> And so he had -- he had brought up that he had worked in -- had shop class . . . .
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> And then I had talked to him about if he was -- how he felt about using power tools and experience. And he had said that he had used power tools and he felt comfortable around them. And so -- and I had talked to him then also about that I would be paying -- paying $12.00 -- $12.00 an hour and that I -- it would be a straight cash and that -- for his services.
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> What else did we talk about? I'm trying to think. We talked about that he would give two weeks at Sonic. And so we looked and it would have been somewhere around the 22nd that we would start -- that he could start.
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> Q. In his interview, did you ever discuss with Brock the nature of his working relationship?

A. I believe I had told him that because it was a new business that I would be -- that he wouldn't be an employee of mine. And I think that was -- I think that is what I had -- what I had said but that I would pay him for the services.

Q. How did Brock respond to that?

A. I think the way he acted, the payment he was -- he really liked the $12.00 an hour, that he liked that idea or he liked the fact of the money. He didn't really ask any other -- didn't ask any questions.

I had talked to him about using a Sawzall, using drills, air tools. And also talked to him about using a table saw. And he said he would use -- he hadn't ever used a Sawzall before but that he's used other power tools and a table saw.[1]

Mr. Scarrow testified he had similar interviews with other workers and similar worker status conversations with the other workers. He testified he trained every worker the same way.

The claimant began working for the respondent on July 22, 2022. He did not fill out any employment paperwork or tax withholding form. The claimant testified he started out full-time, earning $12 an hour, and would work less hours when school started. He testified Mr. Scarrow set his pay, work hours of 6 a.m. to 2 p.m., taught him how to break down pallets and build new ones, provided all tools and equipment, trained him, supervised him, and directed him on what needed to be done. The claimant did not know how to do the work beforehand. The claimant performed the work in a detached garage/shop on Mr. Scarrow's property. According to the claimant, a total of six individuals worked for the respondent, and these workers all had the same job. The claimant testified a marker board in the garage indicated how many pallets were needed before a deadline. The claimant testified he had no input on how many pallets to make, and Mr. Scarrow provided direction as to which pallets to break down and how many were needed. The claimant testified both he and Mr. Scarrow tracked the claimant's hours. According to the claimant, some workers would arrive late and had a small amount of control over when to show up, without any consequences. He stated the workers could leave before 2:00 p.m. if the work was done, but this was not common, and it was more common for them to work after 2:00 p.m.

Mr. Scarrow testified he had two workers before the claimant started. He did not have the claimant fill out any employment forms, nor did he withhold any taxes. The claimant was to work 40 hours a week during the summer and then drop back to 15 to 20 hours when school started. While the claimant was not required to work certain hours, Mr. Scarrow suggested working 6:00 a.m. to 2:00 p.m. because of the afternoon heat. He noted the claimant usually arrived at 6:00 a.m., but not all workers did. Mr. Scarrow

[1] P.H. by Depo. Trans. (Scarrow) at 7-9.

testified he did not set a schedule, but "[t]he schedule was more for - - the shop was open so it was more set up for whenever they were available to work"[2] and some workers chose not to come in until 7:00 a.m. or 8:00 a.m. He showed workers he had a notebook by the door where workers logged their hours. If they forgot, he would ask them the hours they worked and log the time for them.

Mr. Scarrow testified the shop had a job board with the number of pallets to be completed by the end of the week so the workers would have a goal, and he asked them to meet the deadline, but there was no penalty for failure to meet the goal. He stated text messages to the claimant regarding the claimant's availability were simply to ensure he had enough workers to meet the goal each week. Workers faced no repercussions if the goal was not reached. Mr. Scarrow testified workers were not restricted to using the shop on his property. In fact, one worker, Dustin, did some work at his own home, but he did not have all the tools necessary to complete the work. Mr. Scarrow acknowledged the workers used the respondent's tools and equipment. However, Dustin used some personal tools.

On August 1, 2022, Mr. Scarrow showed the claimant how to use the respondent's table saw. That day, the claimant used the respondent's table saw for the first time. As the claimant ran a board through, he sliced his left thumb off. Another worker retrieved the thumb. Mr. Scarrow did not witness the accident, but was in the area and drove the claimant to Freeman Hospital emergency department. The claimant was next flown to Barnes Jewish Hospital for replantation of his left thumb and discharged six days later. He had physical therapy and was released to return to regular activities on October 25, 2022.

Mr. Scarrow indicated his accounting showed he paid a total of $21,203.50 in wages, excluding himself, for the period June 13 through December 1, 2022. On December 20 2022, he testified the payroll was likely $23,000. Some contractors were paid $11, $12 and $15 per hour.

Joshua Shouse is the claimant's father. He testified the claimant had no prior experience disassembling and reassembling pallets. He thought his son would work 40 hours during the summer and 35 hours a week during the school year. Mr. Shouse testified he originally believed his son's medical bills would be covered under workers compensation as he understood Mr. Scarrow was going to notify his insurance company. They were eventually notified Mr. Scarrow did not have workers compensation insurance. Mr. Shouse's health insurance denied benefits based on the accident being work related.

As of December 20, 2022, Mr. Scarrow continued to be without workers compensation insurance. He had two workers. Mr. Scarrow testified the respondent had $800 in the bank and, while the respondent was not insolvent or bankrupt, it lacked the ability to pay the claimant's medical bills or time off work.

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[2] *Id.* at 12.

The ALJ ruled the claimant was the respondent's employee, not an independent contractor. Further, the respondent had the requisite payroll to be subject to the Kansas Workers Compensation Act. The ALJ denied a Motion to Dismiss filed by the respondent and ordered benefits paid to the claimant.

PRINCIPLES OF LAW & ANALYSIS

The respondent and the Fund argue the Order should be reversed. The claimant maintains the Order should be affirmed.

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[3] The Workers Compensation Act is liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.[4] The provisions of the Workers Compensation Act are applied impartially to all parties.[5] The employee has the burden of proof to establish the right to an award of compensation, including the various conditions upon which the right to compensation depends.[6] The trier of fact considers the whole record in determining if a claimant satisfied the burden of proof.[7]

The Board's review of an order is de novo on the record.[8] A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[9] On de novo review, the Board makes its own factual findings.[10]

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

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[3] See K.S.A. 44-501b(b).

[4] See K.S.A. 44-501b(a).

[5] See *id*.

[6] See K.S.A. 44-501b(c).

[7] See *id*.

[8] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[9] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[10] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

> "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.[11] 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.[12]

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.[13]

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.[14]

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;

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

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

[13] *Wallis*, 236 Kan. at 102-03.

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

(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.[15]

The claimant has the burden to prove coverage under the Act under K.S.A. 44-505(a)(2),[16] which states:

> (a) 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 such act shall not apply to:
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> . . .
>
> (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 . . .;
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> (3) 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 has not had a payroll for a calendar year 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 . . . [.]

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[15] *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).

[16] See *Slusher v. Wonderful House Chinese Rest., Inc.*, 42 Kan. App. 2d 831, 833, 217 P.3d 11 (2009).

K.S.A. 44-532a(a) states:

> If an employer has no insurance or has an insufficient self-insurance bond or letter of credit to secure the payment of compensation, as provided in subsection (b)(1) and (2) of K.S.A. 44-532, and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569, and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.

ANALYSIS

1. The claimant was the respondent's employee, not an independent contractor.

The undersigned finds the claimant was the respondent's employee. The fact the respondent believed the claimant to be a contractor is not legally binding, although it is a factor to consider.

The respondent set the claimant's pay. There is no evidence the claimant had any say in the pay dictated by the respondent. The claimant was paid by the hour, not by the piece of work at a fixed price. While taxes were not taken out of the claimant's pay, the overall pay arrangement points to an employer-employee relationship.

The claimant was not operating an independent business or distinct calling of disassembling and reassembling pallets. The claimant worked exclusively for the respondent. The claimant's work was not made available to the general public. The claimant was doing the integral work of the respondent. These factors weigh in favor of an employer-employee arrangement.

The respondent furnished the claimant with all tools and materials. While one of the workers used some personal tools, all of the remaining workers used tools supplied by the respondent.

The respondent interviewed and trained the claimant and all other workers.

The claimant was told when and where to show up to work. The claimant and four other workers only did work at the premises – the garage or shop – operated by the respondent. Only one worker, Dustin, did some work away from the respondent's premises. While the 6:00 a.m. to 2:00 p.m. schedule was not rigidly enforced, it was the normal schedule.

The respondent wanted the workers to meet weekly quotas, even though there was no penalty if the quota was not met.

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. The claimant was not an independent contractor.

2. K.S.A. 44-505(a)(3) applies.

K.S.A. 44-505(a)(3) applies to this matter, as the respondent did not have a payroll for a calendar year. K.S.A. 44-505(a)(2) does not apply.

3. The respondent should have reasonably expected to have an annual payroll over $20,000 for calendar year 2022, and actually had a payroll exceeding $20,000 in 2022.

The respondent contends the claimant was not an employee and none of the other workers were employees. The undersigned already ruled the claimant was the respondent's employee.

Mr. Scarrow stated he interviewed all workers and deemed all the other workers to be contract labor. He testified he trained every worker the same way. The same factors analyzed above, which make the claimant an employee, apply equally to the other workers. As such, the pay the other workers received is considered part of the respondent's payroll.

The respondent paid the workers around $23,000 for basically one-half of one year. It is found the respondent should have reasonably expected the annual payroll to exceed $20,000 in 2022. Therefore, the respondent is a covered employer under the Act.

4. The ALJ's order for the respondent and/or Fund to pay unauthorized medical treatment in an amount greater than $500 in August 2022 is not appealable from a preliminary hearing Order.

An order for medical treatment is not appealable from a preliminary hearing Order.[17]

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[17] See *Timmer v. ResCare, Inc.*, No. CS-00-0436-779, 2019 WL 3705910 (Kan. WCAB July 23, 2019).

5. The ALJ did not err by ordering the Fund to pay medical, TTD or other workers compensation benefits to the claimant, including having the Fund "step into the shoes" of the respondent?

The respondent is uninsured and lacks the financial means to pay for the benefits to which the claimant is entitled. The Order making the Fund liable is affirmed.

WHEREFORE, the Board affirms the January 3, 2023, Order.

IT IS SO ORDERED.

Dated this _____ day of March, 2023.

_____
JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
Kala Spigarelli
John Sill
David Bideau
Hon. Steven Roth