BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

EDUARDO GORDILLO	)	
Claimant	)	
V.	)	
	)	
KIRT COSLETT, d/b/a COSLETT	)	AP-00-0461-205
ROOFING AND CONSTRUCTION	)	CS-00-0443-898
Uninsured Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Workers Compensation Fund (Fund), through Matthew Bergman, requested review of Special Administrative Law Judge (SALJ) Mark Kolich's Award dated September 9, 2021. Jeff Cooper appeared for the claimant. The pro se respondent was given notice of the date and time of oral argument, but did not appear. The Board reviewed the parties' briefs and heard oral argument on January 13, 2022.

RECORD AND STIPULATIONS

The Board considered the same record as the SALJ, consisting of the transcripts of:

1. the discovery deposition of the claimant with exhibits, taken September 26, 2019;

2. the discovery deposition of Kirt Coslett with exhibits, taken October 31, 2019;

3. the regular hearing with exhibits, held December 17, 2020;

4. the evidentiary deposition of Pedro Murati, M.D., with exhibits, taken February 10, 2021; and

5. the evidentiary deposition of Richard Thomas with exhibits, taken January 8, 2021.

At oral argument, the Fund stipulated the claimant is permanently and totally disabled.

ISSUES

1. Does the Kansas Workers Compensation Act apply under K.S.A. 44-505(a)?

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

FINDINGS OF FACT

In 2016, the claimant began working as a roofer for the respondent. He did not complete any paperwork with the respondent. The claimant was in charge of a crew made up of three family members and a friend. They removed and replaced roofs on houses. The claimant was paid in cash based upon the number of "squares" (a 10' by 10' area) determined by the respondent. The claimant paid his crew. The claimant testified he earned between $1,000 and $1,100 per week and crew member usually earned $800 per week. Every Friday, he would meet the respondent at the respondent's bank to receive payment. The respondent then gave him a piece of paper containing addresses of jobs for the following week and the day each job was to be performed. According to the claimant, the respondent showed up at the start of every job, determined what needed to be done and gave instructions. The claimant testified he used his own truck, trailer and tools, but the respondent supplied all materials, such as shingles, paper, tar and nails. The respondent made daily inspections and performed a final inspection upon completion.

The claimant testified the respondent never provided a written document showing the amount of money he was paid each year, nor did the claimant ever file a tax return with the IRS or State of Kansas. The claimant denied performing roofing work for anyone other than the respondent. The claimant denied ever offering roofing work to the public.

On December 21, 2018, the claimant fell off a roof while performing his job duties for the respondent. He suffered several cervical and thoracic fractures and damaged his spinal cord. The claimant has no feeling, sensation or movement below chest level and is confined to a wheelchair. His only remaining capability is limited use of his arms. The claimant's wife assists him with activities of daily living. He takes prescription medication and uses a catheter. The claimant receives ongoing treatment at Grace Medical Clinic.

Kirt Coslett was the sole proprietor of Coslett Roofing and Construction until the end of 2016. In 2017, he opened Central Kansas Siding as a sole proprietor. He denied ever having employees in either Coslett Roofing or Central Kansas Siding. Mr. Coslett testified he had three or four different subcontractors working for him over the last 10 years, including the claimant. The subcontractors would work about nine months of every year. He did not have anything in writing stating the claimant was a subcontractor. He admitted subcontractors performed was an "integral part" of his business.[1]

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[1] Coslett Depo. at 39.

Mr. Coslett testified the claimant could refuse any project assigned to him. He believed the claimant worked for another roofing company at the same time because the claimant declined work a few times because he was doing a job in Beloit, Kansas. Mr. Coslett could not say for sure if he used roofing contractors other than the claimant in 2018, but thought he may have used a couple other contractors. Mr. Coslett was unaware of the claimant using a company name to do roofing work.

Mr. Coslett took a 20% deduction off what he paid the claimant since he could not use the payment as a deduction on his taxes, meaning he paid the claimant $48 per square instead of $60 a square. He never provided the claimant with a Form 1099, nor did he send the claimant any documentation reflecting the yearly amount the claimant was paid. Mr. Coslett testified he grossed between $200,000 and $500,000 each year for the 10 years prior to his October 31, 2019, deposition.

Mr. Coslett testified he notified the claimant about the location of jobs by telephone and they set up a time for the work to be performed. Mr. Coslett testified the claimant usually said when he was available to meet. Mr. Coslett denied being in charge of the claimant's schedule and stated, "They would - - they were just completely on their own. They could start whatever day or any time in the morning they wanted or work till dark or take off at 5:00. I was never in control of any of that."[2]

Mr. Coslett viewed the claimant as a subcontractor because he told the claimant only subcontractors were used and subcontractors were responsible for providing their own crews, vehicles, tools, landfill charges and insurance. Mr. Coslett denied providing tools or vehicles. However, Mr. Coslett purchased materials needed for roofing (shingles, felt paper, pipe flashing, metal edging, vents, nails and perhaps plywood), had the materials delivered to the job sites, and may have let the claimant use his trailer once.

Mr. Coslett admitted he was at the job sites "pretty much" every day.[3] The first day, he let the claimant know if there was anything special about the job. On other days, he might stop to see if the claimant needed more materials or check to see how close the claimant was to completing the job. He showed up the last day to perform a final inspection. Mr. Coslett admitted if he discovered a problem at the final inspection, he told the claimant to fix the problem, but denied it happened very often. He testified the claimant was a good worker and stated, "[I]f he wouldn't have been a good worker and did the jobs right, then it would have been bad for my business."[4] To Mr. Coslett's knowledge, the claimant never communicated with homeowners regarding what work needed to be done.

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[2] *Id*. at 28.

[3] *Id*. at 49.

[4] *Id*. at 60-61.

At his attorney's request, the claimant saw Dr. Pedro Murati on March 4, 2020. Dr. Murati is board certified in physical medicine and rehabilitation, electrodiagnosis, independent medical evaluations and pain medicine. The doctor testified the claimant is a tetraplegic which means he only has one nerve root going to his arms. Using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th edition, Dr. Murati assigned the claimant an 88% whole person impairment. However, Dr. Murati testified the most appropriate impairment for the claimant was a 98% whole person impairment under the *AMA Guides to the Evaluation of Permanent Impairment*, 4th edition. Dr. Murati opined the claimant will require extensive medical treatment from various physicians for the remainder of his life.

At his attorney's request, Richard Thomas, a vocational consultant, interviewed the claimant by phone on October 28, 2020. He prepared a list of 14 non-duplicative tasks the claimant performed in the five years preceding his accident, but felt the claimant had no wage-earning capacity. It was Mr. Thomas' opinion the claimant was permanently and totally disabled. Out of the 14 tasks on Mr. Thomas' task list, Dr. Murati opined the claimant was unable to perform any of the tasks for a 100% task loss.

The SALJ stated:

> The undisputed evidence proves the following:
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> 1. Claimant met with personal injury by accident on December 21, 2018.
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> 2. Respondent admitted in his deposition he was notified of the accident the day after it happened and therefore, notice was timely.
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> 3. Claimant is permanently and totally disabled as a direct result of his accidental injury.
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> 4. Claimant requires continual medical care for his injury.
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> . . .
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> Here, factors exist that suggest claimant was an independent contractor. These include the method of payment, claimant providing his own tools and the crew of family members that claimant was responsible for paying out of the amount he received from respondent.
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> However, being an independent contractor usually involves the potential for profit and the risk of loss. For example, a contractor will present a customer with a bid or price against which his labor and material costs will be deducted. In this case, the amount paid for claimant's services was set by respondent who also furnished all materials. The risk of loss was eliminated as well as the potential to make a profit. The nature of the money received for services performed by claimant was that of a wage.

Obviously, claimant was not capable of reroofing a house by himself. Being allowed to hire assistants does not foreclose a finding of an employer-employee relationship.

The continuity of claimant's service to respondent is consistent with a finding that he was an employee. Claimant was not hurt while performing an isolated job for respondent, nor can his relationship with respondent be described as temporary. Once a job was finished respondent would direct claimant to the next one.

Respondent controlled claimant by the assignment of particular jobs and his directions regarding the scope of work to be performed. Respondent's inspections of claimant's work, both before and after completion, also indicate an element of control. Nevertheless, the Supreme Court has specified that the right of control actually governs, whether or not it is exercised. No evidence has been presented to suggest respondent's right of control was limited to any extent.

A particularly strong indication of employment is the performance of work that is an indispensable part of respondent's business. The existence of respondent's business depends on individuals removing and replacing roofs. All of the work performed by claimant was part of respondent's usual course of business.

Respondent runs a small business that hires undocumented, immigrant workers to perform its fundamental function. By labeling his workers as subcontractors respondent has avoided the payment of workers compensation insurance premiums as well as employment related taxes. This arrangement lacks legitimacy. Claimant was respondent's employee.

Having determined the existence of employer-employee relationship, it is also determined as follows:

1. Claimant's injury arose out of and in the course of his employment with Respondent.

2. Claimant's average weekly wage at the time of his accident was $1,000.00. This finding is based upon claimant's testimony. Respondent did not dispute the testimony and he offered no evidence to the contrary.

3. The parties are covered by the Kansas Workers' Compensation Act. Although payment records were not presented, Respondent testified his receipts for the last decade ranged from $200,000.00 to $500,000.00 annually. It is reasonable to conclude that labor costs exceeding $20,000.00 per year would be required to generate this revenue. Additionally, the amount paid to claimant and his family standing alone satisfies the payroll requirement.

4. The Fund is liable for Claimant's award pursuant to K.S.A. 44-532a. Respondent admitted he is uninsured. Determining respondent's ability to

> pay is challenging without financial records, but respondent's business practices are not particularly consistent with a thriving and successful enterprise. Even if the business generates the amount of revenue respondent claims, his numbers are before expenses and taxes. Perhaps respondent can afford to pay the disability compensation, but it is doubtful he has the resources to cover the magnitude of anticipated costs associated with future medical care. Lack of the ability to pay those medical expenses would certainly have a negative impact on claimant's ability to obtain prompt medical care for his injury. This situation must be avoided.

The Fund argues the claimant's accident does not fall within the purview of the Act. The Fund asserts the respondent's testimony reflects all persons doing work were subcontractors/independent contractors. The Fund also contends the evidence does not prove the respondent's payroll exceeded $20,000 the year preceding the claimant's accident or would have exceeded $20,000 the year the accident occurred. The respondent did not file a brief. The claimant maintains the Award should be affirmed.

PRINCIPLES OF LAW

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.

1. The Workers Compensation Act applies; coverage under the Act is not excluded pursuant to K.S.A. 44-505(a)(2).

The claimant has the burden to prove coverage under the Act under K.S.A. 44-505(a)(2).[5]

K.S.A. 44-505 states, in part:

> (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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> . . .
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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

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

> $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[.]

The preceding calendar year is 2017 and the "current calendar year" is the year of the accident.[6] The claimant testified he earned $1,000 to $1,100 per week at the time he was injured. He also indicated three or four other roofers were each paid $800 per week. The SALJ found the claimant earned $1,000 per week. No evidence contradicts the claimant's testimony concerning his wages. Even if the claimant only worked nine months in 2017 and 2018, the resulting wages of $36,000 each year would obviously exceed a $20,000 total gross annual payroll for the "preceding calendar year" and the "current calendar year." K.S.A. 44-505(a)(2) does not exclude coverage under the Workers Compensation Act.

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

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.[7] 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.[8]

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

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[6] *Id.* at 834.

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

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

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.[9]

Other commonly recognized factors 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.[10]

In *Hill*, the Court noted several factors, including:

(1) [t]he 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.[11]

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

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

[11] *Hill v. Kansas Dept. of Labor, Div. of Workers Comp*., 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).

Some factors point to the claimant being an independent contractor: (1) payment was for the job, not by the hour; (2) the claimant hired his own workers and supplied his vehicles and tools; and (3) he respondent did not train the claimant how to perform work. However, these considerations are not enough to outweigh factors showing the claimant was the respondent's employee.

Generally, a contractor bids on a job, supplies materials, completes the job and is paid. The claimant did not bid on jobs; only the respondent bid on jobs. The respondent fixed the price of work; the claimant did not. There was no one fixed piece of work. Rather, the claimant continually worked for the respondent on many jobs over a period of years. The claimant did not provide materials; the respondent provided materials. The respondent laid out what jobs were to be done, when they were to be done, and, if necessary, provided special instructions. The respondent inspected the final work, and, if needed, had the claimant correct any deficiencies. The claimant denied working for other employers, so his work was not "independent." The claimant did not advertise his work to the public and only did jobs provided to him by the respondent. The claimant was doing work essential and integral to the respondent's business. The respondent was unable to do any work, absent work the claimant and the claimant's crew; i.e., the claimant's work was fully-integrated into the respondent's business model. The weight of the evidence establishes the claimant was an employee of the respondent, not an independent contractor or subcontractor.

AWARD

WHEREFORE, the Board affirms the Award dated September 9, 2021.

IT IS SO ORDERED.

Dated this _____ day of February, 2022.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: (via OSCAR)
Jeff Cooper
Kevin Fowler
Kathryn Gonzales
SALJ Mark Kolich
c: (via USPS)
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